

(2008) 10 DEL CK 0138

Delhi High Court

Case No: OMP. No. 211 of 2001

Union of India (UOI)

APPELLANT

Vs

Kay Bee Alums Pvt. Ltd. and
Another

RESPONDENT

Date of Decision: Oct. 3, 2008

Acts Referred:

- Arbitration Act, 1940 - Section 30
- Arbitration and Conciliation Act, 1996 - Section 34, 34(2)
- Sales of Goods Act, 1930 - Section 64, 64A

Citation: (2008) 4 ARBLR 99 : (2008) 155 DLT 131 : (2008) 106 DRJ 562 : (2008) ILR Delhi 181 Supp

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: R.S. Bhatnagar, for Maneesha Dhir, for the Appellant; Shiv Khorana, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

Objections u/s 34 of the Arbitration and Conciliation Act, 1996 have been preferred by the petitioner, Union of India, with respect to the arbitral award dated 26th March, 2001 of respondent No. 2 Shri B.L. Nishad, the then Additional Legal Advisor to the Government of India, Ministry of Law, Justice and Company Affairs. The respondent No. 1 had made five claims before the arbitrator, of which claims No. 1 and 3 to 5 have been rejected by the arbitrator. Claim No. 2 for Rs. 3,10,865/- towards excise duty at 10%, with 27% interest per annum from 1st July, 2000 has been allowed to the extent of Rs. 3,10,865/- with 15% interest per annum from the date of the award till actual realization. The petitioner, Union of India, had also made a counter claim for rejection of the claims of the respondent No. 1 with special costs. Since one of the claims of the respondent No. 1 was allowed, no special costs were awarded to the petitioner. The petitioner, Union of India, has filed objections

with respect to allowing of claim No. 2 as aforesaid. No objections have been preferred by the respondent No. 1. The only ground of objections urged is that the award of Rs. 3,10,865/- towards excise duty is contrary to the terms of the agreement.

2. The objections were filed on 7th July, 2001 stating the same to be within time for the reason of the award having been received in the concerned department of the petitioner, Union of India, on 9th April, 2001. It was pleaded by the respondent No. 1 that the objections were beyond 90 days. A perusal of the arbitral record shows that the arbitrator has given notice of the making of the award by registered Post A.D. to the respondent No. 1 and to the OSD (LIT) DGS&D, New Delhi by registered post A.D. There is nothing on record to show as to when the award was dispatched. As such there is nothing to disbelieve the version of the petitioner, Union of India, supported by an affidavit to the effect that the award was received in the concerned department on 9th April, 2001. The Counsel for the petitioner, Union of India, has in this regard relied on [Union of India \(UOI\) Vs. Tecco Trichy Engineers and Contractors](#), holding in connection with the Ministry of Railways that it has a large area of operation having different heads and various departments and it is only the concerned department which can take a decision whether the arbitral award is to be challenged or not and thus the period of limitation for filing the petition u/s 34 of the Act commence from service of notice of the making of the award on the concerned department. The said judgment is applicable to the facts of the case. I hold that the petition/objections have been preferred within time.

3. The rate contract for supply of Alumina Ferric Grade between the petitioner, Union of India, and the respondent No. 1 with respect to the excise duty provided as under:

Excise duty. The Central excise duty shall be charged extra at 10% on basic price which shall remain firm and fixed. No ED will be paid extra irrespective of turnover. Statutory variation, if any, shall be buyer's account.

The general conditions of contract further provide:

Excise Duty-

The prices are inclusive/exclusive/exempted of excise duty as indicated in the schedule to prices. While submitting the excise duty bills the contractor will furnish the following certificates on the bills itself:

Certified that the excise duty charged in this/these bills are not more than that what is/are payable under the provisions of the relevant act or to the Rules made thereunder:

Certified that the amount of Rs._____ claimed as excise duty in this bill is in accordance with provisions of the rules in all respects and that the same has been paid to the excise authorities in respect of stores covered by the bills under this

contract....

4. The respondent No. 1 vide its letter dated 31st May, 1997, referring to the contract and rates therein being exclusive of central excise duty at 10% as firm, informed the petitioner that the respondent had "now" availed the exemption scheme for SSI Units and as such shall not be charging any excise duty and thus requested the petitioner to add the 10% extra excise duty payable under the contract to the basic rate and thus increasing the basic rate by 10%. The respondent No. 1 further represented that under the MODVAT Scheme under which the respondent No. 1 was earlier manufacturing, the petitioner would have had to pay extra 8% on the basic price but under the exemption scheme there was no extra burden on the petitioner.

5. The petitioner vide its communication dated 4th June, 1997 to the respondent No. 1 issued an amendment to the rate contract. By the said amendment, the Clause (supra) in the rate contract of excise duty at the firm rate of 10% being payable by the petitioner to the respondent was changed to "nil excise duty".

6. On 18th June, 1997 yet another amendment to the rate contract was issued and whereby the excise duty from 1st March, 1997 to 31st March, 1997 was made payable at 8% on basic price and w.e.f. 1st April, 1997 the excise duty was stated to be "nil".

7. There are on record of the arbitrator, various other letters of the respondent No. 1 to the petitioner whereunder the respondent No. 1 represented to the petitioner for changes in the contract with respect to the excise duty. A perusal of the said letters show that the respondent No. 1 was representing that owing to changes in the policy, the respondent No. 1 for its benefit as well as for the benefit of its customers/purchasers was availing new policies whereunder no excise duty was payable by the respondent No. 1 or excise duty at a rate of less than 10% was payable by the respondent No. 1. The respondent No. 1 thus wanted the 10% towards excise duty agreed to be paid by the petitioner to the respondent No. 1, to be added to the basic price.

8. The respondent No. 1 in its claim petition before the arbitrator also claimed that under the contract, statutory variation, if any, in excise duty was to buyer's i.e. petitioner's account; that u/s 64A of Sale of Goods Act also element of excise duty on variation became price of goods; that the petitioner would have been liable for excise duty @ 18%; that the petitioner however unilaterally and illegally amended the rate contract. The respondent No. 1 in para 8 of the claim petition before the arbitrator stated, "it be further added that the claimant is entitled for excise duty benefit due to non availability of MODVAT benefit and therefore required to be compensated to an equivalent of 10% of the rate contract price which is required to be merged and the rate thus arrived at is required to be declared as firm and final."

The respondent No. 1/claimant in the circumstances made the first claim as under:

amend the Clause 5 of the rate contract by making it that excise duty of 10% be merged in the quoted price.

The respondent No. 1 in claim No. 2 as aforesaid claimed Rs. 3,10,865/- towards excise duty.

9. Though claim No. 1, aforesaid, of the respondent No. 1 has been discarded by the arbitrator but the making thereof by the respondent No. 1 unequivocally shows that even according to the respondent No. 1, the respondent No. 1 without amendment of the rate contract, was not entitled to the sum of Rs. 3,10,865/-.

10. The arbitrator, on the one hand, has held that the respondent No. 1 is not entitled to the amendment of the rate contract as claimed, has on the other hand allowed the claim of the respondent No. 1 for excise duty, which the respondent No. 1 would have been entitled to, only if the rate contract had been amended. I, therefore, find that there is an inherent contradiction in the award and the arbitral award is liable to be set aside on this ground alone.

11. It was held in [K.P. Poulose Vs. State of Kerala and Another](#), the Apex Court held that if the arbitrator arrives at inconsistent conclusions it amounted to misconduct within the meaning of Section 30 of the Arbitration Act, 1940. Again in [Union of India \(UOI\) Vs. V. Pundarikakshudu and Sons and Another](#), it was held that award was liable to be set aside when on the one hand there was award of damages, suggesting that party to be guilty of breach and a finding to the contrary, the award was liable to be set aside for inconsistencies. This court recently in [Union of India \(UOI\) and Another Vs. Sanghu Chakra Hotels Private Limited and Another](#), held a mutually contradictory award to be contrary to public policy within the meaning of Section 34 of the 1996 Act.

12. There is nothing on the record to show that the respondent No. 1 raised any excise duty bills on the petitioner as provided in the contract as quoted above. Moreover, the correspondence and the claim petition show that it was the respondent's own case that since it was not billing for the excise duty at 10%, which the petitioner had agreed to pay, the contract price should be increased by 10%. It is thus obvious that no such bills would have been raised. The Counsel for the respondent No. 1 has, of course, argued that the matter was not pleaded and considered before the arbitrator as before this Court. It is urged that the only plea before the arbitrator was that the petitioner was not liable for excise duty owing to the amendment to the rate contract and the arbitrator has allowed the claim for the reason of the said amendment having not been consented to by the respondent. Even if that be so, under the un-amended agreement, the respondent No. 1 was to become entitled to excise duty only if paid to the excise department and not otherwise. The respondent having neither pleaded nor proved any payment of excise duty to the excise department, was under the terms of the agreement not entitled to the excise duty and I thus find the award to be contrary to the terms of

the agreement and liable to be set aside on this ground as well. The Counsel for the petitioner, Union of India, has rightly relied upon [Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation](#), reiterating that an award against the terms of the contract would be patently illegal and open to interference by the court u/s 34(2) of the Act.

13. Some arguments were also addressed with respect to Section 64(a) of the Sale of Goods Act. The same provides for amount of increase or decrease in taxes to be added or deducted from the price, in a contract of sale of goods. However, the same is subject to the contract between the parties. In the present case the contract, as aforesaid, was to pay excise duty limited to 10% and subject to proof of payment of the same to the department and the respondent No. 1 even if had availed of some other schemes at a cost to itself and by virtue of which it became exempt from payment of excise duty, is under the terms of the agreement not entitled to be compensated for such cost, by the petitioner.

14. I, therefore, set aside the award allowing claim for payment of excise duty. Consequently, the award for payment of interest is also set aside. Having found that no excise duty is payable, there is no need to remit the matter for further arbitration. However, in the facts and circumstances of the case, the parties are left to bear their own costs.