

R-15

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

+ **OMP No. 57/2000**

Date of Decision: 27th April, 2009

UNION OF INDIA Petitioner
Through: Mr. Rajiv Saxena, Advocate.

versus

A-1 SANAT & CO. PVT. LTD. & ANR. Respondents
Through: Mr. Shiv Khorana, Mr. Ashish
Khorana and Mr. V.P. Tripathi,
Advocates.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

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

% **JUDGMENT (Oral)**

VIPIN SANGHI, J.

1. In challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 (the Act) is the award dated 07.12.1996 passed by the learned arbitrator Smt. Shail Goel, Legal Advisor, Ministry of Law, Justice and Company Affairs, Jeevan Dhara Building, 5, Sansad Marg, New Delhi, in relation to disputes which arose between the parties arising out of the contract dated 14.05.1996 for supply of Rotational Moulded Polyethylene Water Storage Tank (Cylindrical Vertical Tanks). The respondent/contractor/supplier was the claimant

before the learned arbitrator.

2. The General Manager, Gun Carriage Factory, Jabalpur, a Union of India ordnance factory, under the Ordnance Factories Board placed a supply order No.96/R058/FY/01 dated 20.02.1997 for procuring 230 Rotational Moulded Polyethylene Water Storage Tank (Cylindrical Vertical Tanks) with close top conforming to specifications IS 12701/89 with amendment No.1 of December 1990 of 300 liters capacity on the respondent as per rate contract dated 14.05.1996 of the DGS&D. In terms of conditions of contract, the Director (Quality Assurance) DGS&D vide inspection note No.KAN/RC/96/Is/19/IF dated 26.05.1997 accepted the 230 water tanks offered by the respondent after conducting inspection on 11th and 12th May, 1997. The inspection note was valid for dispatch upto 24.06.1997. The respondent No.1 transported the 230 tanks as aforesaid to Jabalpur at the petitioner's establishment. During inspection 14 tanks were found broken and in damaged condition. One of these tanks was got inspected and during inspection it was found that the tank did not meet the IS specifications aforesaid in terms of its thickness. The thickness of the tank was checked at various places, which was found to be below the minimum standard prescribed in the IS standard. Consequently, the entire consignment of 230 tanks was rejected by the petitioner. This gave rise to disputes between the parties. The respondent preferred its claims before the arbitrator.

3. The first and major claim made by the respondent was

towards the costs of the 230 tanks amounting to Rs.2,20,800/-. The second was the claim for interest on the aforesaid amount @ 24% p.a. from 01.01.1997 to 31.08.1998, and 01.09.1999 to 31.03.1999. The third claim was towards expenses incurred on travelling and legal expenses for Rs.25,000/-. The fourth claim was made for damages suffered on account of mental agony and damage to reputation and goodwill for Rs.15 Lacs. The petitioner also made counter claims. The first was for withholding the amount of Rs.2,20,800/- as stores were not supplied as per specifications. The respondent also claimed interest @ 18% per from the date of rejection to the date of the award, and thereafter @ 20% from the date of award till the payment. The consignee made a claim of Rs.20,000/- towards costs of placing of supply order and inspection, apart from claiming Rs.1 Lac on account of the inconvenience to the public in the absence of the proper supply by the respondent/claimant. Counter claim of Rs.50,000/- was made towards costs of travelling and legal expenses and another Rs.2 Lacs was claimed on account of keeping the rejected stores. Costs of Rs.10,000/- was also claimed.

4. The learned arbitrator by the impugned award allowed the respondent's claim firstly towards cost of the consignment of Rs.2,20,800/- and also granted interest @ 18% per annum w.e.f. 01.09.1997 to 31.03.1999. While rejecting the other claims of the claimant/respondent herein, pendete lite interest @ 18% apart from interest at the same rate from the date of award till payment on the

amount of Rs.2,20,800/- was also awarded. The award on claim No.(A), which was the principal claim made by the respondent reads as follows:

"Claim No. (A): - Cost of tanks ask per R/C/S.O. @ Rs.960/- each tank of 230 Nos. amounting to Rs.2,20,800/-

Award: Claim (A) of the contractor for a sum of Rs.2,20,800/- (Rupees Two Lakh Twenty Thousand and eight hundred only) being cost of 230 tanks is allowed on the following grounds: -

(i) The Inspecting Officer, the Director of Quality Assurance K-1 Circle, Kanpur vide Inspection Notice dtd. 26.5.1997 accepted 230 tanks.

(ii) The rejection of the consignment by the Works Manger is wrong and illegal as he was not named as consignee. The consignee under the contact was "General Manager Gun Carriage Factory, Jabalpur".

(iii) All the 232 tanks have been wrongly rejected only on the ground that since one tank is defective, the whole consignment is rejected whereas this right is not vested with the consignees. Under the contract the Director of Quality Assurance K-1 Circle Kanpur or his authorised representative shall draw required number of samples of tanks from the lots and shall test them for all tests and if it conforms to the requirements, release the lots after satisfactory test results. As per inspection report dated 26.5.1997, 230 tanks have been accepted.

(iv) The joint inspection was carried out in the presence of the representative of the Directorate of Quality Assurance on 20.2.1997. The statement of the representative of the consignees that even of one tank is rejected, the whole lot of 232 tanks can be rejected is against the guidelines issued under chapter 10 of the "Pamphlet for the guidance of the

indenting departments" filed by the claimant contractor as chapter No.5 alongwith his rejoinder."

5. First submission of learned counsel for the petitioner is that the arbitrator has ignored the contractual terms and has also acted contrary to them while making the award. Each of the reasoning given by the arbitrator has been assailed by the petitioner. The first reasoning given by the arbitrator is that the consignment had been inspected by the Director of Quality Assurance, DGS&D, K-1 Circle, Kanpur vide inspection dated 26.05.1997, thereby implying that no further inspection could have been carried out by the consignee, and on the basis of such subsequent inspection of one tank, the entire consignment rejected. To meet this reasoning, learned counsel for the petitioner points out that Clause 4.2 of the conditions of contract entitles the consignee to reject the goods notwithstanding any approval by the inspector in respect of stores. Clause 4.2, insofar as it is relevant, reads as follows:

“(2) Consignee’s right of rejection – Notwithstanding any approval which the Inspector may have given in respect of the stores or any part or portion thereof or any materials or other particulars or the work or workmanship involved in the performance of the contract (whether with or without any test carried out by the contractor or the Inspector or under the direction of the Inspector) and notwithstanding delivery of the stores where so provided to the interim consignee, it shall be lawful for the consignee, on behalf of the Purchaser to reject the stores or any part, portion or consignment thereof (i) within sixty

days after actual delivery thereof to him at the place or destination specified in the schedule and (ii) in the case of stores the conditions of the contract in respect of which are dealt with in any of the forms DGS&D-71, DGS&D-72 and DGS&D-73 within 90 days reckoned from the date of receipt of complete equipment with spares and accessories, as ordered if such stores or part, portion or consignment thereof is not in all respects in conformity with the terms and conditions of the contract whether on account of any loss, deterioration or damage before despatch or delivery or during transit or otherwise howsoever:" (emphasis supplied)

6. From the aforesaid, it is clear that irrespective of the inspecting officer i.e. the Director of Quality Assurance of DGS&D granting a certificate of fitness to the consignment, the consignee still is entitled to reject the consignment, or any part thereof, if it is found that the same does not meet the specification upon which the consignment was to be supplied. A perusal of the award shows that Clause 4.2 has completely escaped the attention of the arbitrator. In fact she has proceeded on the erroneous basis that once the Director (Quality Assurance) of DGS&D had inspected the stores and found them to be in order, the consignee had no right of inspection or rejection. Consequently, the first reason given by the arbitrator while making the award on Claim (A) cannot be sustained, as the certification by the inspecting officer is not final and the consignee is entitled to reject the goods or any part thereof in terms of Clause 4.2 of the general conditions of the contract.

7. The next reason given by the arbitrator is that the rejection of

the consignment by the Works Manager was wrong and illegal as he was not the main consignee. The consignee under the contract was "General Manager, Gun Carriage Factory, Jabalpur". Learned counsel for the petitioner has drawn my attention to the rejection letters dated 26.08.1997 and 22.09.1997 at pages U-20 and U-21 of the arbitrators record. A perusal of these letters shows that they were issued by the Works Manager "for General Manager".

8. In answer to this submission of the petitioner, learned counsel for the respondent has sought to rely on the definition of the term "consignee" to submit that the consignee does not include its authorized representative. He submits that the Works Manager could not have been authorized and, therefore, could not have rejected the consignment. It was only the General Manager viz. the consignee, who could have rejected the consignment, if at all. The definition of consignee contained in Clause 1(b) of the General Conditions of contract reads as follows:

"(b) "Consignee" means where the stores are required by the acceptance of tender to be despatched by rail, road, air or steamer, the person specified in the acceptance of tender to whom they are to be delivered at the destination; where the stores are required by the acceptance of tender to be delivered to a person as an interim consignee for the purpose of despatch to another person, such other person; and in any other case, the person to whom the stores are required by the acceptance to tender to be delivered in the manner therein specified."

He relies on ***Hindustan Construction Co. Ltd. Vs. State of***

Bihar AIR 1999 SC 3710 in support of his aforesaid submission.

9. I do not find merit in the submission of Mr. Khorana. Reliance placed on **Hindustan Construction Co.** (supra) appears to be misplaced. That was a case pertaining to encashment of the bank guarantee. The court held that a bank guarantee constitutes a separate, distinct and independent contract between the bank and the beneficiary. Since the bank guarantee was furnished by the Chief Engineer and there was no definition of Chief Engineer in the Bank Guarantee, and the bank guarantee did not provide that the Executive Engineer would be included in the term Chief Engineer, it was held that the bank guarantee could be invoked by none except the Chief Engineer. The invocation letter was reproduced by the Supreme Court in Para 17 of the judgment and it shows that the invocation letter had been issued by the Executive Engineer in his own name and on his own behalf and not for and on behalf of the Chief Engineer. Consequently, this decision does not help the respondent in its submission. The definition of the term 'consignee' also does not advance the case of the respondent. The definition does not say that the consignee personally has to receive the consignment, and that the same cannot be accepted or rejected by the Works Manager on his behalf.

10. It is evident that the rejection letters were not issued by the Works Manager on his own behalf and under his own authority, but were issued on behalf of and for the General Manager. It is not that the General Manager personally has to supervise the execution of the

contract of supply in each case. He is the head of the department and his subordinates, who are entrusted with various responsibilities by him, are obliged to work the contract and supervise the same. The rejection, therefore, cannot be said to be by the Works Manager himself. The aforesaid aspect has also escaped the attention of the learned arbitrator and she has failed to deal with the same. Consequently, this finding of the learned Arbitrator, which is based on her failure to notice the fact that the Works Manager had issued the rejection letter on behalf of the General Manager, is unsustainable.

11. The third reason given by the learned arbitrator is that all the 232 tanks had been rejected, even though only one tank was found to be defective. She holds that this right was not available to the consignee/petitioner. She further holds that under the contract the Director of Quality Assurance was required to draw a sample of required number of tanks from the lot and test the same and if the same come up to the requirement, release the lot after satisfactory results.

12. From the aforesaid reasoning of the arbitrator it appears that the arbitrator was of the mind that the inspection conducted by the Director (Quality Assurance) was the only and final inspection and that no further inspection could have been carried out, and on that basis the consignment or any portion thereof could not have been rejected by the consignee. As noticed above, this reasoning of the learned Arbitrator appears to be patently erroneous in view of Clause 4.2

extracted above which has been omitted from being taken into consideration by the learned Arbitrator. The obligation of inspection which is vested in the Director (Quality Assurance) DGS&D is different from the right vested in the consignee to reject the whole or part of the consignment for defects. The inspection by the Director (Quality Assurance) DGS&D comes at a stage before the supply of the goods to the consignee. The Director (Quality Assurance) is an office under the DGS&D. He is required to grant a certificate of fitness of the supplies by drawing the requisite number of samples and testing the same. The Director (Quality Assurance), DGS&D does not function under the consignee. The finding that the consignee did not have the right to reject the whole consignment as only one tank was defective is in the teeth of Clause 4.2 as well as the conditions of acceptance. The conditions of acceptance expressly provide:

“If on examination of any sample from portion of the supply, the material found to be not fully in accordance with the relevant specification as quoted the whole supply may be rejected. The supplies shall conform to the terms and conditions of the contract.”

13. On a perusal of the aforesaid condition of acceptance, it is clear that upon examination of “any sample” “whole supply” could be rejected. The clause is capable of only one interpretation i.e. that the consignee is entitled to reject the entire consignment even if a single sample is found to be defective. This shows that the consignee was not obliged to adopt a similar procedure of inspection i.e. of drawing

more the one sample from the lot before rejecting the entire consignment. It also shows that the rejection of the entire consignment could be founded upon a single defective piece. Unfortunately, the learned Arbitrator has not even noticed the above condition of acceptance. The learned arbitrator rejected the aforesaid submission of the petitioner founded upon the conditions of acceptance by placing reliance on guidelines issued under Chapter 10 *"Pamphlets of the Guidance of the Indenting Department"*. It is argued by learned counsel for the petitioner that the contractual terms could not have been ignored, much less overridden by guidelines, which were not forming part of the contract. These guidelines were not for guidance of the Indenting Departments. They did not vest a right in the supplier to insist on their adherence by the consignee while inspecting or rejecting the consignment.

14. I find force in this submission of learned counsel for the petitioner. The Arbitrator was bound by the contractual terms and could not have imported other rights and obligations by placing reliance on guidelines so as to override the contractual terms.

15. Learned counsel for the petitioner submits that the reasoning of the learned arbitrator is also patently incorrect for the reason that she has ignored the evidence brought on record. Firstly, he has drawn my attention to the inspection format MID (RIG) at pages U101, U102, U103 and U104. These documents show that different lots of the said consignment were received and inspected by the consignee. The first

inspection format MID (RIG) dated 15.07.1997 shows that 55 water tanks were received in one lot. The inspection conducted by the consignee reads as follows: -

“A) Thickness of PVC wall found 0.85 to 3.30 mm – (all)

B) 13 nos. tanks found crack splitted at neck and shoulder

C) 1 no. tank found broken damaged.”

16. The inspection format MID (RIG) dated 04.08.1997 was in respect of two lots of 46 and 45 tanks and the inspection report in respect thereof reads as follows:

“A) Thickness of PVC wall 4.4 mm (thin) found 0.85 to 4.80 mm

Not uniform

B) Overall Diameter Range 650 to 850 mm found 820, 830 & 840 mm”

17. Similarly, the inspection format MID (RIG) dated 02.09.1997 was in respect of lots of 44, 12, 25 & 2 tanks and once again the inspection report reads as follows:

“A) Thickness of PVC all 4.40 mm (minimum) found 0.85 mm to 4.80 mm

Not in uniform”

18. On the aforesaid basis, it is argued that the different lots received on different dates were examined and none of them was found to be meeting the IS standards.

19. Learned counsel for the petitioner has further relied on the

minutes of a meeting held on 19.09.1997 between the parties. The minutes thereof read as follows:

“Minutes of meeting held on 19.9.97 at 3.30 P.M. at J.W.M/MID office. The following were presents.

- From Fy side

From Firm side	From Fy side
S/Sh. M.M. Siddiqui – Prop.	S/Sh. A.K. Mandan DGM F & Sy
S/Sh. N.P. Aggarwal – Local rep	S/Sh. S.P. Misra J.W. M/MID.
S/Sh. S. Ahmadi – Supr.	S/Sh. B.K. Chakraborty A/F (T)

Qty. 232 nos supplied against R.C. no. order no. 96 R058 Fy 01 dated 20.02.97 vide DGS&D l/note no KAN/RC/96/38/19 dated 26.05.97. Out of above qty 14 nos are found either in broken or damaged condition. These fourteen nos are from first supply.

1. Size of one broken tank was taken and found below the specified limit mainly for thickness as such whole lot of 232 nos were rejected.
2. To ascertain the requirement of thickness taken by G.C.F., again thickness are measured in presence of the firm and Fy rep. (as mentioned above) as given in the attached Appendix “A”.
3. The firm rep. stressed that R.C. has already been amended & min thickness as specified in the old spec i.e. 4.4 mm is amended to 3.00 mm min. and wall thickness above the effective height of the tank shall not be less than 75% of the value given.

The firm rep also stated that in (illegible) R.C. the wt and guarantee period are also waived but in old R.C. based on which the order was placed both the above wt and guaranty period are specified which are apart from given IS Spec.

The firm rep has certified that the broken tank for which measurement was taken is manufactured by him and inspected by D.G.S.&D inspection.

The firm rep also requested for measurement of dimension of fresh tank supplied by them to G.C.Fy.”

Appendix-A to the minutes reads as follows:

“Appendix A

Thickness at various placed of Rotational Moulded Polyethylene Water Storage Tank with close top confirming to specification IS-1270/89 with amendment No.1 of Dec. 90 against RC order No.96R058 FY01 dt. 20.2.97 against D.G.S&D Rate/Contract No.J4/ST-7/RC/3929/OHT/ 96-97/ 27/ AL-SANAT/ COAD/ 1193 Dt 14/5/96. Vide If note no KAN/RC/96/38/19 Dt. 26/5/97 for one no.

Thickness in mm

Position	Min	Max	Remark
Top	0.95	3.65	
1	0.85	2.05	
2	2.40	2.60	
3	2.35	3.25	
4	3.00	3.45	
5	3.20	3.50”	

20. From the minutes of meeting dated 19.05.1997, it is argued that the respondent supplier did not seek to challenge the finding that the wall thickness of the water tanks was below 4.40 millimeters. What was contended by the respondent was that the minimum thickness specification in the old specifications was 4.40 millimeters and the same had been amended to 3.00 millimeters and that the wall thickness above the effective height of the tank should not have been

less than 75% of the value.

21. Counsel for the petitioner has drawn my attention to Indian Standard for Rotational Moulded Polyethylene Water Storage Tank placed on record at pages C-76 onwards. Amendment 1 of December 1990 is also found on record at page C-80. With regard to wall thickness, Clauses 6.4 and 6.5 of the amendment are relevant and the same read as follows:

“6.4 Wall Thickness

Owing to limitations of rotational moulding process, the wall thickness of the water storage tank at bottom, top and cylindrical sides at the bottom and top edges where the shape of the tank changes is usually found to be much greater than the wall thickness at other surfaces. However, the wall thickness at any place shall not be less than the values given in 6.1 and 6.2 as relevant. The wall thickness shall be measured at least at 20 points well distributed on the sides, top and bottom and where the direction of plane of tank surface changes. Thickness measurements on the lid shall be made at least in four well distributed locations.

(Page 3, clause 6.6) – Renumber it as 6.5 and substitute the following for the existing clause:

6.5. The dimensions as given in 6.1 and 6.2 refer to finished empty tanks. Measurements shall be made after 48 hours of moulding. The wall thickness may be measured with a dial gauge micrometer fitted with spherical anvil. The overall diameter, height and other dimensions may be measured with steel rule or steel tape of desired accuracy by placing the empty tank on a flat surface.

(Page 4, Table 1) – Substitute the table given on page 3 for the existing table.

(Page 4, Table 2) – Delete.

(Page 4, clause 7.1, line 12) – Substitute ‘Table 3’ for ‘Table 4’.

(Page 4, clause 7.1) – Insert the following new clause after 7.1:”

22. Table one, as amended, contains the dimensions of cylindrical vertical tanks. For net capacity of 300 liters the minimum wall, top, bottom and led thickness in millimeters is prescribed as 4.40 millimeters.

23. Learned counsel for the petitioner submits that these vital pieces of evidence have been completely ignored by the learned Arbitrator and the aforesaid aspects have been completely omitted from consideration by the learned arbitrator. It is, therefore, argued by learned counsel for the petitioner that the reasoning of the learned arbitrator that all the 232 tanks had been rejected upon inspection of only a single tank, does not appear to be correct.

24. In his response, Mr. Khorana learned counsel for the respondent has relied upon the minutes of the undated joint investigation of the consignment, a typed copy whereof is placed on page U-30 of the arbitrators record. By placing reliance on these minutes he states that the petitioner had inspected one of the broken tanks to measure the thickness. He also relies on the stand taken by the representative of the Director, Quality Assurance of DGS&D recorded in these minutes to the effect that stores received in broken conditions could not be taken as sample for testing.

25. I find force in the submissions of the petitioner. Firstly, it is

evident that the learned Arbitrator confused the right of the consignee to inspect the consignment and reject the same with the obligation of the Director (Quality Assurance) of the DGS&D to inspect the consignment. The consignment had to be certified not only by the Director (Quality Assurance), but the consignee had an independent right of inspection and rejection of the same. Even after the consignment being certified by the Director (Quality Assurance) of DGS&D, the same could have been rejected by the consignee if the same, or any part thereof, was found to be below the specified standard. The documents relied upon by the petitioner do indicate that not one, but practically all the supplies made by the respondent were inspected from time to time. They also indicate that the respondent did not dispute the inspection reports and the fact that the thickness of the tanks was below 4.40 mm. From the minutes of the meeting held on 19.09.1997 between the parties it appears that the stand of the respondent was that under the amended specifications the thickness had been reduced to 3.00 mm. However, the amendment suggests otherwise. The stand of the representative of the Director (Quality Assurance) of DGS&D in the undated meeting also needed consideration.

26. It is not for this court in these proceedings to re-appreciate the evidence that has been led by the parties before the Arbitrator. However, where an Arbitrator has completely ignored the evidence brought on record by one or the other party in the making of his award

the award so made does call for interference by the court where it appears that the evidence was relevant and material.

27. For all the aforesaid reasons, in my view, the award is clearly opposed to public policy as it does not conform to the law. The learned Arbitrator has acted contrary to the contractual terms. She has ignored the material evidence brought on record. The same is, therefore, liable to be set aside. Accordingly the award is set aside leaving the parties to bear their respective costs.

VIPIN SANGHI, J.

APRIL 27, 2009
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