

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

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O.M.P. 481/2004

Reserved on March 04, 2008

Decided on March 17, 2008

HINDUSTAN FERTILIZER

..... Petitioner

Through: Mr. Sanjay Poddar, advocate.

versus

J.M.BAXI AND CO.

..... Respondent

Through: Mr. Sanjay Grover, 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

1. The Petitioner, under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act") has objected to the Award so far as it accepted counter claims of the Respondent and awarded Rs.23,94,141.39.

2. The Hindustan Fertilizer Corporation Ltd, the petitioner here, and J.M. Baxi & Co. the Respondent entered into two agreements dated 8th June, 1995 and dated 26th June, 1995, pursuant to a Notice inviting Tender (NIT) and work order for stevedoring, clearing, forwarding and handling of imported fertilizers at Navalakhi and Paradeep ports for 1995-96. During the tenancy of the above agreements/work orders, the Respondent handled five imported urea vessels, namely “Nicolai Pogadin”, at Navalakhi port. Similarly, Respondent’s was appointed for handling of five vessels namely “Hiderby”, “Maratha Deep”, “Jalatapi”, “Jagrahat” and “Rosaleen” at Paradeep port. The parties referred certain disputes to arbitration, since they were to be decided by an arbitration, in accordance with the stipulation in the contract.
3. The petitioner alleged it suffered loss of Rs.3,84,22,355.29 including interest up to 31.10.1999 mainly on account of short delivery, damaged cargo, demurrage to the ships, cyclone damage, excess utilization of empty bags, standardization loss, etc. due to improper handling at Navalakhi port. Further, it claimed interest 20 per annum on the said amount from 1.11.1999 till payment. However, the Respondent’s statement was that in accordance with the agreed terms and conditions, no amount was payable and also denied that any interest was payable to the Claimant’s.
4. The Respondent preferred a counter claim of Rs.55,81,088.75 with interest @

21% per annum from 10.5.2000 until payment/realization of the above amounts. The interest on Rs.40000/00, which is the part of the counter claim has also been claimed from 31.12.1996 until 10.5.2000.

5. The relevant findings in the Award for the purposes of deciding the present petition, are as follows :-

“Counter Claim of the Respondents-Counter Claimant (J.M. Baxi)

Counter Claimants (J.M. Baxi) handled four vessels i.e. Hidirbey, Jagraksha, Maratha Deep and Jalatapi of Paradeep port during the contractual period and raised invoices on each vessel for Rs.1,30,45,326.48, rs.96,99,687.25 Rs.1,25,01,837.36 and Rs.86,48,699.00, aggregating to Rs.4,38,95,550.09. As against this amount of Rs.4,38,95,550.09, the Respondent's (HFC) has paid a sum of Rs.4,06,56,326.63 leaving a balance of Rs.32,39,223.45 towards stevedoring charges to the Counter Claimant (J.M. Baxi). The Respondent's in its statement of claim has admitted a sum of Rs.13,07,012.09 is payable to the Counter claimant and that it is withholding this amount because to adjust claims against the counter claimant. It according to the Respondent's, only this amount of Rs.13,07,012.09 was payable to the counter claimant and not Rs.32,39,223.45, then it is for the Respondent's (HFC) to produce documents to prove that it has paid more money to the counter claimant than what it acknowledged. In the circumstances, the entire amount of

Rs.32,39,223.45 is due and payable to the counter claimant.

The Respondent's (HFC) in his reply to the counter claim however denied that they have to pay Rs.32,39,223.45 to the counter claimant but net, amount of only Rs.12,19,873.13 is payable to the counter claimant. According to the Respondents, against the bills of counter claimant, they paid an advance of Rs.10 lakhs for four vessels handled at Paradeep Port. Thus, the Respondent has to pay to the counter claimant the balance sum of Rs.2,19,873.13,. The Respondent also recovered further TDS of Rs.23000.00 from their bills in respect of four vessels in question handled at Paradeep port totaling to Rs.9,65,519.00. The amount payable to the counter claimant as stated above has been withheld by the Respondent's to recover demurrage charges of Rs.30,28,996.00 as levied and recovered by the Department of Fertilizers towards pre-berthing demurrage charges on M.V. Rosaleen from the Respondent. Thus, after adjustment of Rs.2,19,873.13 of the counter claimant has to pay sum of Rs.28,09,122.87 to the Respondent (HFC) with interest @ 20% per annum amounting to Rs.16,99,870.00 till July, 2001 and further pendent lit interest.

Findings

The Respondent (HFC) in their Statement of Claim dated 10.12.1999 has admitted that a sum of Rs.13,07,012.09 is due to the counter claimant . Further, against this it has been claimed on amount of Rs.10 lakhs as on advance as there was no pleading to this effect in the

Statement of Claim. Thus, the admitted claim, of the counter claimant of Rs.23,94,141.39 against their claim of Rs.32,39,223.45, have been awarded in favour of the counter claimant."

6. In the present petition the Objector, M/s Hindustan Fertilizer Corporation Ltd. challenges the Award mainly on two grounds; the first is a mistake in relation to calculation. It is claimed that instead of the sum of Rs.68,99,080.60 the Arbitrator wrongly awarded the sum of Rs.68,90,073.60. The Petitioner is thus entitled to Rs.9007.00.
7. The main ground for challenge, however, is that the Arbitrator committed a fundamental error in rejecting the Petitioner's plea about its having paid Rs.10 lakhs as advance, while dealing with the Respondents counter claim. It is averred by Petitioner and urged on behalf of Sh. Sanjay Poddar that the respondent had admitted to payment of Rs.10 lakhs with a tax deduction of Rs.23,000/- on 15.10.1996. According to counsel in spite of this admission the Arbitrator awarded Rs.23,94,141.39 which has no factual foundation. Counsel contended that the Arbitrator recorded about an admission by the Petitioner that the sum of Rs.13,07,012.09 was due and later its changed stand in the counter claim that actually a net amount of Rs.12,98,873.13 was

payable to the Respondent against which a set up of Rs.10 lakhs was further sought. Thus the admission was only to the extent of Rs.2,19,873.13. However, the arbitrator awarded Rs.23,94,141.39 which is not supported by any reasons or founded on any material on the record.

8. It was urged on behalf of the Respondent, on the basis of the materials, the pleadings as well as the counter claim that according to the calculations placed before the Arbitrator, the total billing was to the extent of Rs.4,38,95,550.10 against which the sum of Rs.3,96,79,326.63 was admittedly paid. The balance payable was Rs.42,16,223.45. The Respondent adjusted an ad-hoc payment received on 24.9.1996 to the extent of Rs.9,77,000/- and was thus entitled to Rs.32,39,223.45. After adding other miscellaneous charges and the value of bank guarantee wrongly encashed, the earnest money wrongly retained, the total claim made was Rs.52,30,875.20.
9. Counsel contended that the Arbitrator, apparently only basis of the Petitioner's representation further adjusted a sum of Rs.9 lakhs and odd from the amount of Rs.32,39,223.45 to award Rs. Rs.23,94,141.39. This discloses that the Respondent is actually aggrieved in that regard. Counsel submitted that on an overall conspectus of the facts there is enough material to justify the award to the extent of Rs.23,94,141.39 and that mere not furnishing of

reasons does not amount to a fundamental error that would warrant an interference with it.

10. It is apparent from the above factual narration that the real dispute between the parties relates to the sum of Rs.23,94,141.39 awarded against the Petitioner, on the Respondents' counter claim. The above extracts of the Award in that regard would show that the Arbitrator recorded the contentions of the respective parties in detail about the various sums due. The Arbitrator also noticed that the Petitioner had recovered TDS to the tune of Rs.23,000/- from the bills in respect of the four vessels. He even noticed the offer of adjustment of Rs.2,19,873.19 of the respondent counter claimant which agreed to accept Rs.28,09,122.87. However, in the findings, the Arbitrator after noticing the Petitioner's initial admission on 10.12.1999 that the Respondent was entitled to Rs.13,07,012.09, and later reducing that amount on 30.8.2001 to Rs.12,19,873.13, proceeded to award Rs.23,94,141.39. There is no reason in support of this finding or award.
11. Section 31(3) of the Act mandates that the arbitrator has to furnish reasons for his findings, in the award, unless the parties to the arbitration agreement, contract otherwise. In the present case, the arbitration clause contained in the agreement between the parties was as follows :

"(31)(3) The arbitral award shall state the reasons upon which it is based, unless--

- (a) the parties have agreed that no reasons are to be given, or*
- (b) the award is an arbitral award on agreed terms under section 30."*

12. One of the grounds for a public policy challenge, under Section 34, by the Supreme Court, in the decision reported as *ONGC Vs. Saw Pipes*, 2003(5) SCC 705 is non-disclosure of reasons in the award. The Court had in the said judgment, outlined four grounds for successful challenge to an award. The Court further held (Paras 26 and 28 of the judgment, SCC reports) that not furnishing reasons would also be a valid ground for setting aside the award.
13. In this case, as noticed earlier, no reasons are forthcoming as to why the sum of Rs.23,94,141.39 has been awarded or why the respondents' admission for Rs.2,19,873.17 is unacceptable. In the circumstances, the findings and award on the counter claim are unsustainable.
14. For the above reasons, the Petition has to succeed. In the judgment reported as *Mc Dermott International Vs. Burn Standard Co.Ltd.*, 2006(11) SCC 181, (Para 52) it was held the Court, under Section 34, can only set aside an award; it cannot remit the matter for fresh proceedings. The parties will have to seek recourse to arbitration on the portion, set aside in accordance with the

arbitration agreement.

15. The Petition, therefore, is partly allowed; the award, to the extent it allows the counter claim for the sum of Rs.23,94,141.39 is hereby set aside. No costs.

March 17, 2008.
MLB

(S. RAVINDRA BHAT)
JUDGE