

**(2008) 11 DEL CK 0186**

**Delhi High Court**

**Case No:** C.S. (OS) 1700A of 1996

Sachdeva Industries

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

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**Date of Decision:** Nov. 5, 2008

**Acts Referred:**

- Arbitration Act, 1940 - Section 14, 30, 33

**Hon'ble Judges:** Rajiv Sahai Endlaw, J

**Bench:** Single Bench

**Advocate:** Digvijay Rai, for the Appellant; Preeti Dalal, Proxy Counsel and Maneesha Dhir, for the Respondent

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### **Judgement**

Rajiv Sahai Endlaw, J.

Objections to the arbitral award dated 4th June, 1996 of Shri T.K. Sil, Director (Computer) of the Calcutta Telephones have been preferred under the Arbitration Act, 1940.

2. The counsel for the plaintiff/objector has argued that the award is based on conjunctures and surmises and is illogical. Reliance in this regard is placed on the expressions used in the award of the arbitrator being "surprised" and of the certain things being "felt" by the arbitrator. It is argued that the dispute before the arbitrator was with respect to the date on the basis of which the price of goods supplied by the plaintiff to the defendant was to be calculated.

3. The purchase order dated 11th January, 1989 was placed by the defendant on the plaintiff pursuant to the tender submitted by the plaintiff and pre-tender negotiations are also claimed by the plaintiff. The said purchase order, it is not in dispute, was unequivocally accepted by the plaintiff. In the column "delivery schedule" the purchase order provided that the supply of stores must be completed on or before 10th December, 1989. In the column "special instructions", in the purchase order, it was stated "supply is to commence at the rate of 3000 kilo meters

per month after two months from the date of issue of this PO and be completed by 10.12.1989". The counsel for the plaintiff has also drawn attention to Clauses 6 and 14.4 of annexure A to the purchase order. In Clause 6.3 it is provided that the purchaser i.e., the defendant reserves the right to regulate the supplies within the scheduled delivery date; that the purchaser can demand the maximum rate of supplies as quoted in the tender offer or specify a lower rate of supply - such instructions shall be issued as and when required in the form of amendment to the purchase order.

4. Clause 14.4 provides that for applying the price variation formula, the price of the raw material prevailing as on 30 days before the date of offer of stores to the inspecting authority will be taken into account.

5. It is the case of the plaintiff that the officials of the defendant, in the negotiations prior to the purchase order had impressed upon the plaintiff to commence the supplies immediately after the placing of the purchase order and to waive the "lead period" of two months for commencing the supplies which was provided for in the tender submitted by the plaintiff. The counsel for the plaintiff has, in this regard, invited the attention to the letter dated 2nd September, 1988 of the plaintiff to the defendant in the arbitral record, wherein the plaintiff had assured the defendant that the plaintiff will commence the supplies within a week after receipt of the purchase order. It is the case of the plaintiff that the plaintiff had, in fact, offered to commence the supplies on 11th January, 1989 itself. It is further the case of the plaintiff that the defendant, however, vide communication dated 12th January, 1989, intimated to the plaintiff that the defendant was willing to take the supplies even during the lead period but further imposed a condition that no supplies and test call shall be accepted before 27th January, 1989.

6. On the basis of the aforesaid, the plaintiff made a claim for price variation on the price of raw materials 30 days prior to 11th January, 1989 while the defendant calculated the price on the basis of rate prevailing 30 days prior to 27th January, 1989.

7. The arbitrator has found the respondent justified in calculating the price on the basis of rates prevailing 30 days prior to 27th January, 1989 and not found the plaintiff entitled to price on the basis of raw material prices, prevailing 30 days prior to 11th January, 1989. While doing so the arbitrator has expressed surprise that the plaintiff was ready with the supplies of a huge quantity on the date of placing of the purchase order itself and to which expression, objection has been taken by the plaintiff. The counsel for the plaintiff has, during the arguments, also invited attention to the communications addressed by the Additional Secretary of the defendant itself to the other officials of the defendant advising against the embargo of supplies before 27th January, 1989. It has further been argued that no such embargo was placed on other suppliers on whom purchase orders were placed pursuant to the same tender. The plaintiff has also filed before the arbitrator

various communications addressed by the plaintiff objecting to the defendant not taking the supplies before 27th January, 1989.

8. I do not find the arbitrator to have misconducted himself in any manner whatsoever and do not find any error on the face of the award and also do not find the award to be contrary to law or public policy. Even though the purchase order fixed a date for completion of supplies but the same has to be read in entirety. Under Clause 6.3, the defendant, as the purchaser, was entitled to demand a lower rate of supply. The defendant, vide its communication dated 12th January, 1989 (supra) though not bound to accept supplies for two months w.e.f. 11th January, 1989, indicated its willingness to accept supplies after 27th January, 1989. The plaintiff in terms of the purchase order could not compel the defendant to accept supplies for two months from the date of issuance thereof. In the circumstances, nothing wrong can be found with the finding of the arbitrator of the defendant being not liable to accept supplies before 27th January, 1989 irrespective of the offer of the plaintiff. The award is in consonance with the purchase order.

9. The counsel for the plaintiff, in rejoinder, also urged that the arbitrator has not dealt with the claims No. 1 and 2 as per the statement of claim of the plaintiff. The claim No. 1 is for unpaid bills No. 1127 and 1127A for Rs. 5,60,720.80 and claim No. 2 is for interest thereon. It is admitted that the said bills were for the price variation which have been adjudicated by the arbitrator and the objections with respect thereto has not been found tenable. It is, however, stated that the said bills also included the amounts towards Central Excise duties, sales tax etc which it is claimed were payable as per actuals by the defendant to the plaintiff. It was also contended by the counsel for the plaintiff that claim No. 6 for loss of profit of 25% on additional order has also not been adjudicated by the arbitrator. However, the counsel for the plaintiff agrees that the defendant under the terms of the contract was entitled to reduce the quantity ordered. It is urged that, however, in this respect also it is the plaintiff only who has been singled out. Upon it being pointed out that the arguments of victimization, of arbitrariness, cannot be gone into in these proceedings, the counsel has fairly stated that he does not press non-adjudication of claim No. 6 but seeks appointment of an arbitrator to adjudicate the claims on account of excise duty, sale tax etc. However, no such argument was made by the counsel for the plaintiff in the opening and a perusal of the application u/s 14 or the objections filed under Sections 30 and 33 filed by the plaintiff also does not find any reference to the same. The counsel for the plaintiff has argued that the entire award has been challenged. In my view, the objections have to be specific. The plaintiff/objector ought to have, at least, stated that all its claims have not been adjudicated. In the circumstances, after a lapse of more than 12 years of the pendency of this objection, I do not find it a fit case to direct the defendant to appoint an arbitrator to adjudicate the said claims. It is otherwise also the settled legal position under the 1940 Act that the claims/counter claims which are not allowed are deemed to have been allowed. The plaintiff shall, however, be at liberty

to approach the defendant for the unpaid amounts, if any, and the defendant to consider the said request of the plaintiff. The objections are, therefore, dismissed, however with no order as to costs.

10. The award is made rule of the court and judgment in terms thereof is pronounced. Decree sheet be drawn up.