* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P. 566/2009

GILLETTE INDIA LIMITED ..... Petitioner/Objector
Through Mr. Kavin Gulati with Ms. Ruchira Gupta and Ms. Pragya Ohri, Advocates

versus

OFFICE OF THE CHIEF CONTROLLER OF ACCOUNTS AND ORS. ..... Respondents
Through Mr. Aman Ahluwalia, Advocate

% Date of Decision : 12th January , 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

J U D G M E N T

MANMOHAN, J (ORAL)

I.A. 257/2010

Present application has been filed seeking amendment of petition filed under Section 34(2)(b)(ii) of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996").

Since the matter is at the initial stage and even notices have not been issued to respondents so far, I allow the present application for reasons stated in it. Consequently, amended memo of parties and petition filed along with this application are taken on record.

Accordingly, application stands disposed of.

O.M.P. 566/2009

1. Present objection petition has been filed under Section 34(2)(b)(ii) of Act, 1996 challenging the Award dated 15th May, 2009 passed by Mr. B.L. Choudhary, Additional Legal Adviser, Government of India, Ministry of Law and Justice and Sole Arbitrator, DGS&D, New Delhi.

2. Mr. Kavin Gulati, learned counsel for petitioner-claimant stated that in the present case, the contract stipulated delivery at FOR Station of dispatch. He contended that once the goods were handed over to Railways for carriage, the right and title in the goods vested in the respondent/consignee and the Railways acted as a bailee. He submitted that thereafter no title in the goods remained with the petitioner-claimant/consignor and Railways were only answerable to the principal, namely, the respondents. Mr. Gulati also drew my attention to the distinction between 'contracts stipulating delivery F.O.R. station of destination' and 'contracts stipulating delivery F.O.R. station of dispatch without transit insurance'. In this connection, Mr. Gulati referred to Clauses 15.11.1 and 15.11.2 of DG S & D Manual of Government of India, Department of Supply. The said Clauses are reproduced hereinbelow:-

> ***"15.11.1 CONTRACTS STIPULATING DELIVERY F.O.R. STATION OF DESTINATION***
>
> ***Responsibility :*** *In such cases, the contractor is responsible to tender the required number of quantity of articles ordered, complete and in good condition to the consignee at station of destination. Delivery here is*

construed to be complete only when the goods reach the destination station in full and good condition. The contractor is, therefore, liable in such cases for any loss or damage that may occur in transit and to make good the same by replacement free of charges for the quantity lost or damaged in transit.

Procurement for setting claims : *The consignee will merely lodge the claims with the carriers and report the fact to the suppliers/as soon as possible but not later than 45 days of the date of arrival of stores at destination. Thereafter, it will be for the suppliers to pursue the claims with the railways and settle the matter.*

15.11.2 CONTRACTS STIPULATING DELIVERY F.O.R. STATION OF DESPATCH WITHOUT TRANSIT INSURANCE :

Responsibility :

(a) In cases where tenderers have agreed to the condition that they will be responsible until the stores contracted for are received in good condition at the destination, the responsibility for the loss or damage occurring in transit will be of the contractor as in sub para above.

(b) In cases where the suppliers do not agree to take responsibility for loss or damage in transit, the property in the goods passes to the consignee as soon as the same is accepted by the railway authorities for carriage, the Railway acting as a bailee. Thereafter, the contractor is ordinarily not responsible for any loss or damage to goods that may occur in transit, if he has been able to book the goods in railworthy condition under a clear receipt without any adverse remarks as to the condition of the goods on the packing.

(c) In cases, however, where goods are sent under "said to contain" receipt, the supplier should not be absolved of his responsibility for loss/damage in transit. For consignments dispatched under R/R on "said to contain" basis, payment shall be made only with the consignee's receipt certificate. The Controller of Accounts will make necessary recoveries from the bill of the supplier on the basis of remarks incorporated by the consignee on the receipt certificate.

Where the stores have been dispatched under clear R/R, the consignee will take up the matter with the Railways

for direct settlement within six months. If such claims are rejected by the Railways, the consignee/indentor shall bear the losses.

Full details in respect of deficiencies and breakages etc. which are clearly attributable to the carrier should be shown against paragraphs 3 (a) of the Railway Certificate portion of DGS&D-84 and the consignee should prefer a formal claim against the carrier for the loss or damage. The Controller of Accounts would send a copy of the consignee's report to the purchase officer."

3. Mr. Gulati further stated that it was respondents' obligation to take up the issue of late delivery of goods with the Railways. In this connection, Mr. Gulati drew my attention to Clause 9 of Schedule E of the Rate Contract, which reads as under :-

"SCHEDULE E

SPECIAL INSTRUCTIONS TO THE INDENTORS/ CONSIGNEE

xxxx xxxx xxxx xxxx

9. The consignee should ensure that any loss/damage to stores that may have occurred during transit should be notified to the contractor within 30 days of the date of arrival of the stores at destination. Failure to do so would render Government's claim for such loss/damage being rejected by the contractor. In case the entire consignment is not received within 30 days of the dispatch (i.e. the date of R/R) they should immediately take up the matter with the Railways and simultaneously advise the supplier asking them to take up the matter with the Railways."

4. Mr. Gulati further stated that though petitioner-claimant had dispatched the goods on 28th June, 1996, the delivery certificate had been issued by the respondents on 11th January, 2000, that is, beyond the three years period from the date of dispatch and, therefore, the

petitioner-claimant could not claim any damages from the insurance company.

5. Mr. Gulati also submitted that respondents could not have withheld petitioner-claimant's payments of other contracts against late delivery of the goods in the present contract.

6. On the other hand, Mr. Aman Ahluwalia, learned counsel for respondents contended that Clause 15.11.2 on which reliance had been placed by learned counsel for petitioner-claimant was clearly not applicable to the present case as the said Clause only applied to deliveries at F.O.R. station of dispatch without transit insurance. He pointed out that in the present case the responsibility and liability to obtain transit insurance was that of the petitioner-claimant. In this connection, he referred to Clause 5 of Schedule C of the Rate Contract.

7. Mr. Ahluwalia further submitted that by virtue of Clause 18 of General Conditions of Contract, as detailed in Form No. DG S & D 68 (Revised), the respondents were entitled in law to withhold any amount due and payable to the petitioner-claimant till adjudication of the disputes. The relevant portion of the said Clause 18 is reproduced hereinbelow:-

> ***"18. WITHHOLDING AND LIEN IN RESPECT OF SUMS CLAIMED***
>
> *Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the contractor the purchaser shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by*

the contractor and for the purpose, aforesaid, the purchaser shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a lien over the name pending finalization or adjudication of any such claim. In the event of the security being in sufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the purchaser shall be entitled to withhold and have a lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the contractor under the same contract or any other contract with the purchaser or the Government or any person contracting through the Secretary pending finalization or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or monies so withheld or retained under the lien referred to above, by the purchaser will be kept withheld or retained as such by the purchaser till the claim arising out of or under the contract is determined by the arbitrator (if the contract is governed by the arbitration clause) or by the competent court as prescribed under clause 20 hereinafter provided, as the case may be, and the contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the contractor. For the purpose of this clause, where the contractor is a partnership firm or a limited company, the purchaser shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner/limited company, as the case may be whether in his individual capacity or otherwise."

8. Having heard the parties at some length, I am of the view that the scope of the interference by this Court with an arbitral award under Section 34(2) of Act, 1996 is limited. The Supreme Court in ***Delhi Development Authority*** *Vs.* ***R.S. Sharma and Company, New Delhi*** reported in ***(2008) 13 SCC 80*** after referring to a catena of judgments has held that an arbitration award is open to interference by a court

under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy.

9. In the present case, the Arbitrator has given the following cogent reasons in the impugned Award for rejecting the petitioner-claimant's claim:-

> *"8.11 It is seen from the inspection notes released by the inspecting authority that the firm had got the bty inspected within the stipulated delivery schedule. Thereafter, the firm was supposed to dispatch btys to different RODs including 222 ABOD/5 FOD within 15 days of release of insp notes/MC note. The firm says that they have dispatched these batteries accordingly, but it is observed that the firm had not indicated the priority of delivery to the Rlys. In addition, the cost of stores was also not declared by the firm on RR/PWBs. Besides above, the firm did not pursue the dispatch/late delivery of consignment by the Rlys in its correct perspective, as a result of which the btys were recd in 222 ABOD/5 FOD either after expiry of resident shelf life/had negligible residual shelf life. Based on the proof or desp the firm has already recd 98% payment. However, the firm could not get balance 2% payment due to non clearance of No 2 & 5 copy of Insp Notes by the consignee depots i.e. 222 ABOD/5 FOD. As per General Terms & Conditions governing Rate Contract 17.1 the purchaser will not pay separately for Transit Insurance and the supplier will be responsible till the entire stores contracted for arrive in good condition at destination. The transit risk in this respect may be covered by the Contractor by getting the stores duly insured, if he so desires. The insurance cover shall be obtained by the Contractor in his own name and not in the name of the consignee. The consignee will as soon as possible but not later than 45 days from the of arrival of stores at destination notify the Contractor of any Loss or Damage to the stores that may have occurred during transit. In case the claimant had got the transit insurance done for all the good then he should claim the insurance from the New India Assurance Limited. The contention of claimant is incorrect.*
>
> *(emphasis supplied)*

10. Moreover, in the present case, I find that petitioner-claimant had actually claimed refund of amount which had been withheld by respondents under other contracts executed between the same parties. In my opinion, if petitioner-claimant wanted to agitate this claim, it should have invoked the arbitration clause in those contracts wherein the amounts had been withheld or adjusted and not in the present contract wherein petitioner-claimant had been paid in advance 98% of the purchase price.

11. I am also in agreement with the submission of respondents' counsel that Clauses 15.11.1 and 15.11.2 (supra) are not applicable to the present case inasmuch as by virtue of the rate contract the petitioner-claimant had obtained transit insurance and it was the responsibility of the petitioner-claimant that the entire stores contracted for arrive at destination in good condition. Clause 5 of Schedule C of the Rate Contract is explicit in this regard and it reads as under:-

> *"SCHEDULE C*
>
> *SPECIAL TERMS AND CONDITIONS OF THE RATE CONTRACT*
>
> *xxxx xxxx xxxx xxxx*
>
> *5. <u>Transit Insurance: The purchasers will not pay separately for transit insurance and the supplier will be responsible until the entire stores contracted for arrive in good conditions at destination.</u> The consignee will be soon as possible but not later than 20 days of the date of arrival of stores at destination notify the contractor of any loss or damage the stores that may have occurred during the transit."*

(emphasis supplied)

12. In any event, in view of Clause 18 (supra), I am of the opinion that respondents were well within their right to withhold the amount till the disputes between the parties were adjudicated.

13. Though the learned counsel for petitioner-claimant was correct in submitting that by virtue of Clause 9 of Schedule E of rate contract, respondents could have intimated to petitioner-claimant within 30 days of non-receipt of goods but in my view, this is only in the nature of a best practice and would not bestow any right in favour of petitioner-claimant as by virtue of Clause 5 of Schedule C of rate contract, the transit insurance had been obtained by petitioner-claimant and it was petitioner-claimant's responsibility that stores contracted for arrive in good condition at destination. Moreover, nothing prevented the petitioner-claimant from following up the matter with respondents and finding out as to whether goods had been received by them as per schedule or not.

14. Accordingly, present petition being devoid of merits is dismissed but with no order as to costs. However, keeping in view the facts and circumstances of the present case, the cost of Rs. 60,000/- awarded by the Arbitrator is waived off.

MANMOHAN,J

JANUARY 12, 2010
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