

(2008) 09 DEL CK 0218

Delhi High Court

Case No: C.S. (OS) 2176 of 1989

Food Corporation of India

APPELLANT

Vs

Reed Medway Packaging Co. of
India

RESPONDENT

Date of Decision: Sept. 4, 2008

Acts Referred:

- Arbitration Act, 1940 - Section 34

Hon'ble Judges: S. Ravindra Bhat, J

Bench: Single Bench

Advocate: P.K. Dey, for the Appellant; Abhimanu Mahajan, for Defendant No. 1 and Proxy counsel for Barkha Babbar, for Defendant No. 2, for the Respondent

Judgement

S. Ravindra Bhat, J.

The plaintiff, Food Corporation of India (hereafter referred to as "the FCI") entered into an agreement with the first defendant on 2nd February, 1981, after the latter successfully tendered to public notification. In terms of the contract, the defendant was to supply 48 Vehicles, Weighbridges and spare parts for such equipment, for transporting foodgrains procured by the FCI, as a part of its "All India Grain Storage Project".

2. Clause (1) of the agreement stipulated that the conditions spelt out in the general conditions of the contract published in the tender document would govern it and bind the parties. In terms of Clause (6) of the said tender conditions, the defendant agreed to pay actual customs duty, auxiliary duty, countervailing duty and such other duties prescribed by the law including port charges. The defendant applied for customs duty drawback claims as actual user and was to refund the amounts to the FCI.

3. It is not disputed from the pleadings that disputes arose in regard to the performance of the agreement and finally on 14.10.1987, FCI terminated the

contract and went in for performance of the balance work by engaging third parties/agencies. The FCI thereafter addressed a series of letters calling upon the defendant to account and pay the customs duty drawback, which it was entitled to. According to the suit averments, the defendant neglected to pay these amounts. The plaintiff adverts to issuing a legal notice on 10.8.1988 to the defendant and upon failure to comply with its terms, it filed the present suit on 30.6.1989 seeking a decree for the sum of Rs. 17,96,253.10 with interest at 18% per annum.

4. The defendant immediately upon entering appearance moved the Court u/s 34 of the Indian Arbitration Act, 1940 seeking stay of the proceedings on the ground that a valid arbitration clause existed and bound the parties. It, therefore, urged that the disputes raised in these proceeding should be referred to and settle in arbitration. The defendant's application remained pending for a considerable period. The defendant inter alia relied upon its claim and for that purpose, adverted to several letters including demands made on 31.03.1988, 02.04.1988 and 18.03.1989 where the sums in excess of Rs. 7 crores (eventually the sum of Rs. 8,29,17,443.56) were claimed from the plaintiff. This was also part of the averments made in the application u/s 34, (I.A. 7745/1989) filed in this case.

5. The said application I.A. 7745/1989 was rejected by an order dated 19.12.2003. The defendant appealed against this order; the appeal was dismissed on 23.3.2004. The Division Bench affirmed the order of the single Judge which had reserved the right to the defendant to claim a set off and adjustment for satisfying the plaintiff's claims.

6. The defendant thereafter filed its written statement on 08.04.2004. The written statement was accompanied by about 400 documents. Subsequently, the defendant sought amendment to the written statement which was allowed. The amendments incorporated a set off and adjustment in respect of the plaintiff's claim. The said adjustment was articulated in the following terms:

Details of claim	Amount in Rs.
a. Import Licence fee held back by the plaintiff	5,165.00
Interest thereon @ 18% from Jan. 1981 till March 2004	2,58,456.60
b. 5% balance payment on supply and erections retained by the plaintiff	98,875.00
Interest thereon @ 18% from August 1987 till March 2004	35,41,702.00
c. 5% cash security deposit	3,79,632.51
Interest thereon @ 18% from 14th Oct. 1982	1,75,61,799.91
d. Wrongful deduction towards TDS	78,073.00
e. Wrongful deduction towards TDS	10,932.00

f.	Unpaid invoices towards 10 sets of spare parts interest thereon @ 18% from Feb. 1987 to March 2004	32,400.00
g.	Demurrage and Warehousing charges paid to custom authorities on 10 sets of imported components Interest thereon @ 18% from Feb. 1987 to March 2004	32,000.00
h.	Storage charges and inventory costs arising from delayed lifting of supplies from the Answering Defendant and consequential loss of production Interest thereon @ 18% from 1.1.1983 to 3.12.1984	7,27,30,800.00
i	Interest on capital employed and processing Costs of preferring partial claim of draw Back of duty in stead of one consolidated Claim during the period April-September 1985 Interest thereon @ 18% Feb. 1987 to March 2004	62,62,039.00

7. In these proceedings, the Court had framed issues on 21.1.2006. The matter was sent for recording of evidence of the parties to the Joint Registrar. At that stage, the defendant moved an application I.A. 4680/2006 for placing two documents being letters dated 11.05.2004 issued by the plaintiff and its reply dated 25.05.2004 on the record. The Court permitted the said documents to be placed on record on 18.01.2007. On the same day, the Court made the following order in the suit:

CS(OS) No. 2176/1989 Learned Counsel for the defendant submits that the defendant with a view to settle the claims in the suit is willing to pay to the plaintiff the amount of Rs. 12,95,559.09, which was computed by the plaintiff itself to be payable in May, 2004, along with a reasonable amount of interest at the rate fixed by the Court till the date of payment. Learned Counsel for the plaintiff states that this proposal is not acceptable to it since the suit has been filed for realization of the custom duty draw back and any other dues payable by the Corporation to the defendant cannot be adjusted from an amount of the custom duty draw back. He states that the communication dated 11th May, 2004 has not been issued by an authorized officer. I direct the Director, Finance of the Food Corporation of India to state on affidavit with regard to the following:

1. Whether the communication dated 11th May, 2004 has been issued by a competent and authorized officer?

2. Whether the accounting position reflected in the said document, particularly with regard to the credits shown in favour of the defendant are correct as per the books of accounts of the plaintiff?

The Director, Finance would also consider whether the proposal of the defendant contained therein is acceptable to all. Let the affidavit be filed within three weeks. In the meantime, the defendant may deposit an amount of Rs. 12,95,559.09 in this Court along with interest at the rate of 11% per annum from 1st April, 2004 onwards till the date of deposit. The deposit be made in the name of Registrar General of this Court initially for a period of 91 days. List before the Court on 5th April, 2007

8. Accordingly, an affidavit was filed on 04.04.2007 by the Executive Director of FCI. This was considered by the Court on 21.04.2007 when the following order was made:

21.04.2007

Present: Mr. K.K. Joshi for Mr. P.K. Dey for the plaintiff.

Mr. Abhimanyu Mahajan for the defendant.

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The affidavit has been filed by the Executive Director, Finance. In the affidavit the plaintiff does not disown the communication dated 11.5.2004 as per which the amount due from the defendant is computed at Rs. 12,95,559.09 after making adjustment of security deposit of Rs. 3,79,632/- and other liabilities of Rs. 69,493/-. In the affidavit it is stated by the plaintiff that the adjustment of the said amount from the customs duty draw back was erroneously made. It is further stated that security deposit was not liable to be refunded since the contract was terminated on account of its breach by the defendant. Similarly, the liability of Rs. 69,493/- was also not liable to be adjusted for the same reason.

The contract was terminated by the plaintiff on 14.10.1987. Any claim on account of any damages that might have been suffered by the plaintiff against the defendant could have been filed within three years of the termination of the contract. That has not been done and no claim for damages has been raised in the present suit. It is too late for the plaintiff to justify withholding of the security deposit or any other liability owed by the plaintiff to the defendant. It is seen that the total customs duty refund was to be tune of Rs. 17,06,505.81. This amount is mentioned by the defendant in its communication dated 6.2.1988 and is also the amount mentioned by the plaintiff in its communication dated 11.5.2004. Since these duty draw backs were received by the defendant some time in January and early February, 1988, the defendant, after adjustment of the security deposit, and the other liability, as aforesaid should be made liable to pay an amount of Rs. 12,95,559.09 with interest from 1.2.1988.

I have already indicated the rate of interest at the rate of 11% p.a. and the defendant has made a deposit in this Court of the amount of Rs. 12,95,559.09 along with interest at the rate of 11% p.a. from 1.4.2004 onwards.

The plaintiff should gain take specific instructions whether it is willing to accept, in full and final settlement the amount already deposited along with further interest at the rate of 11% p.a. from 1.2.1988 to 31.3.2004. Further affidavit in this respect may also be filed by the plaintiff. The defendant would also seek instructions whether it is willing to pay further interest, as aforesaid.

List on 10.9.2007.

9. On the basis of the order dated 21.04.2007, Mr. P.K. Dey, learned Counsel on written instructions submitted that the FCI would be agreeable for settlement of the dispute, upon its being permitted to appropriate the amounts deposited with interest at 11% per annum from 01.02.1988 to 31.03.2004. On the basis of these, the defendants were asked to indicate their response.

10. The defendant accordingly filed an affidavit on 11.02.2008 outlining its position. It has averred as follows:

7. Pursuant to the order dated 18th January, 2007, the Defendant No. 1 deposited in Court, the amount of Rs. 12,95,559.09 alongwith interest amounting to Rs. 4,04,498.9 (being interest calculated @ 11% from 1st April, 2004 till 31st January, 2007).

8. Subsequently, an Affidavit was filed by the Executive Director, Finance, of plaintiff. In the affidavit, the plaintiff did not disown the communication dated 11th May, 2004 as per which the amount due from the Defendant is computed at Rs. 12,95,559.09 after making adjustment of security deposit of Rs. 3,79,632/- and other liabilities of Rs. 69,493/-. In the affidavit, it is stated by the plaintiff that the adjustment of the said amount from the customs duty drawback was erroneously made.

9. The Defendant states that the suit filed by the plaintiff is for recovery of custom duty drawback benefits and the said letter dated 11th May, 2004 of the plaintiff seeks the balance confirmation as at 31st March, 2004 after taking into account an amount of Rs. 17,06,505.81 as custom duty drawback. The Defendant with the view to settle the claims in the suit deposited the amount of Rs. 12,95,559.09 alongwith interest amounting to Rs. 4,04,498.9 (being interest calculated @ 11% from 1st April, 2004 till 31st January, 2007). This amount was deposited without prejudice to the rights and contentions to the Defendant that no amount whatsoever was payable by Defendant to the plaintiff as the Defendant has set offs amounting to Rs. 8,29,17,443.58 (as stated in the statement attached with letter dated 25th May, 2004 of the Defendant No. 1 to the plaintiff). It is also pertinent to note that the alleged letter of termination dated 14.10.1987 issued by the plaintiff was signed by an

officer other than the Competent Authority under the Contract M-2.

10. The Defendant No. 1 most respectfully states that other than the amount deposited by the Defendant No. 1 in Court, it is not willing to pay any further amount to the plaintiff.

11. The above narration shows that the defendant did not dispute its liability to pay Rs. 12,95,559.09 with interest at 11% per annum from 1.4.2000 onwards. The position taken by it now, however, is that it would not pay any interest for the period prior to 1.4.2004. The justification given for this is that it claims a larger set off/adjustment to the extent of Rs. 8.3 crores.

12. Learned Counsel for the defendant submitted that if the Court were to dispose off the suit by permitting appropriation of the amount deposited in Court with interest accrued upon it, the matter could be resolved and that further claims need not be adjudicated. Learned Counsel relied upon the contemporary inter se correspondence between the parties of the year 1988 in that regard.

13. The above factual narration would show that the plaintiff's claim as made before the Court originally was for the sum of Rs. 17,06,505.81. The main component of this claim was the customs duty drawbacks which the defendants were to pass on to the FCI. The defendants did not dispute this; however, they were claiming larger amounts and making out a case for set off. The defendants also sought for stay of the proceedings u/s 34 of the Arbitration Act which were pending for a considerable period. Eventually, that application was dismissed. While dismissing the said application, the Court reserved the defendant's right to raise the issue of adjustment. The order of Court was made in 2003. The written statement was subsequently filed and eventually amended where the same claims which have been articulated in 1988-89 were urged as a set off.

14. It is evident from the previous discussion that the defendant was aware of its liability but at the same time was insisting on payments of its dues. At this stage, the defendant is expressing its willingness to give up the set off if no further direction for payment of interest is made. Although, the plaintiff has not agreed to the closure of these proceedings on those terms, it has to a certain extent scaled down its demand; in stead of the amount originally claimed at Rs. 17,06,505.81 it expressed willingness to be satisfied with the amount deposited in Court with interest from 1.2.1988 to 31.3.2004. In these circumstances, the Court is of the opinion that an equitable approach to the issue is called for.

15. The defendant's application for stay of proceedings did not succeed, it remained pending for more than 13 years. Its attempts to attack that order was also unsuccessful; the Division Bench dismissed the appeal. The original written statement filed did not contain any set off. In these circumstances, the Court is convinced that the defendant cannot be completely absolved from the liability of paying interest apart from the interest w.e.f. 31.3.2004. At the same time, the Court

cannot be completely oblivious of the claim made by the defendant in the early stages of the proceedings and even articulated in the application u/s 34. That it amended the written statement subsequently is a matter of detail. In these circumstances, the Court is of the opinion that the most equitable order in the case would be to direct the first defendant to pay interest for a part of the period. Accordingly, in stead of the period being 01.02.1988 to 31.02.2004, the Court is of the opinion that the defendants should bear interest liability for a 5 year period from 1.4.1999 to 31.3.2004 on the said amount lying in deposit.

16. In view of the above discussion, the following directions are issued:

(i) The plaintiff is held entitled to the sum of Rs. 12,95,559.09 with interest at 11% from 1.4.2004 till the date it was deposited in the Court along with the interest accrued on the said amount, as kept in deposit by this Court;

(ii) The defendant is directed to bear interest liability at 11% per annum on the said amount of Rs. 12,95,559.09 from 1.4.1999 to 31.3.2004.

17. The plaintiff is permitted to withdraw the amount deposited in the Court with interest accrued on it. The balance interest, according to the above direction, too shall be paid by the defendant to the plaintiff within four weeks. The parties are directed to be present before the Joint Registrar on 15.09.2008, for complying with the above directions, and to give effect to it.

18. The suit is decreed in the above terms. No costs.