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IN THE HIGH COURT OF DELHI

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FAO No.281/2000

M/s. Rajindra Nath Kundu & Sons Appellants
through: Mr. Shiv Khurana, Advocate

VERSUS

Union of India Respondent
through: None

RESERVED ON: 13.03.2008

DATE OF DECISION:
25.03.2008

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

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

: **PRADEEP NANDRAJOG, J.**

1. Having failed to obtain a favourable order from the learned Additional District Judge, the appellant is retesting it's luck in the instant appeal which challenges the order dated 21.2.2000 dismissing appellant's objections to the award dated 28.1.1997.

2. As reproduced in para 1 of the impugned order dated 21.2.2000, the objections to the award was on the following grounds:-

“1. The Arbitrator had failed to give the reasons

and therefore award is liable to be remitted/set aside.

2. The Arbitrator had exceeded the jurisdiction.
3. The Arbitrator had failed to decide the issues and the questions which have arisen in the subject matter.
4. The award is based on no evidence.
5. The Arbitrator had exceeded the reference.
6. The award is made after statutory period.
7. There is error apparent on the face of the award.
8. There is violation of rules of natural justice by the Arbitrator by not affording the proper opportunity to the party.
9. The award is otherwise invalid."

3. The relevant part of the order dated 21.2.2000 containing the reasons is as under:-

4. Union of India referred the matter to the Arbitrator because the contractor/objector had failed to fulfill the contract of supply of the roofs and Union of India made risk purchase at the risk and cost of the contractor. The dispute referred to the Arbitrator was to allow the claim of Union of India for sum of Rs.2,35,086/- which was the difference between contract price and the price at which Union of India had to purchase the material after the determination of the contract because of non-fulfilment of contract by the objector. The other claim made by Union of India was about interest over this amount. Respondent made counter claim, claiming damages to the tune of Rs.3,00,000/-. He also made counter claim of Rs.34,594/- as refund of security and his third counter claim was of Rs.5,000/- as balance price of

store and fourth counter claim was about 18% interest on withheld amount of security calculated upto date of 31.03.92 amounting to Rs.30,000/-.

5. The Arbitrator considered each claim made by Union of India as well as by the objector and gave his reasons. He referred to the various letters and documents while considering the claim of the parties and upheld the first claim of Union of India about the difference in the risk purchase price and the contract price amount to Rs.2,35,086/-. He rejected the claim No.2, i.e., about interest. He disallowed counter claim No.1 of the respondent/objector but allowed counter claim No.2 and 3. He disallowed counter claim No.4 and 5. The Arbitrator has given his Award on the basis of the documents and the evidence placed before him. The counsel for objector has contended that the Arbitrator has not given appropriate reasons for allowing the claim of Union of India and disallowing the claim of respondent. He relied upon 1992(1) Arb. LR PAGE 327 BHARAT FURNISHING CO. VS. DDA and another stating that the reasons given by the Arbitrator were no reasons in the eyes of law. I consider that the Arbitrator in this case has not acted whimsically as alleged by the objector. The Arbitrator has referred to the contract executed between the parties, various extension letters and the failure of defendant to prove that there was scarcity of raw heavily on the Arbitrator was that the risk purchase order was executed immediately by the subsequent contractor who supplied the entire quantity within prescribed time. The Arbitrator disbelieved the contention of the objector/respondent about non-availability of raw material and came to conclusion that the raw material was available, may be it was at higher cost. The Arbitrator disallowed interest to the Union of India as well as to the respondent. I find no infirmity in the Award. The Award is made rule-of-the-court."

4. It is apparent that the laconic objections, being

worthy of no credence, were not pressed and the issue was urged on wholly different grounds. Indeed, at the hearing before me, only 2 grounds were urged to challenge the award.

5. Firstly that the learned arbitrator has violated the principles of natural justice by calling for the departmental file behind the back of the appellant and secondly by ignoring that force majeure conditions entitled the appellant to further extension of time to fulfill the contract and by not extending the time and revoking the contract the respondent acted illegally.

6. In brief, relevant facts are that on 30.6.1983 when an advance tender acceptance was issued to the appellant by the respondent a contract concluded between the parties requiring the appellant to supply 120 sets of Roof Trough to COD Agra @ Rs.3,697/- per set i.e. at a total fixed price of Rs.4,43,640/-. The supply had to be completed by 30.11.1983. A sample had to be got approved before effecting the supply. Rs.22,185/- had to be deposited towards security deposit. Vide Clause 19(h) of the contract it was stipulated that time was of the essence of the contract. Clause 14 stipulated that if there was a breach of the contract the respondent would be entitled to risk purchase within 6 months from the date of cancellation of the contract.

7. The appellant secured the sum of Rs.22,185/- by means of a bank guarantee. However it failed to offer any sample for approval within the time prescribed under the contract. Much after the scheduled date of completion of the contract i.e. 30.11.1983, a sample was offered for inspection. The respondent extended the time for completing the contract till 31.5.1984 and also approved the sample on 27.2.1984. Vide letter dated 24.5.1984 the appellant desired further extension of time to effect delivery which was extended by the respondent till 30.9.1984. This was conveyed to the appellant vide respondent's letter dated 6.6.1984. Since the contract permitted the respondent to increase the contracted quantity, vide letter dated 12.6.1984, the respondent intimated the appellant that supply quantity was increased from 120 pieces to 150 pieces at the same rate. Thus, value of the contract stood enhanced to Rs.5,54,550/-. Likewise the security deposit amount got enhanced to Rs.27,730/-.

8. The appellant did not furnish the enhanced security deposit and on 10.12.1984 sought further extension of time to effect delivery. Vide letter dated 22.12.1984 the respondent extended the time for delivery up to 28.2.1985. At the request of the appellant the time for delivery was further extended up to 31.5.1985.

9. In June 1985, 24 sets of Roof Trough were supplied.

10. The appellant expressed inability to effect further supply stating that the iron/steel to be used as a raw material was manufactured only by 1 company i.e. Steel Authority of India Limited (SAIL) and desired that respondent should issue an essentiality certificate to the appellant as this would facilitate supply of raw material by SAIL. Thus, at the request of the appellant, the respondent issued a letter dated 24.10.1985 informing as under:-

“M/s. Rajendra Nath Kundu & Sons,
Shanpur, Shibtala,
Dassnagar, HOWRAH-711105.

Sub: This office A/T
No.ST4/101/308/29.11.82/24/Raj/063/COAC dated
25.7.83 for supply of Roof Trough Splinters against
indent No. IND/OS/W8/61/82-83 dated 15.4.82.

Ref: Your letter No. DGS&D/85/242 dt. 18-9-85.

Dear Sirs,

The following amendments are hereby authorised in the above cited A/T:-

Under clause 19 Special Instructions.

After existing entries, please add the following Clause 'O'.

ESSENTIALITY CERTIFICATE:

Essentiality certificate will be issued on replenishment basis in your favour for procurement of steel/material required for the

manufacture of the stores. Please note that issuance of this E/C will however carry no guarantee regarding receipt of raw material against the E/C has no link with the delivery period given in the contract which will be independent of the issue of E/C or receipt of steel against it. For issue of E/C you are required to furnish the approved drawing alongwith detailed calculations based on the estimated requirement as worked out. This should be sufficient in the respect enabling verification at our end and also furnish the following details:

Material	Section/Size	Quality	Quantity(Tonnes)
2. <u>Against clause 20 under columns :</u>			
		<u>Rate per unit</u>	<u>Total Cost</u>
For :	Rs.	3,697/-	Rs.5,54,550
Read:	Rs.	3,672/-	Rs.5,50,800

Grand total cost in words may also be amended accordingly as read Rupees five lakhs, fifty thousands and eight hundred only.

All other terms and conditions of the contract remain unchanged.

Please acknowledge receipt

Yours faithfully,

Sd/-

(S.P.SAKHUJA)

Assistant Director (Supplies)

For & on behalf of the President of India."

11. No further delivery being affected, vide letter dated 25.2.1986 the respondent terminated the contract and proceeded to effect risk purchase. By 24.4.1986 the risk purchase was finalized @ Rs.5,491/- per piece. Formal contract was placed on the new supplier on 27.6.1986. The

respondent claimed the differential amount i.e. Rs.2,38,361.76 as loss. Appellant refused to pay. It laid a counter claim. The contract being governed by an arbitration clause, dispute was referred to arbitration.

12. The respondent raised a claim of Rs.2,35,086/- towards loss suffered. Interest @ 18% p.a. was also claimed on said sum. By way of counter claim, the appellant claimed Rs.3 lacs as damages; Rs.34,593/- being refund of security deposit; Rs.5,000/- as balance price of stores and interest @ 18% p.a.

13. The learned arbitrator has disallowed the counter claims except counter claim No.2 for refund of the security deposit which has been held to be adjustable against the claim of the respondent for damages which has been allowed. The award reads as under:-

“Award – claim No.1 of the claimants/UOI:

It is allowed on the following grounds:

1. Date of breach in this matter is 31.12.85 and Advance R.P. A/T was placed on 27.6.86 well within six months from the date of breach. 31.12.85 is the mutually agreed D.P.UOI/claimants have filed photostate copy of letter dated 3.9.85 of agreeing to the extension. Hence it is wrong to argue that 31.12.85 was not mutually agreed D.P.

2. Respondents have filed no evidence to prove that raw material was not available in

market. On the contrary he has made part-supply which shows that raw material was available in the market but may be on some higher side.

3. Supplying essentiality certificate is not the terms of the contract.

4. R.P. A/T holder has completed the supply. Proof has been filed by U.O.I. At page 10 in the documents.

5. U.O.I. have filed the proof of 100% payment to R.P. A/T holder contractor at page -12 in the documents filed by them.

6. Ranking statement has been filed by U.O.I. at page 11.

7. Respondents themselves have accepted reduced rates.

8. I have gone through the awards and judgment filed by the contractor's counsel, the facts and circumstances vary from the present case.

9. There if no force Majeure Clause in this contract and principle of frustration of contract is not applied as no proof of non-availability of raw material is filed by the respondent/contractor.

Award – Claim No.2 of the claimants/UOI:

It is disallowed as U.O.I have already encashed the B.G.

Award – Counter -claim No.1 of the respondents:

It is disallowed on the following grounds:

1. No details of damages is given.
2. No details of damages is proved.
3. It is ceremonial and appears to have been

claimed to increase the pecuniary jurisdiction of the matter.

Award – Counter – claim No.2 of the respondents:

It is allowed as no security money can be forfeited as penalty. If UOI have encashed B.G. the amount will be adjusted to UOI/claimants.

Award – counter-claim No.3 of the respondents:

It is allowed as the contractor/claimants have filed Bills of balance payment for Rs.4613.80. It is allowed to this extent only.

Award – counter-claim No.4 of the respondents:

It is disallowed as withholding is against claim of UOI/claimants.

Award – counter-claim No.5 of the respondents:

It is disallowed as is not found just and proper in the facts and circumstances of the case.”

14. In the recitals to the award the learned arbitrator has noted:

“I have perused the documents filed and relied upon by both the parties.
I have also perused the purchase file brought before me on my direction.”

15. A perusal of the record of the learned arbitrator reveals that the respondent filed as many as 29 documents being the correspondence between the parties and the documents pertaining to risk purchase. The documents have been filed under cover of an index dated 6.1.1992. Like wise,

under cover of 2 indexes, both dated 31.8.1992, the appellant filed 15 documents.

16. No doubt, the learned arbitrator has recorded in the award that he had perused the purchased file brought before him on his directions and that there is no order passed by the learned arbitrator to the effect that the file should be produced before him, but on said count alone the award cannot be set aside unless it is shown that the learned arbitrator had relied upon a document in the department's file and otherwise not forming his record. None has been shown at the hearing. At this stage I may note that the decision relied upon by learned counsel for the appellant reported as 2004 (3) RAJ 685 G.L.Textiles Co. Vs. UOI is distinguishable on facts inasmuch as in para 5 of said decision it was noted that the findings of the arbitrator and in particular the finding that the contract has been validly terminated by the Union of India, are based on the documents and correspondence which the arbitrator might have perused in the purchase file. I repeat, in the instant case learned counsel for the appellant could not show any documents referred to by the learned arbitrator which did not form part of his record.

17. A perusal of the pleading of the appellant before the learned arbitrator shows that the appellant had raised a two

fold plea before the arbitrator. Firstly, that vide letter dated 24.10.1985 (contents noted in para 10 above) the respondent could not unilaterally insert a clause in the contract pertaining to essentiality certificate and secondly due to non availability of raw material in the market force majeure conditions came into existence and hence the appellant was entitled to an extension of time for completing the contract.

18. The pleadings of the appellant qua the first plea before the arbitrator is as under:-

“The respondent to avoid any further delays who was having all the intentions of making the supplies as per letter dt. 8-8-85, even agreed to give Rs.25/- concession but the claimant acting illegally issued the extension letter dt. 24-10-85, changed the terms and conditions regarding the Essentiality Certificate with the terms which was not stated by the respondent by writing down the following:

“Under Clause 19, Special Instructions.

After existing entries, please add the following Clause 'O'.

ESSENTIALITY CERTIFICATE

Essentiality Certificate will be issued on replenishment basis in your favour for procurement of steel/material required for the manufacture of the stores. Please note that issuance of this E/C. will however carry no guarantee regarding receipt of raw material against the E/C. has no link with the delivery period given in the contract which will be independent of the issue of E/C. or receipt of Steel against it. For issue of E/C. you are

required to furnish the approved drawing along with detailed calculations based on the estimated requirement as worked out. This should be sufficient in the respect enabling verification at our end and also furnish the following details.

Material, (Tonnes)"	Section/Size,	Quality	Quantity
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19. Suffice would it be to note that the original contract did not envisage that the respondent would be obliged to help the appellant in procuring raw material. It was the appellant which desired issuance of an essentiality certificate vide it's letter dated 18.9.1985 when it, inter alia, wrote:

“An early action to issue the essentiality certificate is requested.”

20. Even otherwise, issuance of an essentiality certificate was to the benefit of the appellant.

21. The first plea is thus an eye wash and of no legal significance.

22. The plea of force majeure would be available to a party only if it can be shown that due to circumstances beyond its control and not envisaged by the parties when the contract was entered into, it was unable to perform its obligations. Clauses which excuse performance in general terms may be construed as force majeure clauses. It is settled law that it is for a party relying upon a force majeure clause to prove the

facts bringing the case within the clause. The party must therefore prove the occurrence of an event and that due to the same the party has been prevented, hindered or delayed (as the case may be) from performing the contract by reason of that event. Two more things have to be further proved. Firstly that the non performance was due to circumstances beyond the control of the party; and secondly and that there were no reasonable steps that the party could have taken to avoid or mitigate the event or its consequences. To put it pithily the party must show that the performance has become physically or legally impossible. It has to be noted that the instant contract does not contain a force majeure clause. Be that as it may, a perusal of the award shows that the learned arbitrator has considered the said plea raised by the appellant with reference to the case pleaded by the appellant that raw material was not available in the market. The learned arbitrator has returned a finding of fact that the appellant has not led any evidence to establish that the raw material was not available in the market. The learned arbitrator has also noted that as a matter of fact part goods were supplied. From this, an inference has been drawn that raw material was available in the market. The plea of the appellant that only SAIL was manufacturing the iron/steel of the requisite specification and

in the absence of an essentiality certificate was not supplying the raw material to the appellant has been duly considered by the arbitrator. The learned arbitrator has noted that the contract as originally entered into between the parties did not provide for the issuance of any essentiality certificate by the respondent. I may only add that on the one hand the appellant desired an essentiality certificate to be issued to it by the respondent and when the respondent amended the contract to insert a clause pertaining to the essentiality certificate, the appellant had a grievance that the contract could not be unilaterally amended. It would also be relevant to note that the original contract envisaged supply to be effected within 5 months. The contract period was repeatedly extended at the asking of the appellant and notwithstanding the respondent agreeing to issue an essentiality certificate vide letter dated 24.10.1985, no supply was made till contract was rescinded on 25.2.1986.

23. The learned Judge who has dealt with the objections filed by the appellant to the award in question has rightly repelled the challenge for the reason while considering objections to an award the court cannot sit in appeal over the award. The court cannot re-appreciate the evidence.

24. I find no infirmity in the impugned order.

25. The appeal is dismissed.

26. Since none appeared for the respondent at the hearing, there shall be no order to the costs.

March 25, 2008
MM

PRADEEP NANDRAJOG
JUDGE