(2010) 01 DEL CK 0066

In the Delhi High Court

Case No : O.M.P. No. 65 of 2003

Ellora Paper Mills Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 22-01-2010

Acts Referred:

Citation : (2010) 01 DEL CK 0066

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Shiv Khorana, for the Appellant; Nemo, for the Respondent

Judgement

Valmiki J Mehta, J.—This petition u/s 34 of the Arbitration and Conciliation Act, 1996 challenges the Award passed by the sole Arbitrator dated 1.11.2002. By the impugned Award, petitioner has been fastened with the liability of risk and purchase cost of Rs. 52,66,320/- and which amount was awarded on account of the petitioner failing to supply 485.344 metric tones of White Printing and Creamwove paper. The Arbitrator has also awarded interest @ 18% per annum.

2. At the very outset, Mr. Khorana argued that this is a case where the matter should be remanded to the Arbitrator for a fresh decision in accordance with law. This argument was made by Mr. Khorana inasmuch as he contended that the main dispute which was raised by the petitioner before the Arbitrator was that there was no final and binding contract between the parties which laid out the agreed terms. Mr. Khorana further states that there were substantial and wide differences with respect to the contract and there was therefore no consensus ad idem because of the offers and the counter offers.

3. In my opinion, the contention of the petitioner is valid and I therefore accept the argument of Mr. Khorana urged on behalf of the petitioner that the Award in this case needs to be remanded.

4. The facts of the present case are not straight forward in that there is only a single notice inviting tender and a single acceptance of the tender. In reality,

there were repeated offers/counter offers and extensions as is brought out in the Award itself and which portion of the Award reads as under:

It is to be seen that UOI, through DGS&D, the claimant, after inviting tenders for the supply of 485.344 MTs of the While Printing & Creamwove paper and the same were opened on 19.8.94, M/s Ellora Paper Mills Ltd., Mumbai, submitted their offer against the Tender Enquiry. Their quotation No. TEN:94:675 dated 16.8.94 read with their revised offer No. TEN:94:1129 dated 12.10.94 followed by letter No. TEN:94:1065:dated 24.9.94 and letter No. EPB/DGS&D/1225/94 dt. 28.10.94 (A-1). The offer of the firm/respondent was accepted by the UOI claimant and A/T No. PM- 5/506/0002/19.4.93/Bulked/P-5/118/COAD/RP/239/ COAB/dated 25.11.94 (15.U-20.U/C) was placed on the firm for supply of 485.344 MTs of paper printing white paper Creamwove.

5. Mr. Khorana in support of his arguments has taken me through the statement of defence filed in the arbitration proceedings and which gave various reasons showing that unless with respect to such issues there was consensus ad idem, it could not be said that there was a binding contract containing clarity with respect to those terms. I would do no better than to refer to the relevant portion of the statement of the defence and which runs as under:

1. Each and every allegation contained in para 1 of the Statement of Claim made by the claimant are false, wrong, incorrect and are denied. It is denied that there was any valid risk purchase enquiry resulting into issuance of proper enquiry. The respondent had made clear in his terms that his offer contains the following terms:

(1). Sales Tax:- Sales Tax will be extra as applicable at the time of dispatch. Presently Central Sales Tax is 4% against form ''D.'' & local (Maharashtra) Sales Tax is also 4% against form ''AF.''.

(2). Excise Duty:- Rates quoted are exclusive of Excise Duty. At present Excise Duty applicable @ 5% adv.plus 1/8% Cess Adv. Any statutory upward charges will be to your Account.

(3). Octroi:- To be borne by the consignee if applicable. Exemption Forms if any should be made available with supply order.

(4). Delivery:- We are starting the delivery after the issuing the inspection note and completed within 90 days.

(5). Registration:- We are registered with DGS&D, our Permanent Registration No is Regn. II/0662- 90-E,Dt. 17-12-90.

(6). Force Majure Clause:- Our offer is subject to DGS&D Force Majure Clause.

(7). Testing:- We have the requisite testing facility at our Factory at Tumsar.

(8). Deckle:- Our Deckle size is 235/240 cms.

(9). Packing:- Paper will be packed as per requirements of Tender Enquiry. For mansoon packing we will charge Rs. 800/- per Ton extra.

(10). We agree to pre Inspection before dispatch.

(11). Nominal:- Nominal weight of the ordered paper will be charged by us as the relevant Indian Standard Weight Prescribes a tolerance limit in the mass of the ream.

(12). The goods will be dispatched through Railway either in wagon Load or Parcel the freight will be borne by the consignee. In case of if R.R. is prepared than the freight amount will be reimbursed to us. In case of non-availability of Railway Booking despatches by Road Transport should be permitted. The Transport freight will be reimbursed equivalent to railway freight. Unloading charges of Truck at the consignee''s premises will be charged extra & Rs. 500/- per truck.

(13). Modvat Benefit has been taken into account in the quoted prices.

(14). If Railway receipt is issued on prepaid basis than freight will be reimbursed with progress bill.

Note:

(A). Minimum Order per consignee should be for 50 metric tones or more.

(B). Deckle IS 235/240. Please consider the order looking to our deckle, we place order 1/3rd quantity in real width 609 (61cm.) and 2/3 roll quantity in 86 cm. So the deckle can be utilized and next aligned delivery schedule.

6. Mr. Khorana has also then taken me through various counter offers which were made in this case by the petitioner amending one term or the other besides leaving the original terms and conditions given in the letter dated 16.8.1994 unchanged except to the extent of modification specifically mentioned in each of the subsequent letters/counter-offers. These documents are the letters dated 16.8.1994, 25.9.1994 and 12.10.1994 of the petitioner to the respondent.

7. Mr. Khorana, therefore, argued that a conspectus of the aforesaid shows that with respect to various terms such as the force majeure clause or the requirement of consignee to take at least 50 metric tonnes or sales tax and so on, there was no concluded agreement between the parties. Mr. Khorana also drew my attention to the letter dated 10.12.1994 which was sent by the petitioner immediately on receiving the so called work order dated 25.11.1994 issued by the respondent. This letter of the petitioner dated 10.12.1994 categorically states that there is no concluded contract between the parties on account of non-acceptance of the different terms which were already given from time to time by the petitioner. This letter dated 10.12.1994 clearly states that the petitioner informed the respondent that they do not accept the counter offer which was made by the acceptance of the tender dated 25.11.1994 and which letter has too not been adverted to by the arbitrator in the Award.

8. A reference to the Award shows that this issue has been given complete go bye by the Arbitrator. In my opinion, this is indeed an extremely vital issue, which did call for attention and decision for the Arbitrator, because, risk and cost liability can be fastened upon the petitioner only if there was in fact in the final place a contract with the petitioner of the respondent. The Arbitration and Conciliation Act, 1996 vide its Section 31(3) requires that the Award has to be a reasoned Award. What is a reasoned Award has been lucidly dealt with by a learned Single Judge of this Court Rajiv Sahai Endlaw, J in the case of Jai Singh v. DDA 2008 (3) Arb. LR 667. What is a speaking order is also the subject matter of the Constitutional Bench judgment of the Supreme Court reported as S.N. Mukherjee Vs. Union of India, . A decision in terms of the aforesaid Supreme Court decision cannot be a speaking decision unless the Arbitrator deals with and pronounces upon the important contentions of a party. In the present case, the Award is wholly silent as to the vital defence of the petitioner that no contract at all was entered into between the parties.

9. The Award is therefore a non-speaking Award and violates Section 31(3) of the Arbitration and Conciliation Act and needs therefore be set aside and is accordingly set aside. Mr. Khorana states that he accepts fresh arbitration proceedings be conducted by an Arbitrator in terms of the agreed arbitration clause and he would like the matter to be remanded back to the Arbitrator for deciding the matter afresh in accordance with law and after dealing with the contentions of the present petitioner. Accordingly, I set aside the impugned Award and remand the matter back to the Arbitrator for passing a fresh Award in accordance with law and which Award must deal with and pronounce upon the contention which has been raised by the present petitioner with respect to there not being a binding contract between the parties on account of lack of consensus ad idem on various vital terms.

10. With the aforesaid observations, this petition is accepted and the matter is remanded back to the Arbitrator as stated above. The original arbitration records which are before this Court be sent back by special messenger to the Director General of Supplies and Disposal, Jiwan Tara Building, 5 Sansad Marg, New Delhi for being handed over to the Arbitrator.