

(2012) 04 BOM CK 0033
In the Bombay High Court
Case No : Arbitration Petition No. 442 of 2010

BTP Structural (I) Pvt. Ltd.	Vs	APPELLANT
Bharat Petroleum Corp. Ltd.. and Shri U.N. Joshi, Sole Arbitrator		RESPONDENT

Date of Decision : 27-04-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 18, 19, 34, 34(4)

Citation : (2012) 04 BOM CK 0033

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Veerendra Tulzapurkar, Mr. Nikhil Sakhardande instructed by Mr. Chandana Salgaockar, for the Appellant; Sheeja John instructed by y M/s. M.P. Savla and Co., for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—The Petitioner has invoked Section 34 of the Arbitration and Conciliation Act, 1996 (for short the Arbitration Act) and thereby the challenge is raised to the Arbitration Award dated 21 October 2009. The basic events are as under:

The Petitioner is a private limited company, registered under the provisions of the Companies Act, 1956 with the main object of manufacture and supplying empty Liquefied Petroleum Gas (for short, "LPG") Cylinders and Gas Cylinders, valves, pressure regulators and other ancillary equipments and works relating to the LPG cylinders having address for services as stated in the cause title.

2. Respondent No. 1 is a Government of India undertaking incorporated and registered under the provisions of the Companies Act, 1956 having address for service as stated in the cause title and is carrying on the business of refining and marketing of petroleum products. Respondent No. 2 is the Sole Arbitrator who has arbitrated the disputes between the Petitioners and Respondent No. 1 and has made published his award dated 21 October 2009. Respondent No.1 carries

on the business of distribution/supply of LPG. LPG is supplied to domestic consumers in 14.2 Kgs. Metal LPG cylinders.

3. From 4 July 1999 to 9 March 2000, Respondent No. 1 herein placed purchase orders on the Petitioner for design manufacture and supply of 43664 empty LPG cylinders. The Petitioner designed, manufactured and supplied the LPG cylinders strictly in accordance with the specifications given by Respondent No. 1 and in accordance with the terms and conditions set out in the purchase orders. Respondent No. 1 made full payment to the petitioner in respect of the said supplies made and that too in terms of the purchase orders and the terms and conditions set out therein.

The price of the LPG cylinders which the Petitioner was required to supply to Respondent No. 1 were also set out in the purchase orders. The purchase orders specified that "prices as set out in this order are firm and no plea for any increase will be entertained without written request showing adequate reasons for increase". It is clear from the clauses that the prices for the cylinders supplied by the Petitioner cannot be reduced below the price indicated in the purchase order but can only be increased at the request of the Petitioner.

4. On and from 29 March 2000, Respondent No. 1 placed further purchase orders in respect of which design, manufacture and supplies have been made by the Petitioner herein. The total supplies of LPG cylinders made from 12 April 2000 to 27 March 2001 are 56,160. In respect of these cylinders, there were several purchase orders and each of the purchase orders specified the price at which the LPG cylinders are to be supplied by the Petitioner.

Respondent No. 1, instead of making payments for these LPG cylinders in terms of the purchase orders, made payments at lesser price. Not only that, Respondent No. 1 also claimed to have deducted certain sums of money from the payments pertaining to these cylinders on the ground that there was excess payments made in respect of cylinders supplied by the Petitioner to Respondent No. 1 during the period from 4 July 1999 to 9 March 2000.

The purchase orders dated 29 March 2000, referred to hereinabove was for design, manufacture and supply of 15,708 LPG cylinders and at a price of Rs. 705.71 per cylinder. The purchase orders specified that the provisional price applicable for cylinders is Rs. 705.71 and further specified that the prices as set out in the order are firm and no plea for any increase will be entertained without written request showing adequate reasons for increase. It is therefore, apparent from the terms set out in the purchase orders that the price of Rs. 705.71 is firm and it cannot be reduced below Rs.705.71 and can only be increased at the request of the Petitioner.

5. On 23 June 2000, Respondent No. 1 extended the earlier purchase orders dated 29 March 2000 to include an additional quantity of cylinders as mentioned therein viz. 25413 cylinders to be supplied by 30 June 2000 and 38,552 cylinders to be supplied by 30 September 2000. The extension of the purchase orders

specified that the price applicable per cylinder would be Rs. 685.79. The Petitioner supplied the LPG cylinders in terms of the purchase order dated 29 March 2000 and extension of the purchase order referred to hereinabove.

6. On 31 October 2000, Respondent No. 1 sent a circular to all the LPG cylinder manufacturers stating that pursuant to a review of the existing cylinder pricing undertaken by them with the assistance of Price Water Coopers (for short, "PWC") and in terms of the draft report submitted by the PWC, they have decided to revise the provisional basic price of the LPG cylinders to Rs. 645 w.e.f 1 July 1999. The circular further states that Respondent No. 1 will recover the differential amount from the bills and that final adjustment will be made after finalization of the cylinder prices. The circular therefore, was itself a provisional one and states that the price of the LPG cylinders have not been finalized.

Notwithstanding the same, in terms of the circular Respondent No.1, sought to recover monies paid to the LPG cylinder manufacturers with retrospective effect. The recoveries were sought to be made pursuant to the circular even before the basic price of the cylinders was finalized, as is apparent from the circular.

The aforementioned circular is wholly illegal and cannot bind the Petitioner. Respondent No. 1 was bound by the prices set out in the purchase orders pursuant to which, the Petitioner has designed, manufactured and supplied the LPG cylinders. As indicated in the purchase orders, the prices indicated therein were fixed and there could only be an upward revision and not a downward one as is apparent from the terms set out therein. Contrary to the same and based upon the circular dated 31 October 2000, which itself is wholly illegal and does not bind the Petitioner, Respondent No. 1 deducted huge sums of money from the bills of the Petitioner and other LPG cylinder manufacturers in a totally arbitrary manner. In terms of the circular dated 31 October 2000, Respondent No. 1 withheld monies in respect of pending bills on the ground that there have been excess payments made earlier, which excess payment is computed based on the illegal circular dated 31 October 2000.

7. On 16 April 2003, in view of the illegal deductions made by Respondent No. 1, the Petitioner invoked the Arbitration clause found in the purchase agreement vide letter dated 16 April 2003 addressed to The Director (Marketing) M/s. Bharat Petroleum Corporation Limited.

8. On 19 May 2003, the Arbitration clause specified that the Director (Marketing) of Respondent No. 1 or some other officer nominated by the Director (Marketing) shall be the Arbitrator. In accordance therewith, Respondent No. 2 who is the General manager (Aviation) was appointed as the Arbitrator to adjudicate the disputes between Respondent No. 1 and the Petitioner.

9. On 23 July 2003, Respondent No. 2 entered upon the reference and directed the parties to file their statement of claims, counter statements, documents etc. as per time schedule fixed by him, which are set out in his letter.

10. On 20 November 2003, in accordance with the said directions, the Petitioner filed claim statement.

11. On 31 December 2004, Respondent No. 1 filed its objections. Thereafter, the Petitioner filed its rejoinder.

12. On 5 December 2008, subsequent to the completion of the pleadings, the hearing was held, the Petitioner submitted their oral arguments. Respondent No. 1 took time to argue the case on the next date of hearing.

13. On 10 December 2008, after the meeting dated 5 December 2008, the learned Arbitrator sent the minutes of the meeting under the cover of his letter wherein he specifically stated that he was enclosing the minutes of the meeting and further stated as under;

i) M/s. BTP to submit their written arguments positively by 22 December 2008 with a copy to BPCI.

ii) BPCI would thereafter argue the case;

iii) the next date of Arbitration meeting would be advised shortly.

Thereafter, no meeting of the Arbitral Tribunal has ever been held.

14. On 21 October 2009, subsequent to the aforementioned meeting, Respondent No. 1 sent written arguments to the learned Arbitrator along with documents and decisions. Even though the learned Arbitrator was duty bound to fix the next date of hearing of Arbitral Proceedings for hearing the submissions of Respondent no.1 and the rejoinder (arguments) of the Petitioner, the learned Arbitrator, passed an unilateral award after a lapse of over 10 months, without giving an opportunity to the Petitioner to argue or to counter the written arguments and documents and decisions submitted by Respondent No. 1 and rejected the claim of the Petitioner.

15. Being aggrieved and dissatisfied by the aforesaid award dated 21 October 2009, the Petitioner prefers this Arbitration Petition.

16. Heard the learned counsel appearing for the parties.

17. The principal challenge is made solely on the ground that violation of principles of natural justice, fair play and the equity.

18. It is clear from the evidence and facts so recorded above, that the Arbitrator has unilaterally passed the award after taking the written argument of Respondent N.1 behind the back of the Petitioner. There was no opportunity given to the Petitioner to submit the arguments. The award was also passed after lapse of 10 months from the date of last meeting of the Arbitration Proceedings. As recorded, the Arbitrator in fact, never intimated the next date of hearing after the reply of Respondent No. 1, as well as, the rejoinders, arguments of the Petitioner.

19. The correspondences placed on record, read with no specific denial and/or controversy of those averments, goes to show that the Arbitrator has passed the award by making breach of the principle of natural justice, fair play and equity as contemplated u/s 19 of the Arbitration Act read with the settled principles with this regard. The another aspect is Section 18 of the Arbitration Act. This Section itself contemplates that the Arbitrator must give equal opportunity to the parties. Therefore as averred, the Arbitrator, has not given opportunity to the Petitioner to submit his case in all respect. The Arbitrator though recorded in the meeting dated 5 December 2008 that the arguments of Respondent No. 1 would be taken up on the next date of hearing, but failed to fix any meeting of the Arbitration proceedings and pass the award after lapse of 10 months.

20. The award, therefore, so passed against the Petitioner, even on merits, in my view, is contrary to law and illegal. Therefore, at this stage without going to the merits of the matter, the award so passed against the Petitioner, though the grounds are raised that the award is bad on merits, I am not inclined to observe anything in view of the clear breach of the principle of natural justice itself. In my view, the award is bad in law and needs to be quashed and set aside on that ground itself.

21. The learned counsel appearing for the Respondent, however, contended in view of the provisions of Section 34(4) that, by keeping the Arbitration Petition pending in the Court, the matter be remitted back so that the Arbitrator, after giving the opportunity to the Petitioner, may pass the appropriate order even by maintaining the order and/or by setting aside the same.

22. Section 34(4) of the Arbitration Act, is reproduced as under:

34(4)) On receipt of an application under subsection (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

It is clear from the record and after reading the provisions and purpose of Section 34(4) that in a case where some part and portion of the award and/or issue; which the Arbitrator failed to consider and/or required to reconsider, the Court in a given case, may remit back the matter for details and/or reasoning on a particular part and/or issue so referred, but to say that in the cases like this, when the award is bad and void ab initio for the reasons so recorded above and as there is a clear breach of natural justice, equity and fair play and as admittedly, the award was passed without giving opportunity to the Petitioner, to say that the matter can be remitted back for reconsideration and/or rehearing, in my view is nowhere contemplated u/s 34(4) of the Arbitration Act. It is impermissible. The whole award which is void and/or illegal in view of above, therefore, there is no question to remit the matter back for rehearing by keeping

the matter pending in the Court as contended. This is not the case where some part of the award which is severable can be remitted back for readjudication. As observed above, if the whole award is bad in law, there is no question of remittance of the matter so contended. I am inclined to set aside the whole award.

23. The learned counsel appearing for the Petitioner has relied on the Judgment of Networth Stock Broking Ltd., Mumbai Vs. Subhasis Panda, whereby this Court has already observed as under:

6 Having once passed the order, directing the parties to file the documents, it is desirable and necessary to give full opportunity to the parties to make their respective submissions on those added documents. The requirement of principles of natural justice or ex aequo et bono or amicable compositeur, if not complied with, I am of the view that on this ground itself, the award needs to be interfered with. Such award deserves to be set aside. It is made clear that, I am not deciding anything on the merits of the matter

Resultantly, the Petition is allowed. The impugned award dated 21 October 2009 is quashed and set aside. There shall be no order as to costs.