

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 17th February, 2012

Decision on: 15th March, 2012

O.M.P. No. 369 of 2010

MUNICIPAL CORPORATION OF DELHI Petitioner
Through: Mr. H.S. Phoolka, Senior Advocate
with Ms. Mini Pushkarna and
Mr. Kanwar Faisal, Advocates.

Versus

MITTAL PROCESSORS PVT LTD Respondent
Through: Mr. P.C. Markanda, Senior Advocate
with Mr. Amit Kumar, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
15.03.2012

Introduction

1.1 The Municipal Corporation of Delhi ('MCD') has in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenged the Award dated 13th February 2010 passed by the sole Arbitrator in the disputes between it and the Respondent Mittal Processors Pvt. Ltd. arising out of an agreement dated 23rd February 2005 entered into between MCD and the Respondent for supply of 15,77,535.50 meters of polyester-viscose blend suiting cloth for the purposes of uniform for students studying in MCD Primary Schools.

1.2 MCD also challenges the order dated 10th August 2008 passed by the learned Arbitrator dismissing the MCD's application for lifting of fresh samples of the cloth supplied by the Respondent from the stores of the MCD in the presence of the Respondent or his representative and for sending it for

testing in the IIT, Delhi or any other reputed test laboratory. MCD also challenges another order dated 19th October 2008 passed by the Arbitrator in MCD's application under Sections 12 & 13 of the Act requesting the sole Arbitrator to withdraw from the arbitral proceedings.

Background Facts

2. A Notice Inviting Tender ('NIT') preceding the award of the above contract was published by the MCD in the newspapers on 23rd December 2004. The tender was open on 11th January 2005. The Respondent's bid was found to be the lowest. An agreement was executed on 23rd February 2005 and the supply order was also issued on the same day. The period of delivery was two months i.e. from 23rd February to 23rd April 2005.

3. According to MCD, the Respondent supplied uniform cloth in five lots as under:

- i. 1,70,844.50 meters on 9th March 2005.
- ii. 2,68,109.25 meters on 18th March 2005.
- iii. 4,05,090 meters on 24th March 2005.
- iv. 4,16,619.90 meters on 31st March 2005.
- v. 3,16,871.90 meters on 8th April 2005.

4. In terms of Clause 8 of the contract, the samples drawn from the supplies were to be got tested by MCD from any laboratory decided by it. An inspection committee constituted by the MCD lifted samples randomly from the supplies of the Respondent and sent it to the Punjab Test House, Ludhiana, Quality Marking Center (QMC), Ludhiana and the QMC, Panipat. It is stated that after reports were received from the aforementioned government laboratories in respect of the first and second lots, out of the total

supplies of 15,77,535.50 meters of uniform cloth made by the Respondent, 4,16,436 meters of cloth was distributed amongst the students of the MCD Schools. Payment of Rs.97,79,251/- for the first lot and Rs.1,50,32,886/- for the second lot were made to the Respondent.

5. On 13th February 2005 the Central Bureau of Investigation ('CBI'), on the basis of a complaint received by it, along with the officials of the Vigilance Department of the MCD, carried out a raid in the stores where the supplies of the Respondent had been stored and picked up samples at random and sent them for testing to the IIT, New Delhi and Textiles Committee, Mumbai. MCD then decided to stop the distribution of the uniform cloth. CBI informed the Vigilance Department of the MCD the test reports from IIT, New Delhi and Textiles Committee, Mumbai showed that the cloth samples did not meet the parameters as laid in IS:11248.

6. Since there was a contradiction between the results of testing at the three government laboratories earlier and the testing done at the IIT, New Delhi and the Textiles Committee at Mumbai, the Chief Vigilance Officer ('CVO') of the MCD proposed that the samples also be got tested at Shri Ram Institute for Industrial Research ('SRIIR'), Delhi. Under the orders of the CVO, a Board was constituted to lift the samples of uniform cloth from the supplies of the Respondent. The Board in the presence of an official of SRIIR lifted samples at random from different lots of the uniform cloth supplied by the Respondent. The test report received from SRIIR on 26th September 2005 showed that the uniform cloth did not meet the parameters or the BIS specifications in terms of the contract. Pursuant to the said report, MCD decided to stop distribution of the cloth and further payments to the Respondent. According to the MCD, it wrote letters to the Respondent on 24th October 2005 and 20th December 2005 asking it to lift the uniform cloth

supplied by it. However, the Respondent failed to do so. By a letter dated 22nd December 2005, MCD directed the Respondent to refund a sum of Rs.2,46,12,137/- that was paid to it. MCD alleged that a fraud has been played on it by the Respondent by supplying cloth which did not conform to the BIS specifications.

7. On its part the Respondent filed Civil Writ Petition No.19043 of 2006 in this Court challenging the action of the MCD. During the hearing of the said writ petition, the parties agreed to have the disputes referred to arbitration. By an order dated 23rd April 2007, the Court appointed a retired Chief Justice of the Gauhati High Court as sole Arbitrator to adjudicate the disputes between the parties. Before the learned Arbitrator, Respondent filed 8 claims. The MCD filed its reply to the said claims and also filed 8 counter claims.

Proceedings before the Arbitral Tribunal

8. The learned Arbitrator framed the following issues:

- “1. Whether the Laboratories selected by the Respondent or the Government did not find the supplies in accordance with tender specifications, i.e. up to BIS?
2. Whether the action of the MCD in rejecting the cloth is in accordance with terms of contract?
3. Whether the claimant is entitled to the amount as claimed, damages, security deposit, *pendente lite*, further interest and costs, if so how much amount?
4. Whether the Respondents are entitled to the counter claim from the claimant, if so to what amount?”

9. By an order dated 10th August 2008, the learned Arbitrator rejected an application filed by the MCD dated 26th April 2008 for drawing fresh samples from the cloth supplied by the Respondent and sending it for testing to IIT Delhi or any other reputed test laboratory. The learned Arbitrator

referred to Clause 7 of the agreement which envisaged testing only at one stage. The testing made at that stage by the government laboratories resulted in reports which cleared the quality of the consignments supplied by the Respondent. The MCD had also paid the Respondent for two lots on that basis. The learned Arbitrator held that he could not deviate from the conditions of the contract which did not envisage re-testing of the samples. It was further observed that since the material was lying in the open since 2005 and was exposed to atmospheric conditions it would have deteriorated in the last three years and therefore no purpose would be served in having the samples sent in 2008 for re-testing. It was held that the question whether there were contradictions in the reports relied upon by the MCD would be examined at the stage of arguments.

10. By an order dated 19th October 2008 the learned Arbitrator disposed of an application filed by the MCD under Sections 12 and 13 of the Act seeking that the learned Arbitrator should recuse himself. The learned Arbitrator expressed anguish at the prayer made in the application and withdrew himself from the arbitral proceedings but made it conditional upon the MCD refunding to the Respondent a sum of Rs.2.5 lakhs which were the expenses incurred by them, failing which he would be continued as Arbitrator. Since, MCD failed to pay the aforementioned sum as directed to the Respondent, the learned Arbitrator continued as such and proceeded to pass the impugned Award on 13th February 2010.

The impugned Award

11. As regard the first issue, the learned Arbitrator in the impugned Award held that in view of the contradictions in the reports of IIT Delhi, the Textiles Committee Mumbai and the SRIIR laboratory, Delhi no reliance could be placed on any of the said reports. It was held that the testing of the cloth

samples at the three government approved laboratories in Ludhiana and Panipat and the results thereof, were binding on the parties. The three laboratories later chosen by the CBI and the MCD did not test the material in accordance with the provisions of the agreement and therefore could not be given precedence over the reports of the three government approved laboratories. Also since there was no provision in the agreement for re-testing of the materials after the initial test, the reports of the re-testing could not be relied upon and were irrelevant. The CBI had closed the criminal case on the ground of no evidence. The learned Arbitrator accordingly held that there was no negligence of a criminal nature in the transaction. Further, if the material did not conform to the BIS specifications, it should have been marked rejected by the MCD. However, no such procedure was adopted. Further, no steps were taken by MCD to dispose of the stocks by way of auction. Accordingly, the learned Arbitrator accepted the contention of the Respondent that MCD did not consider the material to be rejected, and therefore did not mark them as such or dispose them. MCD also did not fix any rent for storage of the material. It was held that Clauses 8 and 10 of the contract were mandatory in nature and could not be ignored.

12. The learned Arbitrator then decided the individual items of claim. Against Claim Nos.1 to 3 towards supply of cloth in terms of the bills dated 24th March, 31st March and 23rd May 2005, the Respondent was awarded a sum of Rs.6,38,40,845/-. As regards Claim Nos.4 and 5, MCD was directed to release to the Respondent the FDR towards security deposit in the sum of Rs.25,30,000 as well as a demand draft for a sum of Rs.18,93,043 forthwith. As against Claim No.6 for litigation costs, the learned Arbitrator directed both the parties to bear their own costs. Claim No.7 for a sum of Rs.63,84,084 being the 10% penalty recoverable by the MCD was rejected. As against Claim No.8, the learned Arbitrator awarded interest at 9% per

annum from 5th January 2006 till the date of payment. However, if the MCD settled the awarded amount within a period of 60 days from the receipt of the copy of the Award, no interest would be payable for the said period of 60 days. All the counter claims of the MCD were rejected.

Submissions of counsel

13. Mr. H.S. Phoolka, learned Senior counsel appearing for the MCD first submitted that the interpretation placed by the learned Arbitrator on Clause 8 of the contract was erroneous. It was submitted that in terms of said clause, MCD could get the supplies tested from any lab at its discretion and there was no restriction in the agreement on the drawing of any number of samples. Secondly, it was submitted that the learned Arbitrator erred in holding that there was no stipulation in the BIS specification that if the cloth failed in one parameter, the whole lot was liable to be rejected. Referring to the BIS specification No.IS:11248:1995 as amended in November 1997, it was pointed out that the material supplied by the Respondent did not fall within the permissible variations and therefore did not meet the BIS specification. Thirdly, it was submitted that the learned Arbitrator erred in holding that MCD was estopped from contending that the government laboratories did not have the requisite facilities for testing. It was submitted that there was adequate evidence before the learned Arbitrator to show that the three government laboratories did not possess the necessary expertise and equipments to test the samples submitted to them initially. Fourthly, it was submitted that the learned Arbitrator overlooked the letters dated 24th October, 20th December and 22nd December 2005 written by MCD to the Respondent asking it to lift the uniform cloth. It is submitted that no acceptance of the material was communicated by MCD to the Respondent. It is pointed out that the contradictions, if any, in the test reports of IIT, New Delhi, Textiles Committee, Mumbai and the SRIIR was on account of the

variation in the cloth supplied but each of those test reports showed that the samples failed the critical parameters in one way or the other. Whereas IS:11248 specified that double yarn had to be used in the manufacturing of the cloth, most of the test reports showed that the Respondent had supplied cloth of single yarn. Therefore, there was adequate evidence before the learned Arbitrator to show that the cloth supplied by the Respondent was of inferior quality and not in accordance with the BIS specification. Reliance was placed on the decisions in ***Union of India v. A-1 Sanat & Co. Pvt. Ltd.* (2009) 4 RAJ 189 (Delhi)**, ***Bharat Coking Coal Ltd. v. Annapurna Construction* (2003) 8 SCC 154** and ***M/s Rashtriya Chemicals & Fertilizers Ltd. v. M/s Chowgule Brothers* (2010) 6 SCALE 393**.

14. Appearing on behalf of Respondent Mr. P.C. Markanda, learned Senior counsel, first submitted that none of the objections raised by the MCD were within the limited scope and ambit of Section 34 of the Act. In this connection he referred to the decision in ***Union of India v. M/s Arctic India* (2011) 2 RAJ 132 (Del.)** and ***Bhandari Engineering and Builders Pvt. Ltd. v. You-One Maharia* (2012) 1 Arb. L.R. 87 (Del.)**. Mr. Markanda then submitted that the MCD had correctly understood Clause 8 as giving it discretion to send the samples to any lab of its choice. It sent the samples at the very first instance to three government laboratories in Ludhiana and Panipat. The goods were accepted only after the test reports of these labs confirmed that the samples met the specifications stipulated in the contract. The acceptance of the goods, after the approval in the lab testing was 'final' under Clause 8. Referring to the *New Webster's Dictionary of the English Language* (p.662), it was submitted that the word 'only' indicated the mandatory nature of the requirement of having to conduct lab test of the samples prior to approval. Referring to P. Ramanatha Aiyar's *Advanced Law Lexicon* (3rd Edn, 2005) (p.1823), it was submitted that the word 'final'

meant that “which absolutely ends or concludes a matter precluding further controversy on the question passed upon.” In other words, after the three government approved laboratories had cleared the samples, the MCD was left with no option but to finally approve the cloth supplied by the Respondent. In fact it was on this basis that it had paid the Respondent for the first two lots. There was no provision for re-testing the samples. Mr. Markanda referred to the clauses introduced in the subsequent tenders floated by the MCD which enabled it to get the testing of the cloth done at any stage from any lab, if the need so arose, even if the cloth was found to be fit in the earlier lab testing. It is submitted that if the learned Arbitrator had ordered re-testing, he would have acted contrary to the clause of the contract.

15. It was pointed out by Mr. Markanda that MCD failed to give any reason for rejecting the remaining lots; failed to mark the stocks as rejected; did not pay for the storage of the goods and also did not fix the rent for such storage. Referring to Clause 4.2 of the BIS specification, it was submitted that none of the reports relied upon by the MCD pointed out any major flaws as set out in Clause 4.2 of the BIS Specifications. The samples were not found by the three labs to which the CBI had sent the samples to fail in any significant manner the four parameters viz., blend composition, shrinkage, washing fastness and Pilling resistance. There was no complaint by any students in the MCD schools about the quality of the uniform cloth. The witnesses produced by MCD refused to answer questions on the technical aspects of the testing of the cloth. The fact that CBI had filed a closure report in the criminal case was not supportive of the case of the MCD. Referring to the test reports of the IIT, New Delhi, Textiles Committee, Mumbai and the SRIIR, it is pointed out that on various parameters, the reports were contradictory and, therefore, could not be relied upon. The fact that MCD was still seeking to send samples to another lab, even after the SRIIR report, only proved that the said

reports were unreliable. It was further submitted that if the MCD had any grievance about the government laboratories at Ludhiana and Panipat it should have initiated action against them. However, there was nothing to show that any such action was ever initiated. In terms of Clause 12 of the contract, if the material was rejected, MCD had a right to auction the material if the supplier did not lift the material despite notices. The fact that no auction took place only showed that MCD did not consider the material to be defective.

Validity of the orders of the Arbitrator

16. The Court finds no merit in the challenge by the MCD to the orders passed by the learned Arbitrator on 10th August 2008 and 19th October 2008. The learned Arbitrator rightly declined the prayer by MCD for re-testing of the samples, three years after the supplies had been made by the Respondent and particularly when the stocks were not kept in a secure condition but exposed to atmospheric changes. No purpose indeed would have been served by ordering re-testing of such stocks three years after they had been supplied.

17. Also, in the considered view of the Court, there was no valid justification for the MCD to have filed an application under Section 12 & 13 of the Act praying that the learned Arbitrator should cease to act as such. Merely because the learned Arbitrator rejected its application for re-testing of the samples, the MCD could not have asked that he should recuse. The order dated 19th October 2008 passed by the learned Arbitrator was more out of anguish over the prayer of the MCD. Understandably, the learned Arbitrator made his recusal conditional upon the Respondent being recompensed for the fees. The order dated 19th October 2008 cannot, in the circumstances, be held to be erroneous.

Interpretation of Clause 8 of the Contract

18. The central issue is whether the interpretation placed by the learned Arbitrator on the relevant clauses of the contract was correct as this in turn will determine whether the test reports of the three government laboratories could be discarded as unreliable in light of the subsequent test reports of the IIT Delhi, Textiles Committee Mumbai and the SRIIR New Delhi.

19. The relevant clauses of the agreement read as under:

“1. That M/s Mittal Processors Pvt. Ltd., G.T. Road, Sewah, Panipat (Haryana) will supply 15,77,535.50 meters of Uniform Cloth for Polyester Viscose Blend Suiting (Navy Blue Colour) **as per BIS Specifications No. IS:11248:1995 with latest amendment Nov.-1997 @ Rs.56.07 per meter nett. of worth Rs.8,84,52,415/-.**

8. The second party will deliver the supply of material at Central Education Stores located at 22-B, Dev Nagar, Karol Bagh, New Delhi or any other prescribed building/store. The inspection of supplies will be carried out at the Central Education Store or any other prescribed building for storage or at the Factory site by an inspection committee constituted by the Department. **Samples drawn from the supplies shall be got tested by MCD from any lab decided by it and final acceptance of the goods shall be only after the same is approved in lab testing. The supply which is not found as per specification and visual examination will not be accepted and shall be marked suitably as rejected.**

9. The second party shall complete the supply of Uniform Cloth for Polyester Viscose Blend Suiting (Navy Blue Colour) within 60 days from the date of issue of supply order as per schedule prescribed by Director (Edn.) failing which the security amount including performance security shall be forfeited. If the second party fails to supply the material, the item will be purchased from the open market at the risk and cost of the second party.

10. Rejected material will be lifted by the second party at this own risk and cost within a period of two weeks from the date of receipt of communication from the department to the second party to this effect. If second party does not lift the rejected

material within two weeks, the second party will have to pay the rent of the store which would be decided by the Director (Edn.). If the second party fails to lift the rejected material within four weeks, the Director (Edn.) has the right to auction the material without any notice to the second party and the amount so realised will be deposited in Municipal Treasury. The second party will have no right to claim any compensation/damages in this regard.

11. If the quality of the material does not conform to the relevant BIS specifications and matching with the approved sample, the Director (Edn.) reserves the right to cancel the balance quantity of the supply order and withhold either full payment or part thereof from the claim submitted by the second party for the supplies already made.

13. The second party should complete the supply of Polyester Viscose Blend Suiting Cloth (Navy Blue Colour) as per BIS Specification No. IS:11248:1995 with latest amendment Nov.-1997 and as per the schedule given above at Sr.No.9, failing which penalty shall be imposed on the supplier for non commencement, slow performance or delay in completion of supply.” (emphasis supplied)

20. In addition, there were separate terms and conditions specified for the supply of uniform cloth. Clause 24 of the said terms and conditions was in *pari materia* with Clause 8 of the contract agreement. Likewise, Clause 27 was identical to Clause 11 of the agreement.

21. The above clauses make it clear that the cloth had to conform to the BIS Specification No. IS:11248:1995 as amended in November 1997. A reading of Clause 8 of the contract shows that it was open to the MCD to get the samples tested “from any lab decided by it”. While it is correct that the final acceptance of the goods was to be “only” after it was approved in lab testing, there is nothing in Clause 8 which indicates that the testing can be done only once. There is no prohibition in Clause 8 against MCD getting further samples tested if it was found that the labs to which the samples were

initially sent were not equipped to conduct such testing or that the test report of another lab showed that the samples did not meet the BIS specifications. The fact that in subsequent NITs the MCD, for greater clarity, inserted a clause permitting it to have the re-testing done notwithstanding that the test results of the labs to which the samples were initially sent had approved the samples does not mean that under Clause 8 of the contract agreement in the present case MCD was precluded from getting the samples re-tested. In the present case, MCD could have sent the samples for further testing. The reading of Clause 8 by the learned Arbitrator as restricting the testing of the samples “only once” is plainly erroneous and not consistent with the essential requirement of the contract agreement that the cloth supplied must conform to the BIS specifications.

The unreliability of the test reports of the three government labs

22. What is significant in the present case is the raid conducted by the CBI on 13th April 2005 which resulted in the CBI getting the samples tested from the laboratories at IIT, New Delhi and the Textiles Committee, Mumbai. But for the CBI raid, it is possible that the MCD may not have realised that the samples did not in fact conform to the BIS specifications. Since this was the central aspect of the entire supply contract, once the CBI told the MCD that the samples did not meet the specifications, MCD could not have overlooked this subsequent development and continued to accept the remaining stocks. MCD was justified in not only immediately thereafter suspending the acceptance of supplies but later in sending the samples to SRIIR Delhi for a further testing.

23. Apart from a plainly erroneous interpretation of Clause 8 of the contract, the learned Arbitrator appears to have overlooked the overwhelming evidence brought on record to show that the earlier testing done in the three

government laboratories was not at all acceptable from the point of view of the BIS standards. In other words they were not in conformity with the mandatory requirement of Clause 8 of lab testing prior to approval of the stocks supplied. The 'lab testing' under Clause 8 obviously meant not just any lab testing but testing in a lab which was capable of performing tests on the samples to determine if they met the BIS specifications.

24. In the first place there was a self contained note of the CBI, which forms the part of the arbitral record, which stated that the government approved laboratories at Ludhiana and Panipat "do not have the complete facility for conducting the tests prescribed by the BIS". The report further stated as under:

"The officials who had conducted the test were not properly qualified when compared to the experts in other established and reputed labs like IIT, Textiles Committee etc. Moreover, the said labs are not accredited to National Accreditation Board for Laboratories ('NABL') and are not approved by the BIS. Even the DGS&D has stopped using the services of these labs. Further, it is observed that the inspection committee of MCD had collected and forwarded samples of one meter each for testing which is stated to be insufficient as per the experts of BIS/IIT, who are of the opinion that samples of minimum 3 to 5 meters are required for conducting all the prescribed tests. This point may be noted for further guidance. It is also advised that the services of NABL/BIS approved laboratories may be utilized for future requirements of testing.

The test reports received from IIT, Delhi and Textile Committee, Mumbai do reveal that the samples of the uniform cloth did not meet the requirement parameters for blend composition, shrinkage, washing fastness and pilling resistance. Therefore, they do not conform to the BIS specifications mentioned in the tender document."

25. Para 8 of the affidavit on behalf of MCD of Mr. Anil Kumar, Scientist

“E”, BIS stated as under:

“8. That the deponent was asked by his Department to inspect the three Govt. Laboratories from where the MCD had got the samples of cloth supplied by the aforesaid manufacturers tested. The deponent along with Dr. (Smt.) Vijay Malik, Scientist E, BIS, Hqr. Visited the three Govt. Laboratories viz. M/S Quality Marking Center, Panipat, Quality Marking Center, Ludhiana and Punjab Test House, Ludhiana. Upon visit of these Govt. Test Labs, it was found that these Laboratories do not have the complete facility for conducting the tests prescribed by the BIS.”

26. There was another affidavit of Mr. Manoj Kumar, Inspector, CBI who stated in para Nos.7, 8 & 9 of his affidavit as under:

“7. During the inquiry, the Officers of M/s Quality Marking Center, Panipat, Quality Marking Center, Ludhiana and Punjab Test House, Ludhiana were examined and they admitted that their laboratories had no facility for conducting test for colour fastness and that they had conducted the said test by keeping the cloth samples in sun light. Sh. M.S. Saggu, Sr. Technical Officer, Quality Marking Center, Ludhiana also admitted that he had no expertise in textiles and he is specialized in metallurgy. Furthermore, his assistant Sh. Kuldeep Singh is also only matriculate with ITI. The statements of Sh. M.S. Saggu, Sr. Technical Officer, QMC, Ludhiana; Sh. Kuldeep Singh, Jr. Technical Assistant, QMC and PTH, Ludhiana and Sh. Sunder Lal Sehgal, Inspector, QMC, Panipat are annexed hereto as Annexure I, Annexure II and Annexure III respectively.

8. That CBI also got the above three Govt. Laboratories inspected by a team of Officers of BIS comprising of Dr. (Smt.) Vijay Malik, Scientist, E, BIS, Hqr. And Sh. Anil Kumar, Scientist D Textiles, BIS, HQs. The aforesaid officers of the BIS vide their report dated 31/7/2006, specifically reported that the Quality Marking Center, Panipat, Quality Marking Center, Ludhiana and Punjab Test House, Ludhiana were not having complete facility for conducting the tests prescribed by the BIS and also that the officials who had conducted the tests were under qualified. The said report is annexed hereto as Annexure IV.

9. That during the enquiry, CBI examined Sh. A.K. Sehgal, the then Director, DGS&D, New Delhi who informed that DGS&D had also stopped using services of the above mentioned three Govt. labs for getting the samples of textiles tested, Dr. B.K. Behra, Associate Professor, Textile Technology, IIT, Delhi was also examined during the inquiry, who stated that about 3 meters of sample cloth is required for conducting all the tests prescribed by the BIS under IS:11248 and IS:11815. The statement of Sh. A.K. Sehgal and Dr. B.K. Behra are annexed hereto as Annexure V and Annexure VI respectively.”

27. The statement made by Mr. Kuldeep Singh to the CBI showed that the Punjab Test House Ludhiana, the QMC Ludhiana and Panipat had the same officials and therefore in effect they were not three different labs. The confidential report submitted by the BIS to the CBI, which also forms part of the arbitral record, shows that during an uninformed visit paid to the QMC, Panipat by two BIS officers, it was revealed that the laboratory did not have complete testing facilities required for testing of the textiles “with a number of important equipments out of order”. The interview of the testing personnel showed the scanty knowledge and use of methods that had neither been standardized nor validated as per Indian Standards. Likewise, a separate report was given of the assessment of the testing facilities at the QMC, Ludhiana. *Inter alia*, it was observed:

“In this laboratory, traceability of the testing personnel as to who has carried out the testing was completely missing as only one test record register was available for all the three technical staff in textile section and no one has authenticated the test record register for owning the responsibility of testing. There was no record of reference standards require for testing nor was the staff competent to carry out complete testing as per standard procedures.

A visit to QMC, Ludhiana which is housed in an old fort is a deserted place where one of the laboratory attendant named Shri Parveen Kumar was available. He had no work and was not even having a list of equipment lying in this laboratory unattended.”

28. The cross-examination of the above witnesses did little to discredit their statements. It is indeed surprising that the learned Arbitrator chose to overlook the above overwhelming evidence and hold that MCD was estopped from questioning the veracity of the test reports of the three government laboratories. This is not a question of the Court re-appreciating the evidence but of the arbitrator ignoring material evidence on record and consequently coming to a patently illegal conclusion.

The cloth failed to meet BIS Specifications

29. Turning to the BIS standards, it is seen that the permissible variations are specified in Clauses 3 & 4 which reads as under:

“3. Manufacture

3.1 Yarn

The yarn used in the manufacture of the fabric shall be made from uniform and intimate blend of 67 percent polyester with 33 percent Cotton or Viscose. Two folds of evenly spun yarn reasonably free from neps and other spinning defects shall be used for both warp and weft.

3.2 Cloth

The fabric shall be uniformly woven in plain weave and the selvages shall be firm and straight. The fabric shall be well singed. The fabric shall ‘Heat set’ and fully shrunk. Blend composition of the fabric shall conform to the requirements given in Table 1.

4. Requirements

4.1 The cloth shall conform to the requirements specified in Table 1.

4.2 The number of major flaws (defects) in the fabric shall not exceed 10 per 100 meters length. A list of major flaws (defects) is given in Annex. B (see IS:4125:1987). The allowance for providing extra length of cloth in lieu of flaws (defects) not exceeding the permissible limits may be as agreed to between the buyer and the seller.”

30. The above clauses have to be read with Table 1 which *inter alia* sets out the parameters of each characteristic. What is significant is the requirement that the yarn has to be of two folds. Emphasis is placed on Weft Count, Threads/DM and Weight/Mass. It is Annexure B that lists out the 'major flaws'. However, it is not as if the cloth in question does not have to conform to Table 1. Further, the BIS specifications do not say that if a cloth fails only one parameter, it can still be passed. On the contrary it appears that where even one parameter fails the sample may be declared as having failed the test. The 'seriousness' of a flaw is with reference to the degree of importance attached to a parameter that has failed. In the context of the present case, what appears to have weighed with the three labs to which the samples were subsequently sent are the performance against parameters like threads/DM and weight/mass.

31. Much emphasis has been made of the apparent contradictions in the test reports of the IIT Delhi, the Textiles Committee Mumbai and the SRIIR. A tabulated statement of the three reports has been placed before this Court. It was submitted by Mr. Markanda that there were variations in these reports even while in respect of blend composition, shrinkage, washing fastness and pilling resistance the samples had passed by and large. However, if one looked at the blend composition percentage in the test report of IIT, Delhi it is seen that the test failed in 7 samples. It failed in 4 samples when tested by the Textiles Committee, Mumbai. It failed in two samples when tested in SRIIR. The breaking load failed in one sample in the Textiles Committee, Mumbai. The Threads/ DM i.e. Warp and Weft passed in only one sample in IIT, Delhi, only in 2 samples in the Textiles Committee, Mumbai and entirely failed in the SRIIR.

32. A major flaw for which there was no satisfactory answer was that the

Respondent supplied cloth of single yarn whereas the BIS specification clearly required two folds of evenly spun yarn to be used for both warp and weft meaning thereby that double yarn had to be used. Witness No.2, Mr. B.P. Trehan in response to a specific question answered that “the specification referred as 13 to 14 in para 7(d) of my affidavit with regard to count of yarn, warp and weft relates to single yarn”. The yarn count in all the three test reports showed that the count range and the Threads per DM were not in conformity with the BIS parameters. The learned Arbitrator appears not to have discussed the above evidence at all and instead proceeded to hold that the three reports could not be relied upon. What was missed in the said discussion was that even if some of the samples failed in any of the critical parameters, even in one of the labs, that was sufficient reason for entire lot to be rejected. The fact that CBI filed a closure report in the criminal case could not by itself have concluded the issue and in any event could not have wiped out the fact that the samples in fact failed crucial BIS parameters. Again, the failure of school children, who were being supplied free uniforms, to lodge complaints about the quality of cloth could hardly be a reason for the MCD to overlook the lab test reports which plainly showed that the cloth supplied did not meet BIS specifications.

33. The learned Arbitrator also appears to have erred in holding that MCD had failed to inform the Respondent about the rejection of the stocks. The fact that by three letters dated 24th October, 20th December and 22nd December 2005, the MCD had asked the Respondent to lift the stocks, obviously showed that the supplies had been rejected.

34. The impugned Award consequently proceeded to erroneously allow the individual claims of the Respondent, when in fact it was not entitled to any of them. Those claims were premised on the Respondent having supplied cloth

in conformity with BIS specifications. It was also premised on an erroneous interpretation of Clause 8 of the contract. These are absolutely glaring defects which vitiate the entire Award. This in turn led the learned Arbitrator to allow the claims of the Respondent which clearly were inadmissible. Likewise the learned Arbitrator erred in rejecting the counter claims of the MCD.

Conclusion

35. For the aforementioned reasons, the Court is satisfied that the impugned Award dated 13th February 2010 to the extent it allows the claims of the Respondent and rejects the counter claims of MCD suffers from a patent illegality and cannot be sustained in law. It is accordingly set aside. As regards to the counter claims of the MCD, given the scope of the consequential order that can be passed under Section 34 of the Act, it is not possible for this Court to grant any other relief. It is open to the MCD to seek appropriate remedies in relation thereto in accordance with law. The petition is allowed in the above terms with costs of Rs.30,000/- which will be paid by the Respondent to the MCD within four weeks from today.

S. MURALIDHAR, J.

MARCH 15, 2012

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