

Union of India Vs. M/S. India Proofing and General Industries, Kanpur

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Court : Mumbai

Decided On : Mar-23-2000

Reported in : AIR2000Bom292; 2000(3)ALLMR23; 2000(4)BomCR234;
(2000)2BOMLR77

Judge : Vijay Daga, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 34; [Indian Contract Act, 1872](#) - Sections 73

Appeal No. : Arbitration Petition No. 386 of 1999

Appellant : Union of India

Respondent : M/S. India Proofing and General Industries, Kanpur

Advocate for Def. : D.H. Mehta and ;V.R. Dhond, Advs.

Advocate for Pet/Ap. : R. Ashokan, Adv.

Judgement :

ORDER

Vijay Daga, J.

1. This is a petition directed against the award dated 8th June 1999 delivered by the sole arbitrator Smt. Shail Goel, Additional Legal Adviser to the Government of

India, Ministry of Law, Justice and Company Affairs, New Delhi who was appointed as a sole arbitrator vide letter dated 19th February 1997 by the Director General of Supplies and Disposal, New Delhi under the terms and conditions of the contract bearing No. BTX-3/ 137/G/0737(91)/COAD/868 dated 28th December 1992 to resolve the disputes between the parties.

2. The facts of this case, in brief, are as follows:

The petitioner, Union of India, through the Director General of Supplies and Disposals, Directorate of Supplies (Textiles) having its offices at New Delhi and Mumbai had placed the above contract on the respondent for supply of Shorts Men's Drill Khaki-1977 pattern in assorted sizes aggregating to 2,79, 795 pairs as per tender specifications with delivery period upto 31st August 1993. Though the goods were to be delivered upto 31st August 1993. Though the goods were to to be delivered up to 31st August 1993, the said period was extended upto 31st July 1995. The respondent contractor, according to the petitioner, in spite of repeated reminders, did not supply goods within the extended delivery period. Thus by letter dated 11th September 1995 the contract was cancelled at the risk and cost of the contractor. According to the petitioner, the breach of contract committed by the respondent contractor had resulted in heavy losses to the petitioner and its indenting departments, which were recoverable from the respondent contractor as per the terms of contract.

3. The petitioners had further stated that after cancellation of the contract it did not initiate separate purchase contract at the risk of the respondent because of decentralisation and the direct purchases made by the user departments. The petitioner had further stated that the items sought to be purchased were exclusively meant for the defence use and were not available in the open market. Thus the petitioner, after termination of contract by letters dated 11th September 1996 and 20th January 1997, demanded from the respondent, an amount of Rs. 46,40,350/- being the amount of damages and losses suffered by the petitioner and its indenting departments. The respondent, in spite of receipt, of the said demands, failed and neglected to comply with the same. The dispute was, therefore, raised and referred to arbitration which lead to appointment of Smt.

Shail Goel as a sole arbitrator to resolve dispute between the parties.

4. The petitioner had filed its statement of claim on 20th March 1998, before the learned arbitrator. The petitioner stated in the said claim that the risk purchase contract could not be concluded as the finance had certain reservations. The petitioner had further stated that the contracted items were exclusively meant for defence use and not available in the open market. The petitioner, therefore, had to set up a claim towards general damages in the sum of Rs. 46,40,350/- together with interest at the rate of 21% per annum from the due date till the realisation of the amount.

5. On being noticed by the arbitrator, the respondent had filed its written statement and raised a counter claim against the petitioner Union of India. The respondent had submitted that the extension of delivery period upto 31st July 1995 was unilateral. The respondent had further contended that the claimant Union of India never suffered any loss on account of alleged breach. The claimant had not effected risk purchase as the finance had certain reservations with the result the claimant had to return the indent to the indenter. The respondent had, therefore, denied its liability to pay the general damages alleged to have been suffered by the petitioner as no stores were purchased on or around the date of alleged breach. Thus the loss alleged to have been suffered by the petitioner was denied by the respondent. It was also the contention of the respondent that the demand for Rs. 46,40,350/- made by the claimant Union of India by letter dated 9th September 1996 had been withdrawn by another letter dated 25th September 1996. The respondent contractor, therefore, contended that the petitioner was estopped from demanding the above amount.

6. The learned arbitrator, after hearing the parties, by a reasoned award, rejected the claim of the petitioner Union of India for general damages and allowed the counter claim of the respondent contractor to the extent of Rs. 1,79,326.02 towards balance 5% payment withheld by the petitioner and directed the payment thereof with interest thereon at the rate of 18% per annum from the date the amount was withheld till the date of payment. The learned arbitrator has recorded a positive finding that the petitioner, Union of India, failed to adduce evidence that

any stores were purchased by its indenting departments at the risk of the respondent. The learned arbitrator also recorded a finding that no details of the risk purchase were furnished by the petitioner in spite of grant of two months time. The arbitrator also noticed that the claim of the petitioner for general damages was based merely on the letter of the indenting department dated 29th April 1996. It was further observed by the learned arbitrator that no evidence has been produced by the petitioner to prove as to what were the prices prevailing at Kanpur at the time of breach of contract. The acceptance letters in respect of two tenders were produced by the petitioner in evidence. One was the letter of acceptance of tender submitted by M/s. Tibco Enterprises, Calcutta which showed the term of delivery as F.O.R. Calcutta; whereas another was the letter of acceptance of tender submitted by M/s. Navbharat Vanijye Udyog which showed the term of delivery as F.O.R. Delhi. However, in the acceptance of tender by respondent, the terms of delivery was F.O.R. Kanpur. The learned arbitrator, therefore, held that the F.O.R. stations are different in the letters of acceptance of tender which were placed on record by the petitioner by way of evidence. Consequently, the arbitrator refused to accept and rely upon the said evidence in support of the claim set up by the petitioner. Even the quantity recorded in the said letters of acceptance of tender was different. The claim of general damage was, therefore, denied by the arbitrator for want of adequate and proper evidence. Consequently the counter claim of the respondent contractor to the extent of Rs. 1,79,326.02 was allowed as the said amount was withheld by the petitioner towards balance 5% payment. Since the said claim was allowed, interest was ordered to be paid on the said amount finding that there was no justification for the petitioner to withhold the said sum.

7. The aforesaid award is a subject matter of challenge in the present petition. It is urged by the learned Counsel appearing for the petitioner that the aforesaid award is liable to be quashed and set aside in exercise of power under section 34 of the [Arbitration and Conciliation Act, 1996](#) (for short 'Act') being in conflict with the public policy in India. The learned Counsel submitted that rejection of the claim set up by the petitioner has resulted in loss to the public exchequer and therefore, it would be in public interest to set aside the said award. I am afraid, this line of argument is not open on the face of provisions of section 34 of the Act. The

learned Counsel for the petitioner also wanted to canvass a contention that the approach adopted by the arbitrator while appreciating the evidence was not proper. It is now well settled that reappraisal of evidence by the Court under section 34 of the Act is not permissible. It is not open to the Court to deduce reasons in the award and proceed to examine whether those reasons are right or erroneous. The arbitrator is the sole Judge of the quality as well as quantity of the evidence and it is not for the Court to take upon itself the task of being a Judge of the evidence before the arbitrator. The petitioner also contended that under section 73 of the Contract Act actual purchase of goods is not at all necessary. The petitioner sought to place reliance on the decision of the Supreme Court in *M/s. Murlidhar Chiranjilal v. Harishchandra Dwarkadas*, : [1962]1SCR653 . However in the instant case, a categorical finding has been recorded by the arbitrator that even applying the ratio of decision of the Supreme Court in *M/s. Murlidhar Chiranjilal v. Harishchandra Dwarkadas* (supra) the claim has not been proved by the petitioner. No cogent evidence has been produced by the petitioner to prove the rate prevailing at Kanpur at the time of the breach committed by the respondent. It is thus not open to this Court to reassess the evidence or to decide the question of adequacy of evidence. The courts while exercising powers under section 34 of the Act are expected to be very circumspect in respect of the award delivered by the arbitrator. The award of the arbitrator is binding between the parties since he is the tribunal selected by the parties. The power of the Court to set aside an award is restricted to the grounds set out in section 34 of the Act.

8. Considering the submissions, scope of section 34 of the Act and the facts and circumstances of the present case, I do not find that the petitioner has made out any case for setting aside the award. The approach adopted by the arbitrator is reasonable and the reasons given in the award are perfectly legal and valid. As such, the present petition deserves to be dismissed being without any substance.

The petition is, accordingly, dismissed with no order as to costs.

9. Petition dismissed.