
(2012) 03 DEL CK 0009
In the Delhi High Court
Case No : FAO (OS) 558 of 2011

Govt. of NCT of Delhi

APPELLANT

Vs

MBL Infrastructure Ltd.

RESPONDENT

Date of Decision : 12-03-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Central Excises and Salt Act, 1944 — Section 12B
Finance Act, 1994 — Section 83
Sales of Goods Act, 1930 — Section 64A

Citation : (2012) 190 ECR 301

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Zubeda Begum and Ms Sana Ansari, for the Appellant; Anusuya Salwan and Ms Raashi Beri, for the Respondent

Judgement

Rajiv Shakdher, J.—This is an appeal preferred against the judgment of the learned Single Judge dated 19.09.2011. By virtue of the said judgment the learned single Judge has dismissed the objections filed by the appellant under 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said Act). The only issue which arises for consideration before us, is: whether the appellant is required to reimburse the service tax, which came to be levied, post the acceptance of the bid of the respondent?

2. The said issue arises in the background of the following facts which we will shortly notice hereinafter.

2.1 The respondent herein was awarded a contract for maintenance of ring road and outer ring road for a period of three (3) years by the appellant. In respect of the said contract a bid was submitted by the respondent on 15.04.2005. The said bid was accepted on 06.07.2005. A formal contract was executed as between the appellant and the respondent (hereinafter collectively referred to as the parties), on 24.08.2005.

2.2 It would be important to note that in the interregnum a notification was issued qua imposition of service tax on road maintenance. The said notification was issued on 27.07.2005; which was brought into effect from 16.06.2005.

2.3 The period for execution of the contract commenced from 24.08.2005 (i.e., the date when a formal contract was executed) and, it was stipulated to end on, 23.08.2008.

2.4 It is with the issuance of the notification dated 27.07.2005, that a dispute arose between the parties on the recoverability of the service tax imposed on the respondent. Consequently, the disputes in the first instance, under the mechanism encapsulated in the contract, were referred to the Dispute Resolution Expert, i.e., the Chief Engineer, PWD, Maintenance Zone M-3, in terms of clause 21.1 of the General Conditions of the Contract (in short GCC).

2.5 The recommendation of the aforementioned expert, went against the respondent, which propelled the respondent to invoke the arbitration clause under the GCC. In terms of clause 22 of the GCC, the arbitration was invoked and commenced. After completion of pleadings, evidence was led before the learned arbitrator. The learned arbitrator made and published an award on 15.06.2009.

2.6 Aggrieved by the award, a petition u/s 34 of the said Act was preferred by the appellant. The said petition was numbered as: OMP No. 578/2009. To cut a long story short, this court allowed the OMP, on the short ground, that the arbitrator had taken into account the circular dated 28.01.2009 to come to the conclusion that the appellant was required to reimburse the service tax, without giving due opportunity to the appellant to explain the effect of the circular dated 28.01.2009. Resultantly, the said award was set aside, and the matter was remanded to the arbitrator, for a fresh adjudication on the said issue.

2.7 After the remand, the learned arbitrator heard the parties once again, in respect of the issue of the reimbursement of service tax. Once again, the arbitrator by an award dated 11.05.2010, came to the same conclusion. This time, however, the arbitrator observed that even if he were to exclude the circular dated 28.01.2009 from the purview of his reasoning, he would still come to the same conclusion, which he had, in his first award dated 15.06.2009.

2.8 The appellant did not rest its case with said decision, and consequently, took the matter further by filing an OMP, in this court. This time the OMP was numbered as: 496/2010. As noticed hereinabove, the learned Single Judge by virtue of the impugned judgment dismissed the objections of the appellant.

2.9 Ms Zubeda Begum, appearing for the appellant, both before the learned single Judge and before us, has raised somewhat similar pleas. The first plea of Ms Zubeda Begum, is that, the contract between the parties, in particular clause 13.3 of the contract, would show that it was always intended that the appellant would not bear the burden of any taxes and/or duties including any future taxes.

Ms Zubeda Begum seeks to elucidate this submission by relying upon the clarification sought for by the respondent, on 31.03.2005. As per this clarification, it appears, that the respondent sought to know from the appellant as to the mode of payment of service tax by the appellant. Ms Zubeda Begum sought to rely, both on the clarification sought vide communication dated 31.03.2005, and response of the appellant to the said clarification. In response to the said clarification, Ms Zubeda Begum brought to our notice, that the appellant had made it clear that it was not paying any service tax to the contractor(s) on road maintenance, and therefore, no service tax would be paid to the contractor, i.e., the respondent under the contract.

3. The other submission, which is really made to buttress her earlier submission, is that, the circular dated 28.01.2009 makes it abundantly clear that reimbursement of service tax would be made only vis-?-vis the contracts executed in future and not qua contracts which stood finalized and/or in those cases, where tenders had already been received. It is, therefore, Ms Zubeda Begum's contention that the surrounding circumstances would demonstrate that service tax had to be borne by the respondent. In support of her contentions, Ms Zubeda Begum has relied upon the judgment of the Supreme court in *Modi and Co. Vs. Union of India (UOI)*, .

3.1 Ms Zubeda Begum also sought to distinguish the judgment relied upon by the learned Single Judge, in the case of *Pearey Lal Bhawan Association Vs. Satya Developers Pvt. Ltd.*, submitted that this judgment is distinguishable for the reason that there are observations, to suggest, that parties had not visualized the levy of service tax in that case, whereas in the present case, there is enough material to demonstrate to the contrary.

3.2 As against this Ms Salwan, who appears for the respondent, submitted to the contrary. She largely relies upon the judgment of the learned Single Judge to sustain the award which has been passed in favour of the respondent.

3.3 We have heard the learned counsels for the parties. According to us, the question posed in the matter would really turn on: as to whether, the appellant had intended to bear under the contract, service tax, which admittedly, was notified after a contract had materialized between the parties. In order to come to a firm conclusion either way, one would have to first look to clause 13.3 of the GCC. For the sake of convenience the said clause is extracted hereinafter:

All duties, taxes, royalties and other levies payable by the bidder under the contract, and under applicable laws or for any other cause, shall be included in the rates, prices and total bid price submitted by the bidder.

(emphasis supplied)

3.4 A reading of the aforesaid clause clearly indicates that the respondent is required to factor in all duties, taxes, royalties and other levies which were in force "under applicable laws" or "for any other cause" at a point in time, when

parties had entered into a contract. The last part of the said clause makes that abundantly clear, by stating that the rates, prices and total bid price shall include all duties, taxes, royalties etc. payable by the bidder under the contract either "under applicable laws" or "for any other cause". It cannot be said that service tax, which, admittedly was notified on 27.07.2005, could have been in contemplation of the parties when, the bid of the respondent was accepted. Admittedly, the bid of the respondent was accepted on 06.07.2005; which according to us, is the date when, the contract between parties materialized. The execution of the contract on 24.08.2005 was, according to us, a mere formality. Therefore, the service tax which was notified on 27.07.2005, would not have been in contemplation of the parties. We are also of the view that there is no provision in the contract which by implication could be said to, take into account, such an eventuality.

3.5 Ms Zubeda Begum's reliance either on the clarification dated 31.03.2005 sought by the respondent or, on the circular dated 28.01.2009 does not take the case of the appellant any further. It could not have been said that the clarification was sought in anticipation of what the future would hold. None of the parties, could have, at that stage contemplated the imposition of service tax on road maintenance. Therefore, the clarification by itself, would not, in our view, support what Ms Zubeda Begum sought to contend, which is, that the surrounding circumstances seem to indicate that service tax would have to be borne by the respondent. In this context the response of the appellant would be apposite. For the sake of convenience, relevant extracts of both, the clarification and the response of the appellant are set out hereinafter:

Clarification sought by the respondent

Response of the appellant

As per the recent order by the Central Government, the Service Tax @ 10.2% is to be leviable on all services provided by the contractor to any agency. In this case, the contractor has to collect the Service Tax from the client and deposit the same with the Excise Department within the prescribed period. Kindly clarify the mode of payment of Service Tax by PWD.

PWD is not paying any service tax to its contractors undertaking road maintenance works, therefore, no service tax shall be paid to the contractor, under this contract.

3.6 A bare perusal of the response of the appellant would show that the appellant only made a statement of fact, which was that, at the relevant time the appellant was not paying service tax to the contractors on road maintenance. This was obvious, as there was no notification issued for imposition of service tax, on road maintenance.

3.7 The position would be no different vis-?-vis circular dated 28.01.2009. The said circular, which was issued nearly four (4) years after the contract had

fructified between the parties, could not have explained the position or the intention of parties as it obtained on 06.07.2005; when the bid of the respondent was accepted. In our view the circular, as rightly held by the arbitrator, does not carry the case any further, either way. What according to us required determination, was that: whether appellant had intended to bear the burden of future taxes? According to us, as indicated hereinabove, there is nothing in contract which would have us come to the said conclusion.

3.8 The principles which, ordinarily ought to apply even in this case, are those which are contained in Section 64A of the Sale of Goods Act, 1930. The said section for the sake of convenience is extracted hereinafter:

64A. In contracts of sale, amount of increased or decreased taxes to be added or deducted. - (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time, -

(a) If such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) If such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) the provisions of sub-section (1) apply to the following taxes, namely:-

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods.

3.9 A perusal of the section would show that, unless there is an intention to the contrary, if there is any change in tax, i.e., increase or decrease, parties have to bear the necessary consequences which flow from the increase or decrease in tax. Applying the same principle to the present contract, we are of the view that the appellant would have to bear the burden of service tax, which was imposed w.e.f. 16.06.2005.

4. There is also a statutory indication that, this ought to be the result if, one were to advert to the provisions of Section 83 of the Finance Act, 1994 (finance Act) read with Section 12B of the Central Excise Act, 1944 (in short CEA).

Section 83 of the Finance Act by incorporation takes recourse to Section 12B of the CEA. Section 83 of Finance Act as well as Section 12B of the CEA for the sake of convenience are extracted hereinbelow:

Section 83 of Finance Act:

Application of certain provisions of Act 1 of 1944.

The provisions of the following Sections of the Central Excise Act, 1944 (1 of 1944), as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:

9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 14AA, 15, 33A, 34A, 35F, 35FF TO 35O (both inclusive), 35Q, 35R, 36 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40.

Section 12B of the Central Excise Act.

12B. Presumption that incidence of duty has been passed on to the buyer. - Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

4.1 A conjoint reading of the two sections would show that there is a presumption that service tax is required to be recovered from the user of the service. This, combined with our reading of the contract as executed between the parties, brings us to a firm conclusion that the appellant would have to reimburse the service tax which has been imposed on the respondent.

4.2 This brings us to the last aspect the judgment in the Modi & Co. case. The said judgment, in our view, would not be of any help to the appellant as the principle enunciated in the said judgment would have no applicability to the facts which obtain in the present case. The surrounding circumstances, in this case, in our view, do not establish that the parties had within their contemplation, at the time of execution of the contract, that taxes and/or duties, if any levied, post the execution of the contract would also stand included in the bid made by the respondent.

5. For the foregoing reasons, we are of the view that the judgment of the learned Single Judge has to be sustained. It is ordered accordingly.

6. The appellant by order dated 21.11.2011 had been directed to deposit the amount in court. Since the release was conditional on furnishing a solvent security, the decretal amount was not released to the respondent as it was unable to furnish a solvent security. Now that the matter is finally disposed of the condition would dissolve. The grievance of the respondent, however, is that only a part of the decretal amount has been deposited. The decretal amount has been invested in a fixed deposit for a period of two years. In these circumstances, it would be open to the respondent to either withdraw the amount post-maturity of fixed deposit or, seek its dissolution with immediate effect. In case the decree is

still not satisfied, the respondent would be free to execute the decree.

7. The appeal is, accordingly, dismissed with costs of Rs 7500/-.