(2009) 01 DEL CK 0078

In the Delhi High Court

Case No : FAO (OS) No. 335 of 2002

Union of India (UOI) APPELLANT

Vs

Hakam Chand and Co. RESPONDENT

Date of Decision : 13-01-2009

Acts Referred:

Citation : (2009) 01 DEL CK 0078

Hon'ble Judges : Vipin Sanghi, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : A.K. Bhardwaj, for the Appellant; Harish Malhotra and Advocate, for the Respondent

Judgement

Mukul Mudgal, J.—With the consent of the learned Counsel for the parties this appeal is taken up for hearing.

2. This appeal challenges the Judgment of the learned Single Judge dated 29th August 2002 upholding the award dated 29th May 2000 rendered by the Arbitrator while dismissing the objections preferred by the appellant Union of India u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ?the Act?).

3. The parties had entered into a contract whereunder the respondent agreed to supply milk of varying quantities, according to season, during the calendar year 1994. The rates at which the milk was to be supplied was fixed at Rs. 6.90 per kg, 7.90 per kg and Rs. 8.40 per kg in respect of three seasons, namely, the flush season, the transitory season and lean season respectively. The respondent deposited a sum of Rs. 17.25 lakhs with the appellant as security for the satisfactory performance of the contract by it. At the option of the appellant, the period of the contract could be extended by 90 days on the same terms and conditions. Clause 14 of the contract provided for the imposition of penalty/ liquidated damages upon the respondent contractor in case of breach, and the same reads as follows:

14. The committed quantity should normally be evenly distributed on al days of the week. The day-to-day variations in the supply of milk shall not be more than 25% of the notified/committed quantities. In case of failure to supply the contracted quantities of milk on weekly basis by the contractor. General Manager, Delhi Milk Scheme may recover liquidated damages at the following rates:

i) For shortfall in weekly supply upto 10% Nil.

ii) For shortfall in weekly supplies above 10% Rs. 2/- per kg.

In case the supplies of milk are reduced to less than 75% of the committed quantity or stopped without any valid or acceptable reason during any week through out the year, the General Manager, Delhi Milk Scheme without prejudice to his rights shall have the right to terminate the contract and forfeit the security deposit.

4. Clause 15, dealing with the extension of the contract period reads as follows:

15. The contract will be operative from the date of its issue till 31st Dece.1994. However, the contract can be extended for a further period of 90 days from the date of expiry at the sole discretion of General Manager, Delhi Milk Scheme.

5. During the currency of the contract, on account of short supply of milk exceeding 10% of the stipulated quantity, the appellant imposed penalty/ liquidated damages @ Rs. 2/- per kg of the shortfall beyond 10% amounting to Rs. 18,72,738/- upon the respondent.

6. According to the appellant, it extended the contract for a period of 90 days vide letter dated 28.12.1998, stated to have been sent to the respondent by registered post, speed post and by also by tendering a copy of the same to the Attorney of the respondent firm through a special messenger on 29.12.1994. It was also pleaded that a telegram had been sent to the respondent extending the term of the contract on 30.12.1994. Admittedly, the respondent did not make supplies during the extension period.

7. The respondent invoked arbitration in terms of the arbitration agreement between the parties. On the aspect of imposition of penalty/liquidated damages to the tune of Rs. 18,72,738/- by the appellant due to short supply of milk during the original contract period, the case of the respondent was two fold. It was firstly contended that force majeure conditions existed which prevented the respondent from performing the contract during the original contract period. Secondly, it was contended that the imposition of liquidated damages was by way of penalty and was not a genuine pre-estimate of damages.

8. On the aspect of extension of the contract for a period of 90 days, the case of the respondent claimant was that the extension of the contract had been communicated only on 2.1.1995 i.e. after the expiry of the original term of the contract. The extension of the contract ought to have taken place within a reasonable period prior to the expiry of the said contract and could not have

been done after the term of the original contract had expired. The Appellant preferred a counter claim of Rs. 38,80,000/- towards damages suffered due to failure of the respondent in making supplies of milk during the extended 90 day period.

9.The learned Arbitrator held that the imposition of penalty/liquidated damages of Rs. 2/- per kg was by way of penalty and therefore could not have been imposed. He also held that the extension of the contract ought to have been made within a reasonable time prior to the expiry of the original term of the contract. He held that a reasonable time period in the context of the contract in question would be 30 days. Consequently, the claim of the respondent was allowed and the counter claim of the appellant was dismissed.

10. As notice above, the learned single Judge has upheld the award in its entirety, dismissing the objections filed by the appellant.

11. Before us, the learned Counsel for the appellant Mr. A.K. Bhardwaj has advanced his plea on both the aforesaid issues, i.e., the right of the appellant to impose liquidated damages, and the levy of penalty on account of non-supply of the milk by the respondent during the extended period.

12. Learned Counsel for the appellant has contended that since the appellant is M/s Delhi Milk Scheme, and milk is an essential commodity for which there is everyday requirement, therefore, in the context of Clause 14, the appellant was not required to prove any loss suffered by it, which is inherent due to non-supply of the milk to the appellant.

13. On the other hand, Shri Harish Malhotra, the learned Senior Counsel, appearing for the respondent, has contended that without the pleading or proof of actual loss suffered by the appellant, such penalty could not have been levied and the Arbitrator''s findings as upheld by the learned Single Judge are wholly sustainable.

14. We deal with the penalty issue first. The reasoning of the Arbitrator for declining levy of penalty is to be found in paragraph 24 of the Award dated 29th May 2000. Paragraph 24 reads as follows:

24. It is clear from the wording of the clause giving right to the respondent to impose penalties that this clause is penal in nature and has been inserted as a sort of terror for ensuring the compliance of the contract. The legal position on the question of right to recover damages or penalties provided in the contract is now well settled. It is clear that no such clause permitting imposition of liquidated damages or penalties could be enforced till the party claiming such penalties and damages proves on record that it has suffered a legal injury. In the present case, there is no plea even taken by the respondent that it has suffered any damage or loss due to alleged non-performance of the contract by the claimant.

15. The Arbitrator also referred certain judgments in support of his findings. The

conclusion of the Arbitrator is to be found in paragraph 28 of the Award which reads as follows:

28. So in the present case, the clause permitting the imposition of penalties is not stated to be pre-estimate of any loss or damage. The clause is in nature of a penalty and the loss in terms of money could be determined in the present case on failure of the claimant to supply milk. No such proof has been furnished. The Orissa High Court in the State of Orissa and Others Vs. Calcutta Company Limited, , the Gujarat High Court in State of Gujarat v. MA AIR 1988 Guj 179 and the Delhi High Court in case of Pearl Hosiery Mills v. Union of India 1978 RLR 94, have followed the same principle of law. It is thus, clear that a clause permitting imposition of penalties cannot be invoked till the party invoking such clause is able to prove that it has suffered any legal injury. The respondent in the present case has not pleaded or proved that it has suffered any legal injury on account of non-supply of milk by the claimant. Thus the respondent is not entitled to recover any amount from the claimant in the nature of penalties. I thus, disallow the counter claims of the respondent.

16. The crux of the findings of the Arbitrator rests on the Arbitrator''s holding that no pleading or proof of any legal injury on account of non-supply has been made or produced by the appellant.

17. We have considered the pleadings of the parties and after taking into account the specific terms of Clause 14 of the Contract, and in particular, the fact that the appellant is Delhi Milk Scheme which supplies milk to the capital and that milk being an essential commodity which is consumed by the consumers of the Delhi Milk Scheme on a daily basis, we are satisfied that the Clause 14 is exhaustive and does not require any further proof of damages suffered. The loss to the Delhi Milk Scheme is inherent in the failure of the respondent to supply the milk as per the contract. The arbitrator in our view was not justified in adding to the clause the additional requirement of proof of loss. We are also of the view that this levy cannot be considered as penalty much less excessive penalty, as the shortfall of milk supply of up to 10% is ignorable, and for shortfall of weekly supply above 10% alone the contract provides levy of liquidated damages/penalty @ Rs. 2 per Kg. At the then prevalent contractual prices, liquidated damages @ Rs. 2 per kg. cannot be considered excessive in any manner keeping in mind that the contractual rate varied between nearly Rs. 7/- per Kg. and Rs. 8.40/- per Kg. Accordingly, the Award dated 29th May 2000 in respect of claim No. 2 by the respondent and upheld by the learned Single Judge cannot be sustained and is set aside.

18. Turning to the aspect of extension of the contract period, the Arbitrator''s Award in Paras 17 and 18 reads as follows:

17. The first question to be decided in this matter is as to whether the respondent has validly extended the period of contract by 90 days in accordance with the terms of the contract. The contract was to be over on 31st December

1994. There is no proof furnished by the respondent that the letter dated 28.12.1994 was received by the claimant or by its Attorney before 31st Dec. 1994. The claimant had sent a letter dated 3rd January 1995 (C-5) in which it clearly mentioned that the letter of the respondent dated 28th December 1994 was received only on 2nd January 1995 and the claimant clearly disowned that the contract was extended validly in consonance with the terms of the contract. The claimant mentioned in that letter that such extension sought to have been made within reasonable period of at least 30 days before expiry of the period of the contract to enable the claimant to make necessary arrangements to supply the milk during the extended period of the contract.

18. The respondent has at the stage of arguments produced a letter dated 3.1.1995 of the attorney of the claimant sent in response to letter dated 28.12.1995 of the respondent extending the contract. In this letter the attorney has not indicated as to on what date he received the letter. It cannot be inferred that the attorney must have received this letter before 31.12.1994. The attorney also in this letter implored the respondent not to insist upon the supplies for any extended period.

19. It has been contended by Mr. Bhardwaj that the letter dated 3rd January 1995 of the attorney of the claimant/respondent did not state the date on which the letter dated 28th December 1994 was received. Mr. Bhardwaj stated that it had been received during the currency of the original contract period, i.e., on or before 31st December, 1994. Mr. Bhardwaj went on to plead that the extension could be sought by the appellant even after 31st December 1994.

20. The aforesaid plea of the learned Counsel for the appellant cannot be sustained at all because if this plea is to be accepted, the contract could theoretically have been extended even after six month after the expiry of the original term on 31.12.1994 and on that basis damages claimed for failure to supply milk by the contractor for a period of 90 days. We cannot uphold such an unsustainable plea. We gave the appellant time to demonstrate that the letter dated 28th December, 1994 was served on or before 31st December, 1994. The learned Counsel for the appellant has referred to the averment regarding the sending of the aforesaid letter dated 28th December, 1994 by Speed Post, Special Messenger to the attorney of the respondent and sending of the telegram also. However, no proof of sending of the said communications has been filed, nor has any A.D. Card been shown to us to demonstrate that the said letter was received by the attorney of the respondent prior to 1st January 1995. In this view of the matter, since the appellant has not been able to establish that the extension of the contract was communicated to the respondent prior to the expiry of the contract on 31st December 1994, we are satisfied that this plea of the appellant cannot be upheld. Accordingly, while setting aside the finding of the Arbitrator in respect of Claim No. 2, rest of the award is upheld. Accordingly, with the above observations, the appeal stands disposed of.