

(2005) 09 DEL CK 0072
In the Delhi High Court
Case No : OMP No. 434 of 2004

Union of India (UOI) and Others

APPELLANT

Vs

Prem Kumar Lihala

RESPONDENT

Date of Decision : 06-09-2005

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Sales of Goods Act, 1930 — Section 58
Specific Relief Act, 1963 — Section 10

Citation : (2005) 09 DEL CK 0072

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : R.C. Nangia, for the Appellant; T.P. Mishra, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The Union of India, Ministry of Railways, has filed this petition u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act") for setting aside the Arbitral Award dated 3.9.2004 of the Sole Arbitrator Sh. K.K. Gupta, Executive Director (L & A), Railway Board.

2. The dispute originates from an order placed by the petitioner on the respondent vide letter dated 9.4.1996 for supply of 4.33 lakh grooved rubber sole plates. The contract was to be governed by the Indian Railways Standard (IRS) Conditions and Special Conditions of Contract. This order was accepted by the respondent unconditionally vide letter dated 13.4.96 which resulted in a formal contract between the parties dated 4.6.96. The tender terms and conditions contained Clause No. 2900 being the arbitration clause.

3. The petitioner stated that respondent was required to make the supplies by 12.12.97, but failed to supply despite final opportunity being given on account of inability of the respondent to set up the manufacturing facilities duly certified by the Research, Designs and Standards Organisation. The deficiencies pointed out by the petitioner could not be removed. The petitioner terminated the contract

vide letter dated 16.11.99 as the respondent had failed to supply even the initial samples. There were some further communications between the parties, but despite the request of the respondent the petitioner did not consider it feasible to revive the contract. The formal request was sent by the respondent on 10.6.2003 in this behalf, which was rejected by the petitioners vide letter dated 8.7.2003. The respondent-firm thus invoked the arbitration clause vide legal notice dated 24.8.2003. The petitioners appointed the Sole Arbitrator in terms of the arbitration clause to decide the dispute and differences between the parties with regard to termination of the contract without any liability on either side being development contract on account of the failure of the respondent to supply material within the said period.

4. The grievance made in respect of the award is that the final directions in the award amount to revival of the contract and its specific performance. The Arbitrator has directed the petitioner herein to write to the respondent herein within sixty days of the award to supply the contracted quantity within a period of nine months at a rate as it would have been at the end of the scheduled delivery period i.e. 12.12.97 or last accepted rates in the zonal railways where the respondents manufacturing unit is located, whichever is earlier. The respondent is required to accept the offer unconditionally and to complete the entire process of getting his manufacturing facilities certified and taking other action.

5. Learned Counsel for the petitioner contended that a revival of the contract did not fall within the scope of the reference made to the Arbitrator since the Memorandum of Reference dated 27.10.2003 clearly stated that the disputes had to be adjudicated which had arisen with regard to the termination of the contract. It would be useful to reproduce the Memorandum dated 27.10.2003, which is as under:

"Sub: Dispute arisen out of the contract between Ministry of Railways (Railway Board) and M/s. Premco Traders, Kolkata under Contract No. 95/Track II/22/5/89 dated 4.6.96 for supply of ordered quantity of GRSP -- Appointment of an Arbitrator.

The above mentioned contract was awarded to M/s. Premco Traders, Kolkata for supply of GRSP on 4.6.1996.

Whereas, a dispute has arisen with regard to termination of the contract without any liability on either side being developmental contract due to failure of the firm to supply the material within the delivery period 13.12.1997. The contract was terminated on 16.11.99.

Whereas, the aforesaid contract is governed by the IRS Conditions and Special Conditions of Contract, which provide that such disputes may be referred to arbitration under Clause 2900 of these conditions which form an integral part of the contract.

Now, Therefore, in exercise of power vested under Clause 2900 of the said IRS Conditions of Contract, Sh. Kanwarjeet Singh, Member Engineering, Railway Board appoints Shri K.K. Gupta, Executive Director, DM, Railway Board as Sole Arbitrator for deciding the above mentioned dispute and differences, which have arisen between the parties to the contract as stated in paragraphs 1 & 2 above and are referable to Arbitration.

Shri K.K. Gupta, Executive Director, DM, Railway Board is Therefore, requested to enter into reference and pronounce his decision and publish his award on the dispute as early as possible.

DTK(M)EDTK(M) will represent the case on behalf of Railway Board."

(Emphasis supplied)

6. Learned Counsel thus submitted that the Arbitrator had to give a finding on the question as to whether the termination of the contract was right or wrong and could not have revived the contract. Allegations have also been made about the Arbitrator failing to appreciate the documentary evidence, but it cannot be seriously argued that the same fall within the purview of Section 34 of the Act.

7. In view of the aforesaid the sole question for determination is whether it was open to the Arbitrator to revive the contract or the only issue of reference was effect of the termination of the contract and consequently any monetary claim which may be liable to be paid. Learned Counsel for the petitioner has referred to the decision of the Supreme Court in E. Venkatakrishna Vs. Indian Oil Corporation and Another, The said case dealt with the termination of the distributorship by the IOC and a reference was made to the Arbitrator "to adjudicate upon the disputes and differences arising between you and the Corporation and to give his Award/s thereon" The Arbitrator restored the distributorship. The Division Bench of the Madras High Court held that the question of restoration of the distributorship would not arise under the agreement and thus the Arbitrator had no jurisdiction to direct restoration of the distributorship. The Supreme Court observed as under:

In our view, the Division Bench was right. All that the Arbitrator could do,

if he found that the termination of the distributorship was unlawful, was to award damages, as any Civil Court would have done in a suit.

We find it difficult to accept the contention on behalf of the appellant that what was referred to the Arbitrator was the issue of restoration of distributorship in the sense that the Arbitrator could direct, upon holding that the termination was unlawful, that the distributorship should be restored. We think that the reference itself contemplated consequential damages for wrongful termination. In any event and assuming that there is any error in so reading the reference it is difficult to hold that the Arbitrator was thereby vested with jurisdiction to award restoration.

8. Learned Counsel also referred to the judgment of the Apex Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., wherein in Para 14 it has been held that if an award is contrary to the substantive provisions of law or provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered u/s 34 of the Act.

9. Learned Counsel for the respondent on the other hand contended that the Arbitrator was well within his jurisdiction to direct revival of the contract for which representations have been made by the respondent.

10. In order to appreciate the rival contentions, it has to be kept in mind that the contract was for supply of goods. Supply of goods would be governed by the Sale of Goods Act, 1930. Section 58 of the same reads as under:

"Special performance--Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be the unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree."

11. The revival of the contract would amount to decree for specific performance of the contract. Chapter II of the Specific Relief Act, 1963 deals with specific performance of contracts. Section 10 deals with goods in which specific performance of contracts is enforceable and reads as under:

"Cases in which specific performance of contract enforceable.--Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced--

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.--Unless and until the contrary is proved, the Court shall presume--

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases--

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff."

12. Reading of Section 10 of the Specific Relief Act shows that in case of breach of a contract to transfer immovable property, specific performance can be enforced only where the property is not an ordinary article of commerce or is not easily obtainable in the market. If damages as an alternative remedy are available, specific performance could not be granted in respect of movable property.

13. A reading of Section 58 of the Sale of Goods Act, 1930 also shows that specific performance for breach of contract to deliver specific or ascertained goods can be granted, but the same is subject to the provisions of Chapter II of the Specific Relief Act, 1877. In view of the various pronouncements on this aspect, it cannot be doubted that unless the goods are not easily available in the market or have some special value like antiques, the specific performance of goods ought not to be granted. In such cases damages are an adequate remedy.

14. The Courts of equity only exercise their jurisdiction when the chattel in question is of some peculiar value, but would not interfere where the goods are articles of normal commerce, readily available in the market as in such cases the action for damages would be an adequate remedy. In ordinary commercial contract, the condition of money not being an adequate compensation or the difficulty in assessment of damages, would not be conditions which would exist.

15. It has also been held that a seller is not entitled to enforce specific performance of contract u/s 58 of the Sale of Goods Act because it deals with a case of only a buyer or a specific goods in respect of a contract to deliver specific and ascertained goods. In *Maheswari and Co. Pvt. Ltd. and Another Vs. The Corporation of Calcutta*, it was held so. In the present case it is the seller seeking specific performance.

16. The Apex Court in *E. Venhitakrishna v. Indian Oil Corporation and Anr.* (supra) has in fact frowned upon even restoration of a distributorship when it was held that only damages could have been awarded by the Arbitrator. It was found that what was referred to the Arbitrator was the consequential damages in case it was found that there was wrongful termination of the distributorship. In the present case also undoubtedly defendant failed to make the supplies. The contract was terminated. The Arbitrator was thus required to come to a finding whether such termination was valid or invalid and to grant damages in case the same was found to be invalid and illegal.

17. The Memorandum of Reference dated 27.10.2003 itself stated that the disputes had arisen with regard to the termination of the contract and a failure of the firm to supply material. Such revival or specific performance of the contract could not thus said to be a part of the reference to arbitration.

18. In view of the aforesaid, learned Counsel for the petitioner is right in this

contention that the award is both contrary to the provisions of law and did not form subject matter of adjudication before the Arbitrator. The Arbitrator thus fell into an error in restoring the contract. In fact no findings have even been given on this issue as to whether the contract was rightly or wrongly terminated. It was this issue which was referred to be considered by the Arbitrator.

19. In view of the aforesaid, the award dated 3.9.2004 of the Sole Arbitrator is set aside and the matter is remanded back of the Arbitrator to pass fresh award in accordance with law.

Parties are left to bear their own costs.