

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

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1. OMP No. 373/2002

20th January, 2010

CANARA BANK

...Petitioner

Through: Mr. Y.P.Narula, Sr. Advocate with
Mr. Aniruddha Choudhury, Advocate.

VERSUS

M.D. OVERSEAS AND ANR.

....Respondents

Through: Mr. Mahinder Rana, Advocate with
Mr. Dhruva Bhagar, Advocate.

2. OMP No. 447/2002

M.D.OVERSEAS Ltd.

...Petitioner

Through: Mr. Mahender Rana, Advocate

VERSUS

CANARA BANK &Anr.

....Respondents

Through: Mr. Y.P.Narula, Sr. Advocate with
Aniruddha Chaudhary, 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?

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. This objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the Award dated 14.9.02 passed by the sole Arbitrator. The Award decides the disputes which arose between the petitioner/objector/bank and the respondent arose during the pendency of contractual relations in which the petitioner acted as an agent for the respondent for importing of gold. The dispute centres around the rate of the handling charges which the petitioner was entitled to receive from the respondent, more specifically, the dispute is with regard to reduction of the handling charges, whether on account of turn over based incentives given by the petitioner or in any case on account of a agreement to grant of incentive for maintaining business relations.

2. Mr. Narula, Learned Senior Counsel for the petitioner, has limited his challenge to the Award on two counts. The first count pertains to the claim of incentive of Rs.73,44,996/- for the period from 1.12.1997 to 18.2.1998 which according to Mr. Narula ought not to have been awarded in favour of the respondent. The second objection pertains to the grant of interest @ 18% per annum granted by the Award which rate according to the counsel was excessive.

3. Taking up the first objection, what Mr. Narula urged, was that the petitioner bank was fully entitled to charge the changed handling charges on account of the admitted terms in the contract between the parties and as reflected in the letter dated 1.12.1997 filed by the respondent itself in the arbitration proceedings and which clearly provided that “the above guidelines are the subject to change at any time at the discretion of the bank”. In view of this letter, Mr. Narula contended that since the handling charges were changed and charged on the basis of a policy decision, it was not open to the respondent to seek reduction of the handling charges by claiming the higher incentive.

4. The Arbitrator has dealt with this issue and given his conclusions and findings in para 15 of the Award which reads as under:

“15. Now as regards the claim for the recovery of Rs.63,15,210/-, I am inclined to accept this part of the claim of the claimant. From the contents and the tenor of the letter of the respondent dated 11.8.98(Ex.C-16) and the letter dated 30.10.1998(Ex.R-14), the making of the provision for the payment of Rs.1,42,49,742/- to the claimant, read with the statement of Mr. Prabhu, as detailed above, and the fact that the respondent bank did not treat the sum of Rs.73,44,996/- as their profit in their books of account and had further given an outright credit of Rs.10,29,785/- out of the sum of Rs.73,44,996/- and which sum of Rs.10,21,785/- was never sought to be readjusted by the bank treating that as a liability of the claimant, I am of the view that the respondent bank had clearly accepted the claim of the claimant to the extent of Rs.73,44,996/- out of the claim in question and out of which it gave a credit of Rs.10,29,785/- to the claimant. It cannot be inferred that the respondent had merely made an offer of payment of Rs.73 lacs & odd on the condition that that sum would be paid to the claimant in case the claimant agreed to give up its remaining claim. The respondent had taken a firm decision to pay in all Rs.73 lacs & odd to the claimant against the latter's claim. It paid a sum of Rs.10 lac and odd to the claimant unconditionally and without claimant's expressing its willingness to give up its remaining claim or any part thereof. The

respondent however, later seems to have developed cold feet fact and withheld the payment of the balance of Rs.63 lac and odd to the claimant, probably under apprehension that the payment of this amount of Rs.73 lac & odd may not prejudice its case regarding the remaining claim of the claimant. I hold as stated above.”

5. I may note that before allowing the claim of Rs.63,15,210/- (inasmuch as Rs.10,29,785/- was already credited to the account of the respondent from the sum of Rs.73,44,996/-), the Arbitrator had rejected the claim of the respondent for Rs.2,15,41,885/- for this period made on the basis that pro-rata import for a period principle be applied for determining the grant of incentives, and thus, out of the claimed amount of Rs.2,15,41,885/-, the Arbitrator only awarded an amount of Rs.63,15,210/-. In arriving at this conclusion in paras 12 & 13, the Arbitrator has rightly upheld the contention of the petitioner bank with regard to the entitlement of the petitioner to change the handling charges at any point of time during the year. Paras 12 and 13 of the Award reads:

“12. Now coming to the merits of the claimant’s case, the first thing to note is that it is not the case of the claimant that as per the agreement between the parties, the respondent bank was liable to continue the policy decision effective from 1.12.97 for at least one year and could not change the handling charges prior to that viz. w.e.f 19.2.98 and more so without prior consent or information about the claimant. It is that common case of the parties that the respondent bank had been changing charges unilaterally in its sole discretion from time to time from the beginning of the launching of the scheme w.e.f 19.12.97. The claimant continued to have business with the respondent bank from 20.12.97 to 16.7.98 during which period the rates and the basis of handling charges were modified by the respondent bank a few times. The claimant quietly accepted the change of rate and basis of handling charges effected 1.2.97 and all such changes made subsequent to 6.3.98 also without any demur. It chose to challenge the change effected from 19.2.98 only and has sought to build a case on a premise of its own choosing. Further if the case of the claimant was all of breach of contract by the respondent in that regard the only remedy available to the claimant against the

respondent in that case was to seeks to recover damages for alleged breach of contract from the respondent. That obviously is not the case of the claimant. In fact the learned counsel for the claimant himself did not allege violation of any legal right of the claimant by the respondent in recovering the handling charges, including the disputed amount of handling charges. Mr. Kalka Prasad, learned counsel for the respondent, submitted that in equity the claimant should be held as entitled to the refund of the handling charges recovered by the respondent in excess of those calculated @ 60% by giving the incentive of 40% on the normal rate of handling charges of 1% support for this submission is found from the said conduct of the respondent in which the respondent subsequently dealt with the claim of the claimant as stated by me already above, including part admission of the claimant's claim, although conditional one according to the respondent. The respondent nowhere accepted the contention that it was liable to allow incentive to the claimant @ 40%.

13. The case of the claimant for the recovery of Rs. 63,15,210/- however stands on a different footing, namely the alleged admission of the respondent in this regard, which I will deal with little later. I however, fail to see as to how equity comes into play on the facts as stated above, namely, the alleged treatment given by the respondent bank to the claim of the claimant in some of its letters and the balance sheet read with the statement of Mr. Prabhu. The claim of the claimant for the 'entire' dispute sum of Rs.2,15,41,885/- is wholly untenable. "

In view of the findings in paras 12 and 13, I am unable to appreciate the contention of the counsel for the petitioner that the letter dated 1.12.1997, referred to above, can in any manner help the petitioner in order to dislodge the Award so far as it awards Rs.63,15,210/-. This is because the claim of Rs.63,15,210/- has been awarded on the basis of a one time settlement as stated in the letter dated 11.8.1998 for business relations and de hors the contractual relationship governed by the letter dated 1.12.1997.

6. Now, once again advertent to the findings of the Arbitrator in para 15, and which I fully agree with, it is quite clear that the Arbitrator was justified in holding that on account of the business relations, there could be

an ad hoc settlement between the parties for granting of a higher incentive than was otherwise contractually agreed to be payable between the parties. For this purpose, the Arbitrator has relied upon two letters, first one being Ex.C-16 a letter dated 11.8.1998 written by the petitioner to the respondent, and the second being Ex.R-14 an internal letter dated 30.10.1998 by the petitioner from one branch to another. The first letter in my opinion is conclusive of the matter. This letter dated 11.8.1998 is specifically addressed to the respondent itself. By this letter, the petitioner put on record the settlement of granting to the respondent adjustment of the handling charges by reducing therefrom the already paid amount of Rs.10,29,785/-. I would seek to reproduce this entire letter and which is as under:

"Date 11-08-1998

BULLION CELL
T & 10 WING
112, J.C. ROAD
BANGLORE-2

M/s. M.D. Overseas Ltd.,
B-2, Manish Tower,
84, J.C. Road,
Bangalore-560 002

Dear Sir,

Sub: Payment of incentive.

Ref: Your letter dated 13.06.98

With reference to your above letter we wish to inform you as below.

During the period from 1.12.97 to 18.2.98 when the incentive scheme based on turnover was in existence, you had purchased from us gold and silver of CIF value of Rs.690.56 crores. For the above, after taking into account the incentive paid, balance incentive payable works out to Rs.73,44,996/-.

An amount of Rs.10,29,786/- has been adjusted out of the above amount during the period from 2.6.98 to 6.8.98 by our Overseas Branch Delhi. The

balance amount of Rs.63,15,210/- will be paid to you in full and final settlement of your claim.

You may call on our Overseas Branch, New Delhi for payment of the amount.

Yours faithfully,

Sd/-

S JAYARAMAN

DEPUTY GENERAL MANAGER

Copy to: Overseas Branch, New Delhi : Please pay the amount of Rs.63,15,210/- (Rupees sixty three lakhs fifteen thousand two hundred and ten only) to the party after obtaining acceptance in full and final settlement on the copy of this letter.”

This letter leaves no manner of doubt that the petitioner did in fact agree to pay to the respondent a sum of Rs.73,44,996/-. In fact, the Arbitrator has rightly noted that out of the amount of Rs.73,44,996/- an amount of Rs.10,29,785/- was already paid to the respondent by crediting its account and the petitioner was not in any manner seeking any recovery of the said amount of Rs.10,29,785/- from the respondent and which the petitioner would have done if the settlement as stated in the letter dated 11.8.1998 was not final.

7. This action of the parties in arriving at a one time settlement was nothing new to the parties. In fact, even earlier in spite of the contract to the contrary with respect to the rate of handling charges, petitioner bank had in order to promote business relations with its customers, allowed the benefit of higher incentive charges for the period from 20.11.1997 to 30.11.1997. Meaning thereby, it was not unknown that in spite of

contractual charges being otherwise, the petitioner bank had given larger concession/incentive to its customers.

8. In view of the aforesaid discussion and especially the findings in para 15 as given by the Learned Arbitrator there is absolutely no illegality or violation of the contractual provisions or any perversity in the Award so as to entitle this Court to interfere with the Award while hearing objections under Section 34. Objections to this part of the Award is therefore rejected.

9. The second issue which was pressed by the counsel for the objector was with regard to the rate of interest. In my opinion, objection with regard to the rate of interest has to be sustained. The Supreme Court in the recent chain of judgments reported as *Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.* 2005 (6) 678, *McDermott International Inc. Vs. Burn Standard Co. Ltd. & ors* 2006 (11) SCC 181, *Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd.* (2006) 7 SCC 700 and *Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra*, 2007 (2) SCC 720 has directed the Courts that in view of the economic liberalization and the consistent fall in the rate of interest, Court should be alive to this situation and should reduce the high rate of interest as granted by the Award. This Court also has been consistently in view of the ratio of the aforesaid Supreme Court judgments granting interest @ 9% per annum. Accordingly, in the facts and circumstances of the case, I

reduce the rate of interest as granted by the Award from 18% per annum to 9% per annum simple. I am, however, not changing the period for which the interest has been granted.

10. The objection petition is therefore dismissed. In the facts and circumstances of the case, I, however, leave the parties to bear their own costs.

O.M.P. No.447/2002

11. By an order of today's date in OMP No. 373/2002, I have dismissed the objection of the respondent herein and who was the petitioner in OMP No. 373/2002 namely M/s Canara Bank. For the sake of convenience, the facts stated in the said judgment in OMP No. 373/2002 are not being reproduced while disposing of these objections.

12. By these objections what the objector M/s. M.D. Overseas seeks is that it should be entitled to the benefit of pro-rata quantities incentives in terms of a policy for November, 1997 even for the subsequent period of 1.12.1997 to 18.2.1998. Mr. Rana contends that having once given the benefit of additional concession and lower handling charges for the period from 20.11.1997 to 30.11.1997, the objector was entitled therefore on the same principles to the benefit of pro-rata quantities even for the period subsequent to 30.11.1997 i.e from 1.12.1997 to 18.2.1998.

13. In my order of today's date, in OMP No. 373/2002, I have reproduced the relevant portions of the Award and in which findings of the

Arbitrator have been upheld whereby the respondent herein was entitled to regularly change the rates of handling charges and also the incentives/concessionary available to the present petitioner. The petitioner is thus not entitled to the benefit of an old policy because the old policy was given only on a one time exemption by virtue of a letter dated 6.12.1997 (Ext.R-9) issued by the respondent herein, and which specifically limits the concession only for the period 20.11.1997 to 30.11.1997. The Arbitrator, has consequently rightly held that once on the basis of the contract, the present respondent was entitled to vary the handling charges and the concession, then at best the petitioner herein, would only be entitled to payment, if there is a settlement, de hors the agreed contractual relations. The Arbitrator has in fact found an agreement de hors the contractual relations between the parties for the period from 1.12.1987 to 18.2.1998 for an amount of Rs.73,44,996/- on the basis of a letter dated 11.8.1998 (Ex.C-16) and which I have wholly reproduced in my order in OMP No. 373/2002. Therefore, it is only to such amount that M/s. M.D. Overseas is entitled to and not any other amounts.

14. Mr. Rana has contended that the letter dated 11.8.1998 (Ex.C-16) in fact does not specify that it is only for a particular period, and that in fact, according to him it is nowhere stated in the letter that it is only a one time concession. He further contended that the contractual relations between the parties which entitled the present respondent to change the

handling charges were given a go by already by the letter dated 6.12.1997 even for the future. I am afraid, I cannot agree with this contention because the letter dated 6.12.1997 is a specific subject and is not a general letter. Whereas the letter dated 6.12.1997 is specific for a period i.e. 20.11.1997 to 30.11.1997, the subsequent letter dated 11.8.1998 is also only for a specific person-viz the objector herein and also for a specific period so stated therein i.e. 1.12.1997 to 18.2.1998. I have already held in the judgment in OMP No. 373/2002 that contractual relations between the parties will prevail and the letters dated 6.12.1997 and 11.8.1998 were one off exemptions, for the periods of 1.12.1997 to 18.2.1998 and 20.11.1997 to 30.11.1997. There is no proposition in law that if the parties for the sake of business relations give a go by to the agreed terms for a particular period, automatically, the contract is given go-by for all purposes. Once the two letters namely the one dated 6.12.1997 (Ext. R-9) and 11.8.1998 (Ext.C-16) deal with specific parties and specific exemptions for specific periods, surely in law, it can only apply to those specific parties and specific exemptions. They cannot confer a general right to overlook the contractual provisions for all issues and for all points of time in future. Accordingly, I find no reason to sustain the objections which are dismissed with costs of Rs.50,000/-.

VALMIKI J.MEHTA, J

January 20, 2010
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