

(1995) 08 DEL CK 0100

In the Delhi High Court

Case No : Suit No. 786 of 1993 and Interim Application No. 9538 of 1993

Union of India

APPELLANT

Vs

Panipat Foods Ltd. and Another

RESPONDENT

Date of Decision : 01-08-1995

Acts Referred:

Citation : (1995) 60 DLT 258

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : B. Babbar and Pradeep Aggarwal, for the Appellant;

Judgement

K. Ramamoorthy, J.

(1) On 14th of April 1980 there was an agreement between the petitioner Union of India and the respondent M/s. Panipat Foods Ltd. with respect to the supply of tinned vegetable fruits/Dehydrated foodstuff. The contract provided for extension of time in delivery period on payment of liquidated damages. According to the respondent owing to acute shortage of power and non allocation of diesel in Haryana, the respondent could not make the supply on or before 14th of May 1980 and the respondent made a request for extension of time up to 14th of June 1980 and the same was agreed to by the petitioner-Union of India on payment of liquidated damages of 0.2% per month. The respondent by its letter dated 10th of June 1980 requested the petitioner to grant another extension of one month's time from 14th of June 1980 to 14th of July 1980.

(2) By letter dated 20th of June 1980 the petitioner granted extension subject to payment of liquidated damages up to 30th of June 1980. The respondent supplied 30 metric tonnes of fruit products as against 50 metric tonnes agreed to by it. According to the respondent if extension had been granted up to 14th of July 1980 they would have supplied the balance 20 metric tonnes. After 30th of June 1980 the petitioner did not serve any performance notice upon the respondent. On 15th of November 1980 the petitioner issued a notice cancelling

the contract and floated what is called the risk purchase inquiry on 16th of March 1981. The respondent also made an offer and that was ignored and the risk purchase was made.

(3) The petitioner-Union of India claim Rs. 47,306.38 as the loss on account of the breach committed by the respondent and because of the risk purchase.

(4) This dispute was referred to arbitration. The Arbitrator in the first instance passed an award on 17th of September 1984. The Arbitrator Mrs. R. Lakshmanan passed the following award :-

"THE claim of the Union of India for Rs. 47,306.38 (Rupees forty seven thousand three hundred six and paise thirty-eight only) is allowed. I direct the contractor to pay the said amount to Union of India and direct the Union of India to pay the contractor the amount of money, if any, withheld by them on account of the aforesaid claim."

This was set aside by this Court and the matter was remitted. Before the Arbitrator Mr. K.D. Singh, the Company relied upon the decision of the Supreme Court in *M/s. Hind Construction Contractors by its sole proprietor Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra*, and contended that time was not the essence of the contract and the claim of the Union of India on the ground of risk purchase was not in accordance with law and, Therefore, the claim of Union of India could not be entertained in law. The Company also made a counter claim for Rs-2,85,762.26 Along with interest amounting to Rs. 55,723.64. The Arbitrator passed the award on 26.2.93 allowing "the claim made by the Union of India and rejecting the counter claim made by the Company.

(5) The Company had objected to the award in I.A.9538/93. With reference to the sum of Rs. 47306.38 the argument was that the time was never intended to be the essence of the contract and the Union of India never made any demand on the Company respondent to perform this obligation under the contract and having cancelled the contract on 15th of November 1980 making a risk purchase inquiry in March 1981 was a gross misuse of power and on that basis no liability can be fastened on the respondent.

(6) The Arbitrator having noticed the judgment of the Supreme Court would observe that he had gone through the correspondence of the parties and on the facts and circumstances of this case time was intended to be the essence of the contract.

(7) After 30th of June 1980 when the extended period expired there has been no correspondence. No reply from the Union of India extending the time atleast up to 14th of July 1980 by which time the Company undertook to supply the balance quantity. Only on 15th of November 1980 it was stated "As you have failed to supply quantity of 20.128 tonnes Mango tinned of acceptable quantity against the above A/T the same is hereby cancelled at your risk and cost and the amount

recoverable from you will be intimated in due course. This is without prejudice to the rights and remedies available to the Government under the terms of the contract and other rights."

(8) On 16th of March 1981 the Section Officer on behalf of the petitioner wrote as under to the Company :-

"I am directed to enclose a risk purchase tender enquiry of even number dated 16.3.81 inviting you to tender for the supply of 20.128 tonnes Mango Tinned for defense Services. I am to inform you that this quantity is being repurchased at your risk and cost as the same was cancelled vide this Department letter (No. J/13066/9/75/80-Pur.V. dated 15.11.80 against A/T No. J/13066/9/75/80-Pur. V. dated 14.4.80. 2. In the case of risk purchase enquiry if your quotation happens to be the lowest or the lowest acceptable, you will be required to furnish a security deposit in cash equivalent to the difference between your quotation and the next best quotation or 10% of the proposed contract value whichever is more by a specified date before placement of the contract on you, failing which your offer is liable to be ignored and placement of the contract on the next best offer may be considered."

The Company offered to supply again and that was not accepted and the risk purchase was made by the Union of India later. The Union of India gave statement showing the calculations of risk purchase and loss suffered by Union of India as Annexure 1 to the claim statement before the Arbitrator, which reads as under:-

Amount. payable	Amount paid	@ Rs-8.05 per kg.	@Rs.9.96 per kg.	Value of
20.027.700MT	1,61,222.98	1,99,475.89	Excise Duty @ 15%	24,183.45
31,417.85	@ 15.75%	1,85,406.43	2,30,893.34	Sales Tax @4% 7,416.26
9,235.73	Total	1,92,822.69	2,40,129.07 (-)	1,92,822.69 47,306.38"

The Company offered to supply at Rs. 8.05 per kg. but without accepting the same the petitioner Union of India had purchased @ Rs. 9.96 per kg. The principles laid down by the Supreme Court is that the Arbitrators have to act in accordance with law of the country. In the instant case, the parties are governed by the principles of contract as propounded by the Supreme Court in various cases. As per the decision of the Supreme Court in 1979 S.C. 720 (supra) when the contract itself provided extension of time and having regard to the nature of the contract time can never said to be the essence of the contract in this case. The principles laid down by the Supreme Court in the above case was considered by the Kerala High Court in K. Abdulkhadar Vs. The Plantation Corporation of Kerala Ltd., Kottayam, and College of Vocational Studies v. S.S. faitley, Air 1987 Delhi 134. The Andhra Pradesh High Court, applying the principles in the above Supreme Court case, came to the conclusion on the facts of that case that time was the essence of the contract. These cases give the guidelines as to how the principles laid down by the Supreme Court could be applied to a given case.

(9) The view taken by the Arbitrator is perverse and on that ground alone the

award is liable to be set aside. Therefore, the award passed by the Arbitrator is set aside and the claim made by the petitioner in the sum of Rs. 47,306.38 stands rejected. There shall be no order as to costs.