

(2010) 03 DEL CK 0040
In the Delhi High Court
Case No : O.M.P. 271 of 2009

Bharat Sanchar Nigam Limited

APPELLANT

Vs

Haryana Telecom Limited and Another

RESPONDENT

Date of Decision : 10-03-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2)

Citation : (2010) 03 DEL CK 0040

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Lalit Bhardwaj and Randhir Beri, for the Appellant; Narendera M. Sharma and Mithu Jain for R-1, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—Present petition has been filed u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") for setting aside the arbitral Award dated 30th January, 2009 passed by the Sole Arbitrator, Mr. Justice C.L. Chaudhry (Retd.).

2. The only issue that arises for consideration in the present proceedings is whether levy of liquidated damages by petitioner-objector is to be on the total value of the Purchase Order inclusive of duties and taxes or whether duties or taxes have to be excluded. Learned Arbitrator in the impugned Award has rejected the petitioner-objector's argument for levy of liquidated damages on the Purchase Order inclusive of duties and taxes. The relevant portion of the impugned Award reads as under:

5. ...Clause 11 of P.O. is reproduced herein below for the sake of convenience:

Clause 11- "Liquidated Damages: should the firm fail to deliver the stores or any consignment thereof within the period prescribed for delivery, the purchaser shall be entitled to recover ?% of the value of the delayed supply for each week of delay or part thereof subject to maximum of 5% of the value of delayed supply

(on basic value excluding duties and taxes) provided that the delayed portion of the supply does not in any way hamper the commissioning of the systems. Where the delayed portions of supply materially hampers commissioning of the system, LD charges shall be levied as above on the total value of the purchase order (Basic value excluding duties and taxes)" Value of cables as given in LOI and P.Os. is the basic value and rates were exclusive of excise duty and sales tax which shall be paid extra.

In view of the above said clause, the deductions in the form of liquidated damages on the excise and sales tax component is impermissible under the terms of the agreement and contract between the parties.

xxxx xxxx xxxx xxxx

9. In a similar case of arbitration between Continental Telepower Ltd. v. Union of India (Department of Telecom), where Rajasthan Circle has deducted liquidated damages from them on excise and sales tax component of the value of cables, in a arbitration proceedings it was held that "Claimant indicated that Rajasthan Circle in P.O. dated 30.7.1996 in Clause 11 of LD has provided that LD would be recovered on basic value excluding duties and taxes.

P.O. is the essence of the contract. Therefore in view of the aforesaid specific agreement Rajasthan Circle cannot be allowed to levy LD on the duties and taxes.

The aforesaid award passed by Shri N.K. Gupta, Sole Arbitrator, was upheld by Hon"ble Delhi High Court by Hon"ble Justice J.D. Kapoor vide order dated 20.3.2002 passed in OMP No. 83/2002. The copy of the award as well as the order passed by Hon"ble High Court is already part of the present Arbitration proceedings.

xxxx xxxx xxxx xxxx

15.2.... In my opinion, the purchase order is the essence of the contract. The cables were to be supplied to the respondent in terms of the purchase order and the price of the material was to be paid in terms of the purchase order. Regarding levy of liquidated damages, Clause 11 was inserted in the purchase order. Extension for delivering the cables were given by the respondent in terms of Clause 11 of the purchase order. Clause 15 of the tender document regarding levy of liquidated damages fall in Section 111 of the tender document which prescribes General Conditions. Clause 11 of the Purchase order regarding levy of liquidated damages was inserted in place of Clause 15 Section 111 of the tender document in a modified form. Clause 11 of the Purchase Order is a special clause which will prevail over Clause 15 of the tender document which falls u/s 111 of the tender document prescribing General Conditions. In the absence of any clause regarding levy of liquidated damages in the purchase order, the respondent could rely upon Clause 15 of the tender document as part of General Conditions. But in the presence of a clause regarding levy of liquidated damages in the purchase order, Clause 15 of the tender document cannot be given any

effect....

(emphasis supplied)

3. Mr. Lalit Bhardwaj, learned Counsel for petitioner-objector submits that the impugned Award is contrary to the contract executed between the parties inasmuch as in accordance with Clause 15.2 of Section III of General Conditions of Contract (in short "GCC"), the petitioner-objector is entitled to levy liquidated damages on total value of the Purchase Order, which according to him includes both excise and sales tax component. In this connection, Mr. Bhardwaj relies upon Clauses 1 and 15 of Section III of GCC, which read as under:

Section III

General Conditions of Contract

1. Application:

The General Conditions shall apply in contracts made by the Purchaser for the procurement of Goods.

xxxx xxxx xxxx xxxx

15. Liquidated Damages

15.1 The date of delivery of the stores stipulated in the acceptance of Purchase Order should be deemed to be the essence of the contract and delivery must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should, however, deliveries be made after expiry of the contract delivery period, without prior concurrence of the Purchaser, and be accepted by the consignee, such deliveries will not deprive the Purchaser of his right to recover liquidated damages under Clause 15.2 below.

15.2 Should the tenderer fail to deliver the stores or any consignment thereof as per the prescribed schedule for delivery the Purchaser shall be entitled to recover ?% of the value of the delayed supply for each week of delay or part thereof, subject to maximum of 5% of the value of the delayed supply; provided that delayed portion of the supply does not in any way hamper the commissioning of the other systems. Where the delayed portion of the supply materially hampers installation and commissioning of the other systems, L/D charges shall be levied as above on the total value of the Purchase Order. Quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengable by the supplier.

4. Though Mr. Bhardwaj admits that Clause 11 of the Purchase Order provides for levy of liquidated damages exclusive of duties and taxes, he submits that in view of definition of the Purchase Order in Section II of the Contract executed between the parties, the Purchase Order includes not only its Clause 11, but also Clause 15 of Section III of GCC. The definition of Purchase Order in Section II of the Contract reads as under:

Section II

A. Introduction

1. Definitions

xxxx xxxx xxxx xxxx

(f) "The Purchase Order" means the order placed by the Purchaser on the Supplier signed by the purchaser including all attachments and appendices thereto and all documents incorporated by reference therein. The purchase order shall be deemed as "contract" appearing in the document.

5. Having heard the parties, I am of the view that the scope of interference by this Court with an arbitral award u/s 34(2) of Act, 1996 is extremely limited. The Supreme Court in Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi, after referring to a catena of judgments including Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., has held that an arbitral award is open to interference by a Court u/s 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy.

6. In fact, the Supreme Court in a catena of cases has held that in the realm of interpretation of a contract, the arbitrators are supreme.

One such judgment under Act, 1996 is McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, wherein it has been held as under:

112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law.

(emphasis supplied)

7. Consequently, in the present case as the Arbitrator has interpreted Clauses 11 and 20 of the Purchase Order read with Clause 15 of GCC, I am of the view that the said interpretation calls for no interference by this Court in Section 34 proceedings.

8. Even on first principles, I am of the view that Clause 11 of the Purchase Order being a specific clause with regard to liquidated damages must prevail over the general clause, that is, Clause 15 of general conditions of the tender.

9. Moreover, it is a settled principle of interpretation that where the words of a

document are ambiguous, they shall be construed against the party who prepared the document. This rule of Contra Proferentum has been adopted and followed by the Supreme Court in various judgments. In Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and Others, the Supreme Court has held as under:

12. The correctness of these principles is too well established by authorities to justify any detailed discussion. The task being to ascertain the intention of the parties, the cases have laid down that that intention has to be gathered by the words used by the parties themselves. In doing so the parties must be presumed to have used the words in their strict grammatical sense. If and when the parties have first expressed themselves in one way and then go on saying something, which is irreconcilable with what has gone before, the courts have evolved the principle on the theory that what once had been granted cannot next be taken away, that the clear disposition by an earlier clause will not be allowed to be cut down by a later clause. Where there is ambiguity it is the duty of the Court to look at all the parts of the document to ascertain what was really intended by the parties. But even here the rule has to be borne in mind that the document being the grantor's document it has to be interpreted strictly against him and in favour of the grantee.

(emphasis supplied)

10. In any event, since in a similar contract executed between the petitioner-objector and a third party, another arbitrator has taken an identical view and the said view has been confirmed by this Court in OMP No. 83/2002, I am of the opinion that the impugned Award calls for no interference in the present proceedings. Accordingly, present petition is dismissed but with no order as to costs.