

(2009) 10 CHH CK 0033
In the Chhattisgarh High Court
Case No : Arbitration Appeal No. 22 of 2006

State of Chhattisgarh and Another	Vs	APPELLANT
M/s Sal Udyog (Pvt.) Ltd.		RESPONDENT

Date of Decision : 21-10-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 14, 15, 16, 33
Madhya Pradesh Re-organisation Act, 2000 — Section 43, 50, 50(1), 55, 83
Madhya Pradesh Vanopaj Ke Kararon Ka Punarikshan Adhiniyam, 1987 — Section 5A

Citation : (2009) 4 MPJR 115

Hon'ble Judges : R.N. Chandrakar, J;Dhirendra Mishra, J

Bench : Full Bench

Judgement

Dhirendra Mishra, J.—Arbitration Appeal No.22/06 preferred by the State of Chhattisgarh (hereinafter shall be referred as "State") & Miscellaneous Appeal No.727/2006 preferred by M/s Sal Udyog Pvt. Ltd. (hereinafter shall be referred as "purchaser") are being disposed of by this common order as the parties to the Arbitration Case No.69A/05 decided by the learned district Judge, Raipur vide its order dated 14.03.2006 have preferred both the appeals u/s 37 (1) of the Arbitration and Conciliation Act, 1996 (for short Act, 1996)

2. Briefly stated, facts of the case are that the State of M.P. vide agreement dated 30.8.1979 agreed to supply ten thousand tons of sal seeds per year to the purchaser for a period of twelve years. Agreement contained a term for renewal of contract between the parties. Both the parties again entered into an agreement on 30.04.1992 for supply of ten thousand tons Sal seeds per year to the purchaser till 29.04.2004. The State M.P. had delivered sal seeds to the purchaser till 29.08.1992 under the original agreement. Under the renewed agreement also the State of M.P. delivered Sal seeds and continued it up to 31.12.1998 when the renewed agreement stood terminated by virtue of section 5A of the M.P. Vanopaj Ke Kararon Ka Punarikshan Adhiniyam, 1987. The purchaser vide notice dated 06.12.1999 served upon the Secretary, Forest Department, Government of M.P. for refund of excess payment of

Rs.1,72,17,613/- made by them for supply of Sal seeds for the period 1981-82 to 31.12.1998. It was also stated in the claim statement that on 16.07.1999 a claim for a sum of Rs. 3 Crore was made against the State of M.P. Clause 23 of the agreement provides for reference of any dispute arising out of the agreement between the parties to the Secretary, Forest Department, Government of M.P. whose decision was to be final and binding on the parties.

The purchaser preferred MCC No.509/2000 for appointment of Arbitrator u/s 11 (6) of the Act, 1996 before the M.P. High Court at Jabalpur. After coming into force of the M.P. Reorganization Act, 2000, (for short "Act, 2000"), the above MCC was transferred to the High Court of Chhattisgarh at Baispur. The High Court of Chhattisgarh with the consent of the parties appointed Hon'ble Mr. Justice R.C. Shrivastava as Sole Arbitrator vide order dated 21.03.2002. Subsequently, on the application of the purchaser the High Court vide order dated 12.11.2003 passed in MCC No.129/03 appointed Mr. Ashok Masih as Sole Arbitrator to resolve the dispute between the parties.

The Sole arbitrator allowed the claim of the purchaser and passed an award for a sum of Rs.7,43,46,772/- including interest upto February, 2005 at the rate of 18% per annum along with future interest @ 18% w.e.f. 1.3.2005 in favour of the purchaser.

The State preferred an application u/s 34 of the Act, 1996 against the award passed by the sole Arbitrator before the District Judge, Raipur, who vide order dated 14.03.2006 modified the award, set aside the interest awarded from the date of agreement till 31.12.1998 @ 18% and ordered that the purchaser shall be entitled for the interest @ 18% from 06.12.1999 till the date of payment.

3. The State has preferred this appeal against the impugned order on the ground that the claim preferred by the purchaser was liable to be dismissed for non-joinder of necessary party i.e., State of Madhya Pradesh, as the agreement was between the purchaser and the State of Madhya Pradesh and thus cause of action, if any, available to the purchaser was against the State of M.P. The purchaser never claimed refund of excess recovery throughout the period of both the agreements. The purchaser applied for renewal of agreement and got it executed and even after termination of the agreement the purchaser challenged the recovery made in terms of the memo dated 11.07.1997 and thus, the purchaser is estopped from claiming any amount on account of excess recovery for the whole period of both the agreements.

Clause 23 of the agreement provides for reference of any dispute to the Secretary, Forest Department, Government of M.P. and therefore, any arbitral proceeding without resorting to the provisions of clause 23 was without jurisdiction and the learned arbitrator ought to have decided the objection of the State, as provided u/s 16 of the Act, 1996. The purchaser's claim beyond three years is barred by law of Limitation. Learned Arbitrator has assessed the amount of excess recovery on the basis of report of the Chartered Accountant without

considering the terms of agreement and facts of the case.

Learned Arbitrator has also ignored circular of the erstwhile State Government whereby general supervision charges was fixed at 10% of the price which did not require assessment. Learned Arbitrator also not considered that High Court of M.P. at Jabalpur in W.P. No.3177/99 in Bastar Oil Mill's case fixed the recovery towards handling and supervision charges at 20% of the price, which was subsequently fixed by the Hon'ble Supreme Court at Rs.1,500/- per ton vide order dated 17.1.2000 in SLP (civil) No.6/ 2000. Thus, the impugned award whereby the State has been directed refund of general handling and supervision charges collected by the State is bad in law.

Award of interest @18% from the date of notice of demand till the date of payment is illegal as there is no provision in the agreement of payment of interest towards the excess deposits by the purchaser.

4. On the other hand, the purchaser has preferred the miscellaneous appeal against the impugned order on the ground that the learned District Judge was not justified in modifying the award and disallowing the prerule period interest payable from 06.12.1999. The order is beyond the scope of section 34 of the Act, 1996. The Arbitrator has recorded a categorical finding that the amount of contract was wrongly withheld by the State. The Court has no jurisdiction to sit in an appeal to examine the correctness of the award on merits with reference to the material produced before the Arbitrator. Error of the nature, if any, can be got corrected by recourse to Section 33 of the Act, 1996. Modification of the award in the exercise of powers u/s 34 of the act, 1996 by the learned District Judge by relying upon some different arbitral award passed by another Arbitrator is not permissible in law. The award passed in different arbitration proceedings by another Arbitrator is not binding on the Sole Arbitrator in the present arbitration proceedings. Once it is held that the amount which was due to the purchaser was illegally withheld by the State for considerable period under both the agreements, there is no reason for denying interest for pre-reference period.

5. Mr. Vinay Harit, learned Deputy Advocate General for the State vehemently argued that the purchaser did not have cause of action against the State of Chhattisgarh as the disputed work was executed prior to the formation of the State C.G. as per two agreements between the State of M.P. and the purchaser. Agreement was statutorily terminated on 31.12.1998 by the State of M.P. and the cause of action, if any available to the purchaser, is against the erstwhile State of M.P. Claim of the purchaser could not be proceeded and decided without impleading the State of M.P. as a party. It was further argued that in any case the purchaser could not claim refund of recovery of amount which was made beyond a period of three years and any claim for refund beyond the period of three years by the purchaser was barred by law of Limitation. The State was within its right to recover supervision charges under clause 6 at the rate of 10% of the price and there was no dispute raised by the purchaser in this regard and thus, the award directing refund of general handling and supervision charges

collected by the State is contrary to law.

6. On the other hand, Mr. Agarwal with Mr. Kostha, learned counsel for the purchaser argued that the State challenged the award u/s 34 of the Act, 1996 on the ground that the State of C.G. has no liability whatsoever to satisfy any claim arising out of the agreement which was entered into between the State of M.P. and the purchaser; the claim petition could not be proceeded in the absence State of M.P. and the petition was liable for dismissal for non-joinder of necessary party; in view of clause 23 of the agreement the matter ought to have been referred to the Secretary, Forest Department and no arbitral proceeding before the Arbitrator could proceed; and the award passed by the tribunal was without jurisdiction. However, none of the grounds taken by the State in the memo of appeal were before the learned District Judge.

7. Initially, application u/s 11 (6) of the Act, 1996 was filed in the High Court of M.P. for appointment of independent Arbitrator against the State of M.P. After formation of new State of C.G., MCC No.509/00 was transferred to High Court of C.G. at Bilaspur in exercise of power u/s 83 of the Act, 2000. After transfer, the State of C.G. was substituted as party in place of the State of M.P. and the Hon"ble Mr. Justice R.C. Shrivastava was appointed as Sole Arbitrator with the consent of the parties. The State appeared before the Sole Arbitrator and also filed reply to the statement of Claim as also its Counter Claim without raising any objection regarding non-joinder of necessary party. The purchaser filed fresh application for change of Arbitrator u/s 11(6) read with Section 14 & 15 of the Act, 1996 after withdrawal of Hon"ble Mr. Justice R.C. Shrivastava as Arbitrator, for appointment of substitute Arbitrator. After due notice and with the express written consent of the State, Mr. Ashok Masih was appointed as Sole Arbitrator in place of Hon"ble Mr. Justice R.C. Shrivastava.

Section 43 of the Act, 2000 is not applicatble in the instant case as the agreements were not between the purchaser and any undertaking of the State of M.P. but the agreements were between the purchaser and the erstwhile State of M.P. and the same are governed by Section 50 of the Act, 2000. Reliance is placed in the matter of Bhilai Power Supply Company Ltd. Vs. State of M.P. and Others, .

The learned Arbitrator has rejected the objection regarding non-joinder of necessary party with an observation that by virtue of Section 50 (1) (a) of the Act, 2000 the agreement out of which arbitration proceeding arose would come within the jurisdiction of the State and by virtue of Section 55 of the Act, 2000 any liability suffered by the State of C.G. by virtue of decision of the Arbitrator could be reimbursed to the State. Since the arbitrator has been appointed without any objection from any party and since the State failed to obtain necessary orders from the Supreme Court clarifying the above situation, objection in this regard was rejected.

8. We have heard learned counsel for the parties.

9. Section 43 of the Act, 2000 deals with assets and liabilities of the State undertaking. Whereas, section 50 deals with contracts made by the existing State of M.P., which reads as under:

SO. Contracts - (1) Where, before the appointed day, the existing State of Madhya Pradesh has made any contract in the exercise of its executive power for any purposes of the State, that contract shall be deemed to have been made in the exercise of the executive power-

(a) If the purposes of the contract are, on and from the appointed day, exclusive purpose of either of the successor States of Madhya Pradesh and Chhattisgarh, then, of that State; or

(b) In any other case, of the State of Madhya Pradesh, all rights and liabilities which have accrued, or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the existing State of Madhya Pradesh, be rights or liabilities of the State of Chhattisgarh or the State of Madhya Pradesh, as the case may be:

Provided that in any such case as is referred to in clause (b), the initial allocation of right and liabilities made by this sub-section shall be subject to such financial adjustment as may be agreed upon between the successor States of Madhya Pradesh and Chhattisgarh or in default of such agreement, as the Central Government may, by order, direct.

(2) For the purposes of this section, there shall be deemed to be included in the liabilities which have accrued or may accrue under any contract-

(a) any liability to satisfy an order or award made by any court or other tribunal in proceedings relating to the contract; and

(b) any liability in respect of expenses incurred in or in connection with any such proceedings.

(3) This section shall have effect subject to the other provisions of this part relating to the apportionment of liabilities in respect of loans, guarantees and other financial obligations; and bank balances and securities shall, notwithstanding that they partake of the nature of contractual rights, be dealt with under those provisions.

10. From plain reading of section 50 of the Act, 2000 it is evident that where contract is made by the State of M.P. in exercise of its executive powers that contract shall be deemed to have been made in the exercise of executive powers of either of the successor States or for whose exclusive purpose it has been made. Sub-section (2) (a) further clarifies that liabilities, which have been accrued or may accrue under any contract, shall be deemed to be included in the liabilities of the successor States for whose purpose the contract has been made. From perusal of the annexures appended with both the agreements, it is evident that the contract was made for exclusive purpose of the successor State of

Chhattisgarh.

11. Section 55 of the Act, 2000 further provides for apportionment of assets or liabilities by agreement between the successor States.

12. From perusal of the record we find that initially the Arbitrator was appointed on the application of the purchaser with the consent of the parties. Thereafter, earlier appointed Arbitrator was further substituted by the present Arbitrator on the application of the purchaser with the consent of the parties. The Arbitrator gave sufficient opportunities to the State to obtain clarification from the Supreme Court, however, the State failed to do the needful.

13. In the matter of Bhilai Power Supply Co. Ltd. (supra) in the similar situation the Hon''ble Supreme Court directed the M.P. Electricity Board to refund the amount of security deposit made by the petitioner without prejudice to the right of the Board concerned in getting adjustment or recovery of the amount from the C.S.E.B. or State of Chhattisgarh in accordance with the provisions of Act, 2000.

14. Thus, taking overall view of the facts and circumstances of the case considering the provisions of the Act, 2000 and also considering the conduct of the respective parties, we do not find any illegality in the impugned order whereby objection of the State regarding non-joinder of State of Madhya Pradesh as necessary party has been rejected.

15. Now coming to the next objection of the State that as per clause 23 of the agreement any dispute between the parties was to be referred to the Secretary, Forest, whose decision was to be final. Since the claim/dispute in question raised by the purchaser has already been rejected by the Secretary, referring the same dispute to the arbitrator was uncalled for and the purchaser could have challenged the finding of the Secretary before the appropriate court.

16. Mr. Vinary Harit relying upon the judgment in the matter of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., argued that where the arbitration tribunal is improperly constituted, the tribunal so constituted would have no jurisdiction to deal with the dispute and the aggrieved party would have right to require the tribunal to rule on its jurisdiction u/s 16 of the Act, 1996 which provides that the tribunal may rule on its own jurisdiction. The tribunal may also rule on any objection with respect to existence or authority of the arbitration agreement.

17. We are unable to accept the above argument advanced by Mr. Harit in the instant case. Admittedly, the Arbitrator was appointed with the consent of the parties by the High Court. The order passed by the High Court u/s 11 (6) of the Act, 1996 appointing Arbitrator is a judicial order as held by the Hon''ble Supreme Court in the matter of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, and the order passed by the High Court has attained finality as no appeal has been preferred against the said order. The objection regarding jurisdiction of the tribunal could not be decided by the Arbitrator. Thus, the

objection of the State in this regard based on Clause 23 of the agreement has rightly been rejected. In Paragraph No.47 of this judgment, decision in Konkan Railway Corporation Ltd. (supra) has been overruled.

18. The State has also challenged the impugned order whereby the objection of the State that claim of the purchaser is barred by Law of Limitation has been rejected by the Arbitrator and finding of the Arbitrator has been confirmed by the learned District Judge by the impugned order.

19. It was vehemently argued by Mr. Harit that the first agreement was executed on 31.8.1979, which was subsequently renewed on 30.4.1992 for a further period of twelve years. The purchaser deposited purchase amount under the first agreement without any objection. The objection was raised for the first time on 16.9.1999 before that date no prayer was made for referring the dispute for arbitration. Request for appointment of Arbitrator was made for the first time only in the month of June, 2000 when the application was made for appointment of Arbitrator before the High Court and thus the Arbitrator was appointed on 21.3.2002 and therefore, the claim of the purchaser could be considered only with respect to period of preceding three years from the date of request.

20. On the other hand, Mr. Satish Agarwal, learned counsel for the purchaser would argue that the demand for appointment of Arbitrator was made in the month of December, 1999. On failure of the State, application for appointment of Arbitrator was made in the month of June, 2000 in the High Court of M.P. which was within the prescribed period of limitation. In another matter of M/s Sal Industrial Pvt. Ltd. limitation related objection raised by the State has been finally rejected by the Arbitrator appointed in that case. The State did not challenge the finding of the Arbitrator and therefore, plea regarding claim being barred by limitation has been rightly rejected.

21. Indisputably, the purchaser raised a dispute and demanded for referring the dispute to the Arbitrator as per agreement vide its application dated 6.12.1999 and claimed refund of excess recovery made by the State under both the agreements from the year 1979-80 to December, 1998. Period of first agreement expired in the year 1992 and subsequent agreement was executed between the parties on 30.4.1992. Clause-2 of the first agreement provides for renewal of agreement, which reads as under:-

2. If the purchaser shall be desirous of obtaining renewal of this agreement, and gives previous notice in writing to the Government at least twelve months before the expiry of this agreement, the Governor may, in his discretion, agree to renew the agreement for such period as he may decide and for such consideration and on such terms and conditions as may be agreed upon between the Governor and the Purchaser.

Though renewed agreement dated 30.4.1992 was executed after the period of first agreement had already expired and there is no reference in the said agreement that it is renewal of the first agreement, however, from perusal of the

application u/s 34 of the Act, 1996 before the District Judge, contents of memo of appeal preferred by the State against the impugned order as also the fact that stand of the State throughout is that the subsequent agreement was a renewed agreement as per clause-2 incorporated in the first agreement and thus, the subsequent agreement between the parties is undisputedly continuation of the first agreement.

Clause-8 of the first agreement and Clause-7 of the renewed agreement deal with the payment of price by the purchaser, which provides that supply of Sal seeds, shall be made against advance payment deposited by the purchaser for 500 quintals of Sal seeds not later than 30th April of each year. Initially payment is to be replenished by the purchaser every week or immediately after delivery of the quantity paid for, whichever is earlier. Proviso to this clause clearly stipulates that in case of shortfall in the supply of Sal seeds for any such payment, the amount paid for Sal seeds not actually supplied shall be adjusted towards the subsequent payment.

In view of the clear stipulation in the agreement in this regard, the purchaser could not have demanded refund of any excess payment made by him during subsistence of purchase agreement with the State and cause of action accrued to the purchaser only on final termination of the contract i.e. in the month of December, 1998. Therefore, in our view dispute raised by the purchaser regarding refund of excess recovery and demand for appointment of Arbitrator for referring the above dispute for adjudication vide application dated 6.12.1999 was not barred by Law of Limitation as the same was made within the period of three years from the date of accrual of cause of action.

22. The next question for our consideration is whether award of interest @ 18% per annum affirmed by the learned District Judge is exorbitant or whether the learned District Judge was justified in partially modifying the arbitration award on the application u/s 34 of the Act, 1996.

23. Mr. Harit, learned counsel for the State submits that the purchaser did not raise any dispute during subsistence of first agreement or even thereafter till December, 1998 when the purchase agreement was statutorily terminated. There is no provision under the agreement regarding payment of interest by the State to the purchaser for any excess amount deposited by the purchaser against which Sal seeds could not be supplied. In these circumstances, imposition of interest @ 18% p.a. from 6.12.1999 is absolutely uncalled for and the same deserves to be entirely set aside.

24. On the other hand, Mr. Agarwal would argue that the learned sole Arbitrator on the basis of material available on record has recorded a finding that the State was responsible for wrongly withholding of excess payment for all these years and the above finding is based on the material available on record. Sub-section (7) of Section 31 of the Act, 1996 empowers the Arbitrator to decide and grant interest up to the rate of 18% per annum from the date of award to the date of

payment. Issue of quantum of interest as well as period of interest is solely within the jurisdiction of the Arbitrator and the Courts cannot go into the quantum and/or period of interest so awarded by the Arbitrator as it is discretionary power of the Arbitrator.

25. Indisputably, as per terms and conditions of the agreement, the purchaser is not entitled to claim refund for any excess deposit against which the State could not supply Sal seeds to the purchaser and the excess amount so deposited is to be adjusted against the subsequent supplies. The purchaser did not raise any objection or apply for refund of excess deposits made under the first agreement or under the subsequent agreement. Objection was made for the first time after the agreement was finally terminated in December, 1998. There is no provision under the agreements that the State would be liable to be pay interest against any amount deposited by the purchaser. It appears that the purchaser continued depositing purchase consideration throughout the period of 18 years and obtained delivery of Sal seeds against the deposits so made without any objection or without raising any dispute in this regard. In these circumstances, the Arbitrator was not justified in allowing compound interest @ 18% per annum on the amount of Rs. 96,62,971/- refundable under the first agreement w.e.f. 1.9.1991.

26. Learned District Judge has rightly modified the impugned award and was allowed the interest from 6.12.1999, the day on which the purchaser applied for appointment of Arbitrator. Therefore, the appeal preferred by the purchaser is liable to be dismissed and is accordingly dismissed.

27. Further, taking into consideration the arguments advanced by Mr. Harit in this regard that the purchaser did not raise any objection from 1979 to 1998 for a period of 19 years and did not claim refund of any excess amount from the State in these years; excess amount deposited by the purchaser is to be adjusted as deposit towards subsequent period; there is no provision under the agreement regarding payment of interest by the State to the purchaser for excess deposits and the learned District Judge has awarded interest @ 18% per annum from 6.12.1999, we are of the opinion that awarding of interest @ 18% per annum from 6.12.1999 till the realization of the amount will be too excessive. Therefore, looking to the peculiar facts and circumstances of the case and also considering that rate of interest prevailing in the country has substantially reduced, we partially allow the appeal preferred by the State and reduce the rate of interest from 18% to 9% from 6.12.1999.

28. No order as to costs.