

M.C.D. Vs Modern Food Industries (India) Ltd.

Court: Delhi High Court

Date of Decision: Oct. 8, 2009

Acts Referred: Arbitration and Conciliation Act, 1996 " Section 34, 34(2), 37(7)

Civil Procedure Code, 1908 (CPC) " Section 34

Constitution of India, 1950 " Article 137

Interest Act, 1978 " Section 3

Limitation Act, 1963 " Section 18, 20, 8

Sales of Goods Act, 1930 " Section 61, 61(2)

Citation: (2009) 164 DLT 1

Hon'ble Judges: Manmohan, J

Bench: Single Bench

Advocate: Mini Pushkarna, for the Appellant; V.P. Singh and Raman Kapur, for the Respondent

Judgement

Manmohan, J.

Present objection petition has been filed by petitioner-MCD u/s 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as ""Act, 1996"") challenging the arbitral Award dated 19th January, 2004 and the Addendum dated 13th February, 2004 passed by the

Sole Arbitrator, Mr. Justice (Retd.) P.K. Jain.

2. Briefly stated the relevant facts of this case are that respondent-Claimant Company, M/s. Modern Foods Industries (India) Ltd., a Public Sector

Undertaking, as it then was, had entered into four agreements dated 25th August, 1995, 12th September, 1996, 25th October, 1996 and 6th

March, 1998 with petitioner-MCD for supply of bakery products, i.e. fruity bread, milk bread and glucose biscuits to the Municipal Schools and

stores located in various zones. It is pertinent to mention that respondent-Company has been disinvested w.e.f. January, 2000 and has since been

taken over by M/s. Hindustan Unilever Ltd.

3. Since the respondent-Company claimed that certain outstanding amounts had not been paid, it invoked the arbitration clause. The

Commissioner, Municipal Corporation of Delhi vide notification dated 26th February, 2002 appointed Mr. Justice (Retd.) P.K. Jain as Sole

Arbitrator. While respondent-Company filed 11 claims before the Arbitrator, petitioner-MCD filed its counter-claims.

4. Learned Arbitrator after recording evidence and after hearing the parties has passed the impugned Award and Addendum. The learned

Arbitrator has concluded as under:

CONCLUSION

1. That the Claimant Company is awarded a sum of Rs. 2,39,52,044.08 against the Respondent Corporation on account of the balance price of

Fruity/Milk Bread;

2. That the Claimant Company is awarded a sum of Rs. 1,97,42,737.50 against the Respondent Corporation on account of the price of Glucose

Biscuits.

3. That the Claimant Company is awarded a sum of Rs 1,57,30,119/- on account of interest on the above sums of Rs. 2,39,52,044.08/- and Rs.

1,97,42,737.50/- for the period January 1999 to December, 2001 @ 12% p.a. (SI);

4. That the Claimant Company is also awarded pendent lite and future interest @ 12 p.a. on the above two principal sums from the date of the

reference till the date of award, and from the date of award till the date of recovery;

5. Claims Nos. 3 and 4 have merged in claims Nos. 1 and 2 above;

6. Claims Nos. 5, 8 and 9 are rejected;

7. Counter-claims Nos. 1 to 7 are rejected;

8. The Claimant Company is awarded a sum of Rs. 1,00,000/- towards cost of these arbitration proceedings. Besides this cost, the stamp-duty of

Rs. 60,000/- has been paid by the Claimant Company. Therefore, a sum of Rs. 60,000/- is further awarded to the Claimant Company against the

respondent Corporation by way of cost of the arbitration.

5. Ms. Mini Pushkarna, learned Counsel for petitioner-MCD has raised five objections to the Award.

6. She stated that the learned Arbitrator while allowing Claim No. 1 of respondent-Company had not taken into account payments of Rs.

95,870.95 and Rs. 4,10,086.90 already made by petitioner-MCD.

7. She referred to the statement of detail of outstanding amount as well as the statement of outstanding bills for the year 1995-1996 filed by

respondent Claimant Company before the learned Arbitrator. She stated that Bill No. 4891 at Sr. No. 4, Bill No. 336 at Sr. No. 16 and Bill No.

377 at Sr. No. 17 had already been paid by petitioner-MCD. Consequently, she contended that learned Arbitrator had overlooked payment of

Rs. 95,870.95 made during the year 1995-1996.

8. Similarly, she referred to the statement of detail of outstanding amount as well as the statement of outstanding bills for the year 1997-1998 and

pointed out that Bill No. 1875 at Sr. No. 51 had already been paid by petitioner-MCD. Consequently, she stated that learned Arbitrator had

overlooked the payment of Rs. 4,10,086.90 made in the year 1997-1998.

9. Ms. Pushkarna next submitted that the respondent-Company had without any basis claimed and had been erroneously awarded an amount of

Rs. 1,93,22,087.10 on account of supply of fruity bread under Claim No. 1 for the year 1998-1999. She pointed out that the agreement dated 6th

March, 1998 for the year 1998-1999 was for supply of glucose biscuits only. Consequently, she stated that claim for the year 1998-1999 had

been allowed twice over by way of Claim No. 2.

10. Ms. Pushkarna further submitted that some portion of the respondent-Company's claim allowed by learned Arbitrator was time barred as in

fact no bills had ever been received by petitioner-MCD and details thereof had been provided only for the first time before the Arbitrator. In this

connection, she referred to the bills which had not been received by petitioner-MCD. The detail of bills in respect of each of four years is

reproduced hereinbelow:

Year Bill Nos.

1995-1996 4867, 4689, 4690 at Sr. Nos. 1-3; Bill Nos. 4692,

5243, 4682, 4683, 4693, 4694, 5243, 5246, 5241,

5242, 5244 at Sr. Nos. 5 to 15.

1996-1997 Bill Nos. 1277 at Sr. N.18.

1997-1998 Bill Nos. 1973, 1809 at Sr. Nos. 2 and 3; Bill

Nos. 1923, 1955, 1826 at Sr. Nos. 48 to 50.

1998-1999 Bills Nos. 2708, 2716, 2706, 2710 at Sr. Nos. 3 to

6; Bill No. 2707 at Sr. No. 8; Bill No. 2701 at Sr.

No. 15; Bill No. 2750 at Sr. No. 30.

11. Ms. Pushkarna also submitted that the amount awarded by the Arbitrator in respect of the year 1997-1998 pertaining to milk bread in

accordance with the agreement dated 25th October, 1996 was beyond the terms of reference. She submitted that learned Arbitrator had wrongly

assumed jurisdiction with regard to the fourth agreement even though disputes under the said agreement had not been referred to the Arbitrator. In

this context, she referred to the Commissioner of MCD's notification dated 26th February, 2002 by virtue of which the disputes were referred to

Arbitrator for adjudication. The relevant portion of reference order is reproduced hereinbelow for ready reference:

OFFICE OF THE COMMISSIONER

MUNICIPAL CORPORATION OF DELHI TOWN HALL,

No. PSC/290/2002 Dated : 26-2-2002

Sub : In the matter of Arbitration between M/s. Modern Food Industries (India) Limited and MCD regarding payment of pending bills in respect

of supply of Fruity Bread and Glucose Biscuits during 1995-96, 1996-97, 1997-98 & 1998-99

Whereas agreements as per details given below for supply of Fruity Bread and Glucose Biscuits were executed between MCD, represented by

Director (Primary Education), and M/s. Modern Food Industries (India) Limited, Delhi.

(i) Agreement dated 25/08/1995 for the supply of Fruity Bread for the year 1995-96.

(ii) Agreement dated 12/09/1996 for the supply of Fruity

Bread for the year 1996-97. (iii) Agreement dated 06/03/1998 for the supply of Glucose

Biscuits ISI : 1011-1992 for the year 1998 (till 31/07/1998)....

12. Ms. Pushkarna lastly submitted that the interest awarded by learned Arbitrator was excessive. She also submitted that for the pre-reference

period, no interest could have been awarded as respondent-Company had not given any prior notice as contemplated by Section 3 of Interest Act,

1978.

13. On the other hand Mr. V.P. Singh, learned senior counsel for respondent-Company submitted that none of the respondent-Claimant

Company's claim was barred by limitation. In this connection, he drew my attention to the impugned Award wherein learned Arbitrator after

referring to petitioner-MCD's four letters dated 18th November, 1998, 31st March, 1999, 9th December, 1999 and 12th April, 2001 concluded

that the limitation stood extended as petitioner-MCD had unequivocally and unambiguously acknowledged its liability to pay a sum of Rs. 4.5

crores approximately towards unpaid price of the fruity bread, glucose biscuits etc. The portion of the Award referred to by Mr. V.P. Singh, is

reproduced hereinbelow for ready reference:

Without making a reference to a lengthy correspondence by MFIL, Ministry of Food processing industries, Government of N.C.T. Delhi, and

MCD, it is enough to refer to four letters of the Respondent Corporation. D.O. No. PSC/1097/78 dated 18.11.1998, written by the then

Commissioner, MCD to the Chairman-cum-M.D. MFIL, reads as under:

with reference to your d.o. letter No. MF/CMD/DI/98-99 dated 17.11.98, I wish to advise that every effort will be made to clear the actual dues

of Modern Food Industries (India) Limited as quickly as possible. It may not be possible for me to give you an assurance of releasing Rs. 4.50

crores within this week because the matter regarding excess payment earlier is now under examination. However, we are hoping to make a

substantial on account/part payment with a view that this issue can be settled correctly to the satisfaction of both MCD and MFI without delay.

Another letter dated 31.3.1999 was written by Add. Commissioner (EDU), MCD to the Chief Secretary, Govt. of N.C.T. of Delhi, in which it has

been stated:

M/S M.F.I.L has also supplied Fruity Bread and Glucose Biscuits from April 98 to Sept. 98 of worth Rs. 4.5. crores approximately but in view

of the Audit observation indicating the excess payment of Rs. 8.62 crores during 1995-95 to 1997-98 against M/S MFIL, the payment has not

been released to firm as yet.

Another D.O. No. Add. CM. (Edu) 99/180, dated 09.12.1999, written by Add. Commissioner MCD to the Secretary & Commissioner, (F&S),

Govt of NCT of Delhi, reads as under:

Kindly refer to the D.O. letter No. PS/CFS/99/326, dated the 26th October, 1999, addressed to the Commissioner, MCD, regarding payment of

a sum of Rs. 401 lacs and free wheat of 1995 M.T. to M/S M.F.I.L. on account of the supplies of Glucose Biscuits & Fruity Bread by the firm

from 16th March, 1998 to September, 1998 to MCD for Mid-day-meal distribution in schools.

2. An audit team of Accountant General (Audit), Delhi, audited the accounts of the Mid-day-meal scheme and observed that a benefit of Rs. 7.59

crores was extended to Modern Food Industries Ltd. on account of wheat subsidy. The matter has been discussed with the Chairman-cum-

Managing Director, MFIL on 14.1.1999 and 23.3.1999. The CAG Audit Para pertaining to Mid-day-meal scheme is under discussion with the

Public Accounts Committee, GNCTD. It may, therefore, be appreciated that the payment to M/S MFIL could be released only after the audit

para is settled by the PAC.

Similarly, in the letter dated 12.04.2001, written by Add. Director (West), MCD to the GM of MFIL, it is expressly stated:

The audit para is still under consideration of the Public Accounts Committee, GNCTD. The recovery shown by the Audit runs in crores. Hence

release of balance wheat and payments to Modern Food Industries (India) Limited could be considered only after the settlement of audit para by

the Public Accounts Committee.

Thus, right from 18.11.1998 to 12.04.2001 there are clear and unambiguous acknowledgements made by MCD of its liability to pay the unpaid

price of the Fruity Bread, Glucose Biscuits, etc. amounting to Rs. 4.5 crores (approx) and to release free wheat to MFIL. The mere fact that it has

been mentioned that the payments and wheat shall be released after Audit Para is settled does not affect the legality and validity of these

acknowledgments.

It is not disputed that MFIL had requested the Commissioner, MCD vide letter dated 26.04.2001 for the appointment of an arbitrator. Limitation

may be calculated from the day one, but none of the claims arising out of these four agreements can be said to be time-barred. I requires

clarification that MFIL has also included certain bills of a period prior to November, 1995 which are neither relevant nor permissible in these

proceedings. Therefore, I hold that the claims relating to the four agreements, the subject matter of this reference, are within time.

14. Mr. Singh further denied that award of Rs. 19,32,2087.10 for supply of fruity bread in the year 1998-1999 or Award of Claim No. 2 for

supply glucose biscuits was a duplication. He stated that in the financial year 1998-1999 respondent-Company had supplied both fruity bread as

well as glucose biscuits to petitioner-MCD. In this connection, he laid emphasis on petitioner-MCD's two letters dated 31st March, 1999 and 9th

December, 1999 to contend that it was an admitted position that both fruity bread and glucose biscuits had been supplied during the year April,

1998 to September, 1998.

15. Mr. Singh emphasised that there was no duplication in Claim Nos. 1 and 2. According to Mr. Singh, while Claim No. 1 dealt with unpaid

amounts with regard to fruity/milk bread, Claim No. 2 dealt with regard to glucose biscuits. Mr. Singh was at pains to point out that the Award in

respect of Claim No. 2 was based on consent of petitioner-MCD and the said consent had not even been challenged in the present objection

petition.

16. As far as overlooking payment of Rs. 95,870.95 and Rs. 4,10,086.90 for the years 1996-1997 and 1997-1998 respectively is concerned,

Mr. Singh stated that in a bid to cut the controversy short, he had no objection if the Award was reduced by the aforesaid two amounts.

17. As far as petitioner-MCD's plea that the Award in respect of 1997-1998 supplies was beyond the terms of reference is concerned, Mr. Singh

referred to the reference order dated 26th February, 2002 and pointed out that in the subject of the letter itself, it had been specifically stipulated

that the dispute between the parties in respect of fruity bread and glucose biscuits even during the year 1997-1998 was referred to arbitration. He

further submitted that petitioner-MCD having willingly participated in the arbitration proceedings with regard to the fourth agreement, is

consequently deemed to have waived its rights to raise this objection.

18. As far as the issue of interest is concerned, Mr. Singh submitted that interest under special provisions contained in other enactments can be

allowed independent of Section 3 of Interest Act, 1978 for the period prior to institution of proceedings. In this context, he referred to Section

61(2) of Sale of Goods Act, 1930 as well as Section 31(7) of Act, 1996. Mr. Singh also relied upon a Division Bench judgment of Bombay High

Court titled as Ram Bahadur Thakur and Co. and Another Vs. R.B. Shreeram Durgaprasad Private Ltd. and Another, wherein it has been held:

(16) To hold that an arbitrator who has to decide all differences between parties has not got the powers which a Court has in relation to such

disputes, may create great many difficulties even in applying the substantive statutory law when reference is to ""Court"". The first and foremost

amongst such Acts is the Limitation Act and Courts have held that arbitrator is bound to apply the Law of Limitation. Supreme Court in Seth

Thawardas Pherumal Vs. The Union of India (UOI), did not really decide the point in relation to Interest Act but said that the Arbitrator is not a

Court u/s 34, Civil Procedure Code. The question was not argued fully and the case above referred to were not brought to the notice of Their

Lordships. The question of applicability of Section 34 does not arise here at all, the only question being whether the arbitrator had no power to

award interest on the advance price by reason of Section 61 of the Sale of Goods Act and we think he has. It may be mentioned that in AIR 1963

SC 1685 the Court did not hold that the arbitrator could not award interest u/s 61 of that Act but held that the section did not apply as it was not a

suit for refund of the price. It seems to us, therefore, that in respect of 987 tons of ore which the defendant failed to deliver, the arbitrator was right

in awarding interest. Under these circumstances there can be no question of the plaintiff making out equitable grounds for the award of interest,

though he could not award interest on the price of 4,000 tons of ore.

19. Having heard the parties at length and having perused the impugned Award, I am of the view that it would be appropriate to first outline the

circumstances in which a Court can interfere with an arbitration award passed under the Act, 1996. The Supreme Court in Delhi Development

Authority Vs. R.S. Sharma and Co., New Delhi, after referring to a catena of judgments has held that an arbitration award is open to interference

by a court u/s 34(2) of the Act, 1996 if it is:

(i) contrary to substantive provisions of law; or

(ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties.

20. Supreme Court has further held in the aforesaid judgment that an award can be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

21. The award can also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

Supreme Court has also held that

it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is

patently illegal and opposed to the public policy of India.

22. With regard to the petitioner's argument that respondent-Company's claim is time barred, I am of the opinion that the four letters of petitioner-

MCD referred to by learned Arbitrator (dated 18th November, 1998, 31st March, 1999, 9th December, 1999 and 12th April, 2001) make it

abundantly clear that petitioner-MCD was releasing part payments during the course of performance of agreements and all these payments were

on account and not towards any specific bill. Moreover, the aforesaid four letters clearly show that all throughout petitioner-MCD acknowledged

its liability to make payment of its outstanding dues, however it did not make payments as there was an audit objection with regard to excess

payments made by petitioner-MCD in previous years to respondent-Company. Consequently, I am of the view that learned Arbitrator has rightly

held that these four letters constitute an acknowledgement of liability by petitioner-MCD and by virtue of Section 18 of Limitation Act, 1963, a

fresh period of limitation would have to be calculated from the date of these letters.

23. Moreover, in my view, non-submission of some of the bills would not bar the claim of respondent-Claimant Company. It is settled law that

dispute entails a positive element and assertion of denying. Since some of the bills had never been claimed, there was no occasion for the

petitioner-MCD to deny the same and accordingly, the dispute with regard to the said bills had never arisen. In this connection, I may refer to the

observations in Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, wherein Supreme Court has held as under:

4. Therefore, in order to be entitled to order of reference u/s 20, it is necessary that there should be an arbitration agreement and secondly,

difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an

assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding

non-payment of the alleged dues of the appellant. The question is for the present case when did such dispute arise. The High Court proceeded on

the basis that the work was completed in 1980 and, therefore, the appellant became entitled to the payment from that date and the cause of action

under Article 137 arose from that date. But in order to be entitled to ask for a reference u/s 20 of the Act there must not only be an entitlement to

money but there must be a difference or dispute must arise. It is true that on completion of the work a right to get payment would normally arise

but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on

February 28, 1983 and there was non-payment, the cause of action arose from that date, that is to say, February 28, 1983. It is also true that a

party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared,

the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim.

The existence of dispute is essential for appointment of an arbitrator u/s 8 or a reference u/s 20 of the Act. See Law of Arbitration by R.S.

Bchawat, first edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the

other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive

element and assertion of denying not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has

to be found out from the facts and circumstances of the case.

(emphasis supplied)

24. Consequently, it cannot be said that the said claims are barred by limitation. Accordingly, petitioner-MCD's plea that respondent-Company's

claim was barred by limitation is contrary to facts and untenable in law.

25. As far as duplication of Claim No. 2 and excess payment of Rs. 19,32,2087.10 for supply of fruity bread in the year 1998-1999 is concerned,

I am of the view that petitioner-MCD's objections are without any basis. In fact, during the year 1998-1999 respondent-Company had supplied

both fruity bread and glucose biscuits as is apparent from the petitioner-MCD's own letters dated 31st March, 1999 and 9th December, 1999. I

further agree with Mr. V.P. Singh's submission that Claim No. 2 had been allowed with the consent of petitioner-MCD and the said consent has

been neither withdrawn nor challenged in the present objection petition filed by petitioner-MCD. Accordingly, the said objection is rejected.

26. As far as, the Award in respect of supplies made in the year 1997-1998 being beyond the terms of reference is concerned, I am also in

agreement with the submission of Mr. Singh that in view of subject matter of the notification dated 26th February, 2002 as well as the fact that the

petitioner-MCD had participated in the arbitration proceedings with regard to adjudication of payments for the year 1997-1998, petitioner is

deemed to have waived its right to raise any objection.

27. Since, learned senior counsel for respondent-Company has not disputed the payment of Rs. 95,870.95 and Rs. 4,10,086.90 made by

petitioner-MCD, the Award is directed to be reduced by the aforesaid amounts.

28. As far as the issue of interest is concerned, the Supreme Court in McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, has

held as under:

154. The power of the arbitrator to award interest for pre-award period, interest pendent lite and interest post-award period is not in dispute.

Section 31(7)(a) provides that the arbitral tribunal may award interest, at such rate as it deems reasonable, on the whole or any part of the money,

for the whole or any part of the period between the date on which the cause of action arose and the date on which award is made, i.e., pre-award

period. This, however, is subject to the agreement as regards the rate of interest on unpaid sums between the parties. The question as to whether

interest would be paid on the whole or part of the amount or whether it should be awarded in the pre award period would depend upon the facts

and circumstances of each case. The arbitral tribunal in this behalf will have to exercise its discretion as regards (i) at what rate interest should be

awarded; (ii) whether interest should be awarded on whole or part of the award money; and (iii) whether interest should be awarded for whole or

any part of the pre-award period.

(emphasis supplied)

29. Keeping in view the fact that payments had not been released to respondent-Company in view of the audit objections, I am of the view that no

pre-reference interest needs to be awarded in the present case. Moreover at the relevant time, both petitioner-MCD and respondent-Company

were government corporations. In fact, in view of the audit objection, it cannot be said that petitioner-MCD had arbitrarily or without any valid

reason withheld payment of monies to respondent-Company.

30. As far as pendente lite and future interest is concerned, I deem it appropriate to reduce the interest from 12% per annum to 9% per annum

simple interest (See: State of Rajasthan and Another Vs. Ferro Concrete Construction Pvt. Ltd., Consequently, on the two principal sums

awarded by learned Arbitrator (as quoted in Conclusion 1 & 2 in para 4 hereinabove) and after reducing Rs. 95,870.95 and Rs. 4,10,086.90 (as

mentioned in para 27 hereinabove), respondent-Company would be entitled to simple interest @ 9% from the date of invocation of arbitration till

the date of payment. Accordingly, to the above extent the Award is modified.

31. With the aforesaid observations, present petition stands disposed of.