

F-41

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

+ O.M.P. 394/2003

FOOD CORPORATION OF INDIA Petitioner
Through: Mr. Sukumar Pattjoshi, Advocate.

versus

MAHESH KUMAR AND ANR. Respondents
Through: None.

% Date of Decision : April 23, 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. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging the arbitral Award dated 16th June, 2003 passed by the sole Arbitrator Mr. Justice (Retd.) N.G. Das. It is pertinent to mention that the matter was referred to the learned Arbitrator by the Indian Council of Arbitration.

2. The relevant facts of this case are that petitioner-objector floated a tender dated 11th August, 1999 for disposal of more than two years

old 'D' category rice lying at its various depots. On 23rd September, 1999, the tender was awarded to respondent-claimant. However, as respondent-claimant failed to deposit 10% of the costs within a period of seven days, petitioner-objector issued a telegram dated 01st October, 1999 informing the respondent-claimant that EMD deposit had been forfeited and that rice stocks would be sold at the respondent's risk and costs as per the tender terms and conditions.

3. Though the Arbitral Tribunal found that respondent-claimant had breached the contract, it did not pass an award with regard to compensation, as according to the learned Arbitrator the petitioner-objector had failed to prove loss on the date of the breach. The reasoning of the Arbitral Tribunal in the impugned Award is reproduced hereinbelow:

“22. Issue nos. 6 and 8

It is not denied that the rice in question was sold subsequently at a lesser price to two other concerns i.e. M/s. Vinayak Manu Trade (P) Ltd., and Chunni Lal Ramchander, Nokha. But what has been contended quite emphatically by Mr. Pathak, the Sr. Counsel for the Respondent is that since it is an admitted fact that breach of contract occurred 1.10.1999, it is incumbent upon the claimant to prove what was the actual market price of the rice in question on that date. I find much force in this submission of Mr. Pathak and Mr. Mishra, the learned counsel for the Claimant could not assign any valid reason as to why the rice in question was sold after about 5½ months.

23. There is nothing on record to show what was the second highest rate when the rate of respondent was accepted. There is nothing on record to show whether the second highest rate was lower than that the rates of M/s. Vinayak Manu (P) Ltd., and Chunni Lal RamChander.

Moreover no cogent reason has been assigned as to why there were two rates for the same quality of rice. With respect to this questions, the principles of law has been well settled by a Catena of decisions, one of which is a decision of the Supreme Court rendered in the case of Murli Dhar Chiranji Lal Vs. Harish Chand Dwarka Das reported in AIR 1962 SC 366. In that case Supreme Court held that the respondent having failed to prove the rate of similar canvas in Kanpur on the rate of breach it was not entitled to any damages. In the present case the claimant did not make any endeavour to prove what was the market price of the same goods on 1.10.1999. There is also no proof in respect of damages suffered by the claimant. Therefore in view of the decision of the Supreme Court as referred to above I am to hold that the claimant is not entitled to receive the difference in price, although the claimant suffered loss. Both these issues are accordingly determined against the claimant.

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25. *Mr. Pathak in his written arguments at page 23 stated that no evidence was led to show of the costs and expenses that were incurred in the alleged storage of rice. According to him claimant is not entitled to get any amount towards damage unless and until it is affirmatively proved that he suffered losses for storage. It is true that evidence adduced on behalf of the claimant is not sufficient to show what amount of loss the claimant suffered for storage. According to Mr. Pathak the claimant ought to have disposed of the rice in question within 10-15 days since it is perishable goods. I have already made the finding that claimant did not adduce evidence to show why this unusual delay occurred. But it cannot be denied that because of non-lifting of the rice in question in time by the respondent the godown remained occupied. The Claimant claimed storage charge @10 paisa per bag. But there is no evidence on record to show how many bags were there and what expenditure the claimant incurred for their proper maintenance. I am therefore of the view that the claimant should get a taken sum of Rs.10,000/- as storage charges. As regards the contention of Mr. Pathak that earnest money cannot be forfeited in view of the facts and circumstances of the case, I am of the view that earnest money and security money are not the same. According to Earl Jowitt in the "Dictionary of English Law" at page 689: giving an earnest or earnest-money is a mode of signifying assent to a contract of sale or the like by giving*

to the vendor a nominal sum (e.g. a shilling) as a token that the parties are in earnest or have made up their minds". As observed by the Judicial Committee in Chiranjit Singh Vs. Har Swaroop, AIR 1926 PC 1; "earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through by reason of the fault or failure of the vendee".

26. It has already been held by me that contract failed because of the lapse on the part of the respondent and it cannot be denied that for non-lifting of the rice in question in time the claimant suffered loss. I am therefore of opinion that amount of earnest money has been rightly forfeited and that the claimant is also entitled to get storage charges for a sum of Rs.10,000/- only. Both issues are accordingly decided in favour of the claimant."

(emphasis supplied)

4. Mr. Sukumar Pattjoshi, learned counsel for petitioner-objector impugns the arbitral Award insofar as it pertains to issue Nos. 6 and 8. He submits that the Arbitral Tribunal even after coming to the conclusion that respondent-claimant had committed breach of the contract, has not awarded any compensation to petitioner-objector on the ground that the petitioner had failed to prove loss on the date of breach.

5. Mr. Pattjoshi submits that petitioner-objector being a Public Sector Corporation could not have executed a risk purchase tender on the date of breach itself. He further submits that impugned Award is contrary to contractual provisions in particular Clauses (H)(viii) and (O) of the tender which read as under:

“(H) PAYMENT/DELIVERY SCHEDULE:

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(viii) In the event of failure to complete the payment within the specified time, and to present the Bank Draft or deposit at Call Receipt etc. within the aforesaid period, the Food Corporation of India, shall have the option to adjust all losses incurred by the Corporation from the Earnest Money converted into security deposit in full and resale the stocks and would also recover from the firm the loss suffered by the Corporation as a result of the resale of the stocks at the risk and cost of the original buyer.

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(O) The goods sold will be removed by the buyer from the site of accumulation within the period specified in the Release Order. If the stocks sold are not removed within the time specified or delivery is not taken at the time and date given in the Release Order, Food Corporation of India may resale the stocks at the buyer's risk and cost. If the Food Corporation of India is unable to resale the goods within 3 months from the date of expiry given in the Release Order, the decision of the Food Corporation of India in this regard will be final. The buyer shall also be liable to pay storage charges at the rate of Ten Paise per bag or part of a bag per day subject to a minimum of Forty Paise per bag or part thereof. These charges will be recovered in respect of the entire quantities of the unlifted stocks at the end of free period before the delivery of such stocks in actually effected or till the date of release (inclusive). Delivery would be given only during the working hours on all Food Corporation of India working days on presentation by the buyer to the stocks holder of the copy of Release/Delivery order issued by the SRM/District Manager, Food Corporation of India or an Officer authorised by him. Without prejudice of the right to resale, the FCI may at their option permit the buyer to remove on payment in advance of aforesaid charges on account of storage space from the date of following the last date of the free period of delivery given in the Release Order, the said consignment or any part thereof remaining uncleared within the extended period.”

6. I am of the view that the 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, after referring to a catena of judgments including *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.* reported in (2003) 5 SCC 705 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 either the substantive provisions of law or the contractual provisions and/or is opposed to public policy. Even though Section 34 of Act, 1996 permits a Court to interfere on the ground of an arbitral award being violative of public policy, various judgments of the Supreme Court place an extremely restricted and limited interpretation on the term 'public policy'. (Refer to *State of Rajasthan & Ors. Vs. Basant Nahata* reported in (2005) 12 SCC 77).

7. It is settled legal position, both under Arbitration Act, 1940 and to a even greater extent under Act, 1996, that arbitral tribunal's decision is generally regarded as final and courts cannot substitute its own evaluation on questions of law and facts to come to the conclusion that arbitral tribunal has acted contrary to the bargain between the parties. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisalment of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Courts to take upon itself the task of being a judge on

the evidence before the arbitrator (Refer to *M/s. Sudarsan Trading Co. Vs. Government of Kerala and Anr.* reported in (1989) 2 SCC 38).

8. Consequently, this Court is of the view that findings of fact given by the Arbitral Tribunal are not liable to be interfered with unless such findings are perverse and unconscionable. Moreover, as held in *Lesotho Highlands Development Authority Vs. Impregilo SpA and others* reported in 2005 UK HL 43, arbitrators do not exceed their powers simply by making a mistake. In *Burchell Vs. Marsh* reported in 58 U.S. 344 (1855), the United States Supreme Court held that if an award is within submission, and contains an honest decision of the arbitrators, then a Court would not set it aside for error, either in law or fact. According to the United States Supreme Court, a contrary course would be a substitution of the judgment of the judiciary in place of the chosen forum, namely, the arbitrators and would make the award the commencement, not the end of the litigation.

9. In any event, the main issue that arises for consideration in the present proceedings is the test to be adopted for computation of damages. Section 73 of the Indian Contract Act, 1872 (hereinafter referred to as “Act, 1872”) prescribes the test for computation of damages. The said Section 73 reads as under :-

“73. Compensation for loss or damage caused by breach of contract.- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties

knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.-- *When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.*

Explanation.-In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused-by the non-performance of the contract must be taken into account."

10. In ***A.K.A.S. Jamal Vs. Moolla Dawood, Sons & Co.*** reported in ***(1916) AC 175***, the Privy Council has held that Section 73 is declaratory of the common law as to damages. In my view, Section 73 of Act, 1872 is clearly based on two rules. Compensation is recoverable for any loss or damage which :-

- i) naturally arose in the usual course of things from the breach or,
- ii) the parties knew, at the time of contract, as likely to result from the breach.

11. The explanation attached to Section 73 provides for the duty to mitigate damages.

12. In fact, in ***A.K.A.S. Jamal's*** case (supra) the Privy Council held as under :-

"The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is

the measure of damages for breach the difference between the contract price and the market price at the date of the breach--with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach--or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. Staniforth v. Lyall (1) is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract:.....

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Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares and became entitled to damages such as the law allows.....

(emphasis supplied)

13. In fact, in the present case, the Arbitral Tribunal as to my mind followed the correct test of measure of damages as stipulated in *M/s.*

Murlidhar Chiranjilal Vs. M/s. Harishchandra Dwarkadas and Anr.

reported in (1962) 1 SCR 653 wherein the Supreme Court has held as under:-

“The contention on behalf of the appellant is that the contract was for delivery f.o.r. Kanpur and the respondent had therefore to prove the rate of plain (not coloured) canvas at Kanpur on or about the date of breach to be entitled to any damages at all. The respondent admittedly has not proved the rate of such canvas prevalent in Kanpur on or about the date of breach and therefore it was not entitled to any damages at all, for there is no measure for arriving at the quantum of damages on the record in this case. Where goods are available in the market, it is the difference between the market price on the date of the breach and the contract price which is the measure of damages. The appellant therefore contends that as it is not the case of the respondent that similar canvas was not available in the market at Kanpur on or about the date of breach, it was the duty of the respondent to buy the canvas in Kanpur and rail it for Calcutta and if it suffered any damages because of the rise in price over the contract price on that account it would be entitled to such damages. But it has failed to prove the rate of similar canvas in Kanpur on the relevant date. There is thus no way in which it can be found that the respondent suffered any damages by the breach of this contract.

The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps : (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London [1912] A.C. 673). These two principles also follow from the law as laid down in s. 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be re-imbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to

damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.”

(emphasis supplied)

14. Consequently, in my opinion, petitioner-objector is not liable to any compensation as it failed to prove the difference in the contract price and market price of ‘D’ category rice on the date of breach. In my view, neither Clauses (H)(viii) and (O) of the tender stipulate a different test of measure of damages nor could they do so as the contractual provisions have to be in conformity with law.

15. Though the learned counsel for petitioner-objector tried to place reliance on the judgment of the Supreme Court in ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.*** (supra), but I am of the view that the said judgment has no application to the facts of the present case as admittedly there was a market price available on the date of breach. In fact, as rightly pointed out by the Arbitral Tribunal, petitioner-objector had not led any evidence to show as to what was the prevalent market price on date of breach. Accordingly, I am of the view that as the finding of the Arbitral Tribunal with regard to issue Nos. 6 and 8 is plausible and a possible one, it calls for no interference in Section 34 jurisdiction.

16. As far as the issue of storage charges is concerned, I am not inclined to interfere with the same as the Arbitral Tribunal has reached a finding of fact that there was unusual delay on the part of petitioner-objector in disposing of the contracted goods and further petitioner-objector had failed to prove as to how many bags were there.

17. In view of the aforesaid, present petition filed by petitioner-objector are dismissed but with no order as to costs.

MANMOHAN,J

APRIL 23, 2010

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