
(2006) 05 DEL CK 0144

In the Delhi High Court

Case No : CS (OS) No. 1768 of 1996 and I.A. No. 2232 of 1997

Surya Domestic Appliances

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 08-05-2006

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2006) 05 DEL CK 0144

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Shiv Khorana, for the Appellant; Darpan Wadhwa, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.

IA No. 2232/1997 (Under Section 30 and 33 of the Arbitration Act, 1940)

1. A contract was awarded to the petitioner dated 24.10.1991 for supply of 3370 containers for portable food at a cost of Rs. 745/- per piece. The supplies were never made and in view thereof the defendant proceeded for risk purchase and detained the amounts of the petitioner in respect of the said amount. This resulted in disputes arising between the parties and in view of the arbitration clause and the General Terms and Conditions of Contract, Shri Ram Bahadur, Additional Legal Adviser to the Government of India was appointed as the Sole Arbitrator. The Arbitrator made and published the Award dated 29.12.1995. The petitioner aggrieved by the same has filed the present objections under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter to be referred to as, "the said Act").

2. Learned Counsel for the petitioner, conscious of the scope of enquiry by the Court in such proceedings, contended that the Award is liable to be interfered with on account of the following reasons:

- (i) the Arbitrator has relied upon the documents not forming part of the record;
- (ii) no proper opportunity was given to the petitioner to put forth its case; and
- (iii) the so-called reasons given by the Arbitrator are no reasons in the eyes of law.

3. The scope of dispute is extremely limited since Claim No. 1 of the respondent was that it was entitled to retain the amount of Rs. 1,36,678/- towards risk purchase, while the petitioner claimed the said amount as Counter Claim No. 2. The submissions of learned Counsel for the petitioner are confined to only the said issue.

4. The first plea of learned Counsel for the petitioner arises from the fact that the Arbitrator has referred to the risk purchase acceptance of tender placed on 30.03.1993, which was, however, a document not placed on record. Learned Counsel contends that this is the very basis of risk purchase being within time as the risk purchase is stated to have been placed on 30.03.1993, while the date of breach is taken as 30.09.1992. It is, thus, contended that if the risk purchase is of a later date, it would be beyond the period of 6 months from the date of breach and this document was not filed despite demand. Learned Counsel contends that if a material document is not considered by the Arbitrator, the same would amount to a misconduct.

5. Insofar as the legal proposition is concerned, there can be no doubt that if a material document affecting the rights of the parties is ignored or a document not forming part of the record is taken into consideration, the award would suffer from infirmity calling upon the Court to interfere with the same. The document, which is, however, on record is the schedule to acceptance of tender dated 15.04.1993. The said communication has been issued in continuation of the advance acceptance of tender dated 30.03.1993 and sets out the terms. I am of the considered view that the availability of this document on the records of the Arbitrator would suffice insofar as the finding to be arrived at by the Arbitrator in respect of the date of risk purchase is concerned. Thus, it cannot be said that the Arbitrator did not have material on record to come to the conclusion as to the date of risk purchase. The document relied upon by the Arbitrator is this document which stipulates that the advance acceptance of tender was issued on 30.03.1993 and the date of 30.03.1993 is derived from the same.

6. The second submission of learned Counsel for the petitioner is on account of there being no proper opportunity being granted to the petitioner to defend its case. This plea has been raised since the document dated 15.04.1993 is stated to have been filed with the rejoinder. The petitioner wanted to file some additional documents. In my considered view, both the parties were granted opportunity to file the documents. Documents were filed along with the pleadings which can only consists of the claim, reply and the rejoinder. The relevance of the plea is also to be understood in the context of the dispute before the Arbitrator, which was really limited to the issue of risk purchase. The petitioner

wanted the respondent to place on record the document related to risk purchase and the document dated 15.04.1993 was so placed on record. I, thus, find no merit in this plea.

7. The third submission of learned Counsel for the petitioner arises from what are alleged to be too cryptic a reasoning of the Arbitrator. There is no doubt that the Arbitrator could have set forth the reasoning in a better fashion. In fact, the Arbitrator being the Additional Legal Adviser ought to have done so. However, the question remains whether the award is liable to be set aside on this ground. In my considered view, the answer to this question is in the negative on account of the fact that the thought process of the Arbitrator can be deciphered from the award. A perusal of the award shows that there are five reasons noted by the Arbitrator for upholding the claim of risk purchase by the respondent. The same are:

(i) the risk purchase being placed within the stipulated period of 6 months from the date of breach;

(ii) the complete supplies being made in pursuance to the risk purchase;

(iii) full payment being made for the risk purchase;

(iv) there being no major deviations between the risk purchase and the original contract; and

(v) the contractor having not supplied even after capacity verification clearance.

8. The first three aspects arise from the documents placed on record and have been dealt with by the Arbitrator on the basis of the material available. Learned Counsel for the petitioner, however, contends that the Arbitrator having merely recorded that there is no major deviation is not sufficient in view of the pleas raised by the petitioner. In this behalf, it has to be noticed that the document dated 15.04.1993 setting out the terms on which risk purchase was made is available. Learned Counsel seeks to compare the terms to make out a case that there were some deviations, which are not minor. In my considered view, this does not fall within the purview of scrutiny by this Court. The Court in a proceeding under Sections 30 and 33 of the said Act does not sit as a court of appeal. It is not for this Court to interfere with an award merely on the ground that the Court would come to a different conclusion on the material available before the Arbitrator. It is only in the eventuality of an award being totally perverse that such interference is called for. In this behalf, the judgment of the Division Bench of this Court in *DDA v. Bhagat Construction Co. Pvt. Ltd. and Anr.* 2004 (3) ALR 481 can be referred to for support. In fact, the Apex Court has observed that in the absence of the award being absurd, reasonableness is not a matter to be considered by the Court as appraisal of evidence by an arbitrator is not ordinarily a matter for the Court. The judgments of the Apex Court in *Food Corporation of India Vs. Joginderpal Mohinderpal*, and *Sudarsan Trading Co. Vs. Government of Kerala and Another*, can be usefully referred to for

this purpose. So long as the view taken by the Arbitrator is a plausible view, though perhaps not the only correct view, the award cannot be examined by the Court.

9. Learned Counsel for the petitioner has also referred to the aspect of capacity verification clearance, which is at Serial No. 5 of the reasons of the award. The submission of the learned Counsel is that this capacity verification clearance was not available with the petitioner and the same was sought by the agents of the respondent. The issue whether such a clearance was required or not was clarified only in May, 1992 and, thus, the petitioner was entitled to re-schedule of supplies which the respondent failed to do. It is, thus, submitted that the petitioner cannot be faulted for the delay in issuance of this capacity verification clearance. Learned Counsel further submits that this aspect has not even been dealt with properly by the Arbitrator.

10. A reference to the communications between the parties, however, shows that this aspect is not relatable to the contract in question. The submission of learned Counsel for the respondent is that it was clarified by the respondent at the relevant stage of time that the obtaining of such a capacity verification clearance was not a pre-condition to the petitioner executing the contract. A reference to the document at U-28 dated 02.06.1992 of the respondent would show that the requirement of such certificate was stated to be "independent of tendering the stores for inspection". Another communication at U-64 dated 31.03.1992 of the respondent would show that the capacity verification clearance was only required in order to enter the petitioner's name in the defense supplies compendium and the petitioner was asked not to waste further time on the said plea as a ground for non-supply of the goods since the same were urgently required for defense users. No doubt, the petitioner had issued certain communications asking the aspect of issuance of the capacity verification clearance to be expedited, but once the same is not connected with the supply in issue, the petitioner was not within its rights to have delayed making supplies.

11. In view of the aforesaid, I do not find any merits in the objections and the same are dismissed.

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12. The objections having been dismissed, the Award 29.12.1995 of the Sole Arbitrator, Shri Ram Bahadur, is made Rule of the Court leaving the parties to bear their own costs.

13. Decree-sheet be drawn up accordingly.