

(2005) 04 CAL CK 0002

Calcutta High Court

Case No: A.P. No. 342 of 2003 with A.P. No. 6 of 2004

M/s. Batliboi Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: April 13, 2005

Acts Referred:

- Contract Act, 1872 - Section 31(7)(a), 34, 74

Citation: 109 CWN 798

Hon'ble Judges: Ashim Kumar Banerjee, J

Bench: Single Bench

Advocate: Pratap Chatterjee, T. Bose and S. Bagchi, for the Appellant; Hiranmoy Dutta, D.S. Mishra and D.N. Sharma, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

Parties entered into two contracts for supply of two sets of machines for production of arms by the ordnance factory of the Union of India. The first contract stipulated supply of five machines and the second one was for supply of 11 machines. The contracts stipulated a particular period within which delivery was to be made in both cases. There had been admitted delay in supply. The contracts also stipulated payment of exercise duty as well as Sales Tax by the purchaser "at the time of delivery". It also stipulated payment of liquidated damages to the extent of 5 per cent on the outer limit could not supply within the stipulated period in either of the cases. They prayed for extension of time which was granted by the Union of India. Union of India, however, had put conditions to the extent that they would be entitled to recover damages in terms of the contract. For such delay they would also be not liable to pay any additional duty towards the sales tax or exercise. After supplies were made, claimant raised their bills. Union of India paid them in both the cases as well as deducting the additional duty they had to bear on account of sales tax and exercise. Claimant raised protests. Ultimately, matter was referred to arbitration. The Arbitrator after giving hearing both sides, published his award. The

award of the Arbitrator has been challenged by both the parties being Union-of-India as well as the claimant.

2. Both the applications for setting aside were heard analogously by me yesterday, i.e. April 12, 2005 and today, i.e. April 13, 2005. These two applications are disposed of by this common judgment and order.

3. The award appearing at pages 172 - 178 of the petition (AP No. 342/ 2003) would depict that the Arbitrator dealt with the issues under four heads. Under 12.02 the Arbitrator dealt with the question of liquidated damage on the first contract and came to a finding that such imposition of liquidated damage was justified as the claimant could not offer any plausible explanation as to the delay. Such finding of the Arbitrator was, however, not challenged by the claimant. Both parties accepted such decision of the Arbitrator and, as such, I need not go into that question in detail.

4. In paragraph 12.03 the Arbitrator dealt with the issue of imposition of liquidated damage on the second contract. The Arbitrator came to a finding that such delay was caused because of Union of India and, as such, they were not entitled to impose liquidated damage and the deduction on that score was wrongful and the claimant was entitled to get back the deducted amount on that score. This part of the award has been challenged by the Union of India. However, Mr. Hiranmoy Dutta, learned Counsel appearing for Union of India, in his usual fairness (which he does always) has not seriously pressed his claim in view of two Apex Court decisions reported in Sudarsan Trading Co. Vs. Government of Kerala and Another, and (2001)7 SCC 728 (Smita Conductors Ltd. vs. Euro Alloys Ltd.).

5. In both the said decisions the Apex Court observed that it was with the sole discretion of the Arbitrator to interpret a particular clause of the contract and/or contract as a whole. If two views are possible the court should not implant its own view by substituting the view of the Arbitrator. The Arbitrator, in my view, after considering the evidence put forward before him by the parties, came to a factual finding that Union of India was responsible for the delay and, as such, held it against them. Such decision of the Arbitrator, in my view, is not open to challenge. As such, the challenge to the award on that score made by Union of India is rejected.

6. In paragraph 12.04 the Arbitrator dealt with the issue of deduction on the difference of the exercise duty and sales tax. The Arbitrator ultimately came to a finding that Union of India was bound to pay the actual exercise duty as well as sales tax even after the original delivery period was over. Both parties deliberated on the issue in detail. Union of India has challenged that part of the award on the ground that once the Arbitrator came to a factual finding that the delay was caused due to the claimant at least in respect of the first contract, imposition of additional duty on Union of India was an undue hardship having no fault on their part. Mr. Dutta has also urged that when the delivery period was extended by the Union of

India it was conditional upon payment of difference of duty by the claimant. Mr. Dutta has also drawn my attention to a letter wherein the claimant had conveyed thanks to the Union of India having the delivery period extended and thereby not raising any objection with regard to imposition of additional burden on them. Mr. Pratap Chatterjee, learned senior counsel appearing for the claimant on this issue has contended that under the terms of the contract the sales tax and exercise duty were to be paid by the purchaser being purchaser "at the time of delivery". According to Mr. Chatterjee, this was a statutory obligation on the purchaser to pay Exercise Duty and Sales Tax at the time when the sale was effected. Union of India did pay such duty and this cannot be foisted upon the supplier being the claimant herein in absence of any, provision contained in the contract. Mr. Chatterjee has also urged that once the duty was paid by Union of India, recovery of difference by way of damage is contrary to the provisions of the contract in view of the fact that the contracts stipulated recovery of damages maximum to the extent of 5 per cent. Once the Arbitrator held against the claimant in respect of the first contract that imposition of damage to the extent of 5 per cent was justified further imposition of duty in respect of the first contract was not permissible. Mr. Chatterjee submits that on the second contract the question did not arise as the Arbitrator came to a factual finding that imposition of damage was wrongful as the delay was caused because of Union of India. Mr. Chatterjee in support of his contention cited decisions reported in Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., and Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., Mr. Chatterjee has heavily relied upon paragraph 11 of the Apex Court decision in the case of Chunilal vs. Mehta (supra). In the said paragraph the Apex Court observed that the right to claim liquidated damages is enforceable u/s 74 of the Contract Act and where such a right is found to exist no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they at the same time intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach.

7. Relying on the aforesaid paragraph Mr. Chatterjee has submitted that once the contracts stipulated recovery of damage maximum to the extent of 5 per cent of the contract value, there cannot be any further sum recoverable as and by way of compensation or damage.

8. To decide this issue it would not be otherwise out of place, if we refer to the various Clauses of the contract. Under clause 19.01 exercise duty as well as sales tax was to be paid extra at the time of delivery as applicable by the purchaser. Under Clause 20 the delivery schedule was prescribed. Under Clause 18G the purchaser was empowered to recover liquidated damages from 2 per cent to 5 per cent of the total contract price. The said clause also stipulated that delivery would be subject to extension without any liquidated damage on the ground of force majeure clause.

Clause G stipulated that the purchaser would be entitled to opt to cancel the contract at the supplier's risk in case of failure to supply within the delivery period. If these aforesaid clauses are read together and are given harmonious construction, it would reveal that the parties agreed that the supply was to be made within the stipulated period and the statutory responsibility being payment of Excise Duty as well as Sales Tax was to be borne by the purchaser. The purchaser, however, had the option either to cancel the contract in case of failure to deliver within the stipulated period or to extend the said period.

9. In case of force majeure clause delivery within the extended period did not contemplate any liquidated damage meaning thereby that in other cases the purchaser was at liberty to accept delivery within the extended period and recover damage on the ground of delay simultaneously. In the instant case, in respect of first contract delay was on account of the claimant and the imposition of liquidated damage was held to be good. In respect of the second contract the delay was on account of Union of India and the imposition of damage was held to be bad and Union of India was asked to refund the said sum. This has nothing to do with regard to payment of excise duty and sales tax as from the contract it reveals that such statutory outgoings were to be discharged by the purchaser and the purchaser only. In fact the purchaser duly discharged those responsibility. Hence question comes whether additional duty could be reimbursed from the claimant's bill. Paragraph 11 in the case of Mehta (supra) debars a party to recover additional amount when the contract stipulated recovery of maximum liquidated damage. Hence, I am of the view that although in respect of first contract the imposition of liquidated damage was held to be justified because of the delay on the part of the claimant, the recovery of additional duty was not permissible in view of the Apex Court decision referred to supra.

10. I would also like to approach the problem from a different angle. The Arbitrator interpreted the terms of the contract and came to a factual finding that recovery of the additional duty was not permissible. He also gave his reasons therefor. In view of the discussions stated above, it cannot be said that the finding of the Arbitrator was based upon an impossible proposition and as such following the Apex Court decision in the case of Smita Conductors (supra), I am not competent to supplement my own view even if I agree with the contention raised by Union on that score. Hence, this part of the award is also not open to challenge and the challenge on that score is rejected.

11. The Arbitrator dealt with claim for interest, cost and damage to the extent of Rs.2 lakh in paragraph 12.05. The finding of the Arbitrator is quoted below :

In connection with the claim statement the claimant had made a claim for interest at the rate of 18% for unpaid amount, cost of Arbitration and Rs.2 lakhs as damages. Here the claimant was asked to give reference of specific clauses of S.Os on the basis of which such claim was made As the claimant could not give any convincing

replay, the undersigned rejects such claim prayed by the claimant.

12. In this paragraph the Arbitrator rejected 3 heads of the claim on two grounds, (i) the claimant could not give reference to specific clause of the supply order and (ii) the claimant could not give any convincing reply.

13. With regard to damage for Rs. 2 lakh the reasons given by the Arbitrator is not open to challenge as there had been a factual finding on that score.

14. With regard to cost I am unable to co-relate the claim with the reasons given above. However, I do not wish to dilate on this issue as no argument was advanced on that score.

15. This leaves me with the question of interest. The Arbitrator held in favour of the claimant to the extent that the deduction of 5% as liquidated damage in respect of second contract was wrongful. Hence, claim for interest would logically relate to the refund of the said amount which was deducted by Union from the claimant's bill.

16. Mr. Hiranmoy Dutta, learned Counsel, on this score has tried to resist the challenge by contending that award of interest is within the sole discretion of the Arbitrator. The Arbitrator thought it fit not to award any interest and he gave his reasons therefor. The same was not amenable to challenge. I am in full agreement with Mr. Dutta to the extent that awarding of interest is within the sole discretion of the Arbitrator.

17. In this regard, I may refer to Section 31(7)(a) of the said Act of 1996 wherein the Arbitral Tribunal has been empowered to award any reasonable interest unless otherwise agreed by the parties. If I co-relate the reasons referred to above with the issue of awarding of interest, it would reveal that the Arbitrator found that there was no reference to the supply order. Hence, the contract was silent on the issue of interest. If that be the situation, the Tribunal was competent to award any reasonable interest on the money award which he was publishing in favour of the claimant. Lot of emphasis has been put by Mr. Dutta on the word "may". According to Mr. Dutta, the word "may" cannot be construed as "shall" and the Arbitrator was fully empowered not to award any interest.

18. Mr. Pratap Chatterjee, learned Sr. Counsel, however, on this score has relied on the decision of the Apex Court in the case of M. Sunderamoorthy Vs. State of Tamil Nadu through Inspector of Police, . In this short judgment the Apex Court while dealing with the issue of interest observed that awarding of interest by court even when the award was made a rule of court flows from Section 34 of the Code of Civil Procedure. The Apex Court was of the view that the interest ought to be granted in all the cases when there is money decree unless there are strong reasons to decline the same. Relying on the said decision Mr. Chatterjee has contended that when the Arbitrator disallowed interest, such disallowance must be backed up by strong reasons.

19. In my view, the reasons given in paragraph 12.05 could only be co-related with the claim for damage for Rs. 2 lakh. On account of interest no reason was assigned. Once the Arbitrator held that there had been some money wrongfully withheld by Union on account of the claimant, he should have awarded interest from the date of deduction until it is actually paid to the claimant unless he assigned strong reasons for such disallowance on this score. I feel that this part of the award should be set aside and the matter should be remitted back to the Arbitrator for his decision afresh.

20. In the result, A.P. No. 342 of 2003 is dismissed. There would be no order as to costs.

21. A.P. No. 6 of 2004 is allowed in part. The award dated September 16, 2003 is set aside only where the claim for interest was disallowed by the Arbitrator. The award is remitted back to the Arbitrator only to determine the question as to whether the claimant was entitled to any interest and if so, at what rate. The Arbitrator must give hearing to both the parties and publish his award within a period of 4 months from the date of communication of this order to him.

22. In the event the Arbitrator is unwilling to act, Union is directed to have another Arbitrator appointed through the appointing authority within a period of 2 weeks from the date of expression of unwillingness by the present Arbitrator. Let urgent xerox certified copy of this Judgment/Order be supplied to the parties, if applied for, upon compliance of all formalities.