

(2002) 08 DEL CK 0017
In the Delhi High Court
Case No : OMP No. 233 of 2000

Union of India (UOI)

APPELLANT

Vs

Hakam Chand and Co.

RESPONDENT

Date of Decision : 29-08-2002

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Arbitration and Conciliation Act, 1996 — Section 34, 34(2), 75, 81
Constitution of India, 1950 — Article 51A
Contract Act, 1872 — Section 46, 74

Citation : (2002) 08 DEL CK 0017

Hon'ble Judges : Ramesh Chandra Chopra, J

Bench : Single Bench

Advocate : Ashok Bhasin and Raman Oberoi, for the Appellant; Harish Malhotra, for the Respondent

Judgement

R.C. Chopra, J.—This petition u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act" only) raises objections against the Award dated 29.5.2000 and prays that the Award may be set aside. Liquidated damages in the sum of Rs. 38,80,000/- Along with interest @ 12 per cent per annum are claimed in favor of the objector-petitioner. The respondent-claimant has filed a reply to the petition controverting the objections.

2. The facts leading to the filing of the objection petition, briefly stated, are that the petitioner, Delhi Milk Scheme, had issued a tender inquiry for the supply of milk vide tender document dated 15.12.1993. The respondent/supplier made its offer which was accepted by the petitioner vide its letter dated 31.12.1993. In terms of the agreement between the parties, the respondent was to supply agreed quantity of milk to the petitioner from 1.1.1994 to 31.12.1994 on specified rates. It was also stipulated that the contract could be extended by the petitioner for a period of 90 days. A penalty @ Rs. 2 per kg. was also envisaged for short supply of the milk. According to the objector/petitioner there were short supplies of milk during subsistence of agreement and as such liquidated damages

in the sum of Rs. 18,72,738/- were deducted from the respondent's payments. It was also averred by the petitioner that in terms of the contract between the parties the General Manager of the petitioner extended the contract for 90 days but the respondent failed to supply milk and as such liquidated damages in the sum of Rs. 38,80,000/- were due to the petitioner from the respondent on account of non supply of milk during the extended period.

3. The petitioner-objector pleads that the arbitrator did not uphold the petitioner's claim in regard to the damages on the basis of aforesaid penalties and did not appreciate that the counter claim of the petitioner in the sum of Rs. 38,80,000/- was to be determined by the General Manager of the Petitioner only and as such could not be questioned before the Arbitrator. It was also stated that as per the contract between the parties the dispute regarding the extension of contract could not be referred to Arbitrator and the Arbitrator, Therefore, had travelled beyond the scope of reference. The respondent-claimant filed a reply to the objection petition contending that the objections raised by the petitioner were beyond the scope and ambit of Section 34 of the Act and as such the same were liable to be rejected. It was submitted that the learned Arbitrator had given a reasoned Award after considering the facts and circumstances of the case and as such this Court should not interfere with the Award. It was pointed out that the plea of the extension of the contract was rightly considered by the Arbitrator as the counter claim filed by the petitioner could not be decided without going into this question.

4. I have heard learned counsel for the petitioner-objector and learned counsel for the respondent-claimant. I have gone through the Award also.

5. The Arbitration and Conciliation Act, 1996 has given a new dimension to the Arbitral proceedings and the Awards passed under the Act. It has enlarged the powers of the Arbitrators and reduced Courts' intervention at various stages. Section 30 and 33 of the Arbitration Act, 1940, which were very often exploited for delaying the fruits of an Award to a claimant, stand substituted by Section 34 of the new Act which has reduced and restricted the grounds on which an Arbitral Award may be challenged or set aside. According to Section 34 of the Act, an Arbitral Award may be set aside by the Court only if it is shown that a party applying for its setting aside was under some incapacity or the Arbitration Agreement was not valid or no proper notice was given of the appointment of Arbitration or applicant was otherwise unable to present his case before the Arbitrator or that the Award deals with a dispute falling outside the terms of reference or it contains decisions on matters beyond the scope of submission to Arbitration or the composition of Arbitral Tribunal or Arbitral procedure was not in accordance with the agreement between the parties or the Court finds that the subject matter of the dispute is not capable of settlement by Arbitration under the law for the time being in force or an Arbitral Award is in conflict with the Public Policy of India. The objections filed u/s 34 of the Act have to be first tested on the touchstone of the provisions of the Section 34 of the Act and only when

the Court finds that the objections raised in the petition are covered by any of the grounds mentioned therein the Court may consider the same and proceed to dispose them of on merits. The Court does not sit in appeal against the Award and should refrain from interfering with the findings of facts arrived at by the Arbitrator.

6. Learned counsel for the respondent/objector has contended that the objections raised in the present case would be covered by Section 34(2)(b)(ii) of the Act as the Award was in conflict with the Public Policy of India. He submits that the Arbitrator had not correctly appreciated the issues of law and the facts raised before him and as such the Court must interfere with the Award. This Court, however is unable to appreciate the submissions made by learned counsel for the objector/respondent for the reason that Public Policy of India cannot be held to be having so narrow and restricted connotations so as to confine it to the appreciation of conditions of the agreement and findings of facts and law by an Arbitrator. He also argues that the Arbitrator had gone beyond the terms of reference.

7. In the case of *Renusagar Power Co. Ltd. Vs. General Electric Co.*,¹ the Supreme Court while dealing with the question of enforcement of a foreign award held that its enforcement could be restrained if it would be contrary to the fundamental policy of Indian law or the interests of India. It appears that Clause (ii) of Section 34(2)(b) of the Act is primarily aimed at checking the enforcement of those Foreign Awards which are against the public policy of our country. However Explanation to the Section 34(2)(b) of the Act clarifies that an Award would be deemed to be against public policy of India if it is obtained by fraud or corrupt means or is in violation of Section 75 or Section 81 of the Act. Therefore, whenever the Court comes to the conclusion that an Award has been obtained by fraud or by corrupt means, the Court can always set it aside being against public policy of India. The illustrations of an Award being in conflict with the public policy of India can be so many. To quote few, in case an award passed against a person provides that in his office or establishment, he would not employ any person of a particular religion, the same would be held to be against public policy of India as India is a secular State. Similarly, incase an Award passed against a person enjoins upon him not to undertake any activity for research in the field of science or medicine, it would be against the public policy of India as Article 51A of the Constitution of India enjoins upon every citizen to achieve excellence and develop scientific temper. Therefore, in the absence of any such element in an Award and in the absence of anything to show that the Award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81 of the Act, it may not be possible for a Court to invoke Section 34(2)(b)(ii) of the Act and set aside the Award.

8. In the present case the petitioner had refused to release the security deposit of Rs. 17,25,000/-, made by the respondent at the time of entering into the contract, and had also refused to pay the respondents outstanding dues in the

sum of Rs. 6,98,487/- mainly on two grounds. The first ground was that on account of short supply of milk between 1.12.1994 to 31.12.1994, in terms of the contract, the objector/petitioner had become entitled to damages of Rs. 2385825/-. Secondly that on account of non-supply of milk during the extended period of contract the objector had become entitled to claim penalty of Rs. 38,80,000/- and as such the objector was not liable to pay anything to the respondent but rather had to recover certain amounts from it. According to the petitioner-objector the learned Arbitrator had acted in violation of Sub-clause (ii) of Section 34(2)(b) of the Act. It is also argued that the agreement was extended before the expiry of the contract between the parties and as such the Arbitrator was not justified in concluding that it was not extended within a reasonable time. It is submitted that penalty in terms of the agreement could be imposed without proof of damages and as such the Arbitrator was not justified in setting aside the penalty on account of short supply of milk during the subsistence of the Agreement between the parties.

9. Coming to the question as to whether the respondent-objector was entitled to recover penalty from the claimant-petitioner on account of short supply of milk during the subsistence of the agreement in terms of the stipulations made in the Agreement itself, it is found that the learned Arbitrator was the considered view that the penalty envisaged in Clause 15 of the agreement between the parties was in the nature of damages and as such could not be imposed in the absence of proof of injury or damage suffered by the respondent-objector. It was held that since no proof of loss had been furnished the claim regarding penalty as made by the respondent-objector could not be sustained. Learned Arbitrator referred to the leading case of *Maula Bux Vs. Union of India (UOI)*, in which the Apex Court examined Section 74 of the Contract Act and came to the conclusion that in a case where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him and the term "whether or not actual damage or loss is proved to be caused thereby" is intended to cover only those cases where it is not possible for the Court or the party claiming compensation to assess and prove the loss arising out of the breach of the contract. In *State of Orissa and Others Vs. Calcutta Company Limited*, a Division Bench of Orissa High Court also followed the same view and relying upon various other judgments, held that the damages by way of penalty could not be awarded in the absence of proof of actual loss or damage. Learned Arbitrator had considered the rival contentions of the parties and had undertaken in depth examination of the law on Section 74 of the Indian Contract Act for arriving at the decision. The learned Arbitrator, Therefore, was fully justified in disallowing the penalty against respondent/claimant. This Court is not sitting in appeal against the award and the objections raised by the respondent-objector in this regard are not covered by Section 34 of the Act and as such call for no interference.

10. The other objection raised by the respondent-objector against the Award is that in terms of the contract between the parties the respondent-objector was

entitled to extend the period of contract by 90 days which was extended before the expiry of the contract but the claimant-respondent failed to supply milk during the extended period and as such the petitioner-objector became entitled to recover Rs. 38,80,000/- as penalty on account of non supply of milk during the said extended period. On this issue the contention of the claimant/respondent was that the petitioner/objector had not notified the extension of the contract within a reasonable period prior to the expiry of the contract and as such it was not at all in a position to make supplies during the extended period. On the other hand the petitioner/objector submitted that in terms of Clause 15 of the 1st schedule of the Agreement between the parties the objector had extended the contract vide letter dated 28.12.1994 itself whereas the contract was coming to an end on 31.12.1994 and as such the extension of the contract was within a reasonable period. It is stated that the letter dated 28.12.1994 was sent to the Attorney of the claimant/respondent by special Messenger on 29.12.1994 and a telegram was also sent to the claimant on 30.12.1994 informing that the contract had been extended. The claimant/respondent submitted that the said letter was received by it on 2.1.1995 only when the original contract had already expired and as such the extension was not valid. It was denied that any copy of the letter dated 28.12.1994 was given to its Attorney or any telegram was given on 30.12.1994 as alleged. A letter written by the Attorney of the claimant/respondent dated 3.1.1995 was produced before the learned Arbitrator to show that the letter dated 28.12.1994 was received by the Attorney but in the said letter there was no indication as to on what date the Attorney had received the said letter.

11. Learned Arbitrator, after considering Section 46 of the Indian Contract Act, according to which when no time for performance is specified the engagement must be performed within reasonable time, came to the conclusion that the objector ought to have exercised its option in the matter of extension of contract within a reasonable time which was not done in as much as at the fag end of the contract and all of a sudden the contract was sought to be extended by another 90 days. It was held that the notice should have been of minimum a week or so prior to the conclusion of the earlier contract so that the claimant/respondent could keep all his arrangements intact to continue to supply milk to the objector during the extended period of contract. After considering the submissions made by learned counsel for the parties, this Court is of the considered view that the Arbitrator was fully justified in holding that the extension of the contract by the petitioner/objector was not within a reasonable time in terms of Section 46 of the Indian contract and as such the respondent/claimant could not be imposed any penalty for non-supply of milk during the extended period. Further, the objections raised by the objector in regard to the findings on this claim also are not covered by Section 34 of the Act and as such this Court must not interfere with the same.

12. The contention that the Arbitrator had no authority to consider the dispute regarding extension of contract or penalty imposed for non supply of milk during

the extended period is liable to be rejected for the reason that without going into this question the learned Arbitrator could not have adjudicated the disputes referred to him by the parties. This Court, Therefore, is of the considered view that the objections raised by the respondent-objector, in regard to the Award of the learned Arbitrator regarding setting aside of penalty imposed upon the claimant-petitioner on account of short supplies during the subsistence of the agreement and on account of non-supply of the milk during the extended period, are without substance and not covered by Section 34 of the Act and as such there are no grounds for interfering with the impugned Award. The view taken by the learned Arbitrator was fair, just and reasonable and beyond the scope of challenge u/s 34 of the Act.

13. In the result the objection petition filed by the petitioner/objector stands dismissed.