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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. No.260/2003

3rd March, 2010

ROYAL AIRWAYS LIMITED

...Petitioner

Through: Mr. Anil Sapra, Senior Advocate with
Dr. Saif Mahmood, Advocate.

VERSUS

VARUNA AGRO PROTEINS LIMITED

....Respondent

Through: Nemo.

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. By this petition under Section 34 of the Arbitration and Conciliation Act, 1996, the petitioner challenges the Award dated 26.2.2003 passed by the sole Arbitrator. The Award came to be passed on account of the disputes which arose between the parties in which the petitioner was the courier company and the respondent was the booking agent of the petitioner for parcels and cargo. By the impugned Award, the Arbitrator has awarded refund of the security deposit amount of the respondent lying with the

petitioner after deducting therefrom the amounts which were payable by the respondent to the petitioner. The Arbitrator rejected the contention of the petitioner herein that the petitioner was entitled to adjust its claims of charges from the balance amount of the security deposit which security deposit amount has been held to be payable by the petitioner to the respondent.

2. The facts of the case are that the respondent as the booking agent used to book parcels and cargo for the petitioner. This was done on the Air Consignment Notes (ACNs) which used to be issued by the petitioner to the respondent. Once the booking was done by the respondent, one copy of the ACNs used to be sent by it to the petitioner so that petitioner had the necessary record to make its claim for the charges which were collected by the respondent for and on behalf of the petitioner. The respondent used to send to the petitioner the monthly statements with respect to the charges it collected from the customers on the booking of the parcels/cargo. The petitioner used to issue the ACNs in booklet form every month after the old booklets were exhausted. The dispute which arose between the parties was on account of the fact that on the termination of the contractual relations pertaining to the parcels/cargo, the respondent sought the refund of the admitted amount of Rs.10 lacs which was lying with the petitioner as security deposit alongwith contractual rate of interest of 18% which was

payable on the said security deposit. The petitioner, however, sought to forfeit the security deposit on account of its claims.

3. The Arbitrator after referring to the detailed correspondence, the evidence led and the cross-examination of the witnesses has arrived at the following finding of facts:

(i) The security deposit of Rs.10 lacs was admittedly lying with the petitioner and which was to be refunded with interest @ 18% per annum.

(ii) The security deposit amount was not Rs.5 lacs but was Rs.10 lacs because the letter dated 10.4.1995 was written by the respondent to the petitioner on the basis that Rs.5 lacs adjustment is already given, however, which adjustment was in fact actually not done.

(iii) The respondent used to give regular monthly statement with respect to the business carried on and the petitioner used to issue ACNs, thereafter implying that with respect to the ACNs which were not accounted for the same stood cancelled.

(iv) The petitioner failed to file any proof whatsoever, any document whatsoever, any account whatsoever in any form which would show that the petitioner was entitled to forfeit the security deposit on account of its claims for transportation of the parcels/cargo and for which payment was received by the respondent but was not made to the petitioner.

4. The Arbitrator, therefore, arrived at a conclusion directing the refund of the security deposit and denying the claim of forfeiture of the petitioner towards its alleged claim.

5. Paras 23 to 27 of the Award are exhaustive and these paragraphs with clarity give the discussion, findings and conclusions for entitling the respondent to the refund of the security deposit and dis-entitling the petitioner to adjust the security deposit towards its claims. Since these paras with sufficient exhaustiveness and thoroughness give the basis for passing of the Award, it is enough if I adopt the reasoning contained in the same. These paras read as under:

“23. As observed above, the point lies in a very narrow compass. That the Claimant has deposited Rs.10 lakhs as security deposit is admitted by the Respondent Company. By letter dated 21.4.1995 (Ex.P4) the Claimant made a demand for the return of Rs.7,81,854.00 cannot be disputed by the Claimant. The case of the Respondent Company is that the Claimant is not entitled to the return of the security deposit as it had failed to return the Air Consignment Notes. The claimant is to pay the Respondent Company the value thereof. Therefore, the Respondent Company is entitled to set off that amount as against the amount due under security deposit after debiting the amounts due from the Claimant to the Respondent Company. Though the Respondent Company is precluded from projecting any such case as it had not filed any counter claim, as it has been raised in the reply it has necessarily be considered whether there is any wring of truth in the case projected by the Respondent Company. P.W.1 Managing Director of the Claimant Company has categorically stated in his evidence that there was no obligation on the part of the Claimant to pay any money to the Respondent Company. With reference to ACNs, P.W.1 stated in his evidence in answer to Question No.2 in the chief examination:-

“Q.2 Did you take any action with regard to the materials supplied by them after the Courier business was discontinued?

Ans. The practice was that we used to receive fresh stationery from Modiluft. By stationery here I mean, ACNs (Air Consignment Notes). After settling the previous account, stationery issued to us. Now this practice was followed from time to time. However, when we received the letter from Modiluft along with a computer print out of the ACNs issued to us, which according to them were yet outstanding, we searched our stationery records and whatever was discovered was returned to Modiluft

clearly bringing out the point that nothing was remaining due from us. The copy of the letter dated 7.8.1995 is Ex.P6. However, we made a categorically statement in our letter that if any ACNs were still remaining unaccounted they should be black listed and treated as cancelled and the money as already requested towards our security deposit be refunded to us without delay. There were some meetings between myself and Modiluft Managers at the Airport Office but nothing could be resolved. We received letter from Modiluft that ACNs could not be black listed as some of them have been actually used to which we replied that if any ACNs used have remained unaccounted in our statements the money could be debited to us as per the charges stated in the used ACNs. The copy of the letter dated 6.1.1996 is marked as Ex.P7. Modiluft informed us that since the matter was very old they were contacting their various stations and let us know the status in due course, but until such time money could not be refunded to us. Almost more than seven years have passed since the statement of Modiluft but they have not been able to discover even a single ACN claimed by them having been used and not accounted for in our statement for the refund of security deposit and interest.”

24. P.W.1 stated that the Respondent Company claimed a sum of Rs.5,000/- for each blank Air Consignment Note unaccounted for without even giving proof to the Claimant that any ACN had actually remained unaccounted for. In the cross-examination, it was suggested that the ACNs were used by the Claimant and payments were received from the clients which have not been accounted for. Nothing has been elicited in the cross-examination of P.W.1 from which it could be said that the Claimant Company had failed to account for any ACN which had been used by it. The witness examined on behalf of the Respondent Company Mr. A.K. Maheshwari as R.W.1 could not substantiate the case of the Respondent Company about the missing ACNs. In the cross-examination it is admitted by R.W.1 that the maintenance of accounts was by electronic system of accounting. The witness admitted that there are no records available with the Respondent Company to make reconciliation and the witness has no personal knowledge as to what prevented the Respondent Company from reconciling the accounts. The witness frankly admitted that on account of the non availability of the records with the Respondent Company, the Respondent Company has not been able to produce records with reference to the missing ACNs as alleged by the Respondent Company. Therefore, the Respondent Company has not been able to substantiate its case that the Claimant failed to furnish all the documents including the ACNs without which handing over the documents to the Respondent Company, the Respondent Company has also been able to prove that it could claim a sum of Rs.5,000/- for each blank ACN. It is a really tall claim and which is absolutely baseless. I have no hesitation to find that the Claimant has performed its obligation under the agreement and returned all the documents to the Respondent Company and the Respondent Company is liable to return the security deposit after deducting the amounts payable by the Claimant to the Respondent Company in respect of the transactions done by the Claimant.

25. The Respondent Company heavily relied on Ex.R-1 dated 10.4.1995 written by the Claimant Company to the Respondent Company. The case of

the Respondent Company was that the Claimant itself had claimed a sum of Rs.2,47,610.00. The learned counsel for the Respondent Company submitted that the Respondent Company was willing to pay this amount. That can not at all be accepted. PW.1 in his examination has explained under what circumstances that Ex.R-1 was written and what exactly that was conveyed by the Claimant to the Respondent Company. At that time the request of the Claimant to reduce the security deposit, though accepted by the Respondent Company was not really paid over by the Respondent Company to the Claimant. Treating the security deposit as Rs.5 lakhs the letter was written by the Claimant. The Question No.10 and the answer would clear the doubt created by the Respondent Company. The same is as under:

“Q.10 What was your explanation of the letter dated 10.4.1995 which has been annexed with their counter.

Ans. We had requested Modiluft for the reduction of our security of Rs.10 lakhs by 50% and refund us the sum of Rs.5 lakhs. We had been assured by different officers on various occasions that this was being looked into and the refund would be made to us shortly. The letter dated 10.4.1995 is marked as Ex.R-1. The letter dated 11.3.1995 refers to the internal correspondence of Modiluft clears this beyond any doubt that our security deposit was being reduced from Rs.10 lakhs to Rs.5 lakhs. It is marked as Ex.P.16. And the remaining Rs.5 lakh was being refunded to us. With this background, I would like to explain the letter dated 10.4.1995. This letter Ex.R.1 is with the assumption that the security deposit is reduced to Rs.5 lakhs and refund of the remaining Rs.5 lakhs is in process. On this basis, I would like to explain part A. That the amount after adjusting the Courier and Cargo Revenues due to Modiluft the amount of Rs.5 lakhs is reduced to Rs.2,24,625.00. This amount is further reduced by Rs.55,368/- with the further adjustment of Cargo Revenues for the month of March 1995. There is another amount of Rs.11,647.00 due to Modiluft for the month of March 1995. That the sum of Rs.90,000/- as yearly interest due from Modiluft. The total amount payable by Modiluft would arrive at Rs.2,47,610/-. This does not take into consideration the refund of 50% of the security deposit of Rs.5 lakhs which was being processed by Modiluft separately at that time.”

R.W.1 in his evidence stated:-

“Q.5 Can you explain Ex.R-1?

Ans. As per Ex.R-1 Varuna Agro is asking for a payment of Rs.2,47,610.00. How they have arrived at is not very clear to me. From the records it appears that there was no reply sent by Modiluft to Varuna.”

26. Therefore, the Respondent Company cannot pin the claim down to the amount mentioned in Ex.R-1 if really the Claimant was entitled to more.

27. As regards the amount that could be claimed by the Claimant from the Respondent Company, the Claimant itself has put beyond any doubt in his letter dated 21.4.1995 wherein the Claimant demanded a sum of Rs.7,81,854.00. The security deposit was Rs.10 lakhs. The amount due from the Claimant to the Respondent Company was Rs.3,23,146.00. Deducting the same from the principal security deposit of Rs.10 lakhs the amount due from the Respondent Company to the Claimant was Rs.6,76,854.000. Towards interest on the security deposit @ 18% per

annum from 1.10.1994 to 30.4.1995 was Rs.1,05,000.00. That is how the Claimant demanded the sum of Rs.7,81,854.00.”

6. The scope for hearing objections under Section 34 is now well delineated. An Award can be interfered with only if the same is illegal, i.e. it is beyond the law of the land or is violative of the contractual provisions or is so perverse that it shocks the judicial conscience. I do not find any illegality or perversity or violation of the contractual provisions to interfere with the Award.

7. Mr. Anil Sapra, Learned Senior Advocate, on behalf of the petitioner, strenuously raised two arguments. His first argument was that as per the contract, it was the respondent who had to maintain accounts and since the respondent failed to maintain the accounts, the petitioner was entitled to forfeit the security deposit. The second argument was that the forfeiture of the security deposit was justified because the petitioner was entitled to do the same as per para 19B of the contract between the parties.

8. In my opinion, both the contentions as raised by the learned senior counsel for the petitioner are without any merit. This is because the admitted fact is that the petitioner had the security deposit of Rs.10 lacs of the respondent and which it was to return subject to the payment of interest @ 18% per annum. If the petitioner seeks to adjust this security deposit towards its claims, the onus of proof was surely on the petitioner to prove its claims so that such amount could be sought to be adjusted against the

security deposit. If the petitioner miserably fails to lead any evidence whatsoever to discharge its onus of proof that it had valid claims, I cannot understand as to how the petitioner can succeed. After all, since the petitioner was seeking amounts from the respondent on the ground that the petitioner had carried the parcels/cargo for which the respondent had collected charges, nothing was easier for the petitioner than filing the necessary proof with respect to the ACNs for which it did carry the cargo/parcels and when reconciled with the monthly statements it would have shown that payments for such ACNs have not been received by the petitioner. The petitioner cannot, on account of its failure to discharge its onus of proof, simply by an assumption on the basis that the respondent failed to maintain its accounts, in my opinion, automatically succeed in its claims because the petitioner is entitled to its claims only and only if the respondent had collected monies under the ACNs and for which actually transportation of the cargo/parcels was done by the petitioner and booking amounts received by the respondent. As already stated, the petitioner has miserably failed in discharging its onus of proof.

9. Even sitting as an Appellate Court, I would not have interfered with the findings as given in the Award because the same are based on the failure to discharge the onus of proof and the scope of hearing before this Court is further limited because I am not sitting as an Appellate Court but hearing objections under Section 34, the scope of which is narrower than a

Court hearing appeal under the Code of Civil Procedure. In view of Paras 23 to 27 of the Award, I do not find any illegality or perversity whatsoever in the Award for this Court to interfere with. Violation of the contractual provisions, as alleged by the learned senior counsel, cannot automatically amount to an assumption of discharge of onus of proof and an automatic entitlement to the claims which it had to prove before it sought to adjust/set off its claims against the security deposit.

10. Accordingly, I do not find any merit in this objection petition. The objection petition is therefore dismissed with no order as to costs because the respondent was not represented in these proceedings.

With the aforesaid observations, the objection petition stands disposed of.

VALMIKI J.MEHTA, J

March 03, 2010
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