

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

+ **OMP No. 449/2008** **22nd October, 2009.**

KRITHIKA AGRO FARM CHEMICAL & ENGINEERING INDUSTRIES
PVT. LTD.

...Petitioner/Claimant
Through: Mr. C.Mukund, Advocate

VERSUS

COUNCIL OF SCIENTIFIC & INDUSTRIAL RESEARCH

....Respondent
Through: Mr. Y.K.Rao and Mr. Saket Sikri,
Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

% **JUDGMENT (ORAL)**

VALMIKI J. MEHTA, J.

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the award dated 17.6.2008 of the sole Arbitrator HMJ R.C.Lahoti (retired Chief Justice of India). The

basic disputes between the parties pertain to a contract entered into between them whereby the respondent was to supply certain technology to the petitioner for setting up a Palm Oil Mill. Facts are however not that simple because various other parties are necessarily intertwined with this contractual transaction. These parties are the Government of India through the concerned Ministry of Agriculture, the State of Orissa and the consultant appointed by the respondent for the project in question.

2. The facts in brief are that on account of shortage of availability of edible oil in India, the Government of India set up a task force for increasing the production of the same. In furtherance of its objects and for their implementation, the task force required the respondent to develop the requisite technology for producing Palm Oil. The respondent did develop the necessary technology. However, the bringing of an entrepreneur at the initial stage for setting up of Palm Oil Manufacturing Mill, was not easy inter alia because there wasn't availability of sufficient raw-material in the form of Fresh Fruit Bunches, besides the high cost of the project without there being guarantee of adequate profits. Such being the disincentives for producers entering the field, therefore, the Government of India agreed to subsidize the projects of setting up of the Palm Oil Mills. Taking up partnership with the State Governments, the Central

Government came forward to finance part of the project by supplying plant and machinery and so on. Pursuant to this policy, it was the State Government which was to choose a beneficiary and, therefore, send the name of the beneficiary to the Central Government for approval. The recommendation of the State Government was routinely accepted by the Central Government because after all the project was to come up in the concerned State. In this case, the objector was chosen as the beneficiary for transfer of technology by the respondent for setting up of the Palm Oil Mill. The contract in question is dated 20.12.2001 for technology transfer by licencing, engineering, consultancy and project implementation. For the purpose of implementation of the project, the respondent appointed M/s.A.L.Jacob and sons as the Project Engineering Company for the purpose of setting up of the Palm Oil Mill and through whom the technology was to be transferred by the respondent to the objector. Right from 2001 when the contract was entered into and five years or so later till 2005, the objector could not acquire and make available the necessary land for setting up of the project. Firstly, only 0.39 acres of land was acquired out of 5 acres and though later on it agreed to acquire 100 acres however the same was also not done. Civil Construction work was also not completed till 2005. Ultimately, the State Government of Orissa with the necessary information to the

Central Government informed the objector that its beneficiary status was withdrawn. I may note that the Central Government agreed with the same as no contra position emerges from the record as would otherwise have been filed by the objector. Consequently, the State of Orissa issued an advertisement in the newspaper for inviting another person as a beneficiary for setting up of the project. This person, with whom a fresh contract was entered into, in fact completed the project in a short period of time. Differences arose between the parties whereby the objector accused the respondent herein for wrongful withdrawal of the beneficiary status and in fact contended that the beneficiary status cannot be said to have been withdrawn at all. It was argued that the respondent was guilty of breach of contract and specific performance of contract dated 20.12.2001 was claimed with the alternate prayer for damages to the tune of Rs.18 crores. By the award, the learned arbitrator has dismissed all the claims of the objector. The Arbitrator framed issues, considered both the documentary evidence, as also the affidavits by way of evidence, (including the cross-examination of witnesses) and after hearing the arguments of the parties passed the impugned award.

3. Before I consider the challenge to the award as laid out by the present objection petition, it is trite to observe that basically there are three grounds of challenge to an award under Section 34 of the Act.

The first ground is if the award is illegal meaning thereby it is violative of the law of the land. The second ground is if the award is violative of the contractual terms between the parties. The third ground is if the findings in the award are so perverse that it shocks the judicial conscience. Keeping these parameters of the law as applicable, I have examined the objections to the impugned award.

4. The arbitrators had framed the following issues.

“1(a)Whether “Beneficiary Status” of claimant has been withdrawn?

(b) Whether such withdrawal has any efficacy in the eye of Law?

(c) If withdrawn, what is its effect?

2. Whether the claimant is entitled for specific performance of the Bi- Partite Agreement dated 20.12.2001?

3(a)Whether the claimant is entitled for specific performance of the Bi- Partite Agreement dated 20.12.2001?

(b) Whether the claimant is entitled to award of any damages in the event of claim for specific performance being refused?

4. To what relief, the claimant is entitled?”

5. The arbitrator has discussed each and every issue in a detailed manner and arrived at detailed finding of facts duly supported by detailed reasons on all the issues. Each issue has been separately considered under a separate head and dealt with exhaustively. The findings of fact with respect to the issues are that it has been found

that the beneficiary status of the objector was withdrawn and which withdrawal became final in as much as neither was the State Government of Orissa nor the Central Government were parties to the arbitration proceedings. It has been further found that the contract in question is not capable of specific performance in view of the various sub-sections of Section 14 of the Specific Relief Act. Considering and deciding the next issue as to who was guilty of breach of the contract in question, the arbitrator by detailed reasoning has found that the objector miserably failed in performing his part of the contract whether it pertained to acquiring of necessary land or as regards completion of civil construction and so on. Finally, though the Arbitrator need not have, he went on to determine as to whether, assuming the respondent is guilty of breach of contract, what ought to be the quantification of damages which could have been awarded to the objector assuming that the withdrawal of the beneficiary status was not proved by the State Government. On this issue, the Arbitrator after considering the evidence has found that no credible evidence was led by the objector to prove the damages. Thus, by the impugned award and as stated above, all the claims of the objector have been dismissed.

6. Mr. C.Mukund, Learned counsel for the objector has very strenuously and vehemently canvassed his arguments on behalf of the

objector. His two principal arguments were that firstly the beneficiary status was neither withdrawn by the Central Government nor by the State Government of Orissa and secondly that the respondent was guilty of breach of contract in question. It was a limb of his later argument that as per the Minutes of Meeting (MOM) dated 30.8.2004, the objector had time right till January, 2006 to perform the contract and therefore, any action before January, 2006 amounts to denial of the rights under the contract to the objector and, therefore, the calling of the advertisement for a fresh beneficiary by the State Government was not justified.

7. In the present case, instead of giving my detailed observations, I feel it will be more apposite if I copiously reproduce the findings of the Arbitrators, because, as stated above the findings of the arbitrator are indeed very detailed and pithy.

8. On the issue with regard to the withdrawal of the beneficiary status of the objector, the Arbitrator has observed as under:-

“It is not disputed that the conferral of ‘Beneficiary Status’ on the Claimant was an essential pre-requisite to the Claimant being chosen as the executor of the project and the agreement between the parties being entered into. Admittedly, the Claimant was so chosen. Vide letter dated 17.11.2001 of the Government of Orissa, the Claimant was informed that the Government of India, Ministry of Agriculture, Department of Agriculture and Cooperation had ‘conveyed their approval’ in favour of the Claimant for its being chosen

as the Beneficiary Agency. Any such document as lays down the requirement and procedure for choosing anyone as Beneficiary, which would obviously be a policy decision taken at the highest level and in possession of Government of India or the Government of Orissa, has not been filed on the record of the case. However, a careful reading of the contents of this letter dated 17.11.2001 brings to fore strong indicators leading of the inference that it was the State Government who was to identify the Beneficiary and such identification by the State Government was to be approved by the Central Government. There is no material available on record to form a different opinion. Dr. C.Arumughan stated in his cross examination dated 06.02.2007 that so far as the beneficiary status is concerned it required two approvals. First approval is by the Government of Orissa which was primary and substantive. However, an approval by the Government of India was also required as it provided the funds. The fact remains that the beneficiary status was necessary to be conferred as an essential step in the execution of the project forming subject matter of the two agreements.

The cancellation of such Beneficiary Status of the Claimant came to be conveyed by letter dated 03.11.2005 of the State Government wherein it is stated inter alia- 'the State Govt. in Agriculture Department derecognized M/s Krithika Agro Farm Chemicals and Engg. Industries (p) Ltd. as a Beneficiary for establishment of Palm Oil Mill Orissa'.

The attack of the Ld. Counsel for the Claimant on such cancellation is three pronged. He submitted, first the cancellation could not have been by the State Government but only by the Government of India; secondly, such cancellation is akin to black listing and hence should have complied with the principles of natural justice; thirdly, there was no foundation either on facts or in law justifying such cancellation. I will deal with each of these three grounds briefly.

So far as the first ground is concerned, as already stated, it was for the State Government to identify the 'Beneficiary' for the purpose of conferring such status,

of course with the prior or subsequent approval of the Government of India. The State Government has a key role to play in this regard. Mr. V.Sambamoorthy (PW-1) has admitted in this cross-examination that it was the Government of Orissa which had identified the Claimant Company as a beneficiary. However, the witness hastened to add that such identification by the Government of Orissa was on behalf of TMOP & M. This later agency undisputedly belongs to Department of Agriculture of the Government of India. The State Government decided to withdraw such status from the Claimant. It was a matter between the State and the Central Government to finally resolve the issue and any dispute or controversy relating thereto. It is not the case of the Claimant that such cancellation originating from the Government of Orissa has not been approved much less turned down by the Government of India. In any case, the State of Orissa and Government of India are not parties to these proceedings and behind their back the validity and/or efficacy of such crucial decision cannot be adjudicated upon.

It is pertinent to note that consequent upon such cancellation of Beneficiary Status, the agreement itself with the Claimant was jeopardized, as, on 07.08.2005, the Government of Orissa invited, by inserting advertisement, fresh Expression of Interest for setting up of the same project as was with the Claimant. The Claimant filed a writ petition before the High Court of Orissa (sic. Delhi) but the same was dismissed for want of territorial jurisdiction in the High Court thereat. The Claimant preferred a SLP which too was dismissed. However, the cancellation of Beneficiary Status was not put in issue nor sought to be annulled by any timely legal action which if initiated, the State of Orissa and Government of India would obviously have been impleaded as parties in such legal proceedings.

The cancellation of 'Beneficiary Status' of the Claimant has achieved a finality."

I fail to see any perversity in the aforesaid reasons as given by the learned Arbitrator. It is not in dispute that the fact of the withdrawal of the beneficiary status was even otherwise duly informed to the objector by the State Government of Orissa by its letter dated 9.9.2005. In any case, when the State Government of Orissa had invited fresh tenders by advertisement in the newspaper for a new beneficiary for the contract, the present objector had filed a writ petition and in which writ petition, the issuing of the newspaper advertisement (and consequently the withdrawal of the beneficiary status) was challenged. This writ petition was dismissed on the ground of territorial jurisdiction by this court and an appeal thereto was also dismissed by a Division Bench of this court. In any case, no further proceedings were filed by the objector for challenging the action of bringing a new beneficiary who has now in fact completed the project and not only this, it is a fact on record that the Central Government in view of delay and the change of situation refused to release any further amounts for the contract in question because of the delay in the project. Accordingly, I do not find any reason to interfere with the detailed reasoning and findings of the Arbitrator more so because the Government of Orissa and the Government of India are not parties to the arbitration proceedings and if the objector is correct in his contention that the beneficiary status was not

withdrawn by the Central Government, it ought to have filed the some positive evidence and which surely would not have been difficult to obtain if the Central Government had not withdrawn the beneficiary status of the objector. The contention that the State Government ought to have waited till the very last in 2006 before substituting the beneficiary is an argument of desperation as the breach in performance was clearly evident at different stages and periods well before 2006 and it was not necessary therefore to wait till the very end viz January, 2006 the period as per the M.O.M. dated 30.8.2004. It bears repetition that right from 2001 till 2006 the objector acquired less than half an acre of land and the civil work was also nowhere near completion and thus it does not lie in the mouth of the objector to say there was no breach till January, 2006.

9. That takes me to the issue whether the objector was entitled to specific performance of the contract. Indeed, there not being much substance to this challenge and the findings with regard to the dis-entitlement of specific performance, the counsel has not very vigorously pressed the issue, however, I may additionally note that very detailed discussions are found in the award and there are necessary findings which have been arrived at by the Arbitrator by referring to in great detail to the terms and conditions of the contract which required minute details and performances with regard thereto

and consequently therefore such projects cannot be specifically enforced. It was accordingly held by the Arbitrator that the claim even in this behalf is not well conceived. I agree with the same and this petition with respect to entitlement of specific performance is therefore meritless and rejected.

10. Finally this takes me to the issue with respect to the claim of compensation and damages of Rs.18 crores which were claimed by the claimant. The Arbitrator has, and as noted above, found that the respondent was not guilty of breach of contract and it was the objector who did not perform his contractual obligations, and thus the arbitrator need not have arrived at any such finding, but *ex abundata cautela* the arbitrator has considered the documentary evidence, affidavits by way of evidence and the cross examination of the witnesses and has disallowed the claim of damages on account of the same having not been proved at all. In this behalf, the Arbitrator has held as under and to which no fault can be found:-

“As I have already held that the Claimant is not entitled to any compensation either in addition to or in lieu of the relief of specific performance, it is not necessary to deal with the heads of the claims individually and the entitlement of the Claimant to any amount by reference thereto. However still, it may be observed that there is no evidence produced in support of the first claim so as to formulate an opinion how the Claimant could have earned Rs.8 crores which have been lost to him. As to the expenditure incurred as per balance sheet, there is no proof tendered except that

the figures are stated in the balance sheet. As to the third head, there is no proof of the salary that was being paid to Mr. V.Sambamoorthy or as to the salary he would have earned.

The following passage from the cross-examination of Mr. V.Sambamoorthy is extracted and reproduced verbatim:-

“Attention of the witness is invited to page 116 of the Claimant’s documents. The witness states that the figure of Rs.1,22,10,535/- shown as opening balance includes the expenses incurred on the present project till then. So far as the details of such expenses are concerned, only the auditors can tell. It is not correct to say that except for purchasing the land, no other expenditure was incurred on the present project. The figure of Rs. 6,24,000/- refers to the present project, but I cannot say how the auditors have arrived at this figure and classified as ‘know-how-fee’. I do not remember the figure of turnover of the Claimant Company during 2000-01. So also, do not remember the figures of net profit after tax of the Claimant Company during last 3/4 years”.

There is no proof of recurring expenditure as also of the figure said to have been incurred on overheads and maintenance of office. The onus of proving right to recover compensation and the quantum thereof lies on the Claimant which onus has not been discharged in the present case. At best some general damages could have been awarded if only the Claimant would have been held entitled to the decree of specific performance or if the Respondent would have been held guilty of breach of agreement which there is none.”

11. Accordingly, this objection petition is misconceived and liable to be dismissed.

12. Before I close the case, there now remains the issue of costs to be awarded for these proceedings. This court has consistently followed the ratio of judgment of the Supreme Court in ***Salem Advocate Bar Association Vs. Union of India (2005) 6SCC 344*** wherein in para 37 the Supreme Court has directed the courts that it is high time that instead of nominal costs, actual costs ought to be imposed. As per Section 35 and Order XX-A of the Code of Civil Procedure, costs have to follow the event. A Learned Single Judge of this court (Madan Lokur, J) in the judgment titled as ***Austin Nichols & Co. Vs. Arvind Behl 2006 (32) PTC 133***. has held that actual legal costs ought to be paid to the successful party. I may note that at the commencement of the arguments, I had brought to the notice of the counsel for the parties this legal position. Since, I have found the objections to be wholly meritless, the respondents are entitled to costs of these proceedings. Accordingly, I direct that the respondent should file an affidavit with respect to the costs incurred in these proceedings under Section 34 supported by the certificates of its advocates of having received the fees with respect to these proceedings. On the said affidavit and certificates, being filed within a period of four weeks, such costs as stated in the affidavit and the

certificates will be the costs of these proceedings in favour of the respondent and against the objector. While imposing the costs, I have taken into account the valuation of the claims involved and the financial capacity of the parties.

The OMP is accordingly stands disposed of as dismissed.

VALMIKI J.MEHTA, J

October 22, 2009/ib