

(2008) 09 DEL CK 0226

Delhi High Court

Case No: Arbitration Petition 61 and O.M.P. 319 of 2004

Banwari Lal

APPELLANT

Vs

Punjab State Coop. Supply Mktd.

 Punjab State Coop. Supply

Mktd. Vs Banwari Lal Radhey

Mohan

RESPONDENT

Date of Decision: Sept. 18, 2008

Acts Referred:

- Arbitration Act, 1940 - Section 20, 30, 33, 34
- Sales of Goods Act, 1930 - Section 42

Hon'ble Judges: S. Ravindra Bhat, J

Bench: Single Bench

Advocate: Shiv Khorana, in Arb. P. 61/2004 and Vineet Bhagat, Neha Jain, Ashish Gupta and Adarsh Ganesh, in O.M.P. 319/2004, for the Appellant; Vineet Bhagat, Neha Jain, Ashish Gupta and Adarsh Ganesh, in Arb. P.61/2004 and Shiv Khorana in O.M.P. 319/2004, for the Respondent

Final Decision: Dismissed

Judgement

S. Ravindra Bhat, J.

In these proceedings, the correctness of an award dated 27.1.2004 by a sole Arbitrator, appointed to decide the inter se disputes between the parties in the proceedings being suit No. 1392-A/81 u/s 20 of the Arbitration Act, 1940, have been challenged.

2. The petitioner - M/s. Punjab State Co-operative Supply and Marketing Federation Ltd., have challenged the award u/s 30 and 33 of Arbitration Act, 1940.

3. The petitioner - M/s. Punjab State Co-operative Supply and Marketing Federation Ltd. (hereafter referred to as "the Federation") entered into a contract on 29.6.1981 with the State Trading Corporation of India Ltd. (STC) for supply of 4000 metric

tonnes of superior Sela Basmati Rice for export to Daman in Saudi Arabia. The arrangement was a back to back contract between STC and M/s. Suleman Al-Mohd., Al Rashid of Saudi Arabia. Pursuant to the contract, the Federation entered into another contract with the respondent on 16.7.1981 by which the latter was to supply 2000 metric tonnes of the said products.

4. The respondent supplied rice to the extent of 1371.928 metric tonnes. According to the petitioner's allegations, the said rice was inspected by the foreign buyer, at Mumbai, and allegedly found to be of sub standard quality and was, therefore, rejected. The petitioners claim to have got the stocks inspected later through other agencies. The result, according to the petitioner, was that the stock of rice supplied by the respondents was not in accordance with the specifications agreed upon.

5. The petitioner withheld the sum of Rs. 24,52,139.64 due, as residuary payment to the respondent. It issued notice on 19.11.1981 demanding that the respondent should get the stocks replaced to the satisfaction of the foreign buyer. Claiming existence of disputes, the respondent filed an application u/s 20 of the Arbitration Act, i.e. Suit No. 1392-A/81. It also filed a suit bearing No. 1901/1984 impleading State Trading Corporation of India seeking recovery of Rs. 53,19,104.66.

6. This Court, by order dated 4.8.1995, stayed the subsequent suit u/s 34 of Arbitration Act and required the parties to submit sole arbitration to Registrar, Cooperative Societies, Punjab. That order was carried in an Appeal. Ultimately, the Registrar, Cooperative Societies made an award. The petitioner filed objections which were allowed and the Court on 25.9.2001 appointed Mr. justice S.N. Sapra (Retd.), as Sole Arbitrator to adjudicate the dispute.

7. The learned Arbitrator in the impugned award held that the respondent was entitled to the sum of Rs. 29,79,139.64 with interest at 6 1/2% per annum from 1.1.1982 till the making of the award, i.e. the sum of Rs. 42,76,306.68. The award was questioned on several grounds. During the course of the proceedings in the hearing of the present objections, the petitioner has confined the challenge to the award on the ground that the Arbitrator misconducted himself in overlooking that the Certificate (issued by M/s. SGS (India) Pvt. Limited, Bombay, and supplied to it) after the dispatch of seven lots of goods, and that such certificates were fraudulently procured, and they did not present the correct picture. In this regard, reliance is placed on the relevant clause of the Contract dealing with inspection which is as follows

Inspection and approval: Stocks will be inspected and approved by M/s. S.G.S. (India) Pvt. Limited, Bombay, India, before loading at the dispatching rail head Delhi. Only those stocks would be loaded which will be approved by this nominated agency. Stocks rejected will have to be taken back by the Associate at its own expenses and no claim in this respect will lie with Markfed. The Associate will obtain a certificate from the inspecting agency at the time of loading that the stocks loaded were in

prescribed specifications and the jute bags and weight in order and will attach it with the dispatch documents at the time of claiming payments.

8. The Arbitrator had framed issue No. 2; it reads as follows:

Whether the respondent performed their part of the Contract dated 16.7.1981 and supplied rice as per specifications as mentioned therein?

In the analysis part of the award, the Arbitrator concluded that property in the rice passed to the claimant, i.e. the Federation, on delivery of the goods u/s 42 of the Sales of Goods Act, 1930. However, he rejected the respondent's contention that after such event, the claimant could not get the rice inspected for testing its quality. The relevant part of the award can be usefully reproduced as follows:

The rice was supplied and delivered to the claimant by respondent in seven lots. 5 lots of rice were delivered to the claimant at the Delhi Railhead while the two i.e. 6th and 7th were delivered to the claimant at Mumbai. Mr. Atul Jain, had pointed out that while the first lot according to the certificates was inspected by the inspecting agency on 22nd August, and 2nd September, 1981 but Mr. Beg Raj Gupta, witness stated that the inspection for that lot was only done once in the godown.

According to me date of inspection in godown where the consignment was stored were loaded in the Railway Wagon on 02.09.1981. Similar is the position in respect of all the seven consignments the two dates of inspections as mentioned in the certificate do not contradict in the statement of witness. The reports were issued by the inspecting agency after the loading of the rice and this was in accordance with the agreement between the parties.

In the pleading, the claimant has alleged that the respondent obtained the certificates from SGS (I) Pvt. Ltd., fraudulently and in connivance with the inspecting agency, Delhi Office. In fact the 6th and 7th lots of rice was delivered at Mumbai and the same was inspected by the inspecting agency at Mumbai and requisite certificates were issued. The claimant has only raised objections with regard to the SGS (I) Pvt. Ltd., Delhi Office.

The relevant portion of the certificate issued by SGS (India) Pvt. Ltd., read as under:

AT The Request of M/s. Banwarilal Radhey Mohan, 3991, Naya Bazar, Delhi - 110006, we attended for the purpose of checking the quality of the above and have to report as follows:

Place and Dates of Attendance:

Supplier's Godown at 23/3, Rana Pratap Bagh, Delhi on 22nd August and 2nd September, 1981. Sampling/Analysis:

Representative samples were drawn from 10% of the bags selected at random from the stack. The sample thus drawn were divided into three parts. One sample was

forwarded to our Bombay laboratory for and their results are as follows:

	Required Specifications	
Moisture	11.8%	14.0
Foreign matter	0.1%	0.5%
Broken (below 3/4)	2.3%	4.0%
Damaged/Shrivelled/Yellow Grains	0.7%	1.0%
Chalky Grains	2.8%	4.0%
Undermilled and Red Grains	0.3%	1.0%
Paddy	0.1%	0.5%
Admixture	9.7%	10.0%

All the above results are within the limits of the specification provided to us by M/s. Banwarilal Radhey Mohan, Delhi.

Loading

The above bags were loaded into 5 Wagons and the details are as follows:

No. of Bags	Wagon No.
515	SR15332
526	NR34352
513	SC2910
526	NR18253
526	NR40589

All the wagons found reasonably clean prior to loading. All the bags loaded in sound condition properly dunnaged with rice husk bags

Out of the first two lots, samples thus drawn were forwarded to Mumbai Laboratory for analysis. However, the samples for the 3rd, 4th and 5th lots of rice which were drawn were not sent to Mumbai laboratory and were tested at Delhi. It also shows that the representative samples were drawn from 10% of the bags selected at random from the stock and the same were divided into three parts.

The certificate further states that the bags were loaded into wagon (number mentioned and detail of the wagon were also waited.

9. Mr. Adarsh Ganesh, learned Counsel, contends that the respondent could not have legitimately relied upon the Certificate issued by M/s.S.G.S.(India) Pvt. Limited. According to counsel, the inspecting agency was M/s.S.G.S.(India) Pvt. Limited, Bombay. In this regard, it is urged that the first Certificate issued on 3.9.1981 mentions that the goods were inspected on 22.8.1981 and 2.9.1981. However, the respondent's witness Mr. Beg Raj Gupta stated that the goods were inspected only once. Reliance is placed to answer to question No. 50 in the proceedings before the

Arbitrator. Learned Counsel urged that such circumstances clearly demonstrate that the Certificate issued by M/s.S.G.S.(India) Pvt. Limited were false and that the respondent made a patently unfounded and false claim which was overlooked by the Arbitrator.

10. Learned Counsel also argued that the inspection certificate discloses that goods were inspected on 2.9.1981 in the godown of the respondent, however, loading was done on 1.9.1981 which obviously again reveals a glaring discrepancy that could not have to be overlooked, by the Arbitrator. These, it was contended, point to a patently erroneous approach by the Arbitrator.

11. Learned Counsel also urged that the Arbitrator overlooked the fact that in all there were seven consignments by the respondents. In respect of each consignment, the same infirmities as pointed out in respect of the first consignment as well as the Certificate could be found. The SGS Reports were all subsequent to the dates on which the goods were loaded and dispatched. In most of the cases, the date of inspection mentioned in SGS Certificate did not synchronise with each other; thus, there was total breach of contract, i.e. either goods were not inspected or loaded in accordance with the Agreement.

12. Learned Counsel urged that the award is also in error of law in not appreciating that when goods were rejected by the foreign buyer, notice was issued calling upon the respondent to get the stocks replaced to the satisfaction of such buyer or any agency nominated by them failing which it was advised to refund the amount paid to it. The respondent did not come forward a letter refuting the claim or raising any demur. The respondent also did not refute the allegation that the goods were of sub-standard quality as certified by M/s. Markfed. This inaction ought to have been adversely taken and noted and in any case disentitled the respondent to relief.

13. Learned Counsel for the respondent submitted that the attack to the award on the ground that it has overlooked material facts and evidence and rendered findings contrary to the record, is without any basis. Learned Counsel points out that the Arbitrator took into consideration relevant documents, such as inspection certificates and all letters. He also points out to a reference to the letter dated 31.8.1981 written by the petitioner/claimant to its liaison officer, New Delhi, i.e. Shri Charanjit Singh, to contend that M/s. SGS (India) Pvt. Limited; Certificates regarding quality of stocks were in accord with the Agreement. On the basis of this and the cross-examination of the said witness (who stated about having received service from SGS (India) Pvt. Limited and also having followed instructions from the Central Government), it was argued that the Arbitrator rendered his findings on the facts supported by the record. As far as the question of analysis reports given by other agencies are concerned, the Arbitrator noted that the correspondence exchanged between STC and M/s. Suleman Al-Mohd.; Al Rashid of Saudi Arabia and the Memorandum of Understanding between them indicated that the claimant (petitioner) and the STC were contemplating a fresh arrangement with the foreign

buyer to supply basmati rice of the crop 1981-82 instead of crop 1980-81 (which was subject matter of the dispute here). It was noted that this correspondence happened prior to the claimant getting the inspection of the rice done from other agencies. It was contended that the Arbitrator noted that there was doubt about the time when inspection was conducted on behalf of the foreign buyer; also that the award adverts disclosure received in the office of STC, from the foreign buyer.

14. From the above factual narrative, it is evident that the main attack to the award is the ground that the Arbitrator relied on what are termed as fraudulent documents. The petitioners in this regard have adverted CW-8, CW-8/5, CW-8/7, CW-8/9, CW-8/11, CW-9. These certificates were issued by M/s.S.G.S.(India) Pvt. Limited. The argument here is that facially they disclose glaring discrepancies regarding inspection of the suppliers (respondent's godown) at 23/3, Rana Pratap, Delhi. The contention is that even though the certificates were issued on certain dates, inspections were carried out on separate dates which were too close to the date of dispatch. These facial documentary discrepancies are sought to be supported by the evidence by Mr. Beg Raj Gupta who deposed on behalf of the respondent.

15. The Arbitrator in the award squarely dealt with these aspects and held that the claimant/petitioner's representative Shri Charanjit Singh had been cross-examined; he deposed to receiving the Certificates in accordance with the Agreement and also having acted in accordance with the instructions. The Arbitrator also held that at no point of time did the petitioner - Federation raise any objection which was alleged by it in the arbitration proceedings. As regards discrepancies between the record and the evidence of Mr. Beg Raj Gupta is concerned, the Court is of the opinion that too much cannot be made about the inconsistencies if one takes into consideration the fact that the said witness was examined almost twenty years after the disputes arose. In this case, undeniably the disputes arose in 1981-82; the present arbitral proceedings were referred more than 19 years thereafter. Besides the facial disputes sought to be raised, not a single letter, document or evidence in support of the submission that such Certificates were "procured", or the documents were forgeries were ever alleged by the petitioner - Federation. In the absence of contemporaneous documents, the Court is unable to agree with the objection raised in the proceedings that the Certificates could not have been acted upon.

16. As far as the question of inspection of the rice by other agencies is concerned, the Arbitrator held as follows:

It is significant to point out that the exercise of getting the rice inspected from other inspecting agencies by the claimant started subsequent to the rejection of rice by the foreign buyer. It is not disputed that the rejection of rice by the foreign buyer on the ground that the same was sub-standard in nature and not in accordance with the specifications, was not as a result of any analysis done in any laboratory but on the basis of the alleged visual inspection by the foreign buyer. In evidence it has

been mentioned that the foreign buyer made the visual inspection of the rice but none of the witnesses produced by the claimant has been able to show as to when the rice was visually inspected by the foreign buyer and in whose presence. Moreover, there is no document placed on record to indicate as to when this visual inspection was done by the foreign buyer and at the time of that inspection who was present. Even Mr. Ajay Mehra, Director of M/s. Mehta Brothers who were the clearing agent of the claimant and also the rice was stored in the godowns hired by them, deposed that he was not aware as to when the foreign buyer inspected stock of rice in the godowns as he was not present at that time. The question with regard to the visual inspection itself is shrouded in mystery. Firstly, whether on visual inspection by the foreign buyer, it could have been ascertained as to what were the specifications of the rice so inspected and the rice so inspected, in which manner was not in accordance with the respondent and another party packed in gunny bags was stored in three godowns and in which manner the foreign buyer made the visual inspection and in which godown, this is not explained or indicated on the record either by the oral evidence or by any document. How thousands of bags can be inspected by visual inspection.

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The claimant got inspected the rice from other agencies. At the request of the claimant the National Agricultural Cooperative Marketing Federation of India limited (Nafed) had drawn a sample of rice in question stored in godown No. 5 and sent that sample to SGS (I) Pvt. Ltd., Mumbai for inspection. The analysis certificates dated 8.12.1981 which is Exhibit CW5/2 has been given by SGS (I) Pvt. Ltd., thereby stating that the admixture (other varieties) was of 40.4 and thus was not in accordance with the specifications. However, with the regard to the other ingredients of specifications the rice was found in order.

At this stage it will be useful to state that there are accepted norms for drawing of samples. For drawing of primary sample, certain percentage of bags of the total quantities of bags are selected at random. Then the primary samples are drawn from each selected bags in very small quantities. All the primary samples so drawn from the lot are thoroughly mixed to form a homogeneous composite sample. Then the same is divided into 3 final samples weighing each 500 gms. This is clear from the executive instructions issued under the Act by the Government of India. From the certificates Exhibit CW5/2 it appears that only one sample drawn from the rice stored in godown No. 5 was sent for analysis. The certificate also states that the sample was unsealed. It may be noticed that hundreds of bags of rice were stored in godown No. 5 and it has not been established that any representative sample was drawn by the following the accepted norms. It appears that only one sample was drawn and the same was sent for analysis. Moreover, the sample was drawn in the absence and without notice to the respondent. This was against the principles of natural justice. For these reasons, I am of the view that the proper analysis could not

be done.

17. The above discussion would show that objections to the award are with reference to factual findings. It is now well-settled that parties to an Arbitration Agreement are free to refer their disputes on factual issues as well as on questions of law to an Arbitrator. Being an agreed adjudicator, the Arbitrator has the mandate to decide on all such issues. Sans glaring illegalities in approach, irregularity in the proceeding and patent errors in appreciation in law or appreciation of the facts on the record, the Court can hardly, if ever, substitute its opinion to that of an Arbitrator.

18. In the present case, the contract between the Federation and the respondent, its supplier was for sale of 2000 MT rice. The respondent supplied the major part of the contracted quantity. Apparently, disputes arose after the back to back contract with the STC was canceled/rescinded by the foreign buyers who wanted to procure rice for the subsequent season. This is evident from the discussion in the award in more than one place. The petitioner, in turn, refused to pay the amounts withheld for the quantity supplied by the respondent and also cancelled the order for the balance quantity. The respondents sought the price of the quantity supplied. The petitioner claimed that the cancellation was justified and also preferred its claims. The claims were rejected; however, the respondent's counter-claim to the extent of Rs. 29,79,139.64 were allowed. There is no denial that the quantity of 1371.928 metric tonnes were supplied. After an exhaustive consideration of the materials placed before him and the contentions raised, the Arbitrator concluded that the title in the goods had passed (as also the risk) to the petitioner/Federation and that its subsequent position about the goods being sub-standard and having rejected them, were not justified, and in any case unsupported by the evidence.

19. Having considered the objections urged before the Court, pertaining to the genuineness of the inspection Certificate and the subsequent inspection by third party agency, the Court is of the opinion that the same are not substantial. In any event, they pertain to pure findings of facts. The record discloses that the Arbitrator merely drew inferences based on documentary evidence as well as on depositions. This Court discerns no unreasonableness in the approach or patent illegalities in the findings.

20. For the above reasons, the objections of the petitioner are held to be unmerited. O.M.P. 319/2004 is accordingly dismissed. Arb. P. 61/2004 is also disposed of in these terms. The award is accordingly made Rule of Court.

21. The respondent/counter claimant shall be entitled to future interest at the rate of 9% per annum.