

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision : 20th March, 2008

+ CS(OS) 402/2000 WITH IA 2886/2000

UOI

..... Plaintiff

Through Mr. Rajeev Saxena with
Ms.Rani Kiyala, Advocate.

versus

NATIONAL COOP CONSUMER FEDERAT Defendant

Through Mr. J.P. Sengh, Sr. Advocate
with Ms. Iram Majid, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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| 1. Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat (Open Court)

1. In these proceedings, the plaintiff claims for making an award of the Arbitrator dated 31.12.1999 under

Section 14 of the Arbitration Act, 1940. The defendant – objector has filed an application being IA No.2886/2001 challenging the award on various grounds, under Section 30 & 33 of the Act.

2. The brief facts of the case are that the defendant entered into a contract for supply of 'Moong Dal' to the plaintiff on 14.7.1988. It is alleged that the defendant did not make the supplies within the time as a consequence of which the plaintiff had to seek recourse to risk purchase. It was alleged that the petitioner incurred a loss, quantified at Rs.36,52,115.54 (Rupees thirty six crores fifty two lakhs one hundred fifteen and paise fifty four only) on account of risk purchase. It, therefore, invoked the arbitration clause, in terms of paragraph 13 of the Agreement between the parties.

3. Clause 13 of the Agreement reads as follows:-

“ARBITRATION CLAUSE:-

In the event of any question, dispute or difference arising under or out of or in connection with the condition mentioned in this schedule or

in annexure thereto or in general conditions of contract governing contracts placed by the General Purchase Organisation of the Govt. of India (now under Deptt. Of Supplies) Form No.DGS&D-68 (Revised) or touching or concerning the construction, meaning, or operation or effect thereof or of any matter contained therein or as to the rights, duties or liabilities of the parties hereto respectively or otherwise however in connection with this contract (accept as to any matters the decision of which is specifically provided for in the conditions mentioned in the schedule or in annexure thereto or in the general conditions of contract as aforesaid the same shall be referred to the sole arbitration of any person appointed by the Secretary of the Govt. of India, Ministry or Department of the Govt. of India administratively dealing with the contract at the time of such appointment or if there be no Secretary, the Administrative head of such Ministry or Department at the time of such appointment. It will be no objection to any such appointment that the person appointed is a Govt. servant that he has to deal with the matter to which the contract relates or that in the course of his duties as a Government Servant has expressed views on all or any of the matters in dispute or difference.

b) In the event of the arbitrator

dying, neglecting or refusing to act or resigning or being unable to act for any reasons or his award being set aside by the court for any reason it shall be lawful for the said Secretary or the Administrative head to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid and the person so appointed will proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the Secretary or Administrative head of the Ministry or Deptt. as aforesaid shall act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

c) The arbitrator may from time to time with the consent of the parties, enlarge the time for making and publishing the award.

d) Subject as aforesaid the arbitration Act, 1940 and the Rules thereunder and any statutory modification thereof for the time being in force shall apply to the arbitration proceeding under this clause.

e) Upon every and any reference as aforesaid the assessment of cost of an incidental to the reference and award respectively shall be in the discretion of the sole arbitrator.

f) The venue of the arbitration proceeding will be the premises of the Government of India, Ministry of Defence, New Delhi or such other place, as the sole arbitrator may decide."

4. In exercise of the powers, the Secretary to the Government nominated an Arbitrator who entered upon reference on 21.9.1993. The said Arbitrator (hereafter called the first Arbitrator) could not proceed further with the matter, as the time provided for in the First Schedule to the Act, i.e. four months expired. Citing this and his helplessness to proceed with the matter, the Arbitrator resigned on 21.12.1993. This was followed by a lull. The plaintiff did not take any steps to appoint an Arbitrator. Eventually on 5.3.1998, Mr.S.B.Sharan was appointed as Arbitrator. He too resigned on 5.10.1998. The petitioner again appointed a third Arbitrator Smt. Shail Goel on 25.2.1999. This Arbitrator continued just over a month. She resigned on 25.2.1999. After about nearly seven months, on 7.9.1999, Mr. Babu Lal Nishad, Additional

Legal Adviser was appointed as a Sole Arbitrator on 7.9.1999 for adjudicating the dispute. It is the plaintiff's averment that this was the last Arbitrator, and fourth in the series of Arbitrators appointed by it. He entered upon the reference on 29.9.1999 and issued notices to the respondent - Contractor on various dates on 29.11.1999, 2.12.1999 and 3.12.1999 but to no avail.

5. The Arbitrator also caused notices of the proceedings to be published in the newspaper. The respondent did not enter appearance or participate in the proceedings. In the circumstances, the Arbitrator made an award which has been impugned in the present proceedings. That award after narrating the background whereby notices were issued to the respondents, granted the claims to the present plaintiff in the following terms:

"Claim No.1 of the claimant -UOI_
(APO)

The claimant claims a sum of Rs.36,52,115.54 (Rupees Thirty six lakh fifty two thousand one hundred fifteen and paise fifty four only) towards Risk Purchase loss.

I allow this claim of the claimant towards R/P loss for the following reasons:-

- i) Furnishing the security deposit was a pre-requisite condition of the contract but respondent has not furnished the security deposit nor supplied goods even within the extended delivery period. The contract was cancelled by the claimant. Thus, breach of contract was committed by the respondent.*
- ii) The date of breach in this case is 30.4.1989 and the R/P A/T was placed on 26.6.89 well within six months from the date of breach – 30.4.89 is mutually agreed D/P.*
- iii) The claimant has suffered R/P A/T loss of Rs.36,52,115.54 due to breach of contract committed by the respondent.*
- iv) R/P A/T holder firms have completed the supply. Completion certificate (Annexure-C/31 and C/32) has been filed by the claimant.*
- v) The claimant has filed proof of details to payment from CDA (Annexure – C/33).*
- vi) There is no major deviation between the R/P A/T and original*

A/T.

Claim No.2 of the claimant-UOI

The claimant claims interest @ 12% per annum on awarded amount.

AWARD

I allow interest @ 12% per annum on awarded amount from the date of publishing award, till actual realisation.

THE AWARD HAS BEEN MADE UNDER THE ARBITRATION ACT, 1940.

IN WITNESS WHEREOF I HAVE SIGNED THIS AWARD ON THE 31ST DAY OF DECEMBER, 1999."

6. The plaintiff seeks a direction that the award be made rule of the Court. This is opposed by the respondent who has objected to the jurisdiction of the Arbitrator contending that the entire proceedings terminated and were continued without jurisdiction as the plaintiff – petitioner never approached the court or sought consent of the respondent at any point of time.

7. It is contended that the first Arbitrator withdrew

himself from the reference and resigned since there was no consent by the respondent for extension of time. Counsel relied upon Section 28 of the Act to contend that it is only the Court which has jurisdiction to extend the time and that no party can unilaterally extend the period for making the award. Having not approached the Court within time in 1994, the plaintiff could not have taken upon itself the jurisdiction to appoint an Arbitrator much later in 1998. Even if the power to appoint such arbitrator is construed that would be subject to further conditions stipulated in Section 28 & 29 of the Act that the party wishing to appoint an Arbitrator should approach the Court within a reasonable time or if such power were, for some reason, admitted, exercised it also within reasonable time.

8. Learned counsel for the objector/defendant relied upon the judgment reported as ***Hari Krishna Wattal Vs. Vaikunth Nath Pandya (Dead) by L.RS. And Another***, (1973) 2 SCC 510, to contend that upon a proper construction of Section 28, particularly Sub-Section (2), the

jurisdiction to extend the time is discretionary and vested only with the Court. In the absence of consent by any party for enlargement of time even Arbitrators or Umpires cannot extend the time and that any award contrary to that provision is void and of no effect.

9. Learned counsel for the plaintiff relied upon the award and submitted that it cannot be treated as a nullity. Counsel relied upon the rulings of the Calcutta and Patna High Courts reported as ***Kanhayalal vs. Ashkaran*** AIR 1957 Calcutta 658 (V 44 C 172 Nov.) and ***M/s Bokaro & Ramgur Ltd. Vs. Prasun Kumar Banerjee***, AIR 1968 Patna 150 (V 55 C 49), in support of the submission that it is within the discretion of the Court to extend the time for making the award even after it is made beyond the period prescribed under the Act. Counsel contend that in such an eventuality, the award cannot be characterized as nullity. The Court should, having regard to the attending circumstances and the underlying equities, exercise its discretion to grant extension and make the award rule of

the court if necessary. Counsel relied upon the decision in ***Bokaro***(supra), and to say that the respondent undeniably never participated in the proceedings and therefore forfeited its right to object as far as it concerns extension of time for making the award and consequently, the award being made rule of the Court.

10. Learned counsel relied upon Section 28(2) read with clause 32 of the Contract to submit that the restriction or prohibition prescribed under Statute is only against an Arbitrator unilaterally extending the period for making the award; it, however again does not attaches the appointing mechanism like clause 13(2) which enables substitution of an Arbitrator in the event of death, resignation, incapacity or otherwise as mentioned.

11. Learned counsel also relied upon the decision of the Supreme Court in ***State of Punjab Vs. Hardyal***, (1985) 2 SCC 629. Counsel contended that in that case too, the Court recognized that the Courts alone have full discretionary power to extend the time even after the award

has been given or after the expiry of the period of making an award. The Court, of course, has to use its power judiciously and can also invoke it at appellate stages. Learned counsel contended that the Supreme Court took note of its previous decision in ***Hari Kishan Wattal's case***(supra) cited by the respondent in these proceedings.

12. Section 28 of the Arbitration Act, 1940 reads as follows:-

“28. Power to Court only to enlarge time for making award – (1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to be agreement, enlarge the time for making the award, shall be void and of no effect.”

13. A careful reading of Section 28 would disclose that it deals exclusively with the power of the Court only to enlarge the time for making the award. It is not denied that the Act prescribed a period of four months within which an

arbitrator had to complete the proceedings and publish his award. That legislative mandate was subject to the power of the Court to extend or enlarge the time for making the award. The rulings in ***Hari Krishan Wattal*** (supra), ***Bokaro and Ramgur*** (supra), ***Kanhayalal Dugar*** (supra) and ***Hardayal*** (supra), undeniably state that the Court can exercise its discretion and extend the time for making an award even after its expiry and after an award is made beyond the time. The Supreme Court in ***Hari Krishan Wattal's*** case (supra), even went to the extent of saying that such powers can be used at the appellate stage. This line of reasoning was strongly relied upon by the petitioner to say that this court should condone the delay as it were in making of the award and proceed to hear this case and make the award a rule of Court.

14. The decision in ***Wattal's*** case was one which specifically dealt with Section 28(2) of the Act. The Court underlined the nature of power and stated that no arbitrator or umpire can extend or enlarge the period if after entering

upon reference, parties do not agree to such an arrangement. In that case, the parties had apparently consented to extension of time.

15. From the above, it is apparent that the decision as to whether to extend the period for making the award after the period prescribed lapses is one within the discretion of the Court; such discretion has to be exercised judiciously.

16. In the present case, the essential facts pertaining to the time taken for making the award is not in dispute. The reference was made initially on 29.1.1993. The first Arbitrator, therefore, was under an obligation to make the award latest by 30.4.1993. However, he could not do so and in fact resigned on account of the fact that no consent was forthcoming from the respondent upto 21.12.1993. The petitioner's argument is that in view of clause 13 (2) of the agreement, it was empowered to appoint the Arbitrator on account of the resignation. Undoubtedly the said clause provides for such a discretion and jurisdiction as an agreed maxim for replacement of the arbitrator. The same appears

be to in Section 8(2) of the Act. However, what is important is not the power but the manner in which it was exercised. Admittedly, the petitioner sought recourse to it after a lapse of five years i.e. 5.3.1998 when the second Arbitrator was appointed. It is here that the respondent questions the exercise of jurisdiction and to my mind justifiably. The legislative intention of placing a four month cap for completion of pleadings and publication of the award was deemed to be a matter of public policy; this was underlined by Section 28 which entrusted the power to extend the time only with the Courts and none else. The exception deals only with consent by parties. In the present case, clearly, there was no consent by the respondent at all ever, at any stage, taken by the respondent after 21.12.1993. In the circumstances, the argument of the petitioner that the power under Section 13(2) could not be cut down or inhibit the appointment of second or successive Arbitrators cannot be accepted.

17. It is a well known proposition of law that when the

statute provides that a particular thing has to be done or performed in a specified mode or manner, all other methods of performance are deemed unlawful [See ***AIR 1936 PC 253(2)***]. In the present case, the only lawful method for extension of time - be it before the conclusion of proceedings or after the making of the award was to apply to the Court under Section 28. At no point of time, the plaintiff – petitioner ever approached under Section 28. The question of not approaching the court, in the present instance, to my mind, not arising because of invocation of the power under clause 13(2) successively on different dates i.e. on 21.9.1999, when the third Arbitrator was appointed and on 7.9.1999, when the fourth arbitrator was appointed, cannot be accepted. These could not in the very scheme of the Act have been done without approaching the Court. For the same reasons this court is of the opinion that the contention raised by the plaintiff that the reference to Arbitrators and Umpires in Section 28(2) does not inhibit one of the parties to appoint an arbitrator, is unacceptable.

Section 28, as observed earlier, deals exclusively with the powers of the Court; Section 28(2) carves out a limited exception by deliberately permitting, with parties' consent arbitrators to extend the period prescribed. These conditions does not enable one party to unilaterally extend the time for appointment of an Arbitrator and that, after five years, the first arbitrator resigned as in this case.

18. In view of the above reasons, the Court is of the opinion that the reference made by the petitioner on 5.3.1998, subsequently on 21.9.1999 and lastly on 7.9.1999 leading upto the impugned award is without authority of law. In the circumstances of this case and having regard to the highly belated appointment this Court is also of the opinion that extension of time urged by the petitioner cannot be granted as that would not be a judicial exercise of discretion. In view of the above discussion, IA No.2886/2000 is allowed. The impugned award is consequently set aside.

The suit, i.e. CS(OS) 402/2000 is, therefore,
dismissed.

S. RAVINDRA BHAT,J

MARCH 20, 2008
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