(2015) 11 DEL CK 0138

In the Delhi High Court

Case No : EFA (OS) 11/2015, CM Nos. 6787-88, 6791/2015, EFA (OS) 12/2015 and CM Nos. 6889, 6892/2015

ECE Industries Ltd. APPELLANT

Vs

Delhi Power Supply Company Ltd. and Others RESPONDENT

Date of Decision : 23-11-2015

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 31(7)(b)

Citation : (2015) 11 DEL CK 0138

Hon'ble Judges : Gita Mittal and I.S. Mehta, JJ.

Bench : Division Bench

Advocate : Amandeep Bawa, Advocate, for the Appellant

Final Decision : Allowed

Judgement

Gita Mittal, J.

CM No. 6791/2015 in EFA(OS) 11/2015

CM No. 6892/2015 in EFA(OS) 12/2015

1. These applications are allowed.

CM No. 6788/2015 in EFA(OS) 11/2015

Heard.

For the reasons stated, the delay in filing is condoned.

The application is allowed in the above terms.

EFA(OS) Nos. 11&12/2015

2. Disputes arose between the appellant and the Delhi Vidyut Board. The same were referred for arbitration which proceedings culminated in an arbitral award dated 9th April, 2002which awarded amounts in favour of both parties. On 1st July, 2002 Delhi Vidyut Board unbundled into three holding companies, being

Genco (Indraprastha Power Generation Company), Transco (earlier Delhi Power Supply Company Ltd. and three DISCOMS, being distribution companies which were i) BSES Yamuna Power Ltd., ii) BSES Rajdhani Power Ltd. and iii) North Delhi Power Ltd.

3. In terms of the Award, respondent no.2-Delhi Power Company Ltd. made payment of Rs. 1,34,18,612.84 on 11th September, 2002 to the decree holder. On 27th January, 2004, further payment of Rs. 67,39,859/- was made to the respondent no. 1.

4. The appellant-decree holder complained that it had not received the entire interest amount in terms of the award and filed Ex.Pet.No.47/2004. On 21st April, 2014, the learned Single Judge extracted the summary of the quote as detailed in the award and was of the view that the interest has to be paid only on the amount summarised therein. It was held that the computation was filed by the appellant was consequently completely erroneous inasmuch as the appellant had sought to compute interest on Rs. 1,84,98,870.84 from the date of the award and thereafter had made deductions as made in the award and the prayer for payment of the amounts towards interest was rejected. The court extracted the dates on which payments became due as noted by the Arbitrator and directed payment in terms thereof.

5. Aggrieved by the order dated 21st April, 2014, the appellant filed EA No. 377/2014 in the Execution Petition. The appellant has challenged the order dated 21st April, 2014 by way of EFA(OS) No. 11/2015 before us.

6. So far as consideration of EA No. 377/2014 filed by the appellant in the Execution Petition is concerned, by this application the appellant sought modification/clarification of the order dated 21st April, 2014. Operative part of the order dated 21st April, 2014 is as follows :

"......interest has to be computed on the net amount and not on the gross amount, by ignoring the deductions made in the award itself. In the view of the aforesaid, the following amounts are payable to the decree holder/award holder under the award:

i) Rs. 62,82,676.84 along with interest @ 18% p.a. with effect from 09.05.2002 till the date of payment;

ii) Rs. 50,41,000 alongwith interest @ 18% p.a. with effect from 09.10.2002.

The execution petition discloses that an amount of Rs. 1,34,18,612.84 was paid on 11.09.2002 and Rs. 67,39,859/- was paid on 28.01.2004. the Judgment Debtors do not raise any disputes about the said amount being paid and the dates on which they were paid.

In light of the aforesaid, the matter is now referred to the Registrar General to make computation of the amount, if any, payable under the award as on date......"

7. This application was dismissed by the learned Single Judge by an order dated 16th January, 2015 holding that the order dated 20th May, 2014 was in accordance with the award relying on para 11.5.1 and that payments were made after fulfilment of certain conditions and obligations by the appellant-decree holder. The order dated 16th January, 2015 has been assailed by way of EFA(OS) No. 12/2015 before us. Inasmuch as the challenge is on identical grounds, we are taking both the appeals together for consideration and adjudication.

8. By way of EFA(OS) No. 12/2015, the appellant has assailed the order dated 16th January, 2015 passed by the learned Single Judge in Execution Petition No. 47/2004 wherein the learned Single Judge has denied pre-reference and post-reference interest on the amounts awarded to the appellant. There is no material dispute to the essential facts before us. Disputes between the parties were referred to arbitration as aforesaid and culminated in an arbitral award dated 9th April, 2002 whereby an amount of Rs. 1,84,98,870.84 was awarded towards the main claim with interest @ 18%.

9. In as much as, there is no dispute with regard to the principal amount awarded and directed to be paid by the learned Single Judge, for the sake of convenience, we extract the relevant portion of the award to the extent that it considers and awards interest on the principal amount :

"11.4 Interest

Interest on amount due should be awarded to the Claimant since the interest is payable on the basis proposition that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation. The counsel for the Claimant have relied upon various judgments of the Hon''ble Supreme Court to show that arbitrator has the power to grant interest pre-reference and pendente lite. Moreover, Arbitration and Conciliation Act, 1996 in Section 31(7)(b) provides that the arbitration in an award may include interest for the whole or any part of the period between the date on which cause of action arose and the date on which award is made. Section 31(7)(b) also provides that the sum directed to be paid by an arbitral award shall unless the award otherwise directs carry interest @ 18% from the date of award to the date of payment.

In view of the above, I hold that the Claimant is entitled to interest on the amount claimed by the Claimant for the pre-reference period and from the date of reference till the date of the award and further from the date of this award till the date of payment.

10. So far as the award in favour of the respondent is concerned, in para 11.5, the Arbitrator had made the following directions :

11.5 Counter Claim

The respondent as stated above has filed its counter claim claiming various amounts for :-

(1) G.P failed transformers not repaired till date.

(2) Late repair of G.P. failed transformers.

(3) Deficient transformers due to lower copper content.

11.5.1 GP failed transformers not repaired till date

The claim of the Respondent is that various amounts are payable to it for the guarantee period transformers lying the field which are yet to be repaired by the Claimant. The guarantee clause in the Pos provides that "in the event of failure of any transformer within guarantee period, the same shall be repaired, replaced within one month from the date of receipt of intimation from field/distribution department, free of cost as the case may be, failing which a penalty of 1% per week subject to maximum of 10% of the computed cost of the transformer shall be levied and the guarantee period for such repaired/replaced transformers shall be got extended by the period...". It is also stipulated that in case of failure of the party to lift defective transformer and deliver replacement/repaired GP failed transformer the costs of this transformer shall be recovered from the pending payment/Bank Guarantee.

The Claimant has abnormally delayed repair of G.P. failed transformer. One of the reasons may be shortage of funds as their payments were withheld. After so long a period the condition of the transformers must have deteriorated needing complete replacement.

In the clarification dated 16.2.2002 it has been admitted by the Respondent that only 10 nos. of transformers pertain to PO No. TE-923 (4 nos.) and TE- 928 (2nos.). The argument of the Claimant that the failures are due to overloading, theft etc. does not hold good, as the Guarantee Clause does not provide any such limitations. Now that the outstanding payments are being released, I hold that the Respondent is entitled to withhold 100% of the value of these transformers, which amounts to Rs. 7,34,624 for TE-923 and 5,60,460 for TE-928. The total amount of Rs. 12,95,084 with interest would be paid to the Claimant when the Claimant replaces the transformers with new ones, and the defective transformers returned to the Claimant.

The claim of the Respondent for payment of current cost against the GP failed transformer cannot be admitted as there is no such clause in the purchase order and decisions are to be taken within the ambits of the contractual conditions.

11.5.2Late repair of G.P. failed transformers

Various submissions and pleadings documents have been filed by the Claimant to show that intimation of the failure of transformers has not been given to the Claimant. This argument does not hold good as the Claimant is well aware of the failures through telephone intimation and they need to repair the GP failed transformers.

It has come out in the cross examination as well as in the clarifications sought on

9.1.2002 and 16.2.2002 that there are only 62 transformers which pertain to the above mentioned three purchase orders (22 of TE-923, 36 of TE-928 and 4 of TE-922) which have been repaired by the Claimant but not within the period of one month and the maximum penalty of 10% of the computed cost of transformer as envisaged in the guarantee clause, is payable. Hence total amount of Rs. 15,80,749.60 being 10% of the computed cost of the 62 transformers is payable by the Claimant to the Respondent. Since this payment is due to the Respondent, for the reasons aforesaid, interest is payable by Claimant to the Respondent from the date the amount became due up to date of payment.

The payment clause of 10% on late repair will also be applicable in the case of 6 transformers yet to be replaced and I hold that an amount of Rs. 1,29,508.40 is also payable by the Claimant to the Respondent on account of late replacement of these transformers along with the interest.

11.5.3 Deficient transformers due to lower copper content

The Respondent has also claimed amounts on account of deficient transformers with regard to Current Density. As stated, out of the transformers which pertain to the above mentioned three purchase orders only 34 transformers have been checked for CD out of which 32 are alleged to have been found to be deficient as per the cross examination of Sh. Bhupinder Nath. The Respondent has filed documents along with affidavit of Mr. R.K. Tola, which shows that CD checks have been performed at the site of the private repairer. The counsel for the Claimant have submitted that no notice of the CD checks was given to the Claimant and the tests were done at the workshop of private repairer in absence of the Claimant. The counsel for the Claimant has also submitted that the invoices raised by the repairer as well as vouchers relating to payments made by the Respondent were not produced by the Respondent.

I wish the Respondent had given notice to the Claimant and opened the transformers in their presence to avoid the dispute now raised. Besides, this would have alerted them and such deficiency would have been avoided for the future supplies. The findings of the committee constituted by the Hon''ble Chairman of DVB for checking of the ECE transformers, however, cannot be challenged although the checking was not done in presence of the Claimant, since the committee consists of very senior officers.

Further, for determining the quality of goods, normally sample checking is done. Indian Standard also provides such sample testing for various products particularly for the destructive testing. In case of transformers it is not possible to check each and every transformer for current density as this needs opening the transformer and therefore the sample checking is to be relied upon. The sample checking had established the average copper contents of the transformers of the supplies made against the orders.

Supply of transformers not conforming to specification is a serious matter. I find that the transformers of many other suppliers were found deficient in copper content as per details provided by Mr. R.K. Tola, Respondent''s witness. The reason therefore cannot be a fraud as argued by the Respondent and may be an attempt to economise.

The Claimant argued that figure of Rs. 10,000/- per transformer indicated by the claimant as the cost of making good the deficiency or the enhanced figure given during the course of arguments are approximate figures and hence no case can be made based on approximate figures especially when most of the transformers have not been opened for CD check.

However, the deficiency in the copper content makes the transformer under rated and it cannot take the same load as per the rating provided in the order. The figure of Rs. 10,000.00 is not very high taking into consideration of the gravity of the case. The revised figure indicated during the arguments is however on the high side and without any authenticity it cannot be taken as the basis. Since 32 transformers out of 34 checked has been found deficient it comes to 32/34 x 100 or 94.11 percent which, incidentally is quite high. The total transformers supplied against the three purchase orders under reference are 295,94 percent of which comes to 277. The cost of making good the deficiency of 277 transformers shall be 277 x 10,000 or Rs. 27,70,000.00.

Hence amounts payable by the Respondent to the Claimant is Rs. 27.70 lakhs for supply of deficient transformers under purchase orders TE-922, 923 and 928."

11. We may also set out the award of interest in para 11.7 therein which reads as follows :-

11.7 Payment of interest

Note: Plz follow emphasis rule properly payable both to the Claimant and Respondent. The Arbitrator and Conciliation Act provides for payment of interest at the rate of 18% if the arbitrator makes no mention. As such 18% if the arbitrator makes no mention. As such 18% interest is payable to both the parties. The Act is silent about the nature of interest whether compound or simple. If the intentions were compound interest, the Act would have mentioned so and also indicated the period of compounding.

As such I hold that simple interest is payable to both the parties from the date the payment became due till the date of payment. The date of payment due shall be determined as under :-

a) In case of the main claim the payment should be considered as due 30 days from the date of delivery both for the 90% and the 10% payment.

b) In case of the GP failed transformer the payment may be considered as due 30 days from the date of failure.

c) In the case of the deficient transformers the date the payment due shall be the same as the main claim i.e. 30 day from the date of delivery."

(Emphasis by us)

The award is therefore explicit that the amounts awarded to both parties are to carry interest @ 18% during the pre-reference period as well as the post-reference period till such time, the same is actually paid to the claimant-the appellant herein.

12. In the impugned order dated 21st April, 2014, the learned Single judge has directed that the awarded amount of Rs. 62,82,676.84 was to carry interest @ 18% with effect from 9th May, 2002 while the amount of Rs. 50,41,000/- was to carry interest @ 18% with effect from 9th October, 2002 directing the interest to be payable after the passing of the award. In effect, the learned Single Judge has denied the appellant the award of interest during the pre-reference and the post-reference period. The award has been upheld given the clear mandate of the award as extracted above, the denial of the interest for pre-award periods is certainly erroneous.

13. The appellant and respondent nos. 1 and 2 shall place the calculation in terms of the direction at serial no 11.7a,b,c relating to para 11.4 and 11.5 respectively above before the Registrar General before whom the matter is listed on 17th December, 2015 with advance copy to the learned counsel for the other side. The parties shall verify the correctness of the calculation and effect payments.

14. It is submitted by Mr. S.K. Dubey, learned counsel for the respondents that the same observations will apply to the calculation of the interest to which the respondents are entitled in terms of para 11.5 of the award as set out above. This submission is correct.

15. In view of the above, it is held that the appellant and respondent would be entitled to interest computed in terms of para 11.7 of the award as set out above. To this extent, the impugned orders dated 21st April, 2014 and 16th January, 2015 are set aside and quashed.

The appeals are allowed and pending applications are disposed of in the above terms.

