(2015) 04 DEL CK 0360

In the Delhi High Court

Case No : CS(OS) 1508A of 1998

Prestige Foods Ltd. APPELLANT

Vs

The STC of India RESPONDENT

Date of Decision : 13-04-2015

Acts Referred:
Arbitration Act, 1940 — Section 15, 16, 30, 33
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 4

Citation : (2015) 6 AD 24

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Vikram Singh, for the Appellant; Adarsh B. Dial, Senior Advocate and Sumati Anand, Advocates for the Respondent

Judgement

V. Kameswar Rao, J—IA 10271/1998 By way of this order I would dispose of IA 10271/1998, whereby the respondent State Trading Corporation of India (''STC'' in short) has filed objections to the arbitration award dated January 15, 1998, under Section 15, 16, 30 and 33 of the Arbitration Act, 1940. Suffice to state, on the filing of the arbitration agreement by the learned Arbitrator, notice to the parties was issued on July 28, 1998. Facts

2. The objector, STC executed three contracts with the Office National Des Ailments Du Betail, Algeria (''ONAB'' in short) for sale and export of Indian toasted Soyabean meal (pure yellow). The first contract was executed on October 20, 1985 for the supply of 50,000 M.T.; the second contract was executed on April 13, 1986 for the supply of 40,000 M.T. and the third contract was for the supply of 30,000 M.T. of Soyabean meal. The objector in order to fulfill its obligation under the above three contracts with ONAB entered into tripartite agreements with Madhya Pradesh Export Council (''MPEC'' in short) and various suppliers including the plaintiff/claimant.

3. The plaintiff/claimant M/s. Prestige Foods Ltd. filed its claim against the objector-STC arising out of three contracts for the supply of soyabean to Algeria

to recover a total sum of Rs. 2,19,36,962.88/- on account of carry-over charges, bank charges, duty drawback, difference in calculation on exchange difference and excess profit, demurrage, incorrect deductions/calculations on insurance charges on imported dal etc.

4. The learned Arbitrator had framed 14 issues. For the purpose of present objections, this Court is concerned with the issue No. 11, which is reproduced as under:-

"Whether the deduction made by the respondent towards bank charges is legal and tenable?"

5. It may be stated here that the objector-STC had deducted an amount of Rs. 5,01,774.52/- as bank charges and an amount of Rs. 45,878.93/- as insurance charges on import of Dal and paid an amount of Rs. 7,43,691.48/- towards full and final settlement of the plaintiff/claimant.

6. The claimant/plaintiff being not satisfied with the amount it had received from the objector-STC had invoked the arbitration agreement.

7. The issue of arbitrability of the disputes, in the absence of MPEC was raised during the arbitration proceedings. It is noted that later on MPEC filed an application requesting that it may be made a party. The MPEC was impleaded as respondent No. 2 by the decision of the Sole Arbitrator. A further issue arose that in view of stipulation in the contract the claimant/plaintiff cannot seek a unilateral reference without MPEC being a joint claimant. Suffice to state, the second issue was decided against the objector-STC.

8. I have been informed that two petitions were filed in this Court being OMP Nos. 82/1993 and 60/1994. The said OMPs were disposed of by the learned Single Judge of this Court vide orders dated November 23, 2006, which are reproduced as under:-

"OMP 82/1993

1. It is agreed between the parties that since an award has since been published which is a subject matter of challenge vide IA No. 10271/1998 in CS(OS) No. 1508-A/1998, present proceedings may be disposed of as infructuous with a clarification that objections raised by STC in OMP No. 82/1993 which go to the root of jurisdiction of the arbitrator appointed would be decided as raised in the objections to the award and disposal of the OMP would not be treated as if issues raised herein have been decided for or against any party, in that, res judicata or constructive res judicata or estoppel will not apply.

2. OMP No. 82/1993 is accordingly disposed of as infructuous, of course, with the clarification afore-noted."

"OMP 60/1994

1. It is agreed between the parties that since an award has since been published

which is a subject matter of challenge vide IA No. 10271/1998 in CS(OS) No. 1508-A/1998, present proceedings may be disposed of as infructuous with a clarification that objections raised by STC in OMP No. 60/1994 which go to the root of jurisdiction of the arbitrator appointed would be decided as raised in the objections to the award and disposal of the OMP would not be treated as if issues raised herein have been decided for or against any party, in that, res judicata or constructive res judicata or estoppel will not apply.

2. OMP No. 60/1994 is accordingly disposed of as infructuous, of course, with the clarification afore-noted."

9. A perusal of the aforesaid orders would show that the issues which arose in those two petitions were allowed to be raised by the objector-STC in this petition, which is the arbitrability of the disputes raised by the claimant/plaintiff being not within the scope of arbitration clause. The said issue is covered by issue No. 2 as framed by the learned Arbitrator, which is reproduced as under:-

"Whether, the dispute between the parties as referred to arbitration is not within the scope of arbitration clause and is, therefore, not a valid reference"

10. Insofar as this issue is concerned, it was the contention of Mr. Adarsh B. Dial, learned Senior Counsel for the objector-STC that in view of the arbitration clause which is reproduced at page 5 of the award, it was only those disputes between the objector-STC on the one hand and the MPEC and the supplier, the claimant herein on the other hand, in respect of any matter other than the matter forming subject matter of dispute between the STC and the foreign buyer were to be referred to the arbitration by the Indian Council of Arbitration. According to him, the disputes were raised by the supplier i.e. the claimant herein. He would further state that MPEC had no dispute and the claims by the claimant were not arbitrable. The learned Arbitrator has rejected the said objection at page 6 of the award by holding as under:-

"Regarding the point at (a) above, it is stated that the argument has no merit. A plain reading of the clause relating to arbitration does not warrant such an interpretation. It does not say anywhere that reference to arbitration has to be made jointly by the parties. It only says that the parties shall jointly submit to the jurisdiction of the Indian Council of Arbitration. Reference to arbitration and jointly submit to the jurisdiction of Indian Council of Arbitration are two different things. A reference can be made by any party to the agreement; and once a reference has been made, the other party or parties are obliged to submit to the jurisdiction of the arbitration. The very purpose of arbitration clause is to provide an effective forum for the settlement of disputes between the parties. The whole purpose of this clause will be frustrated if the other party or parties have no obligation to submit to the jurisdiction of arbitration. It is to be noted that Agreement is a tripartite agreement where all the three parties are independent. It is very difficult to think that all the three parties could not have different views or interests on a matter and could not safeguard their own interests independently. The present clause cannot be interpreted in such a way that it will require the joining of the other party for making a reference to arbitration to protect the, interest. Hence, the argument of Respondent No. 1 is not valid."

11. I agree with the aforesaid conclusion of the learned Arbitrator. That apart, as noted above MPEC had impleaded itself in the proceedings. The objection would also not sustain in that eventuality. This objection of Mr. Dial, learned Senior Counsel for the objector-STC need to be rejected.

12. Before I come to the claims granted by the learned Arbitrator in favour of the claimant/plaintiff, I note that the IA 10271/1998, whereby the objections were filed by the objector-defendant, was dismissed for non-prosecution on February 21, 2007 as no-one appeared for the objector and the award was made Rule of the Court. An application being IA 9437/2007 under Order 9 Rule 4 CPC was filed for restoration of the IA 10271/1998 i.e. the objections. The said application was dismissed. It appears that the objector had filed an appeal before the Division Bench. When the appeal was listed on November 10, 2009, the Division Bench directed that the awarded amount along with interest thereon shall be deposited in this Court by the objector-STC. The said order was reiterated on January 08, 2010. Suffice to state, the amount was deposited and the Division Bench had finally heard the arguments and thereafter allowed the appeals subject to payment of costs of Rs. 20,000/-.

13. It appears that an application being CM No. 16902/2011 was filed by the claimant/plaintiff before the Division Bench for release of the decretal amount with interest deposited in the Court, stating that the objector has not paid costs and has not taken any steps for revival of the suit being CS(OS) 1508-A/1998. The Division Bench hearing the application allowed the same on January 19, 2012 and Registry was directed to endorse the FDR with respect to the deposit made by the objector-STC. Endorsement was to be made in the name of the claimant/plaintiff. On that date, no-one was present for the objector-STC. Another CM was filed by the objector-STC for recall of order dated January 19, 2012. The application was dismissed in limine on March 19, 2012 by observing that the remedy for the objector-STC was to move an application in the disposed of suit and upon satisfying the learned Single Judge that the appellant had paid the costs to the respondent and explaining the delay for two years after satisfying the learned Single Judge obtain formal order restoring the objections filed to the award. The objections were restored on May 16, 2012.

14. During the course of the submissions, I have been informed that in total the claimant/plaintiff has been paid the amount of Rs. 12,86,985/- (principal amount as per award) and Rs. 45,26,970/- (accrued interest).

15. Mr. Adarsh B. Dial, learned Senior Counsel would object to the bank charges awarded by the learned Arbitrator. He would submit that the bank expenses arising out of Algeria was to be borne by the seller. He would also state that in terms of the tripartite agreement, the STC has entrusted to the MPEC and the

supplier the performance of all obligations, responsibilities and liabilities of the STC under or by virtue of the export contract and the MPEC and the supplier have agreed to accept and fulfill the said obligations/responsibilities and liabilities so far as the export of soyabean is concerned. In other words, it is his submission that in view of the responsibilities and liabilities having been transferred to the supplier, it would be the obligation of the supplier to pay the bank charges.

16. I note, the learned Arbitrator at page 19 of the impugned award has concluded as under:-

"The Respondent No. 1 - STC in its counter statement/written statement has stated that Export Contracts were on FOB basis and the bank charges were incurred by the respondent on account of delay in the receipt of payment from the foreign banks. It is further stated that the letters of credit established by the foreign buyers were non-transferable and the respondent had to establish inland letters of credit in favour of the suppliers, such as the claimant and the documents against the foreign letters of credit were negotiated by the respondent. Had the foreign letters of credit been transferable and the same had been transferred to the suppliers, all bank charges would have been incurred by them directly. It has also been stated that as per the Export Contracts, all the bank charges outside Algeria were to be borne by the supplier and accordingly the amount pertaining to the claimant was deducted/recovered from the dues of the claimant. After examining the tripartite contract or even the ONAB contract, one does not find any clause in the contracts which deals with this subject or authorize the STC to deduct the bank charges from the claimant. Mr. Kamboj who is the Deputy finance Manager of STC and appeared as a witness on behalf of STC, could not point out any specific clause in the contracts relating to this subject. He placed reliance upon the indemnity clause as well as the general scheme of the contract.

The contracts are the main documents which contain the right and liabilities of the parties. In the absence of any provision in the contract, indemnity clause cannot be stretched to cover losses in the form of bank charges on account of delayed receipt of payment from the foreign banks. What the indemnity clause covers is losses on account of any default on the part of MPEC and/or the supplier in the discharge of their obligations under the contract. The above amount was unjustly deduced by the STC."

17. A perusal of the aforesaid would reveal that the buyer had opened the letter of credit in favour of the objector-STC. The same was not transferable.

18. Mr. Adarsh B. Dial, teamed Senior counsel for the objector-STC during submissions has conceded that the bank charges were incurred for payment of money by the foreign buyer to the STC. He also conceded that these charges were not for establishing inland letters of credit for paying the supplier i.e. the claimant by the STC. It cannot be comprehended that when the bank charges

have been incurred by STC while transacting with the foreign buyer for receiving payment, such liability can be transferred to the supplier i.e. the claimant herein. Further, there is no stipulation in the tripartite agreement, as noted by the learned Arbitrator and conceded by the witness of the objector-STC that such a liability can be fastened upon the claimant against obligations, liabilities and responsibilities of STC. In view of the above, I am of the view that the learned Arbitrator has rightly awarded the claim in favour of the claimant/plaintiff.

19. On the issue of insurance charges on import of Dal, the same were towards insurance charges for import of Dal, It is conceded by learned Senior Counsel for the objector-STC that the recovery does not relate to the contracts in question. If that be so, the objector-STC could not have recovered the said amount from the amount due from the contracts which were the subject matter of the arbitration proceedings. Suffice to state, the Arbitrator has rightly allowed this claim as well.

20. On the issue of interest, learned Senior Counsel for the objector-STC would submit that the learned Arbitrator has erred in awarding interest @ 18% p.a. with effect from July 01, 1990 till the amount is paid. He would state that even during the period 1985-1987, the bank interest rates were not so high for the learned Arbitrator to grant interest @ 18% p.a. in favour of the claimant. He would rely upon Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, AIR 2007 SC 817 : (2007) 1 ARBLR 148 : (2007) 1 CompLJ 209 : (2007) 2 JT 447 : (2007) 2 SCALE 95 : (2007) 2 SCC 720 : (2007) 1 UJ 217 : (2007) AIRSCW 527 : (2007) 1 Supreme 133 , Rajendra Construction Company Vs. Maharashtra Housing and Area Development Authority and Others, AIR 2005 SC 3701 : (2005) 2 ARBLR 637 : (2005) 5 CTC 150 : (2005) 7 JT 388 : (2005) 6 SCC 678 : (2005) 2 SCR 582 Supp : (2005) 2 UJ 1259 : (2005) AIRSCW 3992 : (2005) 6 Supreme 292 , Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd., (2006) 3 ARBLR 567 : (2006) 8 JT 461 : (2006) 9 SCALE 18 : (2006) 7 SCC 700 : (2006) 5 SCR 743 Supp , 2009 V AD (DELHI) 489 : 159 (2009) DLT 513 (DB) MMTC Vs. A1 Bamar Company Ltd., Mittal Estates Private Ltd. Vs. Delhi Development Authority and Others, (2010) 166 DLT 99 , and (2006) 3 RAJ 86 (Del) Pt. Munshi Ram & Associates (P) Ltd. Vs. Delhi Development Authority & Anr. in support of his contentions and would submit that the appropriate interest should have been 9% to 10% and not more. On the other hand, learned counsel for the claimant/plaintiff would justify the award of interest by stating that the learned Arbitrator has taken into consideration the totality of facts before awarding interest @ 18% p.a. He would rely upon the judgment of the Supreme Court reported as Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, AIR 1992 SC 732 : (1992) 1 ARBLR 145 : (1991) 6 JT 349 : (1991) 2 SCALE 1369 : (1992) 1 SCC 508 : (1991) 3 SCR 417 Supp : (1991) 3 SCR 417 : (1992) 1 UJ 276 in support of his contentions.

21. Having heard the learned counsel for the parties, on this issue I agree with the submission of Mr. Adarsh B. Dial, learned Senior Counsel for the objector-STC

that interest @ 18% p.a. awarded by the learned Arbitrator is on the higher side. Even during that time it is a common knowledge that the bank interest rates were not so high for the Arbitrator to award interest @ 18% p.a. The Supreme Court in the case of Rajendra Construction Company (supra) has justified the grant of interest @ 10%. Similarly, the learned Single Judge of this Court in Mittal Estates Private Ltd. (supra) has granted interest @ 10 p.a.

22. Even though in some judgments this Court has awarded interest @ 9% p.a. but keeping in view the fact that during that time the interest rate being around 10% p.a., I am of the view that the interest rate should be reduced from 18% p.a. to 10% p.a. The objector STC is accordingly entitled to receive the difference of the interest from the amount already paid to the plaintiff/claimant. With the aforesaid observation, the award of the Arbitrator is modified and the objections vide IA 10271/1998 are allowed to the aforesaid extent.

CS(OS) 1508A/1998

The award subject to the modification in terms of this order in IA 10271/1998 is made Rule of the Court leaving the parties to bear their own costs. Decree Sheet be drawn accordingly.

