(2014) 11 BOM CK 0107

In the Bombay High Court

Case No : Arbitration Petition Nos. 729, 730, 335 of 2012, 736, 737 of 2010, 762, 809, 815, 817, 821 and 905 of 2011

Balaji Pressure Vessels Ltd. APPELLANT

Vs

Bharat Petroleum Corporation Ltd. RESPONDENT

Date of Decision : 15-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Contract Act, 1872 — Section 15

Citation : (2014) 11 BOM CK 0107

Hon'ble Judges : S.C. Gupte, J

Bench : Single Bench

Advocate : Rajni Iyer, Senior Advocate, Vishal Kanade, N.C. Parekh, Hemant Salvi i/b. Mansukhlal Hiralal and Co., Tanvi Gadre Rajadhyaksha i/b. Ashk Purohit and Co, Advocate for the Appellant; Pankaj Sawant, Senior Advocate, Hemali Kurne i/b. Vyas and Bhalwal, Padmashri i/b. Kulkani and Associates, Advocate for the Respondent

Judgement

S.C. Gupte, J.—This group of arbitration petitions challenges the awards passed by the Sole Arbitrators appointed in the matters, under Section 34 of the Arbitration and Conciliation Act, 1996 (''Act''). Submissions made at the bar were mainly advanced in Arbitration Petition No.729 of 2011. These submissions were adopted in other matters and only the distinguishing features of these other matters were argued separately. The issues arising under these petitions for the consideration of this Court, as also submissions advanced by either sides being common, these petitions are being disposed of by this common order. For the purposes of this common order, the facts are taken from Arbitration Petition No.729/2012. Wherever there are distinguishing features or facts and additional submissions were advanced to that extent, these have been considered separately in relation to the particular arbitration petitions in which they were advanced.

2. The facts of the Petitioners'' case may be briefly stated as follows :

(a) The Petitioners are manufacturers of cylinders which are used by the oil industry for LPG cylinders. The Respondents along with Indian Oil Corporation and Hindustan Petroleum Corporation constitute nearly 99% of the cylinder purchasers in the country. In 1980s and till 1992, a single tender was floated by the three Petroleum Corporations including the Respondents herein for purchase of cylinders from manufacturers of cylinders. The Petitioners established their factory in 1982 for manufacture of cylinders.

(b) By their purchase order dated 1 May 1999, the Respondents placed an order for supply of 27509 cylinders of 14.2 kg. at a provisional price with effect from 1 April 1999 of Rs.678.77. The terms and conditions of this purchase order inter alia envisage a formula for price escalation / de-escalation according to which the final price would be fixed by the Respondents and communicated to the Petitioners. This formula was said to have been approved by the Ministry of Petroleum & Natural Gas of Govt. of India (''MOPNG''). The purchase order also contained a risk purchase clause by which the Respondents, upon failure of the Petitioners to supply cylinders as per the schedule of delivery, could procure similar cylinders from other manufacturers at the Petitioners'' risk, cost and responsibility. The purchase order contained an arbitration clause. The Petitioners supplied cylinders to Respondents under this purchase order from time to time.

(c) By their communication dated 28 June 1999, the Respondents informed the Petitioners and other cylinder manufacturers that the price of LPG cylinders, based on the MOPNG approved escalation formula, needed to be reviewed and study in that regard was being conducted. The circular inter alia informed the Petitioners and others that in view of various circumstances referred to therein, the price of LPG cylinders would be kept provisional from 1 July 1999 and the manufacturers would be advised of the firm price on completion of the review by the Industry Task Force. The provisional price fixed on 1 April 1999 was amended by a letter dated 30 July 1999 issued by the Respondents. (The two communications, namely, the circular of 28 June 1999 and the letter of 30 July 1999, have a material bearing on the controversy between the parties and will be discussed in detail later.) Following this letter, by another letter dated 2 August 1999, the Respondents informed the cylinder manufacturers including the Petitioners about the revised procedure for issuing invoices for 14.2 and 19 kg. LPG cylinders. The Petitioners claim to have completed the contract to the fullest satisfaction of the Respondents.

(d) On 29 March 2000, the Respondents issued another purchase order of 28125 gas cylinders at a provisional price of Rs.699.29 per cylinder for the period between 1.4.2000 to 30.6.2000. The purchase order contained similar terms and conditions as the earlier purchaser order in reference inter alia to the formula for the price escalation / de-escalation , risk purchase clause and arbitration clause referred to above. The purchase order was expressly stipulated to be read in conjunction with the abovementioned communication dated 28 June 1999.

(e) The controversy between the parties arose when the Respondents issued letter / circular dated 31 October 2000 that pending determination of the final price by the Industry Task Force after obtaining a report from their consultants M/s.Price Waterhouse Coopers (''PWC''), the Respondents had decided to revise the provisional basic price of 14.2 kg. cylinders to Rs.645/-with effect from 1 July 1999 and that the differential amount, namely, the difference between the provisional price indicated so far and Rs.645/- per cylinder would be recovered from the pending bills of the Petitioners and other cylinder manufacturers. The Respondents further informed the manufacturers that final adjustment would be made after finalization of the cylinder price.

(f) The final report of PWC was received and the Task Force finalized the price of the cylinders. The price for 14.2 kg. cylinders was fixed at Rs.645/- per cylinder and communicated to the Petitioners and others, whereas price of 19 kg. cylinders was fixed at Rs.765/- per cylinder and communicated to the manufacturers by a communication dated 31 January 2001. The Respondents effected recoveries from the Petitioners and other manufacturers on the basis on the respective prices fixed for the LPG cylinders at Rs.645/- per cylinder for 14.2 kg cylinders and Rs.765/- per cylinder for 19 kg. cylinders.

(g) This recovery was challenged by the manufacturers of cylinders including the Petitioners herein. The disputes between the parties were referred to arbitration of a sole Arbitrator. The Petitioners herein filed a statement of claim before the learned Arbitrator in the form of a letter claiming refund of the recoveries made on the basis of the statement annexed to the letter. The Respondents filed their reply to the statement of claim. It was specifically urged by the Respondents in their reply that by the communication dated 28 June 1999, the Respondents communicated to cylinder manufacturers including the Petitioners that during the first quarter of following year 1999-2000, oil companies came to the conclusion that a revised formula was to be determined for the calculation of the cylinder price and that once such decision was taken, the oil companies would intimate the same to all cylinder manufacturers; that by this communication, the manufactures including the Petitioners herein were put to notice that the price of LPG cylinders would be provisional from 1 July 1999 onwards and that the firm price would be advised to cylinder manufacturers including the Petitioners on completion of review by the Industry Task Force; and that the manufacturers including the Petitioners accepted this position and supplied cylinders to the Respondents on that basis. In other words, the case of the Respondents before the Arbitrator was that the original contract contained in the purchase order of 1 May 1999 was varied by a subsequent contract, under which the price of the cylinders to be supplied with effect from 1 July 1999 onwards would be provisional and that the new price would be determined on the basis of a new revised formula to be fixed by the Respondents on completion of review by the Industry Task Force. So also, it was claimed that the subsequent purchase order of 29 March 2000 was issued subject to the understanding recorded in the communication of 28 June 1999. The Petitioners'' rejoinder to this reply simply contains a broad denial without specifically dealing with the question of variation of the contract, as claimed by the Respondents.

(h) The sole Arbitrator accepted the Respondents'' case and rejected the Petitioners'' claim for refund of the recoveries made on the basis of final price determined after review by the Industry Task Force.

3. The Sole Arbitrator dealt with the controversy concerning the variation of the contract in the impugned award and held firstly that the Petitioners were put to notice vide letter dated 28 June 1999 that the price of cylinders would be provisional with effect from 1 July 1999 till a firm price was intimated after completion of review by the Oil Industry Task Force. The learned Arbitrator held secondly that after the receipt of this letter, the Petitioners did not protest the variation of the purchase order, but continued to supply cylinders in accordance with the intimation of 28 June 1999. The learned Arbitrator found that similar intimation was also given with the purchase order of 29 March 2000. The learned Arbitrator next found that after receipt of the draft report of the Task Force prepared with the assistance of PWC, the Respondents by their letter dated 31 October 2000 intimated the provisional price of Rs.645/- per cylinder to be finally adjusted after finalization of the cylinder price upon a final report to the Petitioners and other manufacturers. The learned Arbitrator observed that after receipt of the communication of 31 October 2000, the Petitioners continued to supply to the Respondents cylinders at the rate of Rs.645/- per cylinder for the cylinders supplied with effect from 1 November 2010. Based on these observations, the learned Arbitrator came to the conclusion that both the Petitioners and the Respondents were clear that the price with effect from 1 July 1999 was to be provisional and that the firm price was to be determined and fixed by the Respondents after completion of the review by the Oil Industry Task Force with the assistance of PWC and the same would be binding on the parties. The learned Arbitrator found that the firm price as determined and fixed by the Respondents for cylinders supplied during the period from 1 July 1999 to 31 March 2000 was fixed at Rs.645/- per cylinder and for cylinders supplied from 1 April 2000 to 31 March 2001 at Rs.662.20 per cylinder. The learned Arbitrator accordingly rejected the Petitioners'' claim for refund of the differential of the amounts recovered in respect of supplies during the period from 1 July 1994 to 31 March 2000 on the basis of the final price fixed at Rs.645/- per cylinder and for the cylinders supplied with effect from 1 April 2000 to 31 March 2001 at Rs.662.20 per cylinder.

4. In the light of the pleadings of the parties, as also the documents on record referred to above, the conclusion arrived at by the learned Arbitrator is clearly a possible view. The learned Arbitrator has interpreted the letter of 28 June 1999 followed by the conduct of the parties and treated the same to be a variation of the original contract contained in the two purchase orders referred to above. There is nothing on record to show that the learned Arbitrator did not take into account any material document or that his conclusion is perverse in any manner having regard to the pleadings and documents referred to above.

5. Ms.Iyer, learned Senior Counsel, appearing for the Petitioners referred to the communication of the Respondents dated 30 July 1999. Learned Counsel submitted that by this letter, the Respondents communicated the amended price of cylinders to the Petitioners; that this letter, which was issued after the circular of 28 June 1999, indicates a firm price in accordance with the circular of 28 June 1999. Apart from the fact that no such plea is to be found specifically in the pleadings of the Petitioners before the learned Arbitrator, in the facts of the case and having regard to the documents placed on record, it is apparent that the price communicated on 30 July 1999 was also a provisional price and that this price was subject to finalization after the review by the Industry Task Force upon obtaining the report of PWC. Admittedly, neither the report of PWC was ready by 30 July 1999 nor was any price fixed by the Industry Task Force as of that date.

6. Ms.Iyer further suggested that there was no MOPNG approval for the final price determined by the Industry Task Force. Ms.Iyer in this behalf referred to the letter issued by the Respondents themselves on 28 February 2001 addressed to the MOPNG requesting the latter to approve the report of the Task Force fixing the price of cylinders. That the Respondents sought an approval for the report of the Task Force from MOPNG, is neither here nor there. Seeking of such approval is not a term of contract. The contract, as envisaged by the Respondents'' circular dated 28 June 1999 followed by the conduct of the cylinder manufactures including the Petitioners, does not suggest that there was any such requirement on the part of the Respondents to seek an approval from MOPNG before the price was fixed and communicated to the cylinder manufacturers. As a matter of fact, this is also borne out by the response of MOPNG to the request for approval from the Respondents. The MOPNG in its response dated 7 March 2001, which is reflected in the Minutes of Meeting annexed by the Petitioners themselves to their petition, stated that their approval was not required in the matter and that the fixation of price was a matter between the suppliers and purchasers alone.

7. Similar purchase orders and communications revising the contract and communicating the provisional and final prices of cylinders have been subject matter of several arbitrations between cylinder manufacturers and the oil companies including the Respondents herein. There have been at least three decisions of this Court delivered in the cases of M/s.Lite Containers Pvt.Ltd. vs. Bharat Petroleum Corporation Ltd. 1 , M/s.Suburban Industries Ltd. vs. M/s.Hindustan Petroleum Corporation Ltd. 2 , and M/s. JCL International Ltd. Vs. Bharat Petroleum Corporation Ltd., , where exactly the same communications and provisional and final price fixation by the same communications, which were common to cylinder manufacturers including the Petitioners herein, were construed by the respective Arbitrators and the conclusions of the Arbitrators were found favour with by this Court. Ms.Iyer, learned Senior Counsel, appearing for the Petitioners, however, referred to some other decisions of a learned Single Judge of this Court, where the arbitral awards involving the same facts were set aside by this Court. It is, however, pertinent to note that in those cases decided by the learned Single Judge of our Court (Per Vazifdar, J.) the contract itself

required the oil company to seek an approval of MOPNG before the final price was fixed and communicated to the cylinder manufacturers. The learned Arbitrator in that case came to a conclusion that there was in fact no approval by the MOPNG to the revised price and that accordingly having regard to this conclusion of the learned Arbitrator, this Court did not agree with the final awards passed in the matters and accordingly, set aside the awards impugned in those cases.

8. For the reasons discussed above, there is no merit in the challenge to the arbitration award.

9. Ms.Iyer, learned Senior Counsel, appearing for the Petitioner in Arbitration Petition No.762/2011 submitted that the Petitioner''s case in that arbitration petition contains one distinguishing feature. It is submitted that in this case, the Petitioner''s claim was not only in respect of 14.2 kg. cylinders, but also in respect of 19 kg. cylinders. It is submitted that the case of 19 kg. cylinders stands on an altogether different footing inasmuch as the relevant purchase order in connection with these cylinders stipulated the price stated therein to be a firm price, not subject to any formula. In the first place, there is no such ground urged by the Petitioner before the learned Arbitrator in that case. On the other hand, the statement of claim filed in that case indicates that the rates were accepted to be provisional even in that case and said to be subject to upward / downward revision on account of revised steel price and rail freight. Admittedly, there is no distinction drawn in the petition between 14.2 kg. cylinders and 19 kgs. cylinders. In fact, it was the report of PWC on price, which was criticized on merits before the learned Arbitrator. The nature of price, whether fixed or provisional, is a matter of fact and the Petitioner ought to have raised this matter before the learned Arbitrator. It is not open for this Court to go into this issue for the first time in a challenge to the arbitration award. Even otherwise, having regard to the main plank of the Respondents'' case, namely, that the contract originally contained in the purchase order/s was varied with effect from 28 June 1999 by the circular of that date issued by the Respondents (which circular was common to all the cylinders and without reference to any particular capacity of cylinders), the fact that the original purchase order in this particular case contained a clause of fixed price is hardly relevant. In that view of the matter, there is no distinguishing feature of this particular case, which calls for a different treatment.

10. Now coming to the facts of Arbitration Petition No.375 of 2012, Ms.Rajadhyaksha, learned Counsel for the Petitioners, submitted that in this particular case, the Petitioners have raised an issue of economic duress and vitiation of the contract between the parties by reason of such economic duress, which in the submission of the learned Counsel amounted to coercion entitling the Petitioners to avoid the particular stipulation of the contract, namely, unilateral fixation of price. Learned Counsel submitted that the Petitioners in that case were dedicated manufacturers of cylinders, whose only purchasers were the

oil companies including the Respondents herein. Having regard to the monopolistic position enjoyed by the purchasers of her clients and the meager financial strength of her clients, on the date the revised price was communicated by the Respondents, namely, 31 October 2000, the Petitioners in her case had no option, but to keep supplying cylinders at the revised price and that supply of cylinders at that price cannot be held against the Petitioners. It is submitted that the Petitioners at that stage had no option, but to accept the price declared by the Respondents. Learned Counsel relied on judgments in the cases of Altas Express Ltd vs. Kafco (Importers and Distributors) Ltd. QBD (1989) 1 All ER page 641 and Sara International Limited Vs. Rizhao Steel Holding Group Company Limited, in this behalf and submitted that economic duress was a factor akin to the case of coercion provided under Section 15 of the Indian contract Act and vitiated a consent given by the contracting party.

11. The thrust of the submission of learned Counsel in this behalf is that the case of economic duress was a specific plea raised in the reference and this case was not even considered by the learned Arbitrator. If that is the argument, it is necessary to see if there is any statable case of economic duress at all in the Petitioners'' case, non consideration of which would vitiate the award. For that purpose, one must note the nature of a plea of economic duress, its ingredients and contours and then see, if any statable case is made out in our case.

12. In Altas Express Ltd. (supra), we find a good deal of discussion on economic duress as a factor which vitiates a consent. A litany of judgments has been noted, where English judges have acknowledged the existence of this concept, and applied it to a variety of situations. The passages from the Judgment of Lord Scarman in Pao On Vs Lau Yiu 1979 (3) ALL ER 65 (PC) quoted therein succinctly bring out the meaning of economic duress. ''Duress, whatever form it takes, is a coercion of the will so as to vitiate consent'', notes the learned judge, but explains that in a contractual situation commercial pressure on a party alone is not enough. There must be some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent". In such cases, it may be material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. Simple commercial pressure is not good enough. The pressure so as to constitute duress must be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure. In other words, the pressure exercised by the other party must be such as the law would not regard legitimate. After a review of various authorities on the point, the necessary ingredients of a plea of economic duress as a ground for avoiding a contract are stated by the Delhi High Court as follows:

"(a) Pressure which is illegitimate;

(b) Its effect on the victim i.e. that the pressure must be a significant cause inducing the Claimant to enter into the contract;

(c) Lack of reasonable alternative i.e. that the practical effect of the pressure was that there is compulsion on, or a lack of practical choice for, the victim."

13. In the present case, there is absolutely nothing to show that any illegitimate pressure was brought to bear on the Petitioners by the Respondents so as to coerce the former''s will nor that the Petitioners were pressurized into entering the contract against their will. At the very outset, there seems to be some confusion as to the point of time at which any alleged economic compulsion was faced by the Petitioners in the present case. Learned Counsel submitted that the Petitioners had no choice to accept the declared price of Rs.645/- per cylinder on 30 October 2000. As a matter of fact, whilst examining the case of economic duress, we are not concerned with the communication of fixed price by the Respondents to the Petitioner on 30 October 2000 and the Petitioner''s response thereto. What we are concerned with is the variation of the original contract on 28 June 1999 when the Respondents communicated to the Petitioners that the price post 1 July 1999 would be provisional and that the final price would be communicated after the Respondents fixed the same upon review by the Industry Task Force. On that date, there is no question of the Petitioner accepting any particular depressed price under any economic compulsion. It is obvious that the Petitioner willingly accepted the stipulation of the communication of 28 June 1999, probably expecting the final price to be determined after review by the Task force to be higher than the provisional price then fixed. Once this stipulation is accepted, the Petitioners had no choice left in the matter as to any particular fixation of price. The Petitioners had already agreed to such price as may be fixed by the Respondents after review by the Task Force. On 30 October 2000, a provisional price based on the draft report of PWC was fixed and intimated to the Petitioners and a final price was thereafter fixed and communicated after obtaining a final report. On both these occasions, under the contract between the parties, there was no question of the Petitioners accepting or rejecting the price or indeed, exercising any will. Naturally, therefore, there is no question of the Respondents coercing the Petitioners'' will on any of these occasions. Thus, there is not even a statable case of economic duress.

14. As for the stipulation of 28 June 1999 itself, whether or not to accept the same, was a commercial decision the Petitioners were called upon to take and did so take according to the commercial exigencies. This being a commercial contract accepted by the Petitioners, a plea of unequal bargaining power is hardly open to the Petitioners. I am fortified in this view by a judgment of the Supreme Court in the case of S.K. Jain Vs. State of Haryana and Another, .

15. Thus, the case of the Petitioners in Arbitration Petition No.335/2012 also does not present any distinguishing feature or call for any different treatment.

16. In that view of the matter, there is no merit in the arbitration petitions and the same are rejected. There shall be no order as to costs.

1 Arb.Petition No.365/2008 decided on 10.3.2011 2 Arb.Petition No.259/2005 decided on 13 September 2005

