

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

O.M.P. No. 380/2003

Date of decision : March 17, 2010

M/S. BATA INDIA LTD.

... Petitioner.

Through: Mr. Raman Kapur, Advocate

VERSUS

DIRECTOR GENERAL OF CIVIL SUPPLIES & DISPOSALS Respondent

Through: Ms. Geeta Sharma, Advocate with Ms.
Preeti Dalal, 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 objection petition under Section 34 of the Arbitration & Conciliation Act, 1996 challenges the Award dated 22.4.2003 passed by the sole

Arbitrator. The petitioner was the claimant and the respondent in addition to defending the claims, also filed its counter claims.

2. The dispute between the parties arose with regard to a contract for supply of the shoes by the petitioner to the respondent. A contract was entered into between the petitioner and the respondent and where under the petitioner had to supply indented shoes for the period from 13.1.1994 to 12.1.1995. The contract in question was a rate contract. The disputes which arose between the parties were on account of the fact that the respondent placed two different orders on the petitioner on two dates being 9.1.1995 and 11.1.1995, however admittedly, the petitioner failed to supply the shoes as indented for under the orders placed on 9.1.1995 and 11.1.1995. Accordingly, the Arbitrator dismissed the claim of the petitioner for balance price claimed by the petitioner with respect to the other supplies made under the same contract by allowing withholding and adjustment of such amounts on the ground that the respondent had suffered loss by its action of risk purchase and as per which risk purchase action the contractual shoes had to be purchased by the respondent at higher rates.

3. Mr. Kapur on behalf of the petitioner strenuously raised two contentions challenging the Award. His first contention was that the contract was not extended from 13.1.1995 to 31.1.1995. The second argument was that no orders were in fact placed on 9.1.1995 and 11.1.1995.

4. So far as the contention of Mr. Kapur that the contract was not extended upto 31.1.1995, all that I need to state is that the Arbitrator has not proceeded on that basis and has not dismissed the claim of the petitioner and allowed the counter claim of the respondent by holding that the contract was extended up to 31.1.1995. The Arbitrator has in fact proceeded on the basis that the contract was only valid up to 12.1.1995 and he has only considered the orders placed by the respondent upon the petitioner before 12.1.1995. I therefore need not to go into the first contention as raised by the counsel for the petitioner.

It is in fact the second contention which was very strenuously pressed by the petitioner before this Court. The counsel for the petitioner took me through the photocopies of the postal record to contend that the telegrams placing the orders by the respondent were not dated of 9.1.1995 or 11.1.1995 and were of dates subsequent to 12.1.1995. I have personally gone through the relevant postal documents. Firstly, so far as the document showing the telegrams sent by the respondent to the petitioner placing the order on 9.1.1995 is concerned, I find from a reference to the record that the postal record does show that the telegrams have in fact been sent on 9.1.1995. The Arbitrator has accepted this evidence. I do not find any perversity or illegality in the action of the Arbitrator therefore in holding that certain orders were in fact placed upon the petitioner on 9.1.1995. So far as the orders placed by the respondent on the petitioner on

11.1.1995 are concerned, no doubt, the postal stamp is dim and the date is not clear, however, the Arbitrator, in my opinion, has rightly relied upon the official out bond register of the respondent which contains the entry of the despatch of the telegrams whereby the order was placed upon the petitioner on 11.1.1995. The authenticity of the register is established from the fact that above and below the entry of the telegrams being sent to the petitioner on 11.1.1995, there are other entries showing telegrams issued to other parties also. This is an official record. I do not think that the Arbitrator committed any illegality in considering this official record as evidence in proof of the despatch of the telegrams on 11.1.1995. I may also note that for both the dates of 9.1.1995 and 11.1.1995, the typed copies of the telegrams show the placing of the orders by the respondent to the petitioner show the dates of the telegrams as 9.1.1995 and 11.1.1995. In this view of the matter, the Arbitrator is perfectly justified in holding that the respondent had to be compensated for the risk purchase action in purchasing the shoes at a higher cost. The following paragraphs of the Award contain the appropriate reasoning and conclusions, which I adopt and which also I have already stated are neither illegal nor perverse so as to entitle this Court to interfere with the same under Section 34. The relevant portions of the Award are:

“COUNTER CLAIMS OF THE RESPONDENTS.

The respondents have prayed for the rejection of the claimants' claim of Rs.13,81,686.98 along with interest @ 25% per annum submitting that the amount has been withheld against the respondents' Risk Purchase and General Damages' counter

claims of Rs.1,01,49,772.00 (Rupees one crore, one lakh, forty nine thousand, seven hundred seventy two only) in 5 A/Ts viz. A/T No. WL-6..../677 to WL-6/.../681 mentioned at page No.7, para No.14 of the Counter Statement of Claim(U-1 to U-10). The respondents have also filed separate Counter Claims in respect of the aforesaid A/Ts.

PLEADINGS OF THE PARTIES

It has been submitted by the respondents' counsel, Shri Dalip Singh that 'the respondents have Risk Purchase/General Damages claims of Rs.1,01,49,772.00 in 5 A/Ts viz. A/T No. WL-6/.../677 to WL-6/.../681 mentioned at page No.7, para No.14 of the Counter Statement of Claim (U-1 to U-10), therefore, an amount of Rs.13,81,686.98 has been withheld by the respondents in terms of the Clauses 18 and 18-A of the DGS&D-68 (R) which has unconditionally been accepted by the claimants, hence releasing the withheld amount will be a violation of the accepted Terms and Conditions contained in Clauses 18 and 18-A of the DGS&D-68 (Revised) and will also adversely affect the respondents' interest'. It has also been submitted by Shri Dalip Singh that 'the respondents have filed separate counter claims for each of the aforesaid 5 A/Ts claiming the amount mentioned in each counter statement of claim which are lying at U-11 to U-35.

It has been submitted by the claimants' Advocate, Shri Sanjiv Jha during the hearings of this case, also apparent from para No.14 of the Amended Statement of Claim (C-199 to C-207) that ".... 'the respondent issued false, vexatious and frivolous demands under the said purported communication without suffering any actual loss and have claimed the damages'..." The respondents have illegally withheld a total amount of Rs.13,81,686.98 mentioned in para No. 15 of the Amended Statement of Claim, therefore, the claimants are entitled to claim an interest @ 25% per annum on the withheld amount.

AWARD

It is apparent that the claimants-M/s Bata India Ltd. have received that demand notices from the respondents claiming the amount mentioned in para No.14 of the Counter Statement of Claim (U-1 to U-10) except the claim amount mentioned at Sl.No.1 viz. Rs.1,55,772.00 but failed to deposit the amount that is why the respondents have withhold the claim amount of Rs.13,81,686.98. The submissions made by the UOI's counsel, Shri Dalip Singh in respect of withholding the amount have some force as the respondents are entitled in terms of Clause 18 and 18A of the DGS&D-68(R) to withhold an amount whenever any claim or claims for payment of a sum of money arises out of or under the contract against the contractor and if arises out of under any other contract made by the contractor hence the respondents' prayer for not releasing the claimants' claim amount of Rs.13,81,686.98, with interest @ 25% per annum, is allowed.

The respondents have filed 5 Counter Claims claiming the amounts mentioned under each Counter Statement of Claim of the respective A/Ts towards the R.P./General Damages have also been argued by both the parties during the hearings. I have heard both the parties on each and every Counter Claim and have perused the

pleadings/documents filed by both the parties. The findings in respect of the Counter Claims raised by the respondents in their respective Counter Claims (U-11 to U-35) are as under:-

PLEADINGS OF THE PARTIES.

It has been submitted by the claimants' Advocate, Shri Sanjiv Jha that the alleged telegrams dt. 9.1.95 and 11.1.95(C-145 to C-148, Annexure 'G' of the Claim statement) placing the alleged A/Ts have not been received by the claimants. The claimants have received only the post copies of the alleged telegrams after the expiration of the currency of the subject Price Agreement dt. 3.3.94 (C-15 to C-22) i.e. after 12.1.95, therefore, there is no binding contract between the parties, hence the alleged counter claims of the respondents are not tenable.

It has been submitted by the respondents' counsel, Shir Dalip Singh that the currency of the Price Agreement dt. 3.3.94 was from 13.1.94 to 12.1.95. The Acceptance of Tenders (A/Ts) were despatched on 9.1.95 and 11.1.95 hence in terms of the Section 3 and 4 of the Indian Contract Act, the subject A/Ts are concluded/binding contracts between the parties.

AWARD/FINDINGS.

The submissions made by the respondents' Counsel, Shri Dalip Singh has a force as it is apparent from the documents filed by the respondents that the subject Acceptance of Tenders (A/T) Supply Orders (S.Os.) No.WL-6...../678 dt. 9.1.95 (U-79), WL-6...../679 dt. 11.1.95(U-126), WL-6...../680 dt. 11.1.95 (U-189), WL-6...../681 dt. 11.1.95 (U-241) and WL-6...../677 dt. 9.1.95 (U-294) were despatched vide the telegraphic receipt lying at pages U-80, U-127-128, U-190-191, U-242-243 and U-295 respectively i.e. the communications in respect of the A/Ts/Supply Orders were put in a course of transmission on 9th and 11th Jan.,1995 i.e. well before the expiration of the currency of the Price Agreement viz. well before 12.1.95 asking the claimants to supply the stores by 31.5.95, 30.6.95, 31.8.95, 30.9.95 and 30.4.95 respectively. The claimants failed to supply the stores within the delivery period hence have committed the breach of the contract. The A/Ts were cancelled by the respondents at the risk and cost of the claimants. The respondents have resorted valid Risk Purchases (R.Ps.) by way of placing the R.A. A/Ts on M/s Depra Industrial Polymers (P) Ltd. etc. who have completed the supplies. The respondents have suffered the loss due to the breach of the contract committed by the claimants-M/s Bata India Ltd. hence the respondents have claimed an amount of Rs.1,01,49,772.12 towards the Risk Purchase loss and General Damages by way of filing the Counter Claims for each aforesaid cancelled A/Ts and S.Os. The respondents' Counter Claim towards the R.P. loss as well as the General Damages and the finding/award in respect of the Counter Claims are as under:-

Counter Claim No.1(a)(i).

The respondents have claimed (By way of filing the counter claim) an amount of 20,71,836.00 (Rupee twenty lakh, seventy one thousand, eight hundred thirty six only) towards the risk purchase loss and in the alternate as general damages vide the Counter Statement of Claim (U-11 to U-14) dt. 22.11.2000.

AWARD

M/s Bata India Ltd. failed to furnish the security deposit and also failed to supply the subject stores in terms of the A/T No. WL-6/225/0055/17.2.94/66/654/RP/COAC/678 dt. 9.1.95 (U-79 to U-91) hence have committed the breach of the contract. The contract was cancelled at the risk and cost of M/s Bata India Ltd. and the R.P.A/T dt. 25.8.95 (U-117 to U-124) was placed on M/s Derpa Industrial Polymers (P) Ltd. who have completed the supplies and full payment has been made to the R.P. A/T holder as apparent from CCA's letter (U-345) dt.22.11.2000 i.e. the respondents have suffered the loss due to the breach committed by M/s Bata India Ltd., therefore, the respondents' counter claim towards the R/P loss amounting to Rs.20,71,836.00 is allowed."

Each of the counter claims has thereafter been dealt with by the Arbitrator on the basis of the aforesaid and therefore I need not reproduce other portions of the Award.

5. In my opinion, therefore, there is no merit in the objections of the petitioner. The Arbitrator has therefore rightly allowed the counter claim of the respondent because it had incurred higher cost for purchasing of the shoes which the petitioner contractually had to supply, but which it failed to supply and thereby committed a breach of the contract.

6. The last point which has been urged by Mr. Kapur and which is an argument which I accept is that the Arbitrator has unnecessarily awarded a very high rate of interest @ 15% per annum. The Supreme Court in the recent chain of judgments reported as *Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and others*, 2005 (6) SCC 678, *McDermott International Inc. v. Burn Standard Co. Ltd. and others*, 2006 (11) SCC 181, *Rajasthan State Road Transport Corporation v. Indag Rubber Ltd.*, (2006) 7

SCC 700 & Krishna Bhagya Jala Nigam Ltd. v. G.Harischandra, 2007 (2) SCC 720 and State of Rajasthan Vs. Ferro Concrete Construction Pvt. Ltd (2009)3 Arb. LR 140(SC) has mandated the Courts to reduce the high rates of interest as granted under the Award on account of changed economic scenario and the consistent fall in the rates of interest. This Court has also therefore consistently been awarding interest @ 9% per annum simple. In the facts and circumstances of this case also, I reduce the rate of interest as granted by the Award from 15% to 9% per annum simple. I am, however, not changing the period for which the interest has been granted.

7. With the aforesaid observations, the petition is dismissed leaving the parties to bear their own costs.

VALMIKI J.MEHTA, J

March 17, 2010
Ne