

(2008) 08 DEL CK 0078

In the Delhi High Court

Case No : I.A. No. 5351 of 1985 in CS (OS) No. 229A of 1985

Shree Krishna Woolen Mills (P) Ltd.

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 26-08-2008

Acts Referred:

Arbitration Act, 1940 — Section 14, 17, 29
Sales of Goods Act, 1930 — Section 42, 59, 59(2)

Citation : (2008) 3 ARBLR 477 : (2008) 106 DRJ 340

Hon'ble Judges : Hima Kohli, J

Bench : Single Bench

Advocate : Shiv Khorana, Ashish Khorana and Gautam Sharma, for the Appellant; Manisha Dhir and Preeti Dalal, for the Respondent

Judgement

Hima Kohli, J.—The present application is directed against the award dated 29.12.1984 passed by the learned Arbitrator in a dispute between the Union of India/objector and M/s Shree Krishna Woolen Mills (Pvt.) Ltd./contractor whereunder while the claims of the Union of India were dismissed, the claim of the contractor for balance 5% payment of the stores supplied to Union of India amounting to Rs. 73,554/- was allowed.

2. In a nutshell, the relevant facts of the case are that the DGS&D/Union of India awarded a contract on 9.11.1971 to the petitioner/contractor for supply of 50,000 blankets. The specifications for delivery were stipulated in the tender and the contractor was required to complete the delivery by 31.12.1971. The petitioner/contractor completed supplies of 37,000 blankets till 31.12.1971. Vide letter dated 1.1.1972, the Union of India/objector extended the time granted to the petitioner/contractor and increased the quantity from 50,000 blankets to 1,00,000 blankets to be supplied by 31.1.1972. The petitioner/contractor supplied 99,995 blankets between 26.11.1971 to 29.2.1972. Out of the aforesaid supplies, 6,306 blankets were found by the Union of India/objector not to be as per the required specifications and the same were accepted with a price

reduction of 2%, due to deviations. The said price reduction was accepted by the petitioner/contractor, vide letter dated 28.2.1972. As per Clause V (i) of the Contract, the consignee, namely, Union of India/ objector could exercise its right to reject the supplies within 45 days of such receipt. As the supplies of the blankets were made in a staggered manner from 26.11.1971 to 29.2.1972, the outer limit of 45 days even if calculated from 29.2.1972, expired on 15.4.1972. It is the admitted case of both the parties that till 15.4.1972, the Union of India/ objector did not exercise its right of rejection. Rather, 95% of the value of the goods supplied were released to the petitioner/contractor. After a lapse of about 8 months, on 5.12.1972, the Union of India/objector intimated the petitioner/contractor that they shall re-inspect the blankets supplied and called upon the petitioner/contractor to be present for the re-inspection.

3. As per the Union of India/objector, after the re-inspection was conducted over a period of 12 days w.e.f. 9.12.1972 to 28.12.1972, defects were found in the blankets which could not be relaxed even as per the terms of relaxation. It is the case of the Union of India/objector that out of a quantity of 41,332 blankets which were re-inspected, only 39,923 blankets were finally recommended for acceptance under price reduction ranging between 5% to 50%, while the balance quantity of 1409 blankets were not found acceptable even under price reduction. It was contended that after re-inspection was conducted in the presence of the representative of the petitioner/contractor, a notice dated 23.4.1974 was served upon it informing the petitioner/contractor that 39,923 blankets were accepted, subject to price reduction and that the amount of price reduction in respect of the aforesaid quantity of blankets came to Rs. 3,05,566/- which amount having already been released, was sought to be recovered from the petitioner/contractor. As far as the result of re-inspection in respect of 1409 blankets was concerned, the petitioner/contractor was conveyed that the result of re-inspection shall be intimated to it in due course.

4. Aggrieved by the aforesaid reduction, the petitioner/contractor raised its claim against the Union of India/objector before the learned Arbitrator. The Union of India/objector filed its counter claim praying for refund of Rs. 2,95,859.40 paise and Rs. 53,761.75 paise on the basis of over payment made to the petitioner/contractor, the latter having received 95% of the agreed price. It is also claimed by the counsel for the Union of India/objector that the Union of India/objector claimed a sum of Rs. 39,055.84 paise from the petitioner/contractor towards liquidated damages.

5. The learned Arbitrator passed the impugned award against the Union of India/ objector by dismissing its counter claims. However, the claims of the petitioner/contractor for realization of balance 5% payment of the store supplied, amounting to Rs. 73,554/- was upheld by the learned Arbitrator. Aggrieved by the aforesaid award dated 29.12.1984, the Union of India/objector has filed the present objections.

6. The main grievance raised by the counsel for the Union of India/objector was

that there is an error apparent on the face of the award as the learned Arbitrator failed to return a finding in respect of the liquidated damages claimed against the petitioner/contractor, u/s 59 of the Sale of Goods Act, 1930 (hereinafter referred to as "the Act") regarding diminution or extinction of price for breach of warranty. She submitted that the learned Arbitrator failed to consider the material evidence both oral as well as documentary about the re-inspection of the stores and reduction of price.

7. Counsel for the Union of India/objector stated that even if it is assumed that the Union of India/ objector failed to exercise its right of rejection in terms of Clause V (i) of the contract within a period of 45 days, the said failure does not affect its right u/s 59 of the Act, as the purchaser can still claim damages for breach of warranty in diminution or extinction of price against the petitioner/contractor irrespective of rejection of the goods. Heavy reliance was placed on Section 59(2) of the Act in this regard. In support of her arguments, learned Counsel for the Union of India/objector relied on the following judgments:

1. Firm, Shivallingappa v. Balakrishna & Son AIR 1962 Mad 426,
2. Union of India (UOI) Vs. A.L. Rallia Ram,
3. K.P. Poulouse Vs. State of Kerala and Another,
4. Thyssen Stahlunion GmbH Vs. The Steel Authority of India,

In support of her submissions that there is an error apparent on the face of the award, which requires interference, she relied upon the following judgements:

1. K.P. Poulouse Vs. State of Kerala and Another,
2. UOI v. G. Ramachandra Reddy & Co. and Anr. 2007 (1) ALR 41 Mad
3. Bharat Engineering Enterprises v. DDA and Anr. 2007 II AD (DELHI) 281
4. P.R. Catering Co. and Another Vs. Oil and Natural Gas Corporation Ltd. and Others,

8. Per contra, counsel for the petitioner/contractor supported the award and denied that the impugned award suffers from any error apparent on the face of the record or that the learned Arbitrator failed to consider the material evidence and thus, mis-conducted herself. It was submitted that under the terms of the contract, the learned Arbitrator was not required to give a speaking award and that the reasons given, even though brief, show application of mind. It was submitted that all the inspection notices were duly placed before the learned Arbitrator and a perusal of the same shows that the supplies were accepted by the Union of India/objector after inspection. He stated that as against a period of 45 days stipulated under the contract for exercising the right of rejection, the Union of India/objector chose to reject the blankets supplied by the petitioner/contractor after a period of 2 years 2 months from the date of receipt of the last lot of blankets. He referred to Section 42 of the Act to state that the Union of

India/objector is deemed to have accepted the blankets as it retained the goods without intimating any rejection to the petitioner/contractor after lapse of a "reasonable time". It was urged that the period of 2 years 2 months could not be termed as a "reasonable time" by any stretch of imagination and hence the bar of Section 42 of the Act comes in play and precludes the Union of India/objector from raising such a plea. He stated that 95% of the payment in respect of the supplies was already released by the Union of India/objector during the period of February-March, 1972 and that the period of 45 days if calculated from the last supply, expired on 15.4.1972. Hence, any rejection sought to be done by the Union of India/objector after a period of over two years, is illegal and unjustified.

9. As far as the reliance placed by the Union of India/objector on Section 59 of the Act is concerned, counsel for the petitioner/contractor submitted that the said plea has been raised by the Union of India/objector for the first time and as the same was not taken earlier, such a plea cannot be permitted to be taken so belatedly. Without prejudice to the above, he stated that the Union of India/objector could have elected to exercise its rights under Clauses (a) & (b) of Section 59 of the Act only within the period of warranty, but no action was taken by it even after completion of the inspection in the month of December, 1972. In support of his contention that long silence by the buyer amounts to waiver, counsel for the petitioner/contractor relied upon the following judgments:

1. Mysore State Cooperative Marketing Society Ltd. v. Ko Maung Gyi and Sons and Ors. AIR 1974 MYS 20; and

2. City and Industrial Development Corporation of Maharashtra Ltd., Bombay and another Vs. M/s. Nagpur Steel and Alloys Pvt. Ltd., Nagpur,

10. The following judgments were relied upon by the counsel for the petitioner/contractor to state that if a purchaser keeps the goods for a period longer than it was necessary, he loses his right to return it or to refuse to pay the price:

1. Empire Engineering Co. Branch of the British India Corporation Ltd. Vs. Municipal Board,

2. The Province of Madras Vs. C.A. Galia Kotwala and Co., Ltd.,

3. Mysore State Cooperative Marketing Society Ltd. v. Ko Maung Gyi and Sons and Ors. AIR 1974 MYS 20

4. City and Industrial Development Corporation of Maharashtra Ltd., Bombay and another Vs. M/s. Nagpur Steel and Alloys Pvt. Ltd., Nagpur,

11. It was contended that after conducting re-inspection of the blankets in the month of December, 1972, the Union of India/objector chose to remain silent right through the year 1973 and only in April, 1974 it sent a communication to the petitioner/contractor for the first time that it had decided to impose ad hoc price reduction in respect of the supplies. It was further submitted on behalf of the petitioner/contractor that the Union of India/objector had not raised any

claim against it except for a sum of Rs. 3,05,566/- and the claim for an amount of Rs. 39,055.84 paise towards liquidated damages was in fact not raised against the petitioner/contractor as even in para 12 of the counter claim, the Union of India/objector had stated that they "propose to raise" a claim in this regard. He, therefore, submitted that the learned Arbitrator could not be blamed for not taking the said claim into consideration. In support of his submission that a demand has to be asserted by one party and denied by the other side for a claim to be raised, counsel for the petitioner/contractor relied upon the following judgments:

1. Orissa Mining Corporation Ltd. Vs. Prannath Vishwanath Rawlley, ; and
2. Major (Retd.) Inder Singh Rekhi v. DDA AIR 1987 SC 1007.

12. As far as the award directing the release of balance 5% payment by the Union of India/objector to the petitioner/ contractor is concerned, counsel for the petitioner/contractor stated that once the learned Arbitrator had examined the evidence as produced before her, and arrived at a conclusion that the rejection by the Union of India/objector was arbitrary, she was justified in directing the Union of India/objector to release the balance 5% payment to the petitioner/contractor.

13. Counsel for the petitioner/contractor summed up his arguments by stating that it is established law that the Arbitrator is a master of facts and law and that this Court cannot sit as a Court of appeal to find faults with the reasoning of the learned Arbitrator. In support of his submission that the decision of the learned Arbitrator is final and the Court cannot re-appreciate the evidence, he relied upon the following judgments:

1. State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd.,
2. Hindustan Tea Co. Vs. K. Sashikant Co. and Another,
3. Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others,

14. It was lastly submitted that the petitioner is also entitled to claim interest @ 18% on the awarded amount from the date of the award till realization, which the learned Arbitrator has not awarded. In support of his aforesaid submission that the petitioner is entitled to claim pendente lite and future interest, he relied upon the following judgments:

1. Babu Lal Barwa Vs. Delhi Development Authority and Others,
2. New Venus Cooperative Group Housing Society Ltd. v. R.K.K. Printers 2006 (1) R.A.J. 18
3. Amar Industries v. UOI 2006 (2) ALR 253

15. I have heard the counsels for the parties. At the outset, it is necessary to delineate the scope of interference by a court in an arbitral award. It is settled

law that the Arbitrator is the final arbiter of a dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusions or has failed to appreciate the facts. (Ref.: Sudarsan Trading Co. Vs. Government of Kerala and Another,). The Supreme Court has held that once there is no dispute as to the contract, what is the interpretation of that contract, is a matter for the arbitrator to consider and decide on which the court cannot substitute its own decision. (Ref.: The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others, and Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd.,). As held by the Supreme Court in the case of State of Rajasthan v. Puri Construction Company Ltd. and Anr. 1995 (I) ALR 1, the court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid or not, is a decision within the competency of the arbitrator. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view, though perhaps not the only correct view, the award cannot be examined and set aside by the court. Where reasons have been given by the arbitrator in making the award, the Court cannot examine the reasonableness of the reasons (Ref.: M/s. Hind Builders Vs. Union of India, and Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others,).

16. The arbitrator is the sole judge of the quality and quantity of the evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator, even if there is a possibility that on the same evidence, the court may arrive at a different conclusion than the one arrived at by the arbitrator, that itself is not a ground for setting aside the award. (Ref.: Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, . It is also well settled law that if a question of law is referred to the arbitrator and he gives a conclusion, it is not open to challenge the award on the ground that an alternative view of law is possible. (Ref.: Alopi Prashad v. UOI 1960 (2) SCR 799, and Kapoor Nilokheri Co-op. Dairy Farm Society Ltd. Vs. Union of India (UOI) and Others,).

17. In the case of State of Orissa and Others Vs. Lall Brothers, , it has been held that an award may be set aside by the court on the ground of error on face of the award, but an award is not invalid merely because by a process of inference and argument, it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion. In M/s Hindustan Tea Co. (supra), it was held that an award of the arbitrator ought not to be set aside for the reason that in the opinion of the court, the arbitrator reached at a wrong conclusion or failed to appreciate the facts. The aforesaid judgments have been reiterated by the Supreme Court recently in the case of J.C. Budhraj Vs. Chairman, Orissa Mining Corporation Ltd. and Another, .

18. Thus, it is seen that over the decades, judicial decisions have indicated that courts dis-favour interference with arbitral award on the ground of error of law

and fact, and on the score of mis-appreciation of material on the record and have shown a definite inclination to preserve the award as far as possible. Keeping the aforesaid principles in mind, the challenge by the Union of India/objector to the validity of the impugned award is proposed to be considered hereafter.

19. The main plank of the argument urged on behalf of the petitioner/contractor rests on its grievance that the learned Arbitrator failed to return a finding in respect of the liquidated damages claimed against the petitioner/contractor under the provisions of Section 59 of the Act. A reference to the provision of Section 59 of the Act is necessary in this regard. The said provision is reproduced hereinbelow:

59. Remedy for breach of warranty - (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may-

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

20. It is not disputed by the Union of India/objector that the warranty in the case of the blankets was valid for a period of 45 days from the date of the receipt of the blankets. Taking the outer limit of the supplies made by the petitioner/contractor upto 29.2.1972, the last date of the supplies, the period of 45 days expired on 15.4.1972. It is a matter of record that while receiving the supplies, the officers of the Union of India/objector had inspected the blankets. However, no protests were lodged with regard to the quality of the blankets till as late as December, 1972. Instead, 95% of the payment was released in favour of the petitioner/contractor in the months of March-April, 1972. Only on 5.12.1972, did the Union of India/objector intimate the petitioner/contractor that they shall re-inspect the blankets supplied by it. While conducting the said re-inspection, though the representative of the petitioner/contractor was present, the petitioner/contractor had conveyed in writing to the Union of India/objector that the presence of its representative during the course of re-inspection or his signature on any documents shall not mean that the results have been accepted in any manner. After conducting a re-inspection of the blankets in the month of December, 1972, the Union of India/objector remained silent for a further period of 16 months.

21. Finally, vide notice dated 23.4.1974, the Union of India/objector informed the petitioner/contractor that they were imposing price reduction of Rs. 3,05,566/- in respect of 39,923 blankets, which was sought to be recovered. However, as per

the said letter, the result of the re-inspection in respect of 1409 blankets was to be conveyed later. The counsel for the Union of India/objector has not indicated any material from the record to show that prior to the disputes being referred to the learned Arbitrator, the results of re-inspection in respect of the remaining 1409 blankets was conveyed to the petitioner/contractor. Hence, the claim of the Union of India/objector that it is entitled to invoke the provisions of Section 59 of the Act to sue the petitioner/ contractor for damages of breach of warranty is mis-conceived as no claim for damages was raised by it on the petitioner/contractor in this regard prior to approaching the learned Arbitrator. Hence, the learned Arbitrator did not have the jurisdiction to entertain the counter claim raised subsequently.

22. Even a perusal of the counter claim filed by the Union of India/objector before the learned Arbitrator shows that the same was categorical insofar as refund of Rs. 3,05,566/- was concerned on account of alleged overpayment. However, the claim of Rs. 39,055.84 paise toward liquidated damages was not specifically raised by the Union of India/objector. Instead, the averment in the counter claim was to the effect that "As regards firm's claim for balance 5%, it is proposed to regularize the delivery period with imposition of liquidated damages of Rs. 39,055.84 paise". Hence, the plea of the counsel for the petitioner/contractor that the said plea for liquidated damages had been raised by the Union of India/objector for the first time, is not without merit.

23. Furthermore, counsel for the petitioner/contractor is justified in stating that while it was open to the Union of India/objector to keep the blankets for a reasonable sufficient time in order to examine them, the said time must be limited in terms of the warranty. Considering the facts of the present case, where Union of India/objector retained the blankets for a period of 2 years 2 months, from the date of receipt of the last lot of blankets, the time cannot be extended beyond a period of 45 days, *ad nauseum* and it has to be held that the Union of India/objector lost its right to return the blankets or refuse to pay the price thereof. Thus, the provisions of Section 42 of the Act come into play as the Union of India/objector failed to act within a reasonable time and instead retained the goods for over 2 years, beyond the period of warranty, without intimating the petitioner/contractor that the goods were rejected/proposed to be rejected. This Court cannot lose sight of the fact that even at the time of taking delivery of the blankets initially, the Union of India/objector had examined the batches of goods received by it from time to time before accepting the same. Thus, the claim of the Union of India/ objector against the petitioner/contractor for liquidated damages for breach of warranty is unjustified and without any basis.

24. The other limb of the arguments raised on behalf of the Union of India/objector that the learned Arbitrator failed to return a finding in respect of the liquidated damages claimed against the petitioner/contractor u/s 59 of the Act regarding diminution or extinction of price for breach of warranty is answered by a bare perusal of the impugned award where a categorical finding has been

returned by the learned Arbitrator that the basis on which damages were calculated by the Union of India/objector were also not established. Thus, it cannot be said that the award suffers from an error apparent on the face of the record. However brief the reasons given are, they are sufficient to indicate that the learned Arbitrator was clear in her mind as to how and why she acted in the manner she did. Where non-speaking lump sum awards have been upheld by the courts as in the case of Food Corporation of India Vs. Jagdish Chandra Saha, , Hindustan Steelworks Construction Ltd. Vs. C. Rajasekhar Rao, , brevity of reasons can certainly not be a ground for setting aside an award. (Ref.: Indian Oil Corporation Ltd. (supra)).

25. Rather, irrespective of the fact that the Union of India/objector had not categorically raised a counter claim against the petitioner/contractor for liquidated damages before initiation of the arbitral proceedings and hence the said claim could not have been taken notice of by the learned Arbitrator, a perusal of the award shows that the same was duly taken notice of only to be rejected. Thus, while there is no dispute with the proposition that under the provisions of Section 59 of the Act, the purchaser can claim damages for breach of warranty irrespective of rejection of goods, in the given facts and circumstances of the present case, the Union of India/objector is not entitled to grant of any such liquidated damages. Hence, reliance is placed by the petitioner/contractor on the judgments in the cases of Rallia Ram (supra) and Thyssen Stahlunion GmbH (supra) does not take its case further.

26. A perusal of the impugned award shows that the learned Arbitrator not only examined the documents placed by the parties on the record as also their deposition, but also heard the arguments of the parties and thereafter returned a finding to the effect that the Union of India/objector failed to exercise its right of rejection within 45 days of delivery of the stores as provided for in the terms and conditions of the contract and that the re-inspection of the stores done in December, 1972 in the presence of the representative of the petitioner/contractor, does not show that he had accepted the results. It was also noticed in the impugned award that the results were conveyed to the petitioner/contractor only on 23.4.1974. Lastly, it was observed that the basis on which damages were calculated by the Union of India/objector had not been established. For all the aforesaid reasons, the claims of the Union of India/objector were dismissed and that of the petitioner/contractor for payment of balance 5% of the stores supplied was allowed.

27. The present case is neither one where the learned Arbitrator has arrived at a conclusion without any evidence or where she has mis-conducted the proceedings by ignoring material documents. A perusal of the award shows that the re-inspection carried out by the Union of India/objector was duly taken note of but in view of the facts and circumstances of the case, it was held that the claims of the Union of India/objector were not maintainable. Hence, reliance placed by the petitioner/contractor on the judgments being K.P. Poulose (supra)

and P.R. Catering Company and Anr. (supra) is mis-conceived as all material documents appear to have been taken into consideration by the learned Arbitrator.

28. For the aforesaid reasons, the objections raised by the Union of India/ objector are dismissed as being devoid of merits and the award is made rule of the court.

29. The only remaining issue that requires consideration is the claim of interest made by the petitioner/contractor on the awarded amount. The present petition has been filed by the petitioner/contractor under Sections 14, 17 and 29 of the Arbitration Act, 1940. It is stated by the counsel for the petitioner/contractor that his client is entitled to claim pendente lite and future interest @ 18% per annum on the awarded amount.

30. It is no longer in dispute that the courts have the power to grant interest from the date of institution of proceedings in a court for enforcement of the award till the passing of the decree and from the date of the decree till the date of realization. (Ref.: Renusagar Power Co. Ltd. Vs. General Electric Co., .)

31. Based on the aforesaid decision, it is held that the petitioner/contractor is entitled to grant of interest @ 12% per annum from the date of the award till the date of decree and future interest @ 9% from the date of the decree till the date of realization, with costs quantified in favour of the petitioner/ contractor, of Rs. 5,000/-. Decree sheet be drawn up accordingly.