

**OMPs No.207/2000, 208/2000 &159/2001**

**Date of decision: 4<sup>th</sup> September, 2009**

**....Petitioner**

## Versus

## ... Respondent

Through: Mr. Rajeev Saxena, Advocates for the Respondent/UOI in OMPs No.207/2000 & 208/2000.  
Mr. A.K. Bhardwaj, Advocate for the Respondent/UOI in OMP No.159/2001

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|----|-----------------------------------------------------------------------|----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not?                                | No |
| 3. | Whether the judgment should be reported in the Digest?                | No |

1. The three petitions under Section 34 of the Arbitration Act, 1996, between the same parties, though in relation to three different arbitral awards, involve identical disputes, and are taken up together for consideration.

2. The petitioner is a Government of India Undertaking. It is unfortunate that in spite of the dicta of the Supreme Court in ***ONGC Vs. Collector of Central Excise*** 1995 Supp. (4) SCC 541, such disputes inter-se Government/Govt. Undertakings continue to haunt the courts. In the present case also, the parties are shown to have approached the Cabinet Secretary for resolution of the disputes.

However, the office of the Cabinet Secretary was of the opinion that since the disputes in terms of the agreement were referable to an arbitrator and which was not a tribunal, the clearance of Committee of Disputes was not required to proceed with the arbitration proceedings. Thus the time of the arbitrator, himself an officer of the Government, and of this court is being taken up for matters which ought to have been decided/settled by the Committee of Disputes under the Cabinet Secretariat.

3. The Ministry of Defence of the Government of India had floated an invitation to tender for supply of different kinds of *Dal* which form the subject matter of the arbitral award in the three petitions. The petitioner Delhi State Civil Supplies Corporation Ltd. was one of the tenderers. The tender of the petitioner was accepted by the respondent and the communication thereof sent to the petitioner and the petitioner was also directed to furnish the security deposit as required to be deposited on acceptance of tender, as provided in the terms & conditions of the invitation to tender. The petitioner however failed to make the security deposit or to make the supplies within the time stipulated. The respondent suo moto extended the time for delivery, again in accordance with the terms & conditions of the invitation to tender and finally upon failure of the petitioner to supply the goods, terminated the contract at the cost and risk of the petitioner. The respondent thereafter made purchase of the goods from the State Trading Corporation and notified the petitioner of the said Risk Purchase and the liability of the petitioner thereunder and upon failure of the petitioner to pay the amounts claimed, in accordance with the arbitration clause in the invitation to tender, the arbitration proceedings commenced. The petitioner contested the arbitration proceedings inter-alia on the ground that no contract was

concluded between the parties. The petitioner contended that in terms of the invitation of tender the petitioner was required to attach to its tender, Income Tax Clearance Certificate, Partnership Deed and Power of Attorney and it was further provided therein that tenders not accompanied by the requisite documents “are likely to be ignored”. The petitioner pleads that it did not enclose the requisite documents to its tender and thus its tender was not complete and was to be ignored by the respondent. It was further the case of the petitioner that even after the acceptance of the tender of the petitioner, the petitioner was called upon to deposit the security deposit for fulfillment of the contract and since it did not deposit the security amount, no contract came into existence. The petitioner contested the claim also on the ground that the respondent could not have unilaterally extended the time for delivery and on the ground that the Risk Purchase was made not on the date of the termination of the agreement, if any, with the petitioner but subsequently and the claim of the respondent was based not on the difference in price on the date of termination of the agreement but on the basis of the cost of Risk Purchase.

4. The Arbitral Tribunal has vide award in each case held that:-
  - a. since the petitioner had made the offer in pursuance to invitation to tender and the said offer had been accepted by the respondent, a binding, concluded contract came into existence between the parties;
  - b. furnishing of the security deposit was a condition of the contract and the petitioner by neither furnishing the security deposit nor making the supplies was in breach of the contract;

- c. that the contract was cancelled at the risk of the petitioner, in terms thereof and the cancellation was found to be valid;
- d. that the Risk Purchase tenders were placed thereafter on M/s State Trading Corporation and Risk Purchase was done at the lowest offer without deviation;
- e. that the purchases under the said Risk Purchase Tenders were made by the respondent;
- f. that the Risk Purchase Tenders were on the same terms & conditions as the original tender;
- g. that the Risk Purchase was completed within the stipulated period;

5. The Arbitral Tribunal thus allowed the claim of the respondent and also awarded interest to the respondent against the petitioner @ 18% per annum from the last date for forwarding the Risk Purchase amount and till the date of payment.

6. The senior counsel for the petitioner has in support of these petitions raised the same contentions as were raised before the arbitrator i.e. that there was no concluded contract; that the measure of damages applied by the arbitrator is contrary to law – reliance in this regard is placed Section 73 of the Contract Act and Section 55 to 59 of the Sale of Goods Act; it is also argued that the award is not reasoned; it is further contended that the breach on the part of the petitioner occurred upon failure of the petitioner to furnish the security deposit while the Risk Purchase was made after several months; that there was no evidence before the Arbitral Tribunal of the rate prevalent on the date on which the petitioner

failed to furnish the security deposit. Reliance is placed by the senior counsel for the petitioner on

- i. ***ONGC Ltd. Vs. Saw Pipes Ltd.*** (2003) 5 SCC 705 on the scope of this petition;
- ii. ***State of Madhya Pradesh Vs. Firm Gobardhan Dass Kailash Nath*** AIR 1973 SC 1164 holding that where the making of the initial deposit was a condition precedent for acceptance of the tender, in the absence of such initial deposit there could be no concluded contract;
- iii. ***The Bazpur Co-operative Sugar Factory Ltd. Vs. Surendra Mohan Agarwal*** AIR 1984 Allahabad 174 holding that where the claim was not based on difference between market price prevailing on the date of breach and contract price, there could be no award of damages under Section 73 of the Contract Act;
- iv. ***M/s Matanhella Brothers Vs. Shri Mahabir Industries Pvt. Ltd.*** AIR 1970 Patna 91 laying down that there could be no unilateral extension of contract;
- v. ***Bijoy Singh Vs. Bilasroy & Co.*** AIR 1952 Calcutta 440 laying down that an award containing a wrong basis for damages is liable to be set aside;
- vi. ***Sitaram Bindraban Vs. Chiranjilal Brijlal*** AIR 1958 ***Bombay*** 291 laying down that it is open to the parties to create for themselves any special rights and obligations providing their own measure of damages in case of breach of contract;
- vii. ***Lancaster Vs. J.F. Turner & Co. Ltd.*** 1924 King's Bench Division 222 laying down that settlement should be made on the basis of a price not later than a certain date.

7. The senior counsel for the petitioner has also referred to Section 28 of the Act and contended that in accordance therewith the award is to be in accordance with the substantive law of India as enshrined in the aforesaid judgments. The awards in the present case being contrary to the aforesaid judgments containing the substantive law of India are liable to be set aside.

8. The senior counsel for the petitioner has lastly urged that in any case the rate of 18% of interest awarded by the arbitrator is exorbitant and excessive and is liable to be reduced by this court. Reliance in this regard is placed on ***Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy*** AIR 2007 SC 817.

9. Per contra, the counsel for the respondent Union of India has referred to the reply of the petitioner before the arbitrator containing the letters of the petitioner and contended that the same show that the petitioner also accepted that a concluded binding agreement to have come into existence/materialized between the parties and in fact was seeking clarifications from the respondent with respect to execution thereof; it is contended that the petitioner is now estopped from contending otherwise. Reliance is placed on ***Union of India Vs. Maddala Thathiah*** (1964) 3 SCR 774 in support of the proposition as to when a binding contract comes into existence. On the plea of the petitioner of the award being not reasoned, reliance is placed on ***Markfed Vanaspati & Allied Industries Vs. Union of India*** (2007) 7 SCC 679. However, I may notice that this judgment relates to a non-speaking award and would thus not be applicable. The counsel for the respondent has next

relied upon ***Union of India Vs. M/s Stelco Engineers*** 2006 (1) RAJ 68 Delhi on the scope of interference in such awards.

10. I may first deal with the contention of the senior counsel for the petitioner of the awards being not reasoned. A five Judge Bench of the Supreme Court in ***Goa Daman Diu Housing Board Vs Rama Kant V.P. Darvotkar*** AIR 1991 SC 2089 in an appeal from the order of the Bombay High Court setting aside the award for being without reasons inspite of being required to give reasons, accepted the argument that the mere statement of the arbitrator that the award had been made after hearing the parties and after consideration of papers and documents filed by the parties to be enough and it was held that such an award could not be said to be illegal or suffering from any misconduct. It was further held that unless there was anything to show that the arbitrator has misconducted himself or the proceedings in any other manner or to show that the award had been improperly procured, or that the arbitrator has not fairly considered the submissions of the parties in making the award in question, the award cannot be set aside. The Supreme Court held that from the statement aforesaid of the arbitrator it was evident that the arbitrator had considered all the specific issues raised by the parties in the arbitration proceedings and come to the finding returned. The Division Bench of this court in a recent Judgment in ***DDA Vs Madhur Krishna*** MANU/DE/0984/2009 has also relied upon the said constitution bench judgment. In ***D.D. Sharma Vs Union of India*** (2004) 5 SCC 325 also the arbitrator had in the award stated that he had examined and considered the pleadings submitted by and on behalf of the parties and documentary and oral evidence produced before him. The same was held sufficient by the Supreme Court to hold that

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there did not exist any material on record to show that the arbitration while making the award ignored any material documents. The same was the position in ***Bijendra Nath Srivastava Vs Mayank Srivastava*** 1994 6 SCC 117. There also the challenge to the award for being without any reasons was met, by the arbitrator recording the award that he had heard the parties and considered all the points raised by them, the rights and claims of the parties involved and the accounts and evidence produced by them.

11. A reading of the awards in the present case shows that the arbitrator has gone through the contentions raised by the parties and perused the documents filed by them in support of their contentions and has on the basis of communication of acceptance and acknowledgment thereof by the petitioner held that a concluded agreement came into being between the parties. Once the finding of concluded agreement is found to be reasoned, the breach thereof is not in dispute. The arbitrator has similarly given reasons for other findings also. The arbitrator has found that the Risk Purchase was made by the respondent within the agreed time of one year. This shows that the arbitrator has gone into the aspect of the date of the Risk Purchase for the computation of damages to be awarded to the respondent. Thus, it cannot be said that the award is without any reasons whatsoever. It is also settled law that the court in these proceedings would not go into sufficiency or insufficiency of reasons by the arbitrator (***MCD Vs. M/s Jagan Nath Ashok Kumar*** (1987) 4 SCC 497). The only object of finding whether the reasons exist or not is to satisfy that the arbitrator has not acted arbitrarily and has considered the material placed before him before returning the findings in the award.

12. The finding of the arbitrator of a concluded contract having come into existence between the parties is a finding of fact. The same is not interferable in these proceedings and nothing has been shown as to why the said finding is contrary to any substantive law. The judgment in ***Firm Gobardhan Dass Kailash Nath*** (Supra) relied upon was on its facts of the initial deposit being a condition precedent to the coming into force of the contract. The senior counsel for the petitioner has not shown any term in the tender document in the present case which made the making/placing of a security deposit by the petitioner a condition precedent to the acceptance of the bid by the respondent. I have satisfied myself from the terms & conditions of the tender document (clause 9 of the Appendix) that the making/placing of the security deposit in the present case was an action subsequent to the acceptance of the bid resulting in concluded contract between the parties and was not a condition precedent thereto.

13. As far as the challenge to the computation of damages for breach of contract is concerned, I think the judgment in ***Sitaram Bindraban*** (Supra) relied upon by the petitioner is a complete answer to the same. The purpose of Section 74 of the Contract Act is to place the party other than the one committing the breach of the contract in the same position as it would have been, had no breach occurred. In the present case, the only way in which the respondent could be placed in the same position as it would have been had the petitioner not committed the breach was by sourcing the goods which the petitioner had agreed to supply from elsewhere. Considering the procedure which the respondent Union of India is necessarily required to follow in procuring the said goods, nothing wrong can be found with the tenders being issued at the risk of the

petitioner. The issuance of the said tenders and the acceptance thereof involves a time lag. A pedantic insistence on the damages to be computed on the date of the breach, when it was known to the parties that it is not possible for the respondent to make the purchase on the same date would not fulfill the criteria of the respondent being placed in the same position as it would have been had the petitioner not committed breach of the agreement. The petitioner had in the present case with its eyes open entered into an agreement whereunder the respondent could make the Risk Purchase within one year of the breach (clause 2(ii) of the Appendix). The parties having agreed to the method of computation of damages, no fault can be found with the award computing the damages on such basis. There was no such mechanism agreed in the contract under consideration in ***The Bazpur Co-operative Sugar Factory Ltd.*** (Supra). The arbitrator is thus found to have followed the agreement between the parties in the present case.

14. I may also notice that acquisition of goods by the respondent Union of India entails not only the damages qua difference in price but also other damages. The cost of issuing fresh tenders, screening the same, placing orders and the resultant delays is not measurable. In these circumstances, the criterion laid down in the agreement of measure of damages is to be considered as a genuine pre- estimate of the losses which would be suffered by Union of India in the event of breach. The Supreme Court in ***Saw Pipes Ltd.*** (Supra) has dealt with the aspect of the losses suffered in such cases being not measurable. I find the said principle applicable to the present case also.

15. Thus no grounds are found for interference in the awards. However, as far as the contention with respect to the rate of interest awarded by the arbitrator is concerned, only for the reason of the petitioner also being a Government entity, it is deemed expedient to reduce the rate of interest from 18% per annum to 9% per annum. Save as foresaid, the petitions are dismissed.

No orders as to costs.

**RAJIV SAHAI ENDLAW  
(JUDGE)**

**September 4<sup>th</sup>, 2009  
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