

(2008) 01 DEL CK 0157
In the Delhi High Court
Case No : CS (OS) 2104 of 1993

Oceanic Dehydrates Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 24-01-2008

Acts Referred:

Citation : (2008) 1 ARBLR 484 : (2008) 101 DRJ 637

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Shiv Khorana and Manpreet Bhalla, for the Appellant; Preeti Dalal, for the Respondent

Judgement

Badar Durrez Ahmed, J.—These are objections against the Award dated 29.07.1993 made by the sole arbitrator in respect of the disputes which had arisen in connection with A/T No. J-13071/2/283/80-PUR.V dated 10.11.1980.

2. Briefly stated the facts are that a tender was notified for the supply of dehydrated onions by the Army Purchase Organization. The objector had responded to the tender which culminated in the aforesaid contract dated 10.11.1980. As per the contract between the parties, the objector was required to supply dehydrated onions as per the Specification No. 142 which was issued on 11.03.1983. The said specification clearly indicated the quality, packing, marking, warranty, hygiene and inspection methods. The dehydrated onions were required to be packed in hermetically sealed tins conforming to the specifications given in paragraph 5 of the said Specification No. 142. Paragraph 13 of the said specification clearly indicated that the dehydrated onions were required to conform to the specifications of moisture content, total ash content, acid insoluble ash content and thickness of reconstituted slices as indicated therein. Insofar as the quality was concerned, it was specifically prescribed under the said Specification No. 142 that the dehydrated onions shall be the product prepared from clean, sound bulbs of suitable varieties of onions free from blemish and disease, by proper peeling, washing, cutting into slices of fairly even thickness

and dehydrating in a manner which ensures effective preservation of colour, flavour, texture and food value. It was further prescribed that the dehydrated onions shall have the characteristic colour and marked pungent flavour of fresh onions and shall be free from discoloration and from musty, scorched or other objectionable flavour or odour. It was also stipulated that the dehydrated onions, when cooked according to the method given in Appendix "A" to the Specification, shall yield a product having the appearance of cooked fresh onions. The cooking time shall not be more than 15 minutes and the rehydration ratio, that is, ratio of increase in weight after cooking and draining off excess liquid to its weight before cooking, was required to be not less than 5.0 : 1.0. The further details of the method of analysis was provided in Appendix "A" to the Specification. Appendix "A" reads as under:

The cooking time and rehydration ratio shall be estimated as follows:

(a) Take 10g of the dehydrated onions in a suitable beaker. Add 100 ml of 1.0% sodium chloride solution and heat. Note the time when the boiling commences. Allow to simmer till the vegetable is cooked i.e attains a uniformly soft texture, free from toughness or mushiness having the characteristic taste and flavour of cooked fresh onions. The time taken for cooking from the time of boiling shall be taken as the cooking time.

(b) After the material is completely cooked, allow the excess water to drain off for 5 minutes by covering the beaker with a suitable watch glass (with convex surface inwards) and inverting the whole. Weigh the cooked material. Calculate the Rehydration Ratio as WR/WD , where WR is the weight of the dehydrated onions after cooking and draining off the water and WD is the weight of the dehydrated onions before cooking.

3. The objector, while finalizing the contract, had given its warranty under the standard warranty clause, the relevant portion of which reads as under:

2. In the event of the supplies or a part thereof having been declared during the period of warranty as being unsound, unwholesome or unfit for human consumption as...by the Director of Supplies & Transport, QMG's Branch, Army Headquarters, New Delhi or any officer acting on his behalf (whose opinion as to whether or not the particular consignment is sound, wholesome, or fit for human consumption as...,will be final), the purchaser will have the right to dispose off the condemned stock in any way he considers necessary after giving due notice to the contractor and also, at his discretion, either to allow the contractor to replace the condemned stock within a specified period or to recover from the contractor the contract price thereof together with sales tax and excise duty, if any paid thereon by the purchaser along with all incidental and freight charges incurred from the place of delivery to the place where the supplies were ultimately condemned. The opinion of the Chief Director of Purchase or an officer acting on his behalf in regard to these charges will be final.

4. It is pertinent to note that the warranty was for a period of nine months. The

Union of India (APO) filed a claim before the arbitrator initially for an amount of Rs 2,29,248.91 but subsequently it was restricted to Rs 1,93,363.90 on account of cost of condemned stock (Rs 1,76,079.36) and freight and incidental charges (Rs 17,284.57). This claim was made on the ground that the dehydrated onions supplied by the objector to the Union of India did not conform to the specifications stipulated under the contract. It was contended that the same were tested and as per the test results the goods were rejected under the warranty clause. Since disputes had arisen between the parties with regard to the rejection of the stores and the claim made by the Union of India, the same constituted the subject matter of the Award, which is impugned herein. The main ground taken by the objector is that the learned arbitrator has miscondacted himself by relying upon certain documents and forming an opinion on the basis of those documents without disclosing the same to the objector. He read the Award and particularly the following portion:

...During the course of arguments, the claimants U.O.I had shown me the original documents showing the test results on the basis of which the stores supplied by the respondents were condemned/rejected under the Warranty Clause. After that the respondents have filed an application dated 22.03.1993. They have stated in this application that the claimants destroyed the goods in 1991 without disposal of their application dated 11.09.1987 before the Arbitrator. I have considered the aforesaid documents in the light of the letter 27.11.1981 of the claimants to the respondents and find that the defects (a), (b) and (c) in paragraph 1 of the aforesaid letter are a reproduction of the defects which were specified in the test results, a copy of which has not been given to the respondents due to departmental restrictions but the same has been shown to me during the course of arguments.

In the light of the above, it is proved that 6.533.557 Tonnes of the stores supplied by the respondents had gone bad within the warranty period and were tested for the same in terms of the contract....

After having read the aforesaid extract from the Award, Mr. Khorana, who appeared on behalf of the objector, submitted that it is apparent that the original documents showing the test results on the basis of which the stores supplied by the respondent were condemned/rejected under the warranty clause, were shown to the learned arbitrator. It has also been specifically recorded that the said test results had not been given to the objector "due to departmental restrictions", although the same had been shown to the learned arbitrator in the course of the arguments. He submits that it is on the basis of the said documents that the learned arbitrator has come to the conclusion, as noted in the extract above, that the stores supplied by the objector had gone bad within the warranty period and were tested for the same in terms of the contract. Mr. Khorana submitted that this course of conduct adopted by the learned arbitrator clearly amounted to misconduct inasmuch as the arbitrator has decided an issue against the objector based upon his personal knowledge which he has derived from the

documents which have not been disclosed to the objector. For this proposition, he has placed reliance on the following decisions:

- 1) Dewan Singh Vs. Champat Singh and Others, ;
- 2) President of India v. Kesar Singh AIR 1966 J & K 113;
- 3) Wazir Chand Karam Chand Vs. Union of India and Another, ;
- 4) G.L. Textiles Co. v. Union of India 2004 (3) R.A.J. 685 (Delhi)

5. The learned Counsel appearing on behalf of the Union of India submitted that there was nothing wrong in the Award and that the learned arbitrator had not misconducted himself in any manner. She submitted that the goods supplied by the objector were not found to be in accordance with the specifications as provided under the contract between the parties. The said goods were tested as required under the contract and were thereafter condemned and rejected under the warranty clause. She further submitted that the goods, after having been so rejected, were offered to the objector to be returned to it by virtue of the letter dated 27.11.1981 which finds mention in the Award. She submitted that there were subsequent letters written by the Union of India to the objector to take back the defective/rejected goods but since the objector was not doing so, they were constrained to destroy the same. The destruction of the goods was also done in terms of the warranty clause. She submitted that non-production of the test results before the objector would not vitiate the Award inasmuch as all that the learned arbitrator has recorded is that the letter dated 27.11.1981 conforms to the test results which have been shown to him. She, Therefore, contended that the objections be dismissed and the Award be made a rule of the Court.

6. I have examined the submissions made by the learned Counsel for the parties and I have also examined the decisions cited at the Bar. In Dewan Singh (supra), the Supreme Court was clearly of the view that unless there was an agreement between the parties empowering the arbitrator or arbitrators to decide the disputes based on the personal knowledge of the arbitrator or arbitrators, an Award based merely on the personal knowledge of the arbitrator/arbitrators, would be vitiated. The Supreme Court observed:

The proceedings before the arbitrators are quasi-judicial proceedings. They must be conducted in accordance with the principles of natural justice. The parties to the submission may be in the dark as regards the personal knowledge of the arbitrators. There may be misconceptions or wrong assumptions in the mind of the arbitrators. If the parties are not given opportunity to correct those misconceptions or wrong assumptions, grave injustice may result.

In President of India v. Kesar Singh (supra), the learned Single Judge of the Jammu & Kashmir High Court was of the view that the arbitration proceedings were improper because one party was not permitted to see the evidence of the other party without there being any finding that the said information was privileged.

7. In *Wazir Chand Karan Chand (supra)*, a learned Single Judge of this Court had observed that although an arbitrator is not bound by technical rules or procedure, he cannot ignore rules of natural justice. It was observed:

Thread of natural justice should run through the entire arbitration proceedings and the principles of natural justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken to suggest cross-examination or himself to cross-examine and to be able to find evidence, if he can, that shall meet and answer it, in short to deal with in an ordinary course of legal proceedings.

In that case one party was heard in the absence of the other and the Court observed that this was not permissible and under ordinary circumstances would amount to misconduct on the part of the arbitrator. In *G. L. Textiles Company (supra)* another Single Judge of this Court was faced with the submission of the objector that the learned arbitrator had derived personal knowledge by seeing the purchase file after closure of the case in a secret manner in the absence of the petitioner and without notice to the petitioner and had, Therefore, violated the principles of natural justice and consequently the Award was liable to be set aside on this ground. The learned Single Judge answered the question by holding that the arbitrator ought not to have considered the said material at least without a notice to the petitioner/ objector. Consequently, the Award in that case was held to be liable to be set aside on the sole ground that the arbitrator had looked into material which was not before it during the course of arbitral proceedings and that too after conclusion of the proceedings. Although this is not the exact fact situation in the present case, what is material is the principle that the arbitrator cannot look into material produced by one side and come to a conclusion against the other without the latter having had an occasion to examine the said material.

8. Considering the various decisions referred to above and the facts of the present case, I find that the learned arbitrator has considered the test results to form an opinion against the objector. I do not agree with the learned Counsel for the Union of India that the test results were only seen for the purposes of ascertaining whether the statements contained in the letter dated 27.11.1981 were true and correct. A reading of the entire portion of the Award extracted earlier in this order makes it clear that the documents were considered in detail, which included the test results. It can be easily inferred that the test results did play a significant part in the arbitrator coming to the conclusion that it has been proved that the stores supplied by the objector had gone bad within the warranty period and that they were tested in terms of the contract. Mr Khorana is right in contending that the test results ought to have been disclosed to the objector. Had such a disclosure been made, then the objector could have verified as to whether the sampling and testing of the goods supplied had been done in terms of the contract particularly in terms of Appendix "A" to Specification No. 142 referred to above because it is only then that it could be concluded that the

testing was done in terms of the contract. The learned arbitrator has seen the test results and formed a personal opinion derived from the test results and other ancillary documents without disclosing the same to the objector and without affording it an opportunity to place its point of view before the learned arbitrator.

9. In these circumstances, the inescapable conclusion is that the learned arbitrator has committed legal misconduct and the Award is liable to be set aside. However, the only extent to which the Award is set aside is with regard to the finding that the stores had gone bad and that they had been tested in terms of the contract. The portion of the Award, which records that the goods had been destroyed in terms of the contract, remains unaltered. To the aforesaid extent the Award is set aside and is remanded to the sole arbitrator to be appointed in terms of the arbitration clause between the parties. The limited scope of the remand is that the test results would be disclosed to the objector and it would be entitled to make its submissions with regard thereto and, if necessary, to lead further evidence. The Union of India shall also have the opportunity of leading additional evidence.

This suit stands disposed of.