
(2012) 01 DEL CK 0421
In the Delhi High Court
Case No : O.M.P. 559 of 2009

Union of India

APPELLANT

Vs

M/S Alpine Industries

RESPONDENT

Date of Decision : 18-01-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2012) 1 AD 825

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

Bench : Single Bench

Advocate : Geeta Shrama, for the Appellant; Shiv Khorana, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—The challenge in this petition u/s 34 of the Arbitration and Conciliation Act ("Act") by the Union of India through the Integrated Headquarters of Ministry of Defence (MOD), OMG's Branch, Director General of Supplies & Transport (DGS&T), is to the Award dated 28th May, 2009 passed by the Sole Arbitrator in the disputes between the Petitioner and the Respondent who entered into a contract on 8th August, 1997 for the manufacture and supply of Foot Powder.

2. The Respondent has awarded the aforementioned contract for the supply of 17000 kg. of Foot Powder in unit pack of 70 gm plastic bottles as per Specification No.JJS-6840 @ Rs.46/- per kg + Excise Duty and other Taxes. The Respondent's store failed the test as a result of which the supplies could not be completed within the stipulated period. By letter dated 1st May, 2000, the Petitioner cancelled the contract and went in for risk purchase ("RP"). The Respondent's tender for RP was rejected. The Petitioner deducted amount of loss allegedly incurred towards RP from another bill of the Respondent. The resultant dispute was referred to the sole arbitration of the Additional Secretary in the Department of Legal Affairs, Ministry of Law & Justice.

3. There were four claims by the Respondent (Claimant) before the learned Arbitrator. Claim No. (i) was for Rs.7,82,000/- being the cost of stores manufactured by the Respondent (17 tons @ 46/- per kg.) with interest @ 18% with effect from the date of first rejection note dated 20th May, 1998.

4. Claim No.(ii) was for refund of Rs.3,91,000/- recovered incorrectly by the Petitioner towards RP from other bills of the Claimant together with interest @ 18% with effect from 30th March, 2002.

5. Claim No.(iii) was for Rs.2,00,000/- towards compensation for barring the Respondent from further tenders floated in 2001. This claim was disallowed.

6. Under Claim No. (iv), the learned Arbitrator awarded interest @ 15% per annum on the amounts awarded against Claim Nos.(i) and (ii) - with effect from 1st June, 1998 in the case of Claim No. (i) and with effect from 1st April, 2002 in the case of Claim No.(ii) - till the date of the Award and future interest @ 12% per annum on the amount awarded against Claim Nos.(i) and (ii) with effect from the date of the award till the date of payment.

7. This Court has heard submissions of Ms. Geeta Sharma, learned counsel for the Petitioner and Mr. Shiv Khorana, learned counsel for the Respondent.

8. Ms. Sharma first submitted that the claim of the Respondent under Claim No. (i) that the test protocol of Petitioner was defective was not maintainable. It is submitted that the test protocol was clearly indicated in the contract itself. It was to be as per specification No.JJS-6840. The Respondent had successfully supplied 6958 kg. Foot Powder during 1986 which conformed to the specification/test procedure specified for the present contract in 1999.

9. It was pointed out that although the contract indicated the original formula for calculation of Boric Acid as $VxNx6.18M$ which was later amended as $VxNx6.18x1.6/M$. This is nay event did not make much of a difference since the first active ingredient, boric acid, failed the test over several batches even as per the original specification. After completion of the testing in two batches the Claimant withdrew without intimation and without signing the test report. Ms. Sharma submitted that Arbitral Tribunal travelled beyond the scope of the contract in holding that there was a defect in the test protocol. Not even the evidence of the Respondent's expert witness, Dr. Talwar, could substitute the test protocol specified in the contract. Relying on the judgment in *Bharat Coking Coal Ltd. Vs. Annapurna Construction*, , it is submitted that the Arbitrator had no powers apart from what the parties had entrusted to him under the contract. If he travelled beyond the contract, as in the present case, he would be acting without jurisdiction. As regards Claim No. (ii) it is submitted that the non-grant of the tender for RP was not a dispute arising out of the contract and therefore could not have been arbitrated. Further, with the Respondent contesting the test protocol the award of RP would have led to further litigation. The variations in the terms and conditions of the RP tender were on account of the mandatory guidelines issued by the CVC. There were no changes as far as the specifications

and quality were concerned.

10. Mr. Shiv Khorana, learned counsel for the Respondent, submitted that the Respondent had suggested that the Stores can be got tested at the Central Drug Laboratory. However, the Petitioner did not agree to this. The testing protocol adopted by the Petitioner was defective and this resulted in wrongful rejection of the Respondent's stores. He pointed out that the Respondent filed a copy of the affidavit of one Dr. Santosh K. Talwar, a technical Expert. He was an ex-Director of the Central Indian Pharmacopoeia Laboratory, Ghaziabad. After examination of the protocol contained in JSS:6840-1:1987 and IND/SL/ 9003, Dr. Talwar concluded that both the protocols were not based on rational scientific considerations and, therefore, they were bound to give unsatisfactory results. He also pointed out that all the protocols were different from each other and, therefore, not reliable. The learned Arbitrator accepted the report of Dr. Talwar that there was a defect in the Test Protocol. It was held that had the suggestion regarding the correction in the Test Protocol been considered by the Petitioner, the dispute may not itself have arisen. Accordingly, the learned allowed Arbitrator allowed Claim No.(i) of the Respondent "to the extent of principal cost of the stores i.e.Rs.7,82,000/- " As regards Claim No. (ii) it is submitted that the need for RP was triggered by the wrongful rejection of the Respondent's stores by adopting an erroneous test protocol and therefore the Respondent could not be saddled with the cost of the RP. Moreover, the tender for the RP was wrongly denied to the Respondent. He relied on the decisions in Pragati MGFR Suppliers Vs. Union of India 2009 (113) DRJ 868, Union of India (UOI) Vs. Kundra Shoes, and Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, to urge that the dispute concerning RP could also be validly examined by the arbitrator.

11. The above submissions have been considered. While it is true that the reference in the contract was to test protocol JSS:6840-1:1987, the affidavit of Dr. Talwar, who appears not to have been cross-examined by the Petitioner, explains the technical aspects with sufficient clarity. Annexed to his affidavit dated 19th August, 2006 is a statement the relevant portion of which reads as under;

a. As per the existing International (WHO published "Quality Assurance of Pharmaceuticals Vol. 1, Copies of Page 119 and 123) as well as National (IP 96, Page 12) practices it is mandatory to validate the protocols of analysis so as to ensure that the analytical procedure gives reproducible and reliable results and that it can be replicated in different laboratories. The important parameters for the same are Accuracy, Precision, Robustness, Linearity and range and Selectivity. The method appears to have not been checked for any of the parameters making it unreliable in the very first instance.

b. The method was originally adopted in Nov. 1971 and revised in 1987 JSS: 6840-1: 1987. Subsequently replaced by IND/SL/9003 (Issue date not mentioned), finally a new version adopted in September 2005. It may be seen

that specification issued in 1971, 1987 included multiplication of 1.6 in the calculation but this figure was dropped in the IND/SL/9003. It is worth noting that even if we consider the method of analysis accurate for argument sake, how one can get proper results by multiplying by 1.6. The respondent has attributed it as typographical error.

12. Therefore, it appears that the protocols specified in the contract were replaced by IND/SL/9003 and thereafter a new version was adopted in September 2005. Dr. Talwar also explained that there were other reliable methods for testing Boric Acid. He further explained as under: -

the drawback (in the method included in the protocols), which can be made out is that before the final titration 50 ml each of Glycerin and water is directed to be added to facilitate dissolution whereas in the revised method IND/ SL/9003, 100 ml mixture of Glycerin and water (111) has been used. Please note that in the first case individual addition of the component is recommended whereas in the second case a mixture of the component has been recommended and that has made all the difference. Here it is to be stated that even IP'96 recommends the usage of a mixture though the ratio is 2:1. That can be the reason of getting different values obtained by the Respondent on different occasions. Had the respondent carried out the Validation? This problem may not have arisen.

13. In Annexure-II to his affidavit, Dr. Talwar dealt with the question of testing of each of the other active ingredients i.e. Talc and Zinc Stearate. He has also in a tabular form dealt with the submissions of the Respondent, the defence of the Petitioner and his own comments.

14. The submission of the Petitioner that the learned Arbitrator could not have gone into the correctness of the test protocol overlooks the fact that this formed the very basis of the rejection of the Respondents' stores. The central plea of the Respondent was that there were eight reports in respect of three lists and the eight reports differed from each other. In finding this submission to be substantiated, it is not as if the learned Arbitrator himself examined the technical aspects concerning the test protocol. He has relied on the unchallenged testimony of an expert in the field. It therefore cannot be said that the learned Arbitrator travelled beyond the scope of the contract or returned a finding contrary to the evidence placed before him. These are essentially matters of evidence and it is not for this Court to re-examine it to come to a different conclusion, even if that may be possible. The Award in respect of Claim No. (i) does not call for interference.

15. As regards the claim No.2 towards refund of Rs.3.91 lakhs deducted towards costs of RP, the Arbitrator noted that the Respondent had quoted the lowest rate but the tender for the RP was awarded to another party. There were variations in the terms and conditions of the RP. The contention of the Petitioner regarding lack of expertise of the Respondent was found not tenable since the Respondent had admittedly been supplying the same item in the past. The deduction of the

said sum from the other bills of the Respondent was held to be unjustified and, therefore, the claim was allowed. This Court is unable to discern any patent illegality in the above conclusion of the Arbitrator.

16. As regards award of interest, the Tribunal has awarded pendente lite interest at 15% and post award interest at 12%. This cannot be said to be arbitrary or contrary to law.

17. For the aforementioned reasons, this Court is not persuaded to interfere with the impugned award in the exercise of its powers u/s 34 of the Act. The petition is dismissed but in the circumstances with no order as to costs.