

(2012) 09 DEL CK 0216

In the Delhi High Court

Case No : OMP No. 413 of 2005 and I.A. No. 1857 of 2006 and CS (OS) No. 707-A of 2005

Punjab State Agricultural Marketing Board

APPELLANT

Vs

Swaran Singh
 Swaran Singh Vs Punjab State
Agricultural Marketing Board

RESPONDENT

Date of Decision : 17-09-2012

Acts Referred:

Arbitration Act, 1940 — Section 14, 20, 30, 33
Arbitration and Conciliation Act, 1996 — Section 34(3), 36
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 151
Contract Act, 1872 — Section 73

Citation : (2012) 09 DEL CK 0216

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : M.C. Sharma in OMP No. 413 of 2005 and I.A. No. 1857 of 2006 and None in CS OS No. 707-A of 2005, for the Appellant; M.C. Sharma, Advocate in CS (OS) No. 707-A of 2005, for the Respondent

Judgement

Justice S. Muralidhar

1. O.M.P. No. 413 of 2005 and CS(OS) No. 707-A of 2005 arise out of an order dated 12th October 2001 passed by this Court in Suit No.

1735 of 1990 u/s 20 of the Arbitration Act, 1940 ("1940 Act") whereby a sole Arbitrator appointed by this Court passed the impugned Award

dated 7th March 2005 and a corrigendum thereto on 5th May 2005. On receipt of the original Award by the Court, by the learned Arbitrator on

13th May 2005, notice of its filing was issued to the parties in Suit No. 707-A of 2005 on 24th August 2005. The office noting shows that the

Punjab State Agricultural Marketing Board ("Board") was served with notice of filing of the Award on 24th September 2005. Thereafter, the

Board filed objections to the Award by filing O.M.P. No. 413 of 2005 under Sections 30 and 33 of the 1940 Act on 18th October 2005.

2. Later an application being I.A. No. 1857 of 2006 was filed under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure,

1908 ("CPC") seeking to amend the objections. No reply has been filed by the Plaintiff Swaran Singh either to the objections as originally filed or

to the application seeking the amendment.

3. The Plaintiff Swaran Singh had filed Execution Petition No. 147 of 2005 u/s 36 of the Arbitration and Conciliation Act, 1996 ("1996 Act")

seeking enforcement of the impugned Award dated 7th March 2005. The Plaintiff also filed an application in the said execution petition, being E.A.

No. 336 of 2005 in which an ex parte order was passed by this Court on 27th September 2005 issuing a transfer certificate in favour of the

Plaintiff/Decree Holder to the District Court, Chandigarh for attachment of the properties of the Board. The Court was informed by the Plaintiff

that since no objection had been filed by the Board as on that date and that since the time for filing objections in terms of Section 34 (3) of the

1996 Act had expired, the Award had become executable as if it were a decree. The execution petition was also disposed of.

4. Thereafter, the Board filed Review Application No. 13 of 2006 seeking recall of the said order by pointing out that the Award had in fact been

passed under the 1940 Act and that the learned Arbitrator had filed the Award on 13th May 2005 in this Court. Notice had also been issued to

the parties of the filing of the Award. The Board pointed out that it had filed objections to the Award under Sections 30 and 33 of the 1940 Act

which were pending.

5. Notice was issued in the said review application on 8th March 2006 and thereafter it was adjourned from time to time awaiting the decision on

the objections filed by the Board under Sections 30 and 33 of the 1940 Act.

6. The central thrust of the written submissions filed in the present matter by the Plaintiff Swaran Singh, is that the impugned Award has been

passed under the 1996 Act. This submission is plainly untenable in view of the decision of the Supreme Court in Milkfood Ltd. Vs. GMC Ice

Cream (P) Ltd., , which makes it clear that the proceedings which commenced under the 1940 Act would continue to be governed by the 1940

Act notwithstanding the enactment and coming into force of the 1996 Act. This is further fortified by the fact that the learned Arbitrator correctly understood the legal position and filed the original Award in the Court and notice of filing of the Award was issued u/s 14 of the 1940 Act to the parties by the Registry in Suit No. 707-A of 2005. Thereafter objections were rightly filed by the Board by way of O.M.P. No. 413 of 2005 under Sections 30 and 33 of the 1940 Act. Consequently, the said question regarding the applicability of the 1996 Act no longer survives and for the purposes of the present proceedings, the Award dated 7th March 2005 is considered as having been made under the 1940 Act.

7. The Court now proceeds to deal with the objections filed by the Board to the impugned Award. The background facts are that by a letter dated

4th November 1987 the Board awarded a contract to the Plaintiff Contractor for laying premix carpet over link roads in district Ropar. The

estimated cost of the work was Rs. 1 crore. The approval of the tender was regularized by the Board by a letter dated 13th November 1987. In

terms of the contract, the laying of premix carpet was to be done over a length of 201 kms. of the road. The work was to be completed within four

months. A grace period of 20 days for mobilization was allowed.

8. The Board by letter dated 26th November 1987 furnished to the Contractor a list of roads of which 77.37 kms. were for district Ropar and

46.62 kms. were for district Hoshiarpur. The bitumen which was essential for commencement of the work was to be supplied by the Board.

Admittedly, the first tanker of bitumen was supplied on 13th January 1988. Thereafter, the XEN (C) recommended extension of time ("EoT") up

to 30th June 1988 on account of the delay in supply of bitumen due to the strike of trucks" union at Mathura Refinery. On the said

recommendation, the Chief Engineer ("CE") by a letter dated 25th August 1988 granted EoT up to 31st August 1988. On account of the area

being flooded due to heavy rains, the work had to be suspended. The Executive Engineer ("EE") thereafter recommended EoT up to 30th June

1989. By this time the Contractor had completed 60% of the work. Further EoT up to 30th September 1989 was granted by the CE on the

recommendation of the EE (C).

9. The Assistant Engineer by a letter dated 8th April 1989 gave a list of 6 link

roads, but on examining the said roads, the Contractor found that 4 link roads were badly damaged and required heavy repairs. Of the list of 15 link roads supplied by the EE (Civil) on 17th May 1989 it was found that 10 roads falling under Nurpur Bedi Area required repairs and the 5 remaining roads under Chamkor Sahib were totally damaged. The entire balance amount of mobilization advance was adjusted by the Board while making payment of the 8th running account bill ("R/A bill") on 31st August 1989. Consequently, the Contractor by its letter dated 19th September 1989 asked the CE to treat the work as having been finally done and demanded payment.

10. The Contractor having received no reply from the CE invoked the arbitration clause by a letter dated 3rd April 1990 requesting for reference

of the disputes to arbitration. This was followed by the Contractor filing Suit No. 1735 of 1990 in this Court, wherein by order dated 12th

October 2001 this Court appointed the sole Arbitrator who passed the impugned Award on 7th March 2005. The said order required the learned

Arbitrator to adjudicate the disputes mentioned in Annexure - A to the aforementioned petition filed by the Contractor.

11. At the outset, the learned Arbitrator held that it was the Board that was responsible for the delay in execution of the work and it had

committed breach of the contract. This finding is assailed by the Board on the ground that the delay was solely attributable to the Contractor.

12. A perusal of the impugned Award shows that in coming to the above conclusion the learned Arbitrator has examined the correspondence

between the parties, the documents on record and the evidence of the witnesses in detail. It was found that EoT had been granted by the Board

itself from time to time. There was delay in the Board furnishing the Contractor with the list of roads. The learned Arbitrator found as a fact that the

complete list of roads was not supplied by the Board to the Contractor on or before 16th February 1988. The condition of the roads was also

such that the work could not have been performed by the Contractor. There was no way, therefore, that the Contractor could have stuck to the

stipulated time for completion of the work. The finding of the learned Arbitrator in this regard being factual and based on evidence, suffers from no

legal infirmity and therefore does not call for interference.

13. Under Claim No. 1 the Contractor had claimed Rs. 40,62,512 for the balance value of the work done which had not been paid by the Board.

Admittedly, the Board had paid the Contractor for a length of 156.12 kms. in the 8th R/A bill whereas the Contractor claimed that he had

executed the length of 215.44 kms. For the difference of 59.32 kms. the Contractor claimed Rs. 30,62,512. He claimed a further sum of Rs.

10,00,000 for repairing the pot-holes and patches.

14. The case of the Board was that as per the entries in the measurement books ("MBs"), which were counter signed by the Contractor, he had

executed only 155.68 kms. and the Contractor had been paid for the said work under the 8th R/A bill. The statement tendered by the Board

during the evidence of RW-1/14 showed that the work of the total value of Rs. 77,17,348 had been performed by the Contractor up to the 8th

R/A bill dated 31st August 1989. After adjusting the value of bitumen and security deposit, a sum of Rs. 38,59,306 was paid to the Contractor by

the Board. Although, the 9th R/A and final bill for a sum of Rs. 76,963.95 was ready on 7th May 1990, the Contractor did not come forward to

collect it. Apparently, the Board had deducted the security deposit amount of Rs. 92,120 while calculating the said amount.

15. The learned Arbitrator held that the details of the length measuring 205.18 kms., as stated by the Contractor, could not be relied upon in the

light of the correspondence between the parties which showed that the work during the months of June and July 1989 could not be undertaken.

Further, the bills for the balance length of 59.32 kms. had not been filed. Consequently, it was held that the Contractor was entitled to recover only

a sum of Rs. 76,963.90 and a further sum of Rs. 92,120.

16. As regards the sum of Rs. 10,00,000 claimed towards repair of the potholes beyond the limit of 5%, the learned Arbitrator held that the

documents did show that after heavy rain the road required major repairs. The learned Arbitrator then proceeded to observe as under:

The claimant has claimed a sum of Rs. 10,00,000/- per year as damages u/s 73 of the Contract Act due to loss of profit. In support of this claim,

the claimant has not produced the statement of assessed income for the relevant years or any other document to prove that in fact he suffered any

loss of profit. The claimant in his cross examination dated 20.12.2003 had stated

that as and when the respondent did not provide the site during the period of contract, he had been doing the work elsewhere to utilize the man power. In view of these facts, I hold that the claimant is not entitled to any amount on account of loss of profit. Accordingly, this claim is rejected.

17. As far as the above observation of the learned Arbitrator is concerned, the Court finds that the Contractor had failed to produce the evidence

to substantiate its claim for Rs. 10,00,000. He claimed that the full details were available in the MBs. Further, Learned Counsel for the Contractor

did not seek production of the MBs by the Board. The learned Arbitrator observed that the Contractor ""has also not produced the supporting

documents for these major repairs"". In the absence of any evidence, it is not understood how the learned Arbitrator could have proceeded to

Award the sum of Rs. 2,50,000 to the Contractor against his claim of Rs. 10,00,000 for carrying out repairs of pot-holes and patches.

Consequently, the Award of Rs. 2,50,000 to the Contractor under Claim No. 1, being based on no evidence at all, is hereby set aside. However,

the Award of Rs. 76,963.90 and a further sum of Rs. 92,120 in respect of the 9th R/A and final bill is upheld.

18. Again under Claim No. 2 which was for a sum of Rs. 5,89,000 on account of removal of silt, mud clay and sand deposits, the Contractor did

not produce any supporting vouchers and yet the learned Arbitrator awarded a sum of Rs. 1,00,000. The Award in respect of Claim No. 2 cannot

obviously be sustained in law and is, accordingly, set aside.

19. Claim No. 3 was for a sum of Rs. 6,73,200 on account of loss caused due to expenditure on overheads, establishment and supervision during

the extended period of contract. The learned Arbitrator noted that the Contractor had been able to produce vouchers for payment made in the

sum of Rs. 3,99,000 up to 7th October 1989. The learned Arbitrator however limited the Award under this claim to Rs. 2,00,000 and this has not

been challenged by the Contractor. As there were vouchers in support of such claim, the Award in respect of Claim No. 3 calls for no

interference.

20. Claim No. 4 was for a sum of Rs. 1,70,000 towards additional expenditure due towards various visits made by the Contractor from Delhi to

Chandigarh and Chandigarh to Ropar and return journey. No vouchers were

produced by the Contractor in support of the claim. The Award of Rs. 75,000 in respect of Claim No. 4 was, therefore, based on no evidence and is hereby set aside.

21. Claim No. 5 was rejected. Claim No. 6 was for a sum of Rs. 15,36,329 on account of escalation in wages of labour and transport for the extended period of the contract. The finding of the learned Arbitrator that the Contactor was entitled to 11% increase based on the work done as certified by the Board itself (Ex. RW-1/14) cannot be said to be erroneous. Consequently, the Award of Rs. 4,58,690 under Claim No. 6 is upheld.

22. Claim No. 7 was rejected. Under Claim No. 8 the learned Arbitrator has awarded 9% simple interest per annum from 7th May 1990 till the date of the Award. This is reasonable and does not call for any interference. Claim No. 9 was rejected. The fees fixed at Rs. 1,00,000 under Claim No. 10 does not call for interference. The learned Arbitrator rightly rejected the Board's counter-claim as it was not referred to him for adjudication.

23. In view of the above discussion, the impugned Award stands modified as under:

(i) Under Claim No. 1 the Contractor is held entitled to a sum of Rs. 1,69,084 and the award of the balance sum there under is set aside. The

Award in respect of Claim Nos. 2 and 4 is rejected. The Award of Rs. 2,00,000 under Claim No. 3 is upheld.

(ii) The rejection of Claim No. 5 and the award of a sum of Rs. 4,58,690 under Claim No. 6 is upheld. The rejection of Claim Nos. 7 and 9 and the counter-claim of the Board is also upheld.

(iii) The Award of simple interest @ 9% per annum from 7th May 1990 up to the date of the Award, and thereafter up to the payment of the sum of Rs. 29,25,217, is upheld. The Award of costs of Rs. 1,00,000 is upheld. No interest will be payable on the sum awarded as costs.

The impugned Award dated 7th March 2005 as corrected by corrigendum dated 5th May 2005 is modified in the above terms and is made rule of

the Court. CS (OS) No. 707-A of 2005, O.M.P. No. 413 of 2005 and I.A. No. 1857 of 2006 are disposed of in the above terms with no order

as to costs.