

(2006) 05 DEL CK 0244

In the Delhi High Court

Case No : OMP No. 88 of 2005 and I.A. No. 3615 of 2005

Bharat Sanchar Nigam Limited

APPELLANT

Vs

BWL Ltd. (Formerly known as Bhilai Wires Ltd.)

RESPONDENT

Date of Decision : 08-05-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Contract Act, 1872 — Section 73

Citation : (2006) 2 ARBLR 212 : (2006) 129 DLT 622

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : H.S. Phoolka and Sharat Kapoor, for the Appellant; Sanjay Karol and Gaurav Juneja, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The petitioner floated a tender on 16.04.1999 for supply of 6F Armoured Optical Fibre Cables (hereinafter to be referred to as, "the cables") along with required accessories in proportional quantities for Indian Manufacturer of Optical Fibre Cables. The tender submitted by the respondent and four other companies was accepted and advance purchase order was issued by the petitioner on 11.08.1999 for supply of 871 kms. of the cables. The total value of contract awarded to the respondent was Rs. 5,56,61,562.17.

2. In terms of the tender notice, the respondent gave a performance security of Rs. 23,14,000/-. The respondent was issued a purchase order on 16.09.1999 for the said quantity of 871 kms. of cables along with accessories. The contract stipulated that the respondent was required to secure a Type Approval ensuring technical quality and specification from Tele-Communication Engineering Centre (for short, "TEC"), Department of Tele-Communication within 3 months from the date of issue of purchase order and the supplies were to be completed within 7 months from the date of the purchase order. The supplies were, thus, required to be completed before 15.04.2000. In view of the fact that the contract for supply of such cables was issued for the first time, special inspection to assess

suitability of infrastructure of the respondent's factory for production of the cables was envisaged. Various quality control specifications were also provided. One of the conditions was that the date of delivery was the essence of contract (Condition 16.1 of the General Conditions of the Contract).

3. The respondent applied for infrastructure assessment and Type Approval on 15.12.1999 and deposited the amount of fee with TEC for infrastructure assessment. Since the respondent was awaiting the approval, on 28.03.2000, a communication was addressed by it to the petitioner for extension of time for delivery and such extension was granted on 27.04.2000 by extending the delivery period to 28.06.2000. However, liquidated damages were also levied simultaneously and the respondent reduced the payment term from 95% of the price to 75% on delivery stipulating that the extension of delivery would be treated as the last extension. It may be noticed that the respondent was also executing the contract for supply of another type of cables called Aerial cables. The respondent sought a second extension on 21.06.2000 as the Type Approval had not come from TEC, but there was no response from the petitioner. The respondent again requested the petitioner for extension of delivery up to October, 2000 on 07/08.07.2000 on account of TEC approval being awarded. Finally on 21.07.2000, TEC asked the respondent to deposit Rs. 65,000/- as fee for testing the cables and issuing Type Approval, which was immediately deposited by the respondent. At the stage when the matter was still pending with TEC, the petitioner on 24.07.2000 informed the respondent that on account of failure to complete the supply of cables on or before 28.06.2000 the purchase order was short-closed with immediate effect. The petitioner further encased the bank guarantee of Rs. 23,14,000/-. The respondent thereafter issued a legal notice to the petitioner alleging breach of contract and claimed compensation of Rs. 1,71,92,613/- along with interest @ 24% p.a. from 24.07.2000. The same was not replied to and, thus, a notice dated 04.04.2001 was issued invoking the arbitration clause under the contract between the parties and seeking appointment of an arbitrator. As no arbitrator was appointed, proceedings were initiated by the respondent before the Delhi High Court and in those proceedings, Justice S.B. Wad (Retd.) was appointed as the Sole Arbitrator.

4. The Arbitrator made and published his Award dated 07.12.2004 awarding a total amount of Rs. 2,46,18,890.43 inclusive of interest up to the date of award and costs apart from future interest @ 18% p.a. The petitioner aggrieved by the same has filed the present objections u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred to as, "the said Act").

5. Learned senior counsel for the petitioner was put to notice at the inception of the hearing itself that the grounds and submissions of the petitioner must be confined to the strict parameters of Sub-section (2) of Section 34 of the said Act as expounded by the Apex Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . In view of this position, learned senior counsel based his contentions on the plea that the award is against the public policy. Such violation of public

policy was alleged on the ground that (i) the findings were perverse; and (ii) a fraud was played by the respondent.

6. Learned senior counsel emphasized the fact that it is the respondent which was at fault and yet the petitioner has been burdened with not only the amount of bank guarantee encased but loss of profit alleged to have been suffered by the respondent on account of short-closing the contract. In this behalf, learned senior counsel emphasized that the purchase order was received by the respondent on 16.09.1999 and the respondent for the first time made the application to TEC on 16.12.1999 though 3 months time had been stipulated to obtain Type Approval and 4 months to make the supply. The submission, thus, advanced was that the respondent itself had applied on the last date while the period of 3 months was actually to obtain approval from TEC. The petitioner undisputedly sought extension which was granted by the respondent subject to certain terms. It is also not disputed that TEC asked the respondent to deposit the full fee for inspection only on 21.07.2000 and soon thereafter the petitioner short-closed the order and invoked the bank guarantee on 24.07.2000. A perusal of the award shows that the claim of the respondent was based on the plea that short-closure of the contract was contrary to the terms of contract which had resulted in loss of profit to the respondent. Further, it was the submission of the learned Counsel that bank guarantee could not be invoked as no loss has, in fact, been suffered by the respondent. These pleas arose from the crucial aspect canvassed by the respondent that time was not the essence of contract and, thus, ought to have been extended. In addition, there were reciprocal promises to be performed by the petitioner which the petitioner had failed to perform.

7. The aspect of reciprocal promises and the requirement of extension are to an extent inter-linked. In this behalf, the respondent placed reliance on the communication of TEC dated 14.01.2000 to the petitioner for carrying out infrastructure assessment, which was not sent by the petitioner and was a pre-requisite for the Type Approval. It is in view thereof that the respondent claimed to have asked for extension of time for the delivery. The infrastructure clearance is stated not to have been given from 15.12.1999 to 21.07.2000 when the payment was asked for the Type Approval fee. Interestingly, one of the pleas taken by the respondents is that after short-closing the contract, the petitioner placed the biggest order for supply of 1500 kms. on M/s. Lucent which supplied only 400 kms. of required cables and that too without accessories in the stipulated time and extension was granted to M/s. Lucent up to 28.09.2000.

8. Learned Arbitrator has examined the aspect of the time being the essence of contract in great depth and has considered the various legal pronouncements. The General Conditions of the Contract more specifically Clause 15.3 provides for extension of period for the delivery of goods and performance of services. However, simultaneously Clause 16.1 provides that the date of delivery should be deemed to the essence of contract. On the material placed before the Arbitrator, a finding has been reached that there were reciprocal obligations to be

performed by the petitioner and the role of TEC has been emphasised, which is also part of the Government. The delay caused by TEC and the petitioner as regards the mandatory requirement of approvals was, thus, held not attributable to the respondent.

9. The petitioner has been held as not having adhered to the provisions of contract nor the sequence of responsibilities in performance of the reciprocal obligations. The initial extension was granted by the petitioner because it accepted the contention of the respondent that the mandatory condition in regard to the accessories and the non-availability thereof was correct. In terms of Clause 15.3 of the General Conditions of Contract, the petitioner was held duty-bound "to evaluate the situations" which the petitioner failed to do. The petitioner specifically raised a plea that the respondent caused the delay in securing the Type Approval and did not even start production of the cables when other suppliers, who were granted contract, had substantially supplied the cables. This plea has been negated by the Arbitrator.

10. An important aspect taken note of by the Arbitrator is the fact that almost a period of 7 months was taken after the application filed by the respondent before the respondent was called upon to pay the fee for Type Approval. No material was placed by the petitioner before the Arbitrator to substantiate the plea that other suppliers had made substantial supplies and this was despite the specific stand of the respondent that M/s. Lucent had supplied less than 1/3rd of the contracted quantity and that too without accessories.

11. Insofar as the bank guarantee is concerned, the same was found to compensate the petitioner for loss and damage by reason of the breach of contract. The petitioner did not prove any loss or damage. The forfeiture of the bank guarantee was, thus, held to be illegal.

12. The Arbitrator has thereafter proceeded to determine damages in terms of the parameters of Section 73 of the Indian Contract Act, 1872, which would be legitimate and reasonable and reliance has been placed on the judgment of the Apex Court in Mohd. Salamatullah and Others Vs. Government of Andhra Pradesh, where the order of the High Court reducing the loss of profit from 15% to 10% was set aside and the order of the trial court was restored. The Arbitrator has come to the conclusion that the rate of 20% would be just and fair and on that basis has determined the loss of profit at Rs. 1,11,32,312.43.

13. There is no doubt that in view of the judgment of the Apex Court in ONGC v. Saw Pipes Ltd.'s case (supra), which has again been discussed by the Apex Court in Civil Appeal No. 3134 of 2002 titled "Hindustan Zinc Ltd. v. Friends Coal Carbonisation" decided on 04.04.2006, the scope and scrutiny of the Court has been expanded. It has, thus, been held that an award contrary to the substantive provisions of law or provisions of the Arbitration and Conciliation Act, 1996 or against the terms of contract would be patently illegal and if it affects the rights of the parties, interference by the Court would be called for. The phrase "Public

Policy of India" used in Section 34 of the said Act has been given a wider meaning to connote what concerns public good and public interest. Thus, an award, which is on the face of it patently in violation of the statutory provisions, has been held to be not in public interest as it is likely to adversely affect the administration of justice. The result is that an award can be set aside if it is contrary to : (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. It has, however, been stipulated that illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that the award is against the public policy. A further ground emphasised is that if an award is so unfair and unreasonable that it shocks the conscience of the court, interference would again be called for.

14. An examination of the pleas raised by learned senior counsel for the petitioner in view of the findings of the Arbitrator cannot be said to be of such a nature where the same either shocks the conscience of the court or are contrary to law or the contract. The Arbitrator has succinctly set out three crucial issues and thereafter proceeded to record findings in respect of the same. The said findings, in my considered view, cannot be called perverse.

15. The emphasis of the submissions of learned senior counsel for the petitioner was that the Arbitrator has committed a fundamental mistake in assuming that the respondent was not at fault while making the application to TEC on 16.12.1999. Learned senior counsel did not dispute that the application was made within time, but it was contended that the same was made on the last date. In my considered view, this would make no difference as the respondent was given a time-period to make the application and within the time-period, the respondent did take steps. There is also an important inter-connected fact found in this behalf inasmuch as the TEC took almost 7 months from the date of the application itself for the respondent to be called upon to deposit the requisite fee. I am unable to accept the plea that the petitioner can wash its hands off the role played by TEC. TEC is the body, which is part of the Government and the requirement of Type Approval from TEC is stipulated by the petitioner itself. The extension was also granted apparently on account of the failure to process the application of the respondent expeditiously.

16. It has to be kept in mind that these contracts were at the inception of the process of supply of such cables and various inbuilt safeguards were provided by the petitioner to ensure that the quality of cables supplied were duly certified and approved and the respondent or any other contractor had the infrastructure to make supplies.

17. The second element canvassed by learned senior counsel for the petitioner arises from the plea of fraud. This plea arises from an application filed by the petitioner for filing additional documents on behalf of the petitioner. It is the submission of learned senior counsel for the petitioner that the fraud played by the respondent was that all the relevant communications with TEC were not

placed before the Arbitrator. Interestingly, some of the communications sought to be placed on record are between the petitioner and TEC itself. The petitioner can hardly state that they were unaware of such communications. Insofar as the communications between TEC and the respondent are concerned, in some of the cases, copies have been marked to the petitioner. In any case, TEC is part of the Government and is the designated authority of the petitioner for obtaining necessary approvals. The petitioner can hardly be permitted to contend that it was unaware of the communications or the relevance thereof. It is not that the petitioner moved an application seeking any directions for production of any documents. In such a situation, to label the non-availability of these documents with the Arbitrator as a fraud perpetuated by the respondent would be wholly unsustainable.

18. It must be kept in mind that this Court is not to re-appreciate the evidence or interfere with an award merely because there may be any other equally plausible view other than the one taken by the Arbitrator. This Court does not sit as a court of appeal and this was the position even under the earlier Indian Arbitration Act, 1940 leave aside the more restrictive provisions of the said Act. In my considered view, the award does not suffer from any of the infirmities which could call for interference as set out in *ONGC v. Saw Pipes Ltd.*'s case (supra) except to the extent discussed hereinafter.

19. Learned senior counsel for the petitioner emphasised that even if the findings of the Arbitrator were accepted to be correct, the award of the rate of damages at 20% and of interest at 18% p.a. cannot be sustained.

20. Insofar as the question of the rate of damages is concerned, the Arbitrator has taken the rate at 20%. The Arbitrator himself has referred to judgment of the Apex Court in *Mohd. Salamatullah's* (supra) where loss of profit @ 15% was found to be reasonable by the Supreme Court. The Supreme Court, in fact, interfered with the reduction of the rate of profit by the High Court. I, thus, see no reason why the Arbitrator did not follow the same rate of loss of profit. To that extent, the award is devoid of any reason as to why 20% has been taken as the loss of profit. The Arbitrator has noted that the figure arrived at by the respondent is not on the basis of 20%, but on the basis of 27.52%. Once the Arbitrator himself found that 15% rate of profit was upheld by the Apex Court and there was no other reason or ground disclosed by the respondent for a higher rate of profit, the said rate of profit ought to have been applied. The award of any higher rate of profit is, thus, devoid of any reason, which is mandated in terms of the provisions of the said Act.

21. I am, thus, of the considered view that the loss of profit is liable to be calculated at 15% and not 20%.

22. Insofar as the issue of interest is concerned, learned Counsel for the respondent himself confined the claim and agreed to reduction of the rate of interest from 18% p.a. to 12% p.a. till the date of decree and at 9% p.a. from

the date of decree till the date of realisation on the principal amount, both being simple rate of interest. In view of this concession, no further discussion on this account is required.

23. In conclusion, the objections and the application of the petitioner are disposed of and the Award dated 07.12.2004 made and published by the Sole Arbitrator, Justice S.B. Wad (Retd.) stands modified to the extent that the rate of loss of profit should be calculated @ 15% p.a. instead of 20% p.a. and the interest to be calculated till the date of decree at 12% p.a. simple interest instead of 18% p.a. and from the date of decree till the date of realisation at 9% p.a. simple interest on the principal amount.

24. The petition and the application accordingly stand disposed of leaving the parties to bear their own costs.