

(1985) 05 DEL CK 0076

Delhi High Court

Case No: S. No. 1252-A of 1983

Bhushan Industrial Co. (P) Ltd.

APPELLANT

Vs

Harparshad and Co. Ltd.

RESPONDENT

Date of Decision: May 2, 1985

Acts Referred:

- Arbitration Act, 1940 - Section 20
- Civil Procedure Code, 1908 (CPC) - Order 8 Rule 6, Order 8 Rule 6A(2)

Citation: AIR 1985 Delhi 329

Hon'ble Judges: D.R. Khanna, J

Bench: Single Bench

Advocate: Atul Jain, for the Appellant; Rajiv Sawhney, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

D.R. Khanna, J.

A contract for the supply of (sic) railway equipments and accessories (sic) about 7 crores was entered into by the

(sic) Parshad & Co. Ltd. (hereinafter called (sic) objector") with the Iranian State Railways. (sic) concern was not a manufacturer, and as (sic) had to take recourse to giving of sub-(sic) of different items to a number of (sic) On 21-1-1978 one such contract (sic) as entered into by the objector with the (sic) Industries Co. (P) Ltd. (hereinafter (sic) the "Claimant") for the supply of three (sic). The terms of this contract were such (sic) the claimant took over all the responsibilities including shipment ,freight, delays etc. The objector was indemnified with the following clause:

The liability of the contractor hereunder shall continue till the final acceptance of the goods by the foreign buyer as per the main contract with the foreign buyer and shall cease only after a final acceptance of the goods by the foreign buyer provided

that if any penalty, claims, charges or outgoings are paid or payable to the foreign buyer for the default of the contractor and same shall be borne by and be payable by the contractor.

2. The payments for the goods despatched were to be made by the objector's bank, viz. Punjab National Bank, Parliament Street, New Delhi, to the claimant on presentation of the following documents:

(i) Invoice or Sales Bill in 11 copies certified by the Chamber of Commerce.

(ii) Certificate of Origin in 11 copies attested by the Chamber of Commerce.

(iii) Packing lists including weight and contents of each packet in 11 copies.

(iv) Bills of Lading or Shipping Invoice in 3 originals and 8 copies.

(v) Certificates by a surveillance firm/inspection agency appointed by the foreign buyer relating to the quantity and quality of the goods.

3. On presentation of these documents the bank was to release 100% of the value of the goods despatched by way of revolving letter of credit which was to be opened in favour of the claimant by the bank. It was also provided that the payments were to be made in the Indian rupees for supply of the goods at price equivalent to U.S. Dollair per metric ton F.O.B. Bombay plus freight at actuals for Iranian Port Knorramshahr and Bundarashahpor. In the event of any dispute between the parties they were agreed to be settled by reference to arbitration.

4. There is next no dispute that the claimant furnished a bank guarantee for Rs. 9.5 lacs in favour of the objector for due performance of its part of the contract.

5. 95% of the supplies under this contract were effected by the claimant and 5% remained to be supplied. For the former payments were received by the claimant on shipment of the goods F.O.B. Bombay plus freight.

6. In the meanwhile it so transpired that the objector got the bank guarantee encashed, in January, 1982. The claimant then moved a petition u/s 20 of the Arbitration Act for reference of the disputes and differences between the parties to arbitration. Mr. Justice Deshpande, retired Chief Justice of this Court was then appointed as arbitrator. Both the sides submitted their claims before him. The claimant set up claim of rupees 40 lacs, while the respondent put forth a claim for rupees 25 lacs. These have still to be adjudicated.

7. Since the 5% supplies of the goods had still to be effected to the Iranian State Railways, and the claimant was also objecting to the encashment of the bank guarantee, there was a settlement between the parties under which the claimant agreed to despatch the goods to the Iranian State Railways in two lots. On their despatch the amount of the bank guarantees was to be refunded by the objector to the claimant. The first lot was to be of 63 metric tons of the goods to be despatched

by the claimant from Chandigarh by 15-12-1982, and on this rupees 5 lacs were to be refunded by the objector. The other lot was of 40 metric tons of rail clips not later than 15-1-1983, and on this the balance of rupees 4.5 lacs was to be refunded by the objector to the claimant. This was communicated by the objector's counsel to the claimant's counsel by a letter dated 26-11-1982 and a copy thereof was sent to the learned arbitrator as well. The claimant did despatch these two lots, one on 28-1-1983 and the second on 2-2-1983. Their shipments to the Iranian State Railways followed. Thus there were some delays in their despatch, but much issue has not been made of this from the side of the objector at the time of the hearing of arguments.

8. The claimant, therefore, sought that in view of the special agreement between the parties under which it has already acted and despatched the goods the objector is obliged to pay the amounts of rupees 5 lacs and rupees 4.5 lacs, totalling rupees 9.5 lacs which represented the amount received by the objector on encashment of the bank guarantee.

9. By a letter dated 7-2-1983 the objector informed the claimant that although the claimant had committed delays in the dispatch of the goods, the objector's banker would be informed to pay the two amounts to the claimant when the documents thereof the despatch were received.

10. In the meanwhile the object contends that a telex was received from the Iranian State Railways in which it was mentioned that most of the rail track accessories supplied by the claimant were useless and that arrangement for their inspection by the manufacturer be made. This telex was dated 10-2-1983. The objector then informed this to the claimant by letter dated 15-2-1983. Another telex dated 27-2-1983 was received from the Iranian State Railways by the objector, in which it was pointed out that the goods were not of the standard, and prompt action should be taken to remove the defects or settle the amount of the defective goods, The objector then informed the claimant by letter dated 7-3-1983 that 35% of the coach screws supplied by them were not as (sic) specifications, and that their value came to rupees 16.5 lacs which should be paid by the claimant. Against this claim, the amount (sic) rupees 9.5 lacs payable under the (sic) agreement was sought to be adjusted.

11. Since the settlement about the payment of rupees 9.5 lacs by the objector to the claimant had been arrived at during the court of the arbitration proceedings, and (sic) exchange of letter between the counsel to the parties and the learned arbitrator was air kept apprised of the same, the claimant (sic) that an interim award should be given on in basis of this special agreement. The follow issue inter alia was framed by the (sic) arbitrator:

Whether the whole of the amount of (sic) 9.5 lacs received by the respondent is liable be refunded to the claimant?

12. On this issue the interim award been given, requiring the objector to pay (sic) amount of rupees 9.5 lacs to the claimant view of the agreement contained in the (sic) dated 26-11-1982.

13. This interim award was filed by arbitrator in Court against which the object has filed objections. It is these objections (sic) have now come up for adjudication.

14 The sum and substance of the case of the objector Is that when as a result of defective supplies of goods the Iranian State Railways have set up a claim for rupees 16.5 lacs this amount is due from the claimant to them, and, therefore, they are fully entitled to adjust the amount of rupees 9.5 lacs against the same. It is pointed out that when the objector informed (the claimant of the telex received from the Iranian State Railways, the claimant did not reply or controvert that, nor volunteered to go with the objector to Iran in order to check and rectify the defects in the goods. The learned arbitrator, it is urged, erred in law inasmuch as he gave piecemeal interim award in favour of the claimant ignoring that much larger counter-claim of the objector was pending against the claimant and remained to be adjudicated. Reference has been made to Order 8 Rule 6-A(2) C.P.C., and it is pleaded that the final judgment should have disposed of (sic) the original claim and the counter-claim (sic) mutinously.

(sic) has also been placed upon the case (sic) Mackenzie and Co. Pvt. Ltd. v. (sic) Kumar Sen, AIR 1975 Cal 150, to the (sic) that the parties to the proceedings have (sic) to set off their claims against each (sic) in a proceeding independently of the (sic) of Order 8, Rule 6 where cross demands (sic) out of the same transaction or are so (sic) in their nature and circumstances (sic) it inequitable that the plaintiff should (sic) and the defendant driven to a cross-(sic). The following observations in Halsbury (sic) 3rd Ed. p. 395 were quoted with approval (sic) decision in the case Shakuntala Devi v. (sic) Khullar 1978 R LR 289:

(sic) its effect set-off is essentially different (sic) counter-claim in that set-off is a ground (sic), a shield and not a sword, which if (sic), affords an answer to the plaintiffs (sic) wholly or pro tanto, whereas counter-(sic) as such affords no defence to the (sic) claim but is weapon of offence which (sic) a defendant to enforce a claim against (sic) plaintiff as effectually as in an independent (sic)

15. It has also been pleaded from the side (sic) the objector that reliance by the learned Arbitrator on Union of India v. Raman Iron (sic) AIR 1974 SC 1265 was not correct (sic) as in that case an unascertained amount of damages which had not been specifically adjudicated were sought to be set off and adjusted against ascertained amount of another contract. In the present case it has been pointed out that it has been the same contract in which different amounts are being claimed by the two parties, and, therefore, adjustment is permissible. It is also urged that it would be highly inequitable that the objector should be required to pay the amount due to the claimant while the latter may sit tight over what is due to the objector.

16. From the side of the claimant on the other hand, it has been pleaded that the learned arbitrator has awarded the amount as a result of special contract between the parties arising from the encashment of the bank guarantee by the objector. Had the objector not agreed to pay the amount thereof the claimant would not have despatched the remaining goods to the Iranian State Railways. Now that the claimant has acted under that agreement, the objector should be estopped from raising any objection to the payment of the amount or resile from the same. So far as the claim for damages to the extent of rupees 16.5 lacs, it is contended that the same has still to be determined and that the other claims of the parties for rupees 40 lacs and rupees 25 lacs as set up by them before the arbitrator have also to be adjudicated. Nothing certain about them can be said, and in the circumstances the objector cannot proceed with any assumption that an amount of rupees 16.5 lacs is due to them, and this they are entitled to adjust against the admitted amount of rupees 9.5 lacs due to the claimant. Reference was made to the case [Sarah Abraham Vs. Pyli Abraham](#), in which it was observed that an unascertained amount could not be allowed as legal or equitable set off.

17. I have given my utmost and prolong consideration to the entire matter. There has been a specific issue about the payment of the amount of rupees 9.5 lacs by the objector to the claimant before the arbitrator. The parties sought a decision on the same and the learned arbitrator has given his award though it is of course interim in nature so far as the overall disputes between the parties under the main contract. The propriety of payment of this amount by the objector to the claimant is, therefore, not open to challenge before the Court. Rather the objector too is not disputing this liability. This liability was the result of the special agreement between the parties under which the claimant supplied certain goods and the objector agreed to pay the amounts. This was irrespective of the other claims of 40 lacs and rupees 25 lacs which had been raised by them before the learned arbitrator. This was also independent of the indemnity clause existing in the main contract. It is under that indemnity clause that the objector is now seeking to enforce the adjustment of this amount against the claim of rupees 16.5 lacs. Had those telex from the Iranian State Railways not been received for some time, payment of rupees 9.5 lacs would have been made as a matter of course.

If has, however, to be seen what is the effect of their having been received by the objector and setting up of the claim for rupees 16.5 lacs against the claimant. The learned arbitrator has held that the controversy with regard to rupees 16.5 lacs will receive adjudication in due course as the objector had already filed a claim on its basis. However, the obligation to pay rupees 9.5 lacs under the special agreement has been held to be operative and required to be honoured. Considering the overall circumstances, I am not inclined to interfere in this interim award. The same is, therefore, made a rule of the Court and a decree in terms thereof is passed. However, in order to protect the interest of the objector it is directed that the amount of this decree would be realisable by the claimant on furnishing security to

the satisfaction of the Registrar of this Court to the effect that in case any claim is found due to the objector, the claimant would refund the amount received in this decree accordingly.