
(2018) 04 DEL CK 0263

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 127 Of 2018

Adani Global Pte. Ltd

APPELLANT

Vs

MMTC Ltd

RESPONDENT

Date of Decision : 02-04-2018

Acts Referred:

Rules Of Arbitration Of The Indian Council Of Arbitration — Rule 15A, 15A(e)
Arbitration And Conciliation Act, 1996 — Section 18, 21, 34

Citation : (2018) 04 DEL CK 0263

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Vikram Nankani, Arpan Behl, Avinash Tripathi, Sanjeev Puri, Akhil Sachar, Priyanka Puri

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner (AGPL), a company registered under the laws of Singapore, has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act"), inter alia, impugning an arbitral award dated 29.09.2017 (hereafter "the impugned award") delivered by the Arbitral Tribunal (hereafter "the Arbitral Tribunal") comprising of three arbitrators Sh D.P. Wadhwa, Sh R.C. Lahoti and Sh Deepak Verma, former judges of the Supreme Court of India.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in relation to a contract dated 11.12.2008 (hereafter "the Agreement"), in terms of which AGPL had agreed to supply Indonesian Steam Coal to the respondent (hereafter "MMTC"). AGPL, inter alia, claimed that it is entitled to receive the consideration for the coal supplied at the price as indicated in the Letter of Intent and not as specified in terms of the Agreement. The Arbitral Tribunal has rejected the said claim and this has led AGPL to challenge the impugned award.

3. Briefly stated, the controversy between the parties arise in the following context:-

3.1 On 15.05.2008, MMTC invited offers for "supply of 5.00 Million Metric Ton +/- 10% with option to buy additional 3.00 Million Metric Ton +/- 10% Imported Steam (non-coking) coal" as per the specifications indicated in the notice inviting offers. The said bids were invited by MMTC for procuring coal for its customer, Tamil Nadu Electricity Board (hereafter "TNEB").

3.2 M/s Adani Enterprises Ltd. (hereafter "AEL") submitted its bid pursuant to the said invitation to tender. In its bid, AEL disclosed that it would supply coal directly through its overseas subsidiary ? AGPL. After negotiations, MMTC issued a Letter of Intent dated 20.08.2008 (hereafter "the First LOI") to AGPL for supply of 7.50 lakh Metric Ton imported steam coal of Indonesian origin at the following rates on C & F basis:-

(i) USD 151.50 Per Metric Ton (PMT) at Ennore Port for quantity of 3.75 lakh MT +/- 10%.

(ii) USD 162.50 Per Metric Ton (PMT) at Tuticorin Port for quantity of 3.75 lakh MT +/- 10%.

3.3 The First LOI also provided that the supply of coal has to be arranged by AGPL on back to back terms and conditions of the purchase order, that would be placed on MMTC by TNEB and the shipments would be made as per the delivery schedule of TNEB. AGPL accepted the First LOI.

3.4 On 07.10.2008, AGPL requested MMTC to place the purchase order to complete the documentary procedures. MMTC responded to the said letter enclosing the response received from TNEB. TNEB had stated that FOB Price and Baltic Indices of the Panamax and Handymax vessels were declining and TNEB proposed to have a meeting on 17.10.2008 to proceed further in the matter.

3.5 On 20.10.2008, AGPL informed MMTC that it was not in a position to offer any additional discounts on the rates already firmed and accepted, but, as a goodwill gesture and without prejudice, it was willing to extend a discount of USD 4.00 PMT in the final rates without prejudice to its rights. AGPL once again requested for issuance of purchase order without any further delay.

3.6 On 24.10.2008, MMTC informed AGPL that it had taken up the matter with TNEB and has enclosed the letter received from TNEB. TNEB had stated that there was a fall in the international coal prices and the freight rates and, therefore, TNEB would not be in a position to issue a draft purchase order unless MMTC reduces the offered rates, substantially, to match the prevailing market. MMTC was also requested not to arrange for any delivery plan till finalization of the above procurement. Thereafter, parties held certain negotiations with regard to prices and, on 24.11.2008, AGPL sent a letter indicating its willingness to reduce price of USD 104.50 PMT for supply at Ennore Port (instead of USD 151.50 PMT as per the First LOI) and USD 109.50 PMT for supply at Tuticorin

Port (instead of USD 162.50 PMT as indicated in the First LOI). However, AGPL also stated that it was accepting reduced rates in order to minimize its further losses and the same was without prejudice to its rights.

3.7 MMTC issued a revised LOI dated 11.12.2008 (hereafter "the Second LOI") to AGPL for supply of 5.00 lakh Metric Ton +/- 10% imported steam coal of Indonesian origin: 2.50 lakh Metric Ton +/-10% at USD 104.50 PMT for supply at Ennore Port and a quantity of 2.50 lakh Metric Ton +/- 10% at USD 109.50 PMT for supply at Tuticorin Port .

3.8 AGPL accepted the Second LOI albeit with a noting "accepted without prejudice to our rights against previous LoI dated 20/08/08". The Second LOI also expressly stated that "in view of the revised LoI, the earlier LoI issued on 20th August, 2008 shall be treated as Null and Void".

3.9 Thereafter, the parties entered into the Agreement captioned as "Contract for Supply and Purchase of Non-coking (steaming) coal of Indonesian Origin in bulk". The Agreement set out the detailed terms and conditions of the supply including specifications, quantity and the price. Table 1 in Clause 1.1 of the Agreement, which sets out the price and the quantity to be supplied is set out below:-

"1 MATERIALS AND PRICE

1.1 PRICE: TABLE I

Sl. No.

Description

Qty. in Metric Tonnes

Price USD/MT

Total Price (USD)

1.

Non-coking (Steaming) Coal of Indonesian Origin in Bulk (C&F Price/MT) as per the specification in Table II and Price Basis as follows:

Ennore Port 2,50,000 +10%

104.50

2,87,37,500

2.

CCV (ADB) 6000 Kcal/Kg., Total Moisture (ARB) 15%, Ash Content (ADB) 8%

Tuticorin port 2,50,000 +10%

109.50

3,01,12,500

3.

Insurance Charges (Reimbursable at actuals subject to a maximum of 0.09 USD/MT

5,00,000

0.09

49,500

3.10 Thereafter, on 15.12.2009, AGPL sent a letter to MMTC, inter alia, stating that it had supplied coal at reduced prices in lieu of tremendous pressure exerted by MMTC/TNEB and it had suffered huge losses. AGPL stated that it was in the process of calculating the same and it would revert back to MMTC with the extent of losses suffered. Thereafter, on 21.05.2010, AGPL sent a letter to MMTC demanding a sum of ₹ 110 crores on account of the alleged loss suffered by AGPL. AGPL followed this letter by another letter dated 15.07.2010.

3.11 On 06.06.2011, AGPL sent another letter stating that in view of the disputes, the matter be referred to arbitration in terms of Clause 19 of the Agreement.

3.12 On 22.08.2012, AGPL submitted its request for arbitration to Indian Council of Arbitration (ICA) in terms of Clause 19 (Arbitration Clause) of the Agreement. Thereafter, AGPL filed its Statement of Claims. On 20.09.2013, MMTC filed its Statement of Defence. AGPL filed a rejoinder. The arbitral proceedings culminated in the impugned award, which was delivered on 29.09.2017.

Submissions

4. Mr Nankani, the learned Senior Counsel appearing for AGPL has assailed the impugned award, essentially, on three grounds. First, he submitted that the impugned award is patently illegal as the Arbitral Tribunal had denied equal treatment to AGPL. He submitted that the arbitral proceedings were conducted in violation of Section 18 of the Act, which enjoined the Arbitral Tribunal to treat each party equally and to provide each party equal opportunity to present his case. He stated that during the arbitral proceedings, MMTC had indicated that it did not wish to produce any witness and, accordingly, on 28.11.2015, the Arbitral Tribunal closed MMTC's right to lead any evidence. Notwithstanding the same, MMTC sought permission to file an affidavit of one Mr Hemant Bisht after the evidence was closed.

5. The Arbitral Tribunal passed an order dated 10.12.2015 allowing the application filed by MMTC. He submitted that in its order, the Arbitral Tribunal had also recorded the statement of the counsel appearing for MMTC that an additional affidavit of the witness (Hemant Bisht) would also be filed to bring on record the documents that may be required by AGPL for the purposes of cross-

examination of the witness. Pursuant to the aforesaid direction, the witness (Hemant Bisht) filed an additional affidavit on 29.06.2016 alongwith certain other documents. He submitted that, thereafter, AGPL had sought production of documents which were referred to in the letter of 10.12.2008 pursuant to which some documents were produced; however, MMTC did not produce copy of the minutes of the meeting held on 21.11.2008 on the grounds that record of the same was not maintained by MMTC. He stated that on perusal of documents produced by MMTC, AGPL sought production of further documents, which was denied. In this backdrop, AGPL filed another application for production of documents, which was rejected by the Arbitral Tribunal by an order dated 13.02.2017. He stated that after the final arguments were concluded, AGPL found the documents, the disclosure of which was sought for by AGPL and, therefore, filed an application to place the same on record.

6. This application was also rejected by the Arbitral Tribunal without affording AGPL any opportunity of being heard. He earnestly contended that on one hand, the Arbitral Tribunal had allowed the MMTC's application for leading additional evidence and on the other hand, denied both the applications - the application for discovery and production of documents and the application to file such documents on record ? filed by AGPL. He submitted that this, apart from showing clear bias, also established that the parties had not been treated equally as required under Section 18 of the Act.

7. Second, Mr Nankani contended that the impugned award is patently illegal as it failed to recognize that the First LOI had resulted in a binding contract. He relied on the decision of the Supreme Court in *Dresser Rand S.A. v. Bindal Agro Chem and Anr.*: (2006) 1 SCC 751 in support of his contention that a Letter of Intent communicating the acceptance of an offer would amount to a concluded contract.

8. Third, he submitted that the decision of the Arbitral Tribunal, that AGPL's claim is barred by limitation, is wholly erroneous. He stated that the Arbitral Tribunal had failed to appreciate that the notice of arbitration was issued on 06.06.2011, which was within a period of three years from the date of the First LOI and, therefore, AGPL's claim was within the period of limitation. He referred to Clause 19 of the Agreement and submitted that the said clause not only provided that the arbitration would be conducted under the ICA Rules but also expressly provided that the same would be conducted under the Act. He stated that in view of the reference to the Act, the arbitral proceedings would commence on the date on which the request for arbitration was made, as provided under Section 21 of the Act. Since such request was made on 06.06.2011, which was within the period of limitation, AGPL's claim could not be rejected as barred by limitation.

Reasons and Conclusion:

9. The first and foremost question to be addressed is whether the arbitral

proceedings had been conducted in violation of Section 18 of the Act. There is no dispute that the Arbitral Tribunal had afforded both the parties an opportunity of being heard. AGPL's grievance arises from the fact that while the Arbitral Tribunal had allowed MMTC's application for filing the affidavit of Hemant Bisht, it had rejected the AGPL's application for production of additional documents and for placing the documents on record.

10. MMTC had filed an application to place on record the draft purchase order sent by TNEB, which MMTC had come across after its evidence was closed. MMTC stated that the said draft purchase order had been acknowledged by AGPL's representative even prior to the issuance of the Second LOI and, therefore, the same was a material document. MMTC had also offered its witness for cross-examination. The Arbitral Tribunal had considered the said application on merits and in its wisdom had allowed the same as at the material time. The Arbitral Tribunal was of the view that the documents sought to be produced may have same bearing on the merits of the case. The relevant extract of the said order passed by the Arbitral Tribunal reads as under:-

"We have heard the learned Counsel for the parties. We prima facie find that document may have some bearings on the merit of the case. It may be too early to held so at this stage. We do not wish to go into the various contentions raised by the learned Counsel by the parties at this stage, as we are inclined to admit the document and give an opportunity to the Claimant to file any further documents and cross-examine of the witness of the Respondent."

11. A bare perusal of the aforesaid passage indicates that at the material time, the Arbitral Tribunal had permitted production of the said documents without examining the various contentions raised by the parties, as at that stage, the Arbitral Tribunal was of the prima facie view that the documents sought to be produced by MMTC may have a material bearing on deciding the subject disputes. The Arbitral Tribunal had also directed that additional affidavit be filed and, admittedly, this direction was complied with. AGPL had also sought production of the documents referred in the letter produced by MMTC, which was also provided (except minutes of the meeting held on 21.11.2008 which the MMTC said, was not available). This Court finds no infirmity with the decision of the Arbitral Tribunal, and it is also apparent that full opportunity was granted to AGPL to contest the application.

12. The application filed by AGPL for production of documents was, essentially, related to seeking production of communications between TNEB and MMTC. The said application came to be considered by the Arbitral Tribunal at a stage when the matter was listed for final arguments and the controversy to be addressed had crystallised. The Arbitral Tribunal rejected the said application, as it was found that the same would not be relevant to decide the disputes between the parties. The relevant extract of the said order dated 13.02.2017 reads as under:-

"After Claimant's witness was cross-examined on the affidavit filed by it,

Respondent made statement that it would not produce, any evidence and the matter was listed for arguments. However, on the date so fixed Claimant sought adjournment. At this stage Respondent filed an application seeking permission to bring on record additional documents. This application was allowed with liberty to the Claimant to seek additional documents for the purpose of cross-examination of the witness of the Respondent. Cross-examination of the witness of the Respondent was done and the case now posted for final arguments. Now in the meanwhile, present application has been filed. It is not necessary for us to delve on the diverse arguments by the learned Counsel of the parties on the present application. Till this application was filed TNEB was not in picture. Documents sought by the Claimant pertain to the communications exchanged between TNEB and the Respondent. It is not clear how these documents now sought would be relevant for the purpose of the decision respecting the dispute between the parties. As noted above, agreement dated 11.12.2008 has been performed and there is no dispute regarding that. Claimant has alleged that it was not made aware of the communication exchanged between TNEB and the Respondent to know under what circumstances Claimant was made to reduce /lower the price of the coal. Claimant has made a claim on account of loss suffered by it because price of the coal and its quantity has not been in accordance with agreement dated 20.08.2008 when it had made all arrangements of shipment of coal and incurred expenses. Again as noted above, to sustain its claim, Claimant has taken the stand that it had agreed to agreement dated 11.12.2008 without prejudice to the agreement dated 20.08.2008. It is not the case of the Claimant that it was mislead by the conduct attributed to TNEB and Respondent. It is difficult to appreciate the arguments of the learned Counsel of the Claimant as to how the documents now sought to be produced are relevant and help the Arbitral Tribunal in reaching correct decision resolving the pending dispute between the parties. The application does not merit any consideration. It is dismissed."

13. Undisputedly, AGPL's claim for loss suffered was on account that the price and quantity of coal was not in terms with the First LOI. Thus, the principal question to be addressed by the Arbitral Tribunal was whether the First LOI was binding given that AGPL had accepted the Second LOI and, thereafter, had also entered into the binding Agreement.

14. In the circumstances, the Arbitral Tribunal considered that the communications between TNEB and MMTC were not relevant for deciding AGPL's claim. The impugned award also clearly indicates that the communications between TNEB and MMTC were not relevant in the context of the reasons indicated in the impugned award.

15. This Court finds no patent illegality in the approach of the Arbitral Tribunal. AGPL's application for placing the documents on record after the final hearing had been concluded was also rejected, as the said documents were not relevant to the merits of the real controversy being considered by the Arbitral Tribunal. Even otherwise, the Arbitral Tribunal's decision to reject an application to place

additional documents after the arguments had been heard cannot be faulted.

16. The contention, that allowing of MMTC's application and rejection of AGPL's applications indicate that the Arbitral Tribunal had violated Section 18 of the Act, is wholly bereft of any merit. Section 18 of the Act does not require the Arbitral Tribunal to balance the number of applications to be allowed on each side; it only enjoins the Arbitral Tribunal to give equal opportunity to both the parties to present their cases. There is no dispute that the Arbitral Tribunal had given opportunity to both the parties to be heard. The fact that some applications of a party may be allowed while those of the other may be disallowed is not relevant for considering whether the Arbitral Tribunal has provided equal treatment to both the parties.

17. The next question to be addressed is whether the decision of the Arbitral Tribunal is patently illegal or opposed to the public policy of India, as contended on behalf of AGPL. It was contended on behalf of AGPL that the parties were bound by the First LOI even though AGPL had accepted the Second LOI and, thereafter, entered into the binding agreement (the Agreement).

18. The Arbitral Tribunal rejected the said contention, as it found that the Agreement was complete in all respects. The Arbitral Tribunal also held that AGPL had raised invoices in terms of the Agreement without any reservations and the same had been duly paid. AGPL's contention that it was still entitled to claim the prices as per the First LOI since the Second LOI was accepted without prejudice was considered by the Arbitral Tribunal at some length. The Arbitral Tribunal held that the expression "without prejudice" used by AGPL in its letter had exhausted all its purpose. The Second LOI had clearly stated that the First LOI was "to be treated as null and void". Thus, the use of the expression "without prejudice" while accepting the Second LOI would be of little significance. The Arbitral Tribunal had further held that any controversy centering around this issue came to an end by the parties signing the Agreement unreservedly.

19. There is no dispute that the Agreement was signed by AGPL without any qualification. A letter addressed by AGPL on the next date, that is, on 12.12.2008 would be of no relevance. The Arbitral Tribunal also noted that AGPL had supplied coal under the Agreement and had also received payments for the same and, therefore, its claim for loss under the First LOI was unmerited. This Court finds no infirmity with the said view.

20. The decision in the case of Dresser Rand S.A. (supra) is of also little assistance to AGPL. There is no dispute that in certain cases, a Letter of Intent which communicates the acceptance of the offer unequivocally would be considered as resulting in a binding contract. However, in this case, the principal issue is not whether the First LOI resulted in a contract but the consequence of AGPL in accepting the Second LOI, which expressly provided the First LOI to be null and void. Further, the controversy also centred on the effect of the parties entering into a firm Agreement unreservedly.

21. Clearly, in the facts of this case, where AGPL had entered into a formal Agreement consenting to all terms and conditions of the contract including price and quantity, without any reservation, it would not be open for AGPL to set up the claim in variance to the terms of the Agreement.

22. It is also relevant to mention that AGPL had invoked the arbitration clause as contained in the Agreement and not as set out in the First LOI. The Arbitral Tribunal was also constituted in terms of the arbitration clause under the Agreement, and it is well settled that the Arbitral Tribunal would have no jurisdiction to render an award contrary to the terms of the Agreement. In this case, the main contract was embodied in the Agreement which specified the prices at which coal was to be supplied by AGPL. This Court finds no infirmity with the decision of the Arbitral Tribunal in rejecting the petitioner's claim for loss as the same was premised on the terms, which are at variance with those specified in the Agreement.

23. The last question to be addressed is whether the Arbitral Tribunal's decision that the AGPL's claim was barred by limitation is erroneous.

24. In this regard, it would be necessary to refer to Clause 19 of the Agreement (the Arbitration Clause), which reads as under:-

"19.0 ARBITRATION:

Any dispute or difference whatsoever arising between the parties out of or relating to the construction meaning scope operation or effect of this contract or the validity or the breach thereof shall be settled by mutual negotiation failing which the party may go for arbitration in accordance with the provisions of Arbitration and Conciliation Act 1996 and Rules of Arbitration of the Indian Council of Arbitration. Award made in pursuance thereof shall be binding on the parties. Venue of arbitration will be CHENNAI, Tamil Nadu, India.

It is clarified that pending reference to arbitration, the parties shall comply with their remaining obligation under the contract and the supplies shall not be stopped unless dispute is of such a nature that it is not possible to continue the work performance. All disputes shall be settled amicably by mutual consultations between the two parties. In between event of failure to settle a dispute amicably, the same shall be settled by recourse to arbitration."

25. Mr Nankani's contention, that since the arbitration clause also provided that the arbitration shall be in accordance with the provisions of the Act, the notice dated 06.06.2011 invoking the arbitration would be the date for commencing of the arbitral proceedings, is also unmerited. Section 21 of the Act (which was relied upon by Mr Nankani) reads as under:-

"21. Commencement of arbitral proceedings.- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

26. The opening words of Section 21 ? "unless otherwise agreed by the parties" makes it explicitly clear that the arbitration would commence on the date on which a request for disputes to be referred to arbitration is received except where the parties have agreed otherwise.

In the present case, the arbitration clause expressly provides that the arbitration shall be conducted in accordance with the Rules of ICA.

27. Rule 15A of the ICA Rules expressly provides that arbitration shall be deemed to have commenced on the day the application for arbitration, registration fee and statement of claim are received. Rule 15A(e) of the ICA reads as under:-

"Rule 15A(e) The Arbitration shall be deemed to have commenced on the day the application for arbitration, registration fee and statement of claim are received in the office of the Council."

28. Concededly, the request for arbitration was received in the office of ICA on 06.09.2012 and there is no dispute that if this date is considered as the date of commencement of the arbitration, AGPL's claim would be barred by limitation. Since the parties have expressly agreed that the arbitration shall be conducted under the Rules of ICA, the provisions of Section 21 of the Act, which are at variance with the Agreement of the parties, would not be applicable.

29. In view of the above, this Court finds the present petition to be unmerited and the same is, accordingly, dismissed. The parties are left to bear their own costs.