(2018) 10 DEL CK 0159

In the Delhi High Court

Case No : Original Miscellaneous Petition No.(COMM) 116 OF 2016

Rishabh Agro Industries Ltd APPELLANT

Vs

Union Of India RESPONDENT

Date of Decision : 09-10-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2018) 10 DEL CK 0159

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

Prathiba M. Singh, J

1. The present petition under Section 34 of the Arbitration & Conciliation Act, 1996, challenges the award dated 26th August, 2008 passed by the

learned Sole Arbitrator, a nominee of the Respondent.

2. The proceedings arose out of a contract for supply of milk by the Petitioner to the Respondent for use in the Delhi Milk Scheme (`DMSâ??). The

Petitioner had agreed to supply 25,000 kgs of milk per day. The tender was floated on 31st December, 1993, and was to be in effect till 31st

December, 1994. However, on 28th December, 1994, the Respondent unilaterally extended the contract for supply by the Petitioner for another 90

days. The Petitioner, however, due to scarcity of milk did not supply for 3 days i.e. 29th December, 1994 to 31st December, 1994.

3. On 1st January, 1995, the Petitioner informed the Respondent that it was unable to make any more supplies, and hence it did not wish to accept the

extension of 90 days.

4. The Respondent, however, did not cancel the contract immediately. It was only on 25th April, 1996 that the extension was cancelled, and the

security amount of Rs.17.25 lakhs was forfeited on 7th November, 1996. A Sole Arbitrator was appointed in December, 1999.

5. On 30th June, 1997, a reference came to be filed before the Board for Industrial and Financial Reconstruction (hereinafter, â??BIFRâ??), against

the Petitioner company and the BIFR commenced an enquiry under the Sick Industrial Companies Act, 1985 (SICA). However, on 21st February,

2000, the Petitioner filed its claim petition before the Arbitrator. The Arbitrator, however, resigned on 16th October, 2000 and a fresh Arbitrator was

again appointed, who entered reference on 26th April, 2001. It is important to note that the Petitioner did not at any point in time, inform either the

Respondent or the Arbitrator that proceedings against it had been commenced in the BIFR.

6. In the meantime on 17th December, 2003, BIFR referred the Petitioner company for winding up and on 9th April, 2004, the company was directed

to be wound up. The Government filed its statement of claim on 27th April, 2004 seeking forfeiture of the security deposit as also damages. The

Arbitrator entered reference on 3rd March, 2004.

7. It is the case of the Petitioner that the Petitioner was never served notice by the second Arbitrator, and service was effected only through

publication. The Government preferred the following claims:

â??Claim No.1: Rs.4,13,800/- towards LD for short Â supplies in the month of December, 1994 i.e. during the initial contract period.

Claim No.2: Rs.38,80,000/- towards LD for nonsupplies during the extended period from 1.1.1995 to 31.3.1995.

Claim No.3: Rs.92,73,800/- towards loss suffered on account of risk purchase of milk from Maharashtra.

Claim No.4: Rs.1,44,37,486/- towards pre-suit interest apart from the pendente lite and future interest till realization.

Claim No.5: Rs.50,000/- towards cost of arbitral proceedings.â??

8. Paragraph 21 of the award is relevant and is set out below: -

â??21. It is seen from the previous pleadings that the Respondent had claimed refund of security money with interest and had prayed for declaring

extension and termination of contract and forfeiture of security money as illegal.

The Respondent had also prayed for award of cost in its favour. The

Claimants hereinabove in its Counter Claim before the previous arbitrator had prayed for rejecting the claim of Respondent towards refund of security

money and claimed the amount of Rs.38,80,000/- towards LD with interest and Rs.50,000/- towards cost in its favour. Now in the fresh Claim, the

Claimant hereinabove has made five claims as mentioned in para 13 above.â??

9. Thus, even before the first Arbitrator, the Respondent had filed its counter claim and had sought damages from the Petitioner. The second

Arbitratorâ??s proceedings were in continuation of the first reference. The Petitioner was all along aware of the arbitration having being invoked by

the Respondent, and therefore, the non-appearance before the second Arbitrator cannot be condoned.

10. The second Arbitrator thereafter, awarded the claims in the following manner:

â??In the light of the above, the claims of Claimant are decided as follows:

Claim No.1: Rs.4,13,800/- towards LD for short supplies during the 1994.

Award: As discussed in paragraph 23 above and also as per clause 14 of the First Schedule to the Tender, the Claimant was entitled to claim LD in

case of short supply or non-supply during the contract period. Since the Respondent stopped supply w.e.f. 29.12.1994 whereas the contract was valid

till 31.12.1994, the claim of LD for the period during the validity of contract is legally valid and the Claimant has correctly given the calculation of the

LD in para 15 of the Statement of Claim. Hence, the claim is justified and allowed.

Claim No.1 is allowed.

Claim No.2: Rs.38,80,000/- towards LD for nonsupplies during the extended period from 1.1.1995 to 31.3.1995.

Award: As discussed in para 26 above, the claim of the LD for the extended period is legally not sustainable. Therefore, it is disallowed.

Claim No.2 is disallowed.

Claim No.3: Rs.92,73,800/- towards loss suffered on account of risk purchase of milk from Maharashtra.

Award: For the reasons given in paragraph 28 above, Claim No.3 is disallowed as there was not a valid risk purchase contract.

Claim No.3 is disallowed.

Claim No.4: Rs.1,44,37,486/- towards pre-suit interest apart from the pendente lite and future interest till realization.

Award: I am of the view that under the facts and circumstances of this case, the Respondent alone cannot be held responsible for the long drawn

process of this arbitration case. Hence, the claim of interest is not justified.

Therefore, it is disallowed.

Claim No.4 is disallowed.

Claim No.5: Rs.50,000/- towards cost of arbitral proceedings.

Award: No order as to cost.â??

11. The Arbitrator also considered the Petitionerâ??s claims as counter claims and ruled as under: -

â??30. The Respondent in its pleadings before the previous arbitrator had prayed for some reliefs, which, in the interest of justice, are treated as

Counter Claim and being decided as follows:

i) The Respondent had prayed for declaring letter dated 28.12.1994, vide which contract was extended for further 90 days, as illegal and arbitrary and

null and void and nonoperative in the eyes of law. I have considered the arguments and as discussed in para 26 above, this prayer of the Respondent is

allowed.

ii) The Respondent had further prayed for declaring letter dated 25.4.1996, vide which contract was terminated and security money was forfeited, as

illegal and arbitrary and null and void and non-operative in the eyes of law. As discussed in para 27 above and under the facts and circumstances of

this case, termination of contract and forfeiture of security deposit are legally valid because there was a breach of contract. Hence, the prayer of the

Respondent is disallowed.

iii) The Respondent had prayed for direction to the Claimant to refund security money along with interest @ 18%. For the reasons already given in

para 23 & 27 above, this prayer of the Respondent is not sustainable. Hence, it is disallowed.

iv) Question for awarding pendente lite interest on the security deposit does not arise as the refund of the same has been disallowed.

v) Prayer for award of cost of the proceedings in favour of the present respondent is not sustainable, hence disallowed.â??

12. It is submitted by learned counsel for the Petitioner that the Petitioner having

been in liquidation, the duty was of the Official Liquidator to pursue

proceedings on behalf of the company. Moreover, the company had already informed the Respondent, vide letter dated 1st January, 1995 that it was

not interested in seeking an extension of the contract. Thus, the Petitioner had put the Respondent to sufficient notice that it did not wish to make any

further supplies of milk. The learned counsel, therefore, submits that the award of liquidated damages for short supplies is not justified. He further

submits that the forfeiture of the security deposit could have been only for losses which are established by the Respondent before the Arbitrator. He

relies on the judgment of Kailash Nath and Associates v. DDA (2015) 4 SCC 136 of the Supreme Court.

13. On the other hand, learned counsel for the Respondent submits that the Section 34 petition is barred by limitation as the Petitioner all along had

notice of the arbitral proceedings, and chose not to participate. It is further submitted that clearly there were short supplies for the period from 29th

December, 1994 to 31st December, 1994. In view thereof, by invoking the forfeiture clause, the Government was entitled to refuse the refund of

security deposit. He relies on the calculation of liquidated damages as per the claim statement.

14. This Court has heard the counsels for the parties.

15. Coming to the issue of limitation, there is no doubt that the Petitioner had knowledge of the arbitration proceedings, when it filed its claim on 21st

February, 2000 before the first Arbitrator. If the company was under liquidation, the Petitioner had a duty to inform the Arbitrator as also the

Respondent about the reference pending before BIFR. It has been neither argued nor submitted that such intimation was ever given by the Petitioner

to the Respondent or to the first Arbitrator. Further, even the Official Liquidator who was appointed in 2003, may or may not have been informed

about the arbitration reference which they had already entered into.

16. However, in view of the exceptional circumstances during which the reference was pending between 30th June, 1997 till 30th May, 2011 when the

Punjab & Haryana High Court directed revival of the company, the fact that the first Arbitrator had resigned and in the second Arbitratorâ??s

proceedings, since the Petitioner was only served through publication, the challenge to the award is held to be not barred by limitation.

17. Insofar as the claims of forfeiture and the claim for short supplies is concerned, the Petitioner accepts that there was a short supply for the period

29th December, 1994 to 31st December, 1994. The calculation for the short supplies are contained in the statement of claim which is reproduced

herein below:

â??Claim No.1: Liquidated damages of Rs.4,13,800/during the currency of the contract: -

14. That there exists provision for recovery of preestimated liquidated damages vide clause 14 of the first schedule to the tender which reads as under:

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â??The committed quantity should normally be evenly distributed on all the days of the week. The day-to-day variations in the supply of milk shall not

be more than 25% of the notified/committed quantities. In case of failure to supply the contracted quantities of milk on weekly basis by the contractor,

the GM, DMS may recover liquidated damages at the following rates: -

i) For a shortfall in weekly supply upto 10% .... nil

ii) On shortfall in weekly supplies above 10% .... Rs.2/- per kg.

In case the supplies of milk are reduced to less than 75% of the committee quantity or stopped without any valid or acceptable reason during any

week throughout the year, the General Manager, Delhi Milk Scheme without prejudice to his rights shall have the right to terminate the contract and

forfeit the security deposit.â??

15. That the claimant is entitled for recovery ofliquidated damages of Rs.4,13,800/- for short supply/non-supply of milk during the month of Dec., 1994,

the details of which are as under: -

Total contracted quantity from 1.12.094 to 31.12.94 @ 25,000Â kgs./day

Total supply in ...... 15,50,000 kgs.

December, 1994 ...... 4,11,330 kgs.

Total short supply

Exemption @ 10% of ...... 3,63,670 kgs.

contract qty.

Recoverable short ...... 1,55,000 kgs.

supply

Total recoverable amount 2,86,170 x ...... 2,86,170 kgs.

Rs.2 per kg.

Less recoverable 5,72,340/-

already made 1,58,540/-

Net sum recoverable 4,13,800/-

14. It is prayed that the claim of Rs.4,13,800/- be awarded by the Ld. Arbitrator in favour of the claimants.â??

18. In the claim petition, the Respondent has already given credit for the short supply recoveries which were already made. So, the shortfall claimed is

as per clause 14 of the tender document, as per which the Respondent is entitled to seek Rs.2/- per kilo of short supply. Thus, the award of the claim

cannot be stated to be unjustified.

19. Insofar as the forfeited amount is concerned, the Respondent justifies the forfeiture on the ground of clause 14. However, since the contract was

almost coming to an end, and there was short supply only for three days, the entire security deposit which constitutes Rs.17.25 lakhs i.e. a sum

equivalent to value of 10 days contracted quantity of milk, cannot be allowed to be forfeited. The forfeiture of security deposit, is valid due to the

breach by the Petitioner but since the breach was only of three days short-supplies, the security deposit already forfeited by the Respondent would be

proportionately reduced for a period of three days. The remaining amount of security deposit would be liable to be refunded. Thus, while upholding the

award of damages for actual short supplies, the forfeiture of security deposit is upheld only in respect of the proportionate three days and not the

entire 10 day period. The total security deposit was a sum of Rs. 17.25 lakhs for ten days. Proportionate security deposit for three days would be a

sum of Rs. 5,17,500/- Thus the total amount awarded is upheld to the extent of Rs. 9,31,300/-. Since a higher sum of Rs.17.5 lakhs is already lying

forfeited with the Respondent, no interest is being awarded. The remaining sum of Rs. 8,18,700/- be refunded to the Petitioner within eight weeks. If

the same is not refunded within eight weeks, simple interest at 8% p.a. would be liable to be paid on the said sum.

20. OMP is disposed of.

