

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

+ O.M.P. 133/2003

DOMINANT OFFSET LTD. Petitioner
Through Ms. Pratibha M. Singh with
Mr. Deepak Gogia, Advocates
versus

ADAMOVSKE STROJIRNY ... Respondents
A.S. & ORS. Through: None

% Date of Decision : 9th April, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the 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.

J U D G M E N T

MANMOHAN, J (ORAL)

1. Despite the matter having been called out on several occasions, none has appeared for respondents. Accordingly, I have no other option but to proceed ahead with the matter.
2. Present petition has been filed under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") challenging the arbitral Award dated 15th November, 2002 passed by Mr. Justice P.K. Bahri (Retd.), Sole Arbitrator. By virtue of the impugned Award, the claims filed by petitioner-objector were rejected.

3. The facts of the present case are that Agreements dated 18th July, 1986 and 25th July, 1986 were executed between petitioner-objector and predecessor-in-interest of respondent no. 1. Under the said Agreements, the predecessor-in-interest of respondent no. 1 was to supply to petitioner-objector technical documentation and know-how in relation to printing machines Adast Dominant 514 and Adast Dominant 725 respectively. Since clauses of both the Agreements are identical except with a few minor variations, Clause 5.02 of one of the Agreements is reproduced hereinbelow :-

Clause 5.02 : Improvements and Supplemental Information.

If any time during the terms of this agreement LICENSOR shall make an improvement or addition to their technical know-how relating to the manufacturing technique of the product, LICENSOR will inform LICENSEE about such improvement(s) or addition(s). LICENSEE shall then be entitled to adopt such know-how in their manufacturing operations. The supply of such additional information shall be made free of charge.

Said Supplemental Information also includes technical, engineering and manufacturing information and drawings for ADAST DOMINANT 515 which is a model to be introduced by LICENSOR with modifications in ADAST DOMINANT 514. As to deliveries of machines, components and/or spare parts the stipulation 4.03 is applicable also for ADAST 515.

4. Learned Arbitrator by the interim Award and order dated 18th April, 1998 held that both the Agreements came into effect from 27th May, 1987 and were valid till 22nd May, 1995.

5. On 22nd May, 1992 a tripartite protocol was entered into amongst petitioner-objector, respondent no. 1 and a third party called KOVO

whereunder, according to petitioner-objector, respondent no. 1 had acknowledged and accepted its obligation to supply free of charge, documentation for models AD 516 (against AD 514 as per Agreement) and AD 726 (against AD 725 as per Agreement) as a part of existing collaboration agreement.

6. Since in January 1995 respondent no. 1 appointed M/s. Amit International, that is, respondent no. 2 herein, as its sole selling agent in India, petitioner-objector filed a petition being A.A. 82/1996 seeking appointment of an arbitrator as well as an application for interim injunction being I.A. 7107/1996 seeking an injunction restraining the respondents from directly selling offset printing machines in its exclusive territories of India, Nepal and Bhutan in accordance with the alleged negative covenant contained in the said Agreements. However, on 6th May, 1997 the aforementioned petition as well as injunction application were dismissed.

7. On a Special Leave Petition being filed in the Supreme Court, Mr. Justice P.K. Bahri (Retd.) was appointed as Sole Arbitrator vide order dated 19th September, 1997. The said order is reproduced hereinbelow:-

“Leave granted.

In view of the developments, which have taken place during the pendency of these appeals in this Court, we are not obliged to trace the course of litigation. Learned counsel for the parties submit that the parties have entered into an agreement to refer their disputes to sole arbitration of Mr. Justice P.K. Bahri (Retired). The terms of the agreement are as follows:

“I) All dispute between the parties arising out of the said agreements dated 18th July, 1986 and 25th July, 1986 are agreed to be referred to the sole arbitration of Hon’ble Mr. Justice P.K. Bahri (Retd.) and the said disputes shall include but shall not be limited to the following:

- a) Whether any Arbitration Agreement exists between the petitioner and the respondent?*
- b) Whether the said agreements are valid and subsisting?*

Issue (a & b) above shall be decided by the learned Arbitrator independently of the findings of the learned Single Judge in A.A. 82/96 and I.A. No. 6901/96 in Suit No.1448/94.

- c) Whether the petitioner is entitled to damages and account of profits from the respondents?*
 - i) The Arbitrator may consider any request for interim orders in accordance with law.*
 - ii) Venue of the Arbitration proceedings shall be at Delhi.*
 - iii) All the SLPs may be disposed of on the above terms.”*

In view of the agreement arrived at between the parties, Mr. Justice P.K. Bahri (Retd.) is appointed as the sole arbitrator and shall enter upon the reference, as per the terms of the agreement (supra). The learned Arbitrator shall fix his own remuneration and shall complete the arbitration proceedings, as far as possible, within eight months from the date of entering upon the reference.

Any further order or direction arising out of the arbitration proceedings or the Award shall be obtained from the High Court of Delhi by either of the parties and challenge to the Award, if any, shall also be made in that High Court only.

The appeals are disposed of in the above terms. No costs.

New Delhi

(A.S. ANAND)J

September 19, 1997.

(K. VENKATASWAMI)J

8. After the interim Award dated 18th April, 1998, learned Arbitrator passed the impugned final Award wherein he rejected all the claims filed by petitioner-objector. Some of the relevant observations in the impugned Award are reproduced hereinbelow :-

“8. The effective date was determined as 22-5-1987 and the agreements in question were held to have expired on 22.5.1995. The two major reliefs claimed in para 22(a) and (b) of the statement of claim seeking permanent injunction against the respondents restraining them from manufacturing, selling or dealing with the off-set printing machines subject matter of the agreements dated 18.7.1986 and 25.7.1986 in the exclusive territories of India, Bhutan and Nepal became unavailable as the agreements had expired even before the claimant had filed the petitions in the High Court. Moreover in the statement of claim in para 17 the claimant had averred that it was in 1996 that the respondent No.1 appointed the respondent No.2 as sole selling agent for the said machines. The agreements with the claimant already stood expired in May, 1995. Hence the claimant has no legal right to restrain the respondents from dealing with such machines in India or anywhere else as the agreements with the claimant had expired. I reject those reliefs.

9. The respondents No.2 and 4 are not party to the agreements in question. As such no relief can be claimed by the claimant against the said respondents in relation to any breach of the terms of the agreements by the respondent No.1. thus the claims raised against the respondents No.2 to 4 are rejected.

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12. Be as it may there is no evidence that any printing machines subject matter of the agreements in question were imported and sold in the exclusive territories of the claimant prior to the expiry of the agreements.

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51. In 1992, the respondent No.1 agreed to supply drawings of AD 516 and AD 726 P as part of existing

collaboration agreements and free of charge. The drawings were not supplied. The claimant had not applied to the Government of India for getting permission to import such drawings. Soon after this protocol was executed under which the claimant was also to import components of considerable value, the claimant appears to have lost interest in getting the drawings or components. There is a reason for this conduct of the claimant.

52. In 1992 admittedly the claimant entered into a collaboration agreement with another company Dobresske for getting the technology of one to six colour machines. The claimant had disputes with that company and in 1994 as suit was filed (S. No.1448/94) against the said company. In this suit the respondent No.1 was also joined as a party. In this suit the claimant has pleaded that technology of manufacturing printing machines of colour one to six by Dobrusske is similar to the technology of the respondent No.1 and even the components of the machines manufactured by Dobresske and the respondent No.1 are interchangeable. The claimant averred that its agreements of collaboration with the respondent No.1 have expired in 1994 and in order to maintain continuity the claimant entered into collaboration agreements with Dobresske.

53. In this suit no averment was made against the respondent No.1 that it had committed any breach of the terms of the agreements of 1986 or 1992. The claimant sought relief of injunction so that Dobresske and the respondent No.1 should not be able to sell machines in competition with the claimant in India. No claim of damages was raised against the respondent No.1 in that suit.

54. RW-1/1 (page 247 of Volume V) is a fax dated 24.9.1992 sent by the claimant in which the claimant asked for stopping all deliveries of components of AD 715 A and AD 725 P/A. Shri Raghbir Singh the witness of the claimant, was vague in his replies as to performance of mutual obligations contemplated in protocol of 1992. There is no evidence produced on the record to show that the claimant procured any components under 1992 protocol. This leads to inference that the claimant became totally disinterested in the protocol of 1992 as the claimant had been able to enter into collaboration agreement with Dobresske for getting technology of not only one and two colour machines to which

the protocol of 1992 and agreements of 1986 and 1982 related but of also technology of six colour machines as well.

55. The claimant has placed on record two letters dated 7.3.1994 and 29.4.1994 (pages 217,219 Volume I) to show that it asked for supply of drawings from the respondent No.1. the respondent No.1 has denied receipt of the said letters. The parties had led documentary as well as oral evidence but the claimant failed to prove that in fact these letters were sent. No prayer has been made for filing any additional evidence to prove that these letters were actually sent and received by the respondent No.1.

56. Along with rejoinder written arguments some copies of letters of 1994 and 1995 with postal AD receipts have been filed. These documents cannot be looked into inasmuch as no permission has been sought to lead more evidence and no opportunity could be given to the respondents to rebut such additional documents.

57. Even assuming that the respondent No.1 committed breach of the terms of the protocol of 1992 in not supplying the drawings of improved versions even then the claimant was duty bound to prove that it had suffered any losses on that score. The claimant did not wish to import components of the latest machines in terms of the protocol. This leads to inference that the claimant did not wish to manufacture machines based on technology of the respondent No.1 as the claimant has got technology for manufacturing same type of machines as well as three to six colour machines from Dobresske in 1992. Thus the claimant cannot plead that it had suffered any losses for want of drawings of some machines from the respondent No.1. These letters were not filed in S. No. 144/94 which was filed in July, 1994. It is not explained by the claimant as to why it needed any drawings of any machines from the respondent No.1 after the claimant as to why it needed any drawings of any machines from the respondent No.1 after the claimant had entered into an agreement with Dobresske for having technology of one to six colour machines. In case the claimant was still keen to having drawings of some improved machines from the respondent No.1 after 1992 the claimant would not wait for two years even if it is assumed that this claimant had written those two letters in 1994. The claimant was of the firm view that its agreements with the respondent No.1 had expired in 1994 before the filing of S. No.1448/94 in July, 1994.

58. *There could arise no occasion for the claimant to demand any drawings from the respondent No.1 after filing of the said suit. In case the claimant had any grievance of being not supplied any drawings of improved machines after 1992, the claimant would not have failed to pinpoint that grievance in S.No.1448/94.*

59. *From above discussion, I conclude that there was not committed any breach of the terms of contract by the predecessor of respondent No.1 from 1986 to 1992. There was no delay caused in the period 1986 to 1992 in supplying the drawings to the claimant.*

60. *After execution of the protocol the claimant became disinterested in having any drawings from the respondent No.1 as the claimant had entered into agreement with Dobresske to get same type of technology of wide range of machines than envisaged in the agreements in question. It is another story that there arose disputes later on between the claimant and Dobresske which forced the claimant to file a suit against that company as well as the respondent No.1 in July, 1994.*

61. *The claimant even in September, 1992 asked the respondent No.1 and KOVO not to supply components mentioned in 1992 protocol. It shows that the claimant did not wish to manufacture any improved version of machines mentioned in protocol of 1992. The claimant had imported components of expected new improved model in the year 1992. It is the case of the claimant that the machines of Dobresske and of the respondent No.1 are similar and the components are also interchangeable.*

62. *In this background it is not possible to agree with the claimant that the claimant suffered any losses on account of non-supply of drawings of improved models or components in terms of Protocol of 1992. Issue is decided against the claimant.*

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66. *US Dollars 1,660,400/- are claimed as damages for breach of negative covenant in the agreements by the respondents. The respondent No. 1 has appointed respondent No. 2 to 4 as its agents for selling printing machines in completion with machines being manufactured by the claimant in relation to agreements of 1986. This*

arrangement came to be made in January, 1995. In between January, 1995 and till expiry of agreements in May, 1995 there is no evidence as to how many machines of same type were sold by the respondents in exclusive areas of the claimant. Be as it may, the claimant in S. No. 1448/94 categorically averred that the agreements in question stood expired in 1994. The respondents acting on this averment could justifiably treat the agreements having expired and enter into fresh deals. Thus I reject this claim as well."

(emphasis supplied)

9. Ms. Pratibha M. Singh and Mr. Deepak Gogia, learned counsel for petitioner-objector submitted that the Arbitrator had failed to appreciate that petitioner-objector was entitled to damages on three counts, namely, for breach of negative covenant, for non-supply of improvement in drawings and for non-supply of minimum sets of components.

10. They further submitted that the impugned Award being contrary to substantial documentary and oral evidence produced by petitioner-objector was liable to be set aside. Nearly each and every factual finding of the Arbitrator was challenged on merits as being contrary to the record. For instance, it was stated that the Arbitrator's finding that letters dated 7th March, 1994 and 29th April, 1994 had not been proved, was contrary to record inasmuch as according to them letter dated 7th March, 1994 was duly acknowledged by respondent no. 1. In this connection, they pointed out that letter dated 7th March, 1994 had been re-faxed on 5th April, 1994 and had been duly responded by respondent no. 1 vide its letter dated 25th April, 1994.

11. It was also submitted that the entire reasoning of the impugned Award was based on pleadings in Suit No. 1448/1994 filed by petitioner-objector against a third party, namely, Dobrusske Strojirny. It was submitted that the said Suit arose out of completely different agreement and had nothing to do with the present Agreements. In any event, according to them, the Supreme Court vide order dated 19th September, 1997 directed the Arbitrator to decide the matter independent of the findings arrived at in Suit No. 1448/1994.

12. Learned counsel for petitioner-objector further submitted that petitioner-objector had adduced documentary evidence like advertisement published by respondent no. 2 wherein it had claimed to have sold huge number of machines two years prior to 1997. They further submitted that the Arbitrator had failed to pass an order of rendition of accounts against respondents as petitioner-objector could not be expected to be privy to the said respondents' accounts.

13. Having heard the parties, I am of the view that scope of interference by this Court with an arbitral award under Section 34(2) of Act, 1996 is extremely limited. Supreme Court in ***Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi*** reported in ***(2008) 13 SCC 80*** has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is contrary to provisions of the contract or substantive provisions of law and/or is opposed to public policy.

14. In fact, the Supreme Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.* reported in (2006) 11 SCC 181 has succinctly summed up the scope of interference by this Court by stating “the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc.....”

15. I am of the opinion that this Court in Section 34 jurisdiction under Act 1996, cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the material on record. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for this Court to take upon itself the task of being an appellate judge on the evidence before the arbitrator.

16. In the present instance, the Arbitrator has given cogent reasons for rejecting the petitioner-objector’s claim petition. In my view, the conclusions reached by the learned Arbitrator are plausible. The Arbitrator has committed no error in law by relying upon the proceedings and pleading in Suit No. 1448/1994. There was nothing in the Supreme Court’s order dated 19th September, 1997 which prohibited the Arbitrator from doing so. Undoubtedly, the Arbitrator was not bound by the findings of learned Single Judge in A.A. 82/1996 and I.A.

6901/1996 in Suit No. 1448/1994 but there was nothing which prevented the Arbitrator from independently reaching the same conclusion as the learned Single Judge arrived at in the said proceedings.

17. As far as reference to the letter dated 7th March, 1994 and the alleged acknowledgement dated 25th April, 1994 is concerned, I find that respondent's letter dated 25th April, 1994 is in response to petitioner-objector's letter dated 6th April, 1994 and not 7th March, 1994. Even if the letter dated 7th March, 1994 is assumed to have been faxed to respondent no.1 on 5th April, 1994, it certainly could not have been acknowledged as a letter of 6th April, 1994.

18. Also the Arbitrator, in my opinion, has concluded that no evidence has been led by petitioner-objector to show as to how many machines of the same type were sold by respondent no. 1 in the exclusive areas of petitioner-objector. Respondent no. 2's alleged advertisement only states that it has sold a large number of machines two years, prior to 1997. The finding of the Arbitrator that the Agreements had expired in May, 1995 has not been challenged and accordingly, there is no evidence on record to show that a specific number of machines were sold between the period January to May, 1995. It is also not understood as to how the onus of proof shifted to the Arbitrator to direct the respondents to produce the accounts. It was open to petitioner-objector to file interrogatories and discoveries—

which it failed to do. In view of aforesaid, present objection petition being devoid of merits is dismissed but with no order as to costs.

MANMOHAN,J

APRIL 09, 2010

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