

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

+ **FAO No.249/2005**

% **7th July, 2011**

THE STATE TRADING CORPORATION OF INDIA LTD. Appellant

Through: Ms. Nidhi Minocha, Advocate & Ms.
Sangeeta Bharti, Advocate.

VERSUS

M/S TINI PHARMA PRIVATE LTD. Respondent

Through: Mr. S. Madhusudan Babu, 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? **Yes**
3. Whether the judgment should be reported in the Digest? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this first appeal under Section 39 of the Arbitration Act, 1940 (in short 'the Act') is to the impugned judgment dated 29.4.2005 of the court below which has accepted the objection petition of the present respondent filed under Section 30 and 33 of the Act against the Award dated 10.5.1991 passed by the arbitrator and thereby the Award has been set aside.

2. The facts of the case are that the appellant State Trading Corporation

is a canalizing agency of the Government of India. The need for canalizing arises on account of scarcity of certain materials/goods/products. In the present case, the matter relates to the chemical used by the drug industry and which is referred to as 6-APA. The respondent on account of local purchase of 1820 kgs of the subject material from within the country became entitled to import 2980 kgs of the material at a price of Rs.1013 per kg. An allocation for 975 kgs was made in favour of the respondent by the appellant as per the allocation order dated 30.12.1985 which clearly provided that the price was provisional and shipment was to be by air (High Seas). The issue with respect to the price being provisional is also clarified in Clause 2 of the terms and conditions of the allocation order and which Clause reads as under:-

“2.(a) In cases where the price stipulated in the A.O is provisional it is subject to revision at any time without notice. In the event of any revision in the price, even after delivery of the goods, the allottee shall be liable to pay balance within 7 days of the receipt of intimation of revision failing which STC reserves the right to charge interest on the unpaid balance amount at 18% per annum from the date of revision of the price till the date of full payment.”

3. The facts are that though the respondent paid the price to the appellant with respect to the material on 29.1.1986, however, the subject shipment did not land at the Indian Airport (Mumbai) till 3.3.1986. On the consignment landing in India a delivery order was issued in favour of the respondent on 5.3.1986. The price of the material was increased by the

Government of India as per its letter of even date and which reads as under:-

“No.8(16)/84-D.II
Government of India
Ministry of Industry
Department of Chemical & Petro-Chemicals
Office of the Development Commissioner (Drugs)
New Delhi, the 5th March, 1986

To

State Trading Corporation,
35, Chandralok Building,
Janpath,
New Delhi

Subject: PRICE OF 6-APA.

Sir,

I am directed to say that in exercise of the powers available under paragraph 73 of the Import & Export Policy for the period April 1985 to March, 1988, Government fixes the pooled price of 6-APA at Rs.1778/-per kg. The retention price for the indigenous manufacturers of 6-APA is also fixed at Rs.1778/- per kg.

Your faithfully

(PRADIP MEHRA)

DEPUTY SECRETARY TO THE GOVERNMENT OF INDIA

Copy to:

1. I.D.P.L
2. H.A.L
3. Alembic Chemical Works Co. Ltd.,
4. Max (India) Limited
5. Pharmchem
6. Gujarat Lyka
7. B.I.C.P.

(PRADIP MEHRA)

4. The court below accepted the objections and refused to allow the appellant to charge enhanced price in terms of the Government of India, Ministry of Industry's letter dated 5.3.1986 on the ground that the price of

the goods had already been paid on 29.1.1986 and therefore it should be held that the ownership in the goods had already passed in favour of the respondent and consequently, once the sale was complete there was no question of applicability of the higher price as informed by the Ministry in its letter dated 5.3.1986. It was held that the letter dated 5.3.1986 cannot operate retrospectively and prices can only increased with respect to any sales made w.e.f. 5.3.1986 and since in the present case, the trial court held that the property in goods had passed when the complete price was paid on 29.1.1986, therefore, the respondent was held not liable to pay the increased price. The objections were therefore accepted and the Award of the Arbitrator was set aside, by which, the respondent was directed to pay the differential price in view of the Clause 2.(a) of the terms and conditions and also Clause (g) of the allocation order dated 30.12.1985 which provided that the price stated in the allocation order was only provisional.

5. Before this court, learned counsel for the appellant argued that the description of the sale, whether called a High Seas Sale or otherwise, cannot take away the fact that the transfer of property/ownership in the goods has necessarily to be governed by the Sale of Goods Act, 1930, inasmuch as, what was being sold by the appellant to the respondent were goods being movable and which is the subject matter of the Sale of Goods Act, 1930. Counsel for the appellant has relied upon the provision of 2(4), Section 19, Section 23 and Section 25 of the Sale of Goods Act, 1930 to canvass that

property/ownership of goods in the facts of the present case only passed on 5.3.1986 when the delivery order was issued to the respondent, though, unfortunately for the respondent, the Ministry on this very date increased the price of the subject material. The aforesaid Sections relied upon by the learned counsel for the appellant are reproduced herein below.

“Section 2(4) : “document of title goods” includes a bill of lading, dock-warrant, warehouse keeper’s certificate, wharfingers’ certificate, railway receipt,[multimodal transport document,] warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;

Section 19. Property passes when intended to pass-
(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

Section 23. Sale of unascertained goods and appropriation.- (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(Emphasis argued)

6. A reference to the aforesaid Sections shows the following:-

- (i) Ownership in the property passes when the party intends the same to be passed.
- (ii) In case of documents such as the bill of lading an airway bill etc., if the

goods contained in the same are deliverable to consignee and consignee has physical possession of this document being the bill of lading, an airway bill etc., only then the ownership in the property passed to the consignee.

(iii) Since the delivery order was in fact issued only on 5.3.1986, and which order has not been issued with any delay inasmuch as the goods in question in fact landed on the Indian shore only on 3.3.1986, means that ownership in the property passed only on 5.3.1986.

(iv) Payment of price has nothing to do with the transfer in ownership in the property inasmuch price/consideration in a contract can be paid prior to the contract simultaneously with the contract or even after the ownership in the property by virtue of the provision of Section 2(d) of the Contract Act, 1872.

(v) No doubt, there is no retrospectivity to the price as became payable by the letter of the Ministry of Industry dated 5.3.1986, however, since ownership was only transferred on 5.3.1986 when delivery order was issued, the respondent was liable to pay enhanced price.

7. In reply, learned counsel for the respondent sought to argue that since it is a high sea sale, ownership had passed at the time when the price was already paid i.e. on 29.1.1986. When queried as to whether he has any judgment in support of his argument or as to whether he can cite any provision of law rebutting the provision of law/sections of the Sale of Goods Act, 1930 and Contract Act, 1872 quoted above by the learned counsel for

the appellant, the counsel for the respondent could not cite any provision of law to argue that in the facts of the present case, the ownership would have been transferred once the price was paid on 29.1.1986. It is also argued by the learned counsel for the respondent that the Sale of Goods Act, 1930 is not applicable to a High Sea sale. Once again on what basis this argument is put forth i.e. which Act applies or which decision applies, the learned counsel for the respondent could not cite anything in support of his argument.

8. The power of a court hearing objections under Section 30 and 33 of the Arbitration Act, 1940 is limited. An Award can only be set aside if the Arbitrator misconducts himself or the proceedings. The Arbitrator, however, cannot go against direct provisions of law and admitted facts of the case. In the present case, not the arbitrator but the court below has gone against the direct provision of law as applicable, being the provision of the Sale of Goods Act, 1930 and the admitted facts that the delivery order was only issued on 5.3.1986. Since the goods landed on 3.3.1986 at the Indian Airport i.e. Mumbai, it cannot be said that there was no delay in issuing of the delivery order. There was no evidence before the Arbitrator as to how in such circumstances it can be said that delivery order is unnecessarily delayed. The respondent's counsel could not dispute that admittedly no evidence was led of delivery orders being issued by the appellant to other persons simultaneously to the payment of the price so as to establish that the delivery order in the facts and circumstances of the present case given

within two days of landing of the goods of the Indian shore can be said to be delayed. In fact, learned counsel for the appellant rightly argued that there was no malafides of the appellant inasmuch as the letter dated 5.3.1986 was not known even to the appellant and came to its knowledge much after 5.3.1986 inasmuch as this letter of the Ministry was circulated in around 10.3.1986. The trial court has thus clearly committed an illegality and perversity in setting aside the Award.

9. Learned trial court also set aside the Award on the ground that Award was passed after the statutory period of four months. This ground is again misconceived inasmuch as the respondent participated during the entire proceedings before the arbitrator even after the period of four months without any objection and therefore it did not lie in the mouth of the respondent to contend that the Award is liable to be set aside as it was passed after the period of four months. Learned counsel for the appellant has relied upon ***Hindustan Steel Works Construction Ltd. Vs. C. Rajasekhar Rao (1987) 4 SCC 93*** and para 2 thereof which reads as under:-

“2. He, however, firstly contends that the award was made beyond time. He further contends that the Umpire had no jurisdiction to proceed with the arbitration on or about December 18,1984 as the period of two months from the date of his entering upon the references vis., October 20,1984 had expired on December 18,1984. According to the said objections, the Umpire became functus officio. It was contended that the power to extend the period of passing the award was vested in the court alone under Section 28 of the Arbitration Act and it was not permissible for the parties to

extend the time. We are unable to accept this position. Mr. Markandeya drew our attention to certain observations of this Court in the case of *State of Punjab v. Hardyal* (1985) 3 SCR 649. He relied on the observations of the court at page 656 and emphasised that law precludes parties from extending time after the matter had been referred to the arbitrator; it would be a contradiction in terms to hold that the same result could be brought about by the conduct of the parties. These observations, in our opinion, are out of context. The policy of law is that the arbitration proceedings should not be unduly prolonged. The arbitrator therefore has to give the award within the time prescribed or such extended time as the court concerned may in its discretion extend and the court alone has been given the power to extend time for giving the award. The court has got the power to extend time even after the award has been given or after the expiry of the period prescribed for the award. But the court has to exercise its discretion in a judicial manner. In that case this Court found that the High Court was justified in taking the view that it did. **This power, however, could be exercised even by the appellate court.** In view of the policy of law that the arbitration proceedings should not be unduly prolonged and in view of the fact that the parties have been taking willing part in the proceedings before the arbitrator without a demur and had all along been willing to extend time, this will be a fit case, in our opinion, for the extension of time. We accordingly extend the time for giving the award and the award will be deemed to have been given in time. In this case, it appears that under Section 28 and in the light of Section 3 of the First Schedule the parties are allowed to extend the time. In this connection reference may be made to *H.K.Wattal v. V.N.Pandya* (1974) 1 SCR 259, where this Court reiterated that sub-section (2) of Section 28 indicated one exception to the above rule that the arbitrator could not enlarge the time, and that was when the parties agreed to such an enlargement. It is clear this Court reiterated that the arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the arbitration the parties to the arbitration agreement consent to such enlargement of time. In this case precisely it so happened. Furthermore the parties have proceeded before the Umpire on that basis which is just and proper and furthermore the time should be extended as was done in the case of *State of Punjab v. Hardyal* (1985) 3 SCR 649. In the aforesaid view of the matter we are unable to accept the

submission on behalf of Shri Markandeya that the award of the
Umpire was beyond time.” (Emphasis argued)

10. It is thus argued that this court can also extend the time. I accept this argument and accordingly, I exercise my powers under Section 28 of the Arbitration Act, 1940 in the facts and circumstances of the present case, stated above, and extend the time for making of the Award.

11. In view of the above, the court below having acted against the direct provisions of law and admitted facts which appear in the present case and as stated above, has clearly gone beyond the mandate of Sections 30 and 33 of the Arbitration Act, 1940 in interfering with an Award which clearly cannot be said to be illegal or perverse in any manner whatsoever or that the Arbitrator can be said to have misconducted himself or the proceedings. The appeal is accepted. The impugned judgment dated 29.4.2005 allowing the objections of the respondent, is set aside. The objections of the respondent under Section 30 and 33 of the Arbitration Act, 1940 are therefore dismissed and the Award of the Arbitrator dated 10.5.1991 is accordingly upheld. The appeal is disposed of accordingly. Trial court record be sent back.

JULY 07, 2011
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VALMIKI J. MEHTA, J.