(2008) 09 DEL CK 0145

In the Delhi High Court

Case No : C.S. (OS) No. 1476A of 1999 and I.A. No. 1125 of 2008

Bajaj Electricals Ltd. APPELLANT

Vs

Power Grid Corpn. of India Ltd. RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:
Arbitration Act, 1940 — Section 20, 30, 33, 8
Limitation Act, 1963 — Article 137, 18

Citation : (2008) 09 DEL CK 0145

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : S.B. Upadhaya, Anisha Upadhaya and Shubhra Goyal, for the Appellant; Atul Varma and Suman Dutta, for the Respondent

Judgement

S. Ravindra Bhat, J.—In these proceedings, the request to make an award of the arbitral tribunal, appointed by the parties, rule of court has been made. In the award, dated 31-5-1999, a majority of two arbitrators had found in favour of the claimant plaintiff (hereafter called "the contractor"). In the minority award of Shri S.K. Sinha, the claims of the contractor were rejected. The defendant/ Respondent (hereafter "Corporation") assails the findings, in an application, under Sections 30/33 of the Arbitration Act, 1940 ("the Act"), being IA 9419/1999.

2. The brief facts necessary for a decision in these proceedings are that the National Thermal Power Corporation (NTPC, the predecessor of the Corporation) had, in 1985, invited tenders for the supply and erection of station lighting package; the contractor submitted its offer on 26th July 1985, which, after evaluation, was found to be the lowest. The contractor was awarded the work on 10th April 1986, concerning Station Lighting Package for 400 KV Durgapur Substation. Clause 2.0 of the contract spelt out the intent and scope of work; Clause 2.5, which has some relevance in this dispute, read as follows:

2.5: Notwithstanding the classification of the total scope of work under this award into two portions, the contract is awarded to you on single source responsibility basis and breach in any portion or part of the Contract shall be construed as breach of the entire contract.

The scope of work shall include all such items and works which although not specifically mentioned in the bid documents and/or in your proposal but are needed to make the equipment system complete unless otherwise specifically excluded under exclusion in our bid documents.

According to Clause 4, the agreed consideration for the contracted work was Rs. 34,52,510, divided into the supply portion of Rs. 27,89,116/08 and Rs. 6,63,394/56.

3. Clause 37.01 stipulated that no alteration, amendment, etc., (to the contract) could be made by the contractor, except as directed by the Engineer, in writing. The Engineer, however, had power (subject to other terms) during execution of the contract, by notice in writing, to instruct the Contractor to make such variation in the contract without prejudice to the contract. Clause 37.04 provided as follows:

37.04 If any Variation in the works, results in reduction of Contract Price, the parties shall agree in writing, so to the extent of any change in the price before the Contractor proceeds with the change.

Clause 37.06 stated that:

Notwithstanding anything stated above in this clause, the Engineer shall have the full power to instruct the Contractor, in writing, during the execution of the Contract, to vary to quantities of the items or groups of items in accordance with the provisions of clause entitled ''Change of Quality'' in section INB of this volume I. The Contractor shall carry out such variations and be bound by the same conditions, as though the said variations occurred in the contract documents. However, the Contract Price shall be adjusted at the rates and the prices provided for the original quantities in the Contract.

4. The NTPC deemed it necessary to lay cables, i.e. 3 core ? 10 sq. mm & 4 core ? 10 sq. mm 415V armoured AL PVC cables. The contractor agreed to this, which was recorded in Minutes of Meeting between parties, dated 5-4-1987. The work progressed and on 21st January, 1988 the second Running Account (RA) bill was prepared which recorded that 5775.7 metres of 2C ? 10sq.mm cables laying and termination @ Rs. 65 per sq. metre, less 4% rebate was supplied; the bill was passed, and amounts paid on 11-2-1988. The entire work was completed and the material reconciliation statement was jointly prepared and signed by the parties, on 12-4-1988. NTPC took over the work, on 31st May, 1988. In the meanwhile, the contractor had requested, through letter dated 14-4-1988 for release of payments in respect of 4C ? 10 sq. mm cable. The parties also exchanged correspondence, whereby the contractor asked for payments against work including supply of 3C and 4C ? 10 sq. mm cables, at rates at least

equivalent to what was agreed to be paid in respect of 2C cables. On 2-8-1988 NTPC proposed an amendment to the contract revising the quantity of work, both in respect of the supply and erection parts of the contract. The total amount of consideration was reduced from Rs. 34,52,510/64 to Rs. 29,94,640/-. The contractor expressed disagreement and did not consent to this change, and communicated this intention through its letter dated 24th September, 1988. It also mentioned, inter alia, that several outstanding amounts were payable to it, under the contract, and that the NTPC had not finalized the cost of 4C ? 10 sq. mm cables supplied.

5. The NTPC, in its letter dated 28th October, 1988, expressed its assurance that it would look into the matter, and finalize it so that payment could be released - to the contractor, at the earliest. Thereafter, on 18/19th April, 1989, the NTPC proposed yet another amendment ("the second amendment") to the contract, whereby it reduced the contract price to Rs. 27, 59, 963.40. This amendment "fixed" the rates for items, such as laying and terminating 415 V 4C ? 10 sq. mm AL PVC armoured cable (Rs. 55,272); laying and terminating 415 V 3C ? 10 sq. mm AL PVC armoured cable (Rs. 5,103/-); laying of 2C ? 10 sq. mm AL PVC armoured cable in existing cable trench panels, etc (Rs. 33,348.70); One end termination of 2C ? 10 sq. mm AL PVC armoured cable in existing cable trench panels, etc (Rs. 5126.40). Besides these, the NTPC proposed recovery from the bills of the contractor. This amendment was also not accepted by the contractor.

6. The parties to the contract attempted to resolve their differences; a series of meetings were held for that purpose, including those held on 27-7-1989; and letters exchanged between them. On 3-4-1993, the NTPC''s contracts and liabilities, in regard to the agreement in question, were taken over by the corporation. Thereafter, on 13th April, 1993, the corporation and the contractor held a meeting, where it became apparent that the former was insisting on acceptance, by the contractor, of the two amendments, proposed by it to the original contract. The contractor approached this court, u/s 20, for filing the arbitration agreement. That petition was disposed on 19th July, 1996; arbitrator nominees of each party were appointed, and the said arbitrators appointed an umpire/ third arbitrator.

7. In the arbitral proceedings, a majority of two arbitrators held in favour of the contractor, allowing his claims and directing refund of amounts withheld by the corporation. The third arbitrator, however rejected the claims and reference, holding, inter alia, that the demands were time barred.

8. Mr. S.B. Upadhyay, learned senior counsel, submitted that the impugned award is unsustainable in law. It was urged that the arbitrators overlooked the fact that the dispute in this case was excepted as the decision of the competent official, i.e. the Engineer was final. Therefore, on a proper application of the law laid down in Vishwanath Sood Vs. Union of India (UOI) and Another, , it has to be held that the arbitrators lacked jurisdiction in adjudicating upon the claims made by the contractor.

9. It was next contended that the award is unsupportable in law, since the majority of arbitrators rejected the corporation''s contention about the contractor''s claims being time barred. Counsel urged that the claim for money arose in 1988; the contractor raised a dispute and approached the court in 1994, for appointment of arbitrator. In such circumstances, the award should not have allowed the claims. Learned Counsel submitted that the dispute, if considered to be with reference to the Minutes of Meeting of July, 1989 was clearly time barred. It was also urged that the disputes first arose on 28th August, 1989 when the parties disagreed in regard to the amounts, payable to the contractor. Thus, applying Article 137 of the Schedule to the Limitation Act, the disputes were clearly time barred and could not have been entertained. Reliance was placed upon the decision reported as S. Rajan v. State of Kerala 1992 (2) Arb LR. 281 and J.C. Budhraja v. Chairman Orissa Mining Corporation Ltd. 2008 (1) Arb. LR 238. It was submitted that there was no acknowledgement of liability as contemplated by Section 18 of the Limitation Act.

10. It was submitted that the award discloses a patent illegality in regard to the merits, as the arbitrators concluded, without any materials that the amendments could not be given effect to. The Engineer, it was submitted, could amend the specifications; the power concededly existed in the agreement. He exercised that power; the contractor could not have therefore, contrary to the contract, made a grievance on this aspect, since additional work, forming part of the contract, could be executed. The contractor did not challenge the exercise of such power, nor could have done so. Therefore, after being satisfied that the work done was of a particular quality, the quantities were indicated. Counsel urged that the contractual rate of Rs. 65/- was applicable only to the work of laying of 2C cables which conformed to the original scope of work. The amendments provided for rates of the work which did not fall in the original scope, but were executed by the contractor. It was further urged that the original contractual rate of Rs. 65/- could not apply to over ground laying of 2C cables as that rate applied to buried underground cable laying. In overlooking these aspects, and allowing the contractor''s claim the award discloses a patent error of law; it is also contrary to contract between the parties.

11. Learned Counsel relied on the decision reported as Mcdermott International Inc. v. Burn Standard Company Ltd. and Ors. 2006 (2) Arb. LR. 498, to say that the award discloses errors which can be considered as patent illegalities, warranting interdiction by the court. Counsel submitted further that the award of Rs. 7,50,000/- as costs even while the contractor had claimed only Rs. 3 lakhs was unreasonable. it was not preceded by any discussion on this aspect. It was also urged that the rate of interest awarded is too high, in any case, and cannot be sustained.

12. The contractor''s contention is that a look at the relevant conditions in the contract would show that the disputes ultimately decided in arbitration were not "excepted" matters. The further contention was that the reason why the

corporation withheld amounts was the variation in the agreement, after execution of the contract. The contractor''s version here is that there was no question of any decision by the Engineer; he unilaterally changed the quantities, through the amendments. When the contractor expressed disagreement, the corporation kept postponing any final decision, and after holding a series of meetings, surreptitiously prepared a so called final bill, which was furnished for the first time to it, in 1993. In these circumstances, the disputes raised were not "excepted" from arbitration.

13. The contractor''s counsel urged that the claims in arbitration were not time barred, because the final bill itself was not prepared, and the amendments proposed were a subject of dispute. Eventually, when the corporation declined to accede to its (the contractor''s) position, the latter approached this Court u/s 20 of the old Act, and sought for reference, which was allowed in 1996. Counsel relied on the judgment reported in Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, for the proposition that the cause of action to approach for arbitration did not arise till the final bill was prepared.

14. It was next urged that under Clause 37.04, if any variation in the contractual rates resulted in reduction of consideration, the Engineer could not impose it without consent of the contractor. It was contended that in this case, 4C ? 10 sq. mm cable and other items, for which no rates were fixed, the corporation was bound to pay consideration an issue which remained outstanding after the supply of the goods and services. Instead of fixing reasonable cost, for the supplies and services, which could have had co-relation to the agreed rates, the corporation reduced rates, unilaterally, twice over. The award merely held that the contractor was entitled to amounts for such supplies and services.

15. Counsel submitted that the majority award of the arbitrators contains reasons, which are sound in law and premised on available materials. On application of settled principles guiding the court as to scope of judicial intervention under Sections 30 and 33 of the Act, it has to be concluded that there was no infirmity with the findings or the approach of the arbitrator, calling for interference. Reliance was placed on the decisions of the Supreme Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, and Rajasthan State Mines And Minerals Ltd. v. Eastern Engineering Enterprises and Anr. 1999 (3) Arb LR. 350. It was contended that even if the Arbitrator commits an error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication, the Court cannot interfere, unless it is palpably capricious or manifestly erroneous.

16. The scope of a court''s power interfere with an arbitration award, under the Act has been repeatedly emphasized, by a string of decisions, starting with Union of India (UOI) Vs. A.L. Rallia Ram, down to the recent decision in Food Corporation of India Vs. Chandu Construction and Another, . It has been ruled, thus that "misconduct" does not imply moral lapse or perversity in findings, but to something unreasonable which would fall outside the jurisdiction of the

arbitrator. It has been further held that the standard to be applied while considering whether the award is vitiated by misconduct is irrationality, caprice, arbitrariness by the arbitrator, or acting beyond the terms of the agreement (See Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., ; Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, . It has been held in U.P. State Electricity Board Vs. M/s. Searsole Chemicals Ltd., that where the arbitrator had applied his mind to the pleadings, considered the evidence adduced before him and passed an award, the Court could not interfere by reappraising the matter as if it were an appeal. Another test, indicated by the Supreme Court Chandu Construction (supra) and Bharat Coking Coal Ltd. Vs. Annapurna Construction, , is that where the arbitrator travels beyond the contract, he acts in excess of jurisdiction, in which case, the award becomes vulnerable and can be questioned in an appropriate Court.

17. In the present case, the issue whether disputes were arbitrable, hinges around interpretation of Clause 37.05, which is as follows:

37.05 In all the above cases, in the event of a disagreement as to the reasonableness of the sum, the decision of the Engineer shall prevail.

The other stipulation is Clause 33.3 which says that:

The Engineer''s decision and the filing of written objection thereto shall be a condition precedent to the right to request arbitration. It is the intent of the agreement that there shall be no delay in the execution of the works and the decision of the Engineers as rendered shall be promptly observed.

18. The decision in Food Corporation of India Vs. Sreekanth Transport, are authorities on what constitute "excepted matters". In Vishwanath Sood, the condition read as follows:

2. Compensation for delay. The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be essence of the contract on the part of the contractor and shall be reckoned from the fifteenth day after the date on which the order to commence the work is issued to the contractor. The work shall through out the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one percent, or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown in the tender for every day that the work remains uncommenced, or unfinished, after proper dates. And further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds, one month (save for special jobs to complete one-eight of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed; three-eighth of the work, before one-half of such time has elapsed, and three fourth of the work, before three-fourth of such time has elapsed). However, for special jobs if a time schedule has been submitted by the contractor and the

same has been accepted by the Engineer-in-charge, the contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation and amount equal to one per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the said estimated cost of the whole for every day that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provision of this clause shall not exceed 10 per cent, on the estimated cost of the work as shown in the tender.

The terms of Clause 2 unambiguously envisioned that the determination of compensation for the delay in execution of the work was only by the Superintending Engineer and specifically mentions that the decision of the Superintending Engineer "in writing shall be final." In this case, the conditions concerned, i.e. Clauses 37.05 and 33.3 do not invest finality of a similar kind. The latter merely outlines a mechanism for submission to arbitration; the former states that the views of the Executive Engineer about the price would prevail. Yet, these do not preclude submission of the dispute, arising from disagreement to arbitration. Moreover, in the facts of this case, the corporation was unable to show when, and what was the decision, rendered by the said official, became final, and precluded arbitration. The Engineer proposed amendments, after completion of contract; which were never agreed to; the parties thereafter kept negotiating, and concededly recorded minutes of meeting. The record does not reflect any final decision by the Engineer, of the kind argued by the corporation, which inhibited reference to arbitration. Therefore, it is held that the award does not disclose any infirmity vis-?-vis findings concerning arbitrability of the disputes. They were not "excepted" matters.

19. Next, the issue of limitation. Here, the corporation argues that the contractor''s claims were time barred, since the earliest point in time, when it was possible to refer the disputes, was in 1989; the court was approached in 1994. The contractor, on the other hand, counters by saying that the question of downward revision of cost, contrary to agreement, was being negotiated for a long time; eventually, on 13th April, 1993, the corporation indicated its final opinion that the rates proposed through the two amendments were not being revised. Till that time, the contractor could not have visualized that a dispute would arise; it is also urged that the final bill was furnished to the contractor in that meeting of 13th April, 1993, after which reference was sought, by approaching the court u/s 20.

20. The corporation had relied on the ruling in J.C. Budhiraja (supra), where no doubt it was held that if a party merely says, without admitting liability, that it would examine the claim or the accounts, it may not amount to acknowledgement and that an acknowledgement of liability is one which consciously admits a party''s liability to pay or admit his intention to pay the debt. Yet, the facts of this case are different here. The final bill was made

sometime in 1992; the minutes of meeting show that there was no agreement on the question of cost of the services, or the variations indicated, in 1989, till the corporation expressed disinclination, finally on 13th April, 1993. In such a case, the ruling of the Supreme Court in Major I.S. Rekhi is apt. In that case, the contention about lack of arbitrable dispute, in the absence of a final bill was upheld, in the following words:

...But in order to be entitled to ask for a reference u/s 20 of the Act there must not only be an entitlement to money but there must be a difference or dispute. It is true that on completion of the work, a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on February 28, 1983 and there was non payment, the cause of action arose from that date, that is to say, February 28, 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but, where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an Arbitrator u/s 8 or a reference u/s 20 of the Act. There should be dispute and there can only be a dispute when a claim is asserted by one party and denial by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denial, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case.

The above ruling has been followed in Pandit Munshi Ram and Associates Pvt. Ltd. v. Delhi Development Authority and Anr. 2002 (Supp) Arb. LR 659 DEL; it has also been approved in J.C. Budhraja. In Hari Shankar Singhania and Others Vs. Gaur Hari Singhania and Others, , following Rekhi it was held that:

In the instant case, correspondence was not merely in the nature of reminders but also instruments to resolve the matter and amicably negotiate. Therefore, when the negotiations were taking place between the parties by way of various letters written by both parties the right to apply can be said to accrue when it becomes necessary to apply, that is to say when a dispute in fact arose. Furthermore, the respondent did not ever dispute the claim of the appellants.

21. Having regard to the above position in law, it is held that the claims in this case were not time barred, since the final bill was prepared in 1992, and the disagreement which was referred to arbitration, took place on 13th April, 1993. The award therefore, does not show any jurisdictional infirmity, calling for interference by this court.

22. As far as the merits are concerned, the court does not discern any scope for holding that the award discloses any perversity in approach, caprice, or unreasonableness. The majority award is a fairly reasoned document. It has

dealt with each contention raised by the parties, who had submitted written notes of arguments, besides voluminous documents. The substratum of reasoning is that the amendments were made after performance of the contract; they reduced the amounts agreed, unilaterally. The corporation''s actions were held to be beyond the scope of the contract, since Clause 37.04 visualized consensual change, particularly in reduction of the value of the contract. The contractor here was asked to perform jobs which were unspent in the contract and yet, by two amendments, the value was progressively reduced. The arbitrators, not unreasonably, held that this was unjustified. This Court is of opinion that no error of law, or fact, or infirmity in the approach of the arbitrators, can be discerned here. The court cannot fault the award, merely because it can arrive at contrary findings, on a different process of reasoning; such conclusions would amount to impermissible appellate review, clearly beyond the scope of Sections 30 and 33.

23. As far as the grievance of the corporation regarding costs are concerned, the court is of opinion that the approach of the arbitrators cannot be supported. The contractor had claimed Rs. 3 lakh towards cost of arbitrator. The additional amount of Rs. 5 lakhs appears to have been claimed during the course of submissions, and finds mention in Volume D-1. The addition is towards counsel''s fee; there is no discussion or supportive material by the majority award, on this head. The award, grants Rs. 7,50,000/- cannot therefore, be sustained; it is set aside, to the extent it exceeds Rs. 3,00,000/.

24. The majority award grants Rs. 4,05,212/60 to the claimant, for the erection portion, and Rs. 1,79,029/41 for the supply portion (aggregating Rs. 5,84,242/01). After adjusting recoveries, the amount admissible was held to be Rs. 5,55,419/27. An amount of Rs. 1,48,564/- towards refund was also allowed. The award allowed 18% interest p.a compounded annually, on the sums granted; a specific amount was also indicated in the award. Such interest, for the entire period, in the opinion of the court, is unsupportable, having regard to bankers depressed prime lending rates in the mid 1990''s. In the circumstances, the court hereby modifies the interest to 15% simple interest, from 1-6-1988 to 31-5-1993 and thereafter, from 1-6-1993 till award, and future interest, till payment at 10% per annum, (simple interest).

25. In view of the above reasons, IA 1476-A/1999 has to partly succeed. The costs, to the extent it is in excess of Rs. 3,00,000/- is set aside. The award of interest too, is modified, to the extent indicated in the preceding paragraph. The award is made rule of court, in these terms; the suit and application are decreed accordingly. No costs.

