
(2013) 03 DEL CK 0173
In the Delhi High Court
Case No : FAO (OS) 517 of 2012

Jsw Ispat Steel Limited

APPELLANT

Vs

Ariba India Private Limited

RESPONDENT

Date of Decision : 18-03-2013

Acts Referred:

Citation : (2013) 03 DEL CK 0173

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Parag P. Tripathi, Mr. Gaurav Bahl, Mr. Ankur Khandelwal and Ms. Mahima, for the Appellant; Mukul Talwar and Mr. Sradhananda Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—The respondent, earlier known as "Free Markets Service Pvt. Ltd." now known as "Ariba India Pvt. Ltd." was engaged in the business of providing e-sourcing software and services. The appellant, "JSW ISPAT Steel Ltd." was engaged in the business of manufacture of steel. The two entered into an "Access and Services Agreement" on May 01, 2003, wherein the appellant agreed to purchase access to the "Full Source Product Offering" of the respondent. The duration of the agreement was 15 months. During the said period of 15 months the respondent was required under the agreement to complete 6 sourcing projects (2 every 5 months) having Cumulative Bid Volume (CBV) in sum of Rs. 250 crores i.e. said sum was the outer limit of the Cumulative Bid Volume.

2. The parties identified the following 6 commodities/services for the sourcing projects: (i) Alloys, (ii) Refractory, (iii) Fluxes, (iv) Consumables, (v) Logistics & Material Handling, and (vi) Coke & Pellets.

3. Undisputedly four out of six sourcing projects were completed by the respondent pertaining to the competitive bidding, being: (i) Rolls, (ii) Fluxes, (iii)

Ferro Alloys and (iv) Transportation. With respect to the other two the agreement was not implemented and there was a dispute whether the appellant had consented to the respondent not executing the two due to unfavourable working conditions.

4. The details of the four sourcing projects which were detailed and completed are as follows: (i) Rolls-13/08/2003 (ii) Fluxes-28/08/2003 (iii) Ferro Alloys-19/12/2003 & 20/12/2003 (iv) Transportation-30/03/2004 & 31/03/2004.

5. Article 6.1 of Schedule I to the Agreement provided for payment of Commitment Fee by the appellant to the respondent, and we note that the same reads as under:

Commitment Fees Subject to Free Market due fulfilment and faithful performance of its obligation under this agreement, ISPAT shall pay Free Markets an all inclusive, non-refundable fixed fee (the commitment fee) of INR 100,000.00 per calendar month during the Full Source Term, which shall be invoiced on monthly basis. Unless otherwise specifically set forth in the Agreement or in this Schedule, the commitment fee shall be prorated for any month that this Schedule is in effect for less than an entire calendar month. In the event that Free Markets conduct fewer than six(6) sourcing projects during the Full Source Term or INR 250 crores has been reached in less than 6 sourcing projects, for reasons attributable to ISPAT the Commitment Fee shall remain unchanged.

6. Article 6.2 of Schedule I to the agreement provided for payment of Full Source Fee, and it reads as under:

Full Source Fee. Subject to Free Market the fulfilment and faithful performance of its obligations under this Agreement, ISPAT shall pay Free Markets fixed and an all inclusive lump sum fee of INR 17,250,000.00 during the Full Source Term ("Full Source Fee") to be invoiced as follows: INR 525,000.00 each calendar month for the first three months, INR 837,500.00 each calendar month for second three months, INR 1,150,000 each calendar month for the third three months, INR 1,462,500 each calendar month for the fourth three months, and INR 1,775,000/- each calendar month for the fifth three months of the Full Source Term. Unless otherwise specifically set forth in the Agreement on in this Schedule, the Full Source Fixed Fee shall be prorated for any month that this Schedule is in effect for less than an entire calendar month.

7. As per Article 4 of Schedule 1 to the agreement, the appellant was also required to reimburse the actual costs and expenses incurred by the respondent up to a maximum of Rs. 40,000/- per month.

8. While executing the work pertaining to four sourcing projects, in terms of Article 6.1, appellant raised invoices each month, as also invoices pertaining to the amount payable under Article 4. Payments were made by the appellant only for three months of May, June and July. No payments were made after August 2003.

9. On June 10, 2004 the appellant called upon the respondent to complete the balance projects of Refractories and Coke so as to achieve the CBV of Rs. 250 crores as envisaged under the agreement to which the respondent replied vide letter dated June 22, 2004 informing appellant that market conditions were not conducive and besides Rs. 1,31,25,000/- remained outstanding and payable.

10. Responding vide letter dated June 25, 2004 the appellant declined to make any payment taking a stand that the respondent had not achieved the CBV of Rs. 250 crores and additionally had also failed to maintain the Return On Investment (ROI) in the ratio 3:1 as envisaged by the agreement. To which the respondent responded on July 02, 2004 informing having achieved Cumulative Price Differential of more than Rs. 8 crores, a figure which was above what was to be achieved under the contract.

11. Stalemate continued till when on May 26, 2005 the respondents served a legal notice on the appellant calling upon it to make payment in sum of Rs. 1,72,40,906/-, to which appellant responded on June 20, 2005 denying any liability.

12. The dispute got referred to arbitration with each party nominating one Arbitrator. A third, presiding Arbitrator had to be appointed but vide order dated July 04, 2011 passed by this Court in OMP No. 358/2010 it was agreed that the dispute could be referred to a Sole Arbitrator, Justice A.P. Shah, (a retired Chief Justice of the Delhi High Court).

13. The respondent, as claimant before the Arbitrator, raised six claims as under:-

(i) Rs. 1,68,75,000/- towards Commitment (or fixed) fee and the Full Source (or performance) fee for the work done by the claimant;

(ii) Rs. 27,63,556/- towards the Volume Deficit Fees in terms of Article 6.5 of Schedule I of the agreement;

(iii) Rs. 3,65,906/- towards reimbursement of expenses in terms of Article 4 of Schedule I of the agreement;

(iv) Rs. 27,57,560/- towards interest on the outstanding amounts calculated in terms of Article 3.2 of Schedule I of the agreement;

(v) Pendente lite and future interest @18% per annum; and

(vi) Costs.

14. The appellant filed its statement of defence and counter-claim claiming:-

(i) Refund of Rs. 18,75,000/- paid under invoices raised against commitment fee and the full source fee alleging that since the respondent had breached the contract no payment was due and that the running payments made had to be refunded;

(ii) Damages due to the material loss to the tune of Rs. 2,40,59,126/- and Rs.

9,04,14,702/- towards additional costs for procuring 4 lots of fluxes and 5 lots of Ferro alloys respectively; and

(iii) Losses and damages amounting to Rs. 3,444.10 lakhs as loss of profit due to unavailability of fluxes and alloys not supplied on time by the suppliers recommended by the respondent.

15. It was not in dispute that correspondence was exchanged between the parties with respect to two sourcing projects due to the market being volatile and in respect of said letters the stand of the respondent was that the appellant had consented to the two scheduled projects being deferred. As per the appellant no such consent could be evidenced by the letters exchanged.

16. Thus, one issue of fact which required to be adjudicated by the Arbitrator was: Whether the appellant consented to 2 sourcing projects to be deferred. This issue impacted the CBV of Rs. 250 crores, which admittedly was not achieved, and the entitlement of the respondent to receive monies as per the claims for the reason if a consent was to be found, the respondent would be entitled to the amounts as per invoices raised. The other issue which fell for consideration before the Arbitrator was: Whether the ROI of 3:1 was maintained by the respondent. Whether the commitment and the full source fee, per calendar month was to be paid, and if not paid, whether the respondent was entitled not to continue with the work.

17. We highlight that the last issue would have resulted in the respondent succeeding if verdict was in its favour irrespective of the first factual dispute i.e. whether the appellant consented to 2 projects being deferred.

18. We note the conclusions reached by the learned Arbitrator on the three issues, in paragraph 81, 82, 90 and 91 of the award. The same read as under:-

81....Regarding whether it was incumbent upon the Claimant to maintain an ROI of 3:1, the answer is that the maintaining of ROI of 3:1 was mandatory in terms of Clause 6.4 of Schedule I to the contract. As to whether such ROI was maintained, the answer is that the ROI of 3:1 was clearly maintained by the claimant as per clause 6.4 of Schedule I to the contract, though the Cumulative Bid Volume of Rs. 250 crores was not achieved due to the reasons attributable to the Respondent...

82. ... Regarding whether there was consent of the Respondent for postponement of the two projects and whether the Claimant was prevented from doing so, it can be clearly seen that the Respondent had accorded its content for postponement of the two projects since at that time, the markets were volatile and were not conducive to conducting the said two projects. It was therefore decided between the Parties that the two sourcing projects of Coke and Refractories shall be revisited later. It can further be seen that the Claimant was unable to conduct the further sourcing events due to pendency of arrears to the tune of Rs. 1, 31, 25, 000/-. After the payment of the first three invoices, the

Respondent made no further payment to the Claimant and in fact, no reason was given for not making such payment despite receipt of invoices. Therefore, these projects were clearly not completed because the Respondent did not make payment of the arrears...

xxx xxx

90. In the projects of Refractories and Coke were initially stopped with the consent of the Respondent and thereafter the said projects could not be completed due to Respondent's refusal to make payment of fees and arrears to the Claimant. Thus four sourcing projects were completed by the Claimant. Clause 6.4 of Schedule I to the contract makes the Claimant liable to refund any access fee received by it at the end of every five months, if so found upon a reconciliation of accounts, done at the option of the Respondent. Furthermore, the respondent was required to make payment of the Commitment Fee as well as Full Source Fee every month. Thus, the Respondent clearly could not have stopped these monthly payments on a mere apprehension that the Claimant may not be able to achieve of ROI of 3:1 once the accounts were reconciled at the end of the five months period. In fact, the Respondent did not even seek a reconciliation of the figures at the end of either the first five months or the second five months term.

91. The Respondent simply stopped the payment to the Claimant after making payments towards the first three invoices without providing any justification for the said payments. Thus, the Cumulative Bid Volume of Rs. 250 crores could not be achieved due to reasons solely attributable to the Respondent.

19. Thus, the learned Arbitrator held against the appellant on both counts. The learned Arbitrator returned a finding of fact after considering the documentary evidence that the appellant had consented to 2 projects being postponed due to market conditions being volatile. Interpreting the contract and in particular Article 6.1 of Schedule 1 the learned Arbitrator opined that the appellant were obliged to make monthly payments and refusal to make payments after August 2003 entitled respondent to not proceed ahead with the work. Though not so expressly stated by the learned Arbitrator, it is apparent that the agreement was read as containing reciprocal obligations with commitment of the appellant being to make a monthly payment and the reciprocal obligation of the respondent being to proceed ahead with the work.

20. The learned Arbitrator, after adjusting the amounts paid, awarded the first claim i.e. commitment fee in sum of Rs. 1,53,90,360/-. Rejecting the volume deficit fee because of the finding that there was consent even by the respondent to postpone 2 projects and finally give up the same due to market conditions not being favourable, Rs. 1 lakh was awarded towards reimbursement of expenses. Pre-claim interest was awarded in sum of Rs. 25,16,687/- and pendente lite and future interest was awarded @ 9% per annum. Cost of arbitration in sum of Rs. 15 lakhs was awarded. Needless to state the counter claims were denied.

21. Laying a challenge to the award before the learned Single Judge appellant contended that there was no evidence to establish that it had consented to 2 sourcing projects being postponed and as a consequence it was urged that the admitted position would be that the respondent had not achieved the CBV of Rs. 250 crores. Highlighting that with respect to 4 sourcing projects CBV in sum of Rs. 213,15,25,902/- was achieved, it was urged that no amount whatsoever was payable. It was highlighted that the respondent would not be entitled to any pro-rata payment of the full source fee pertaining to the 4 projects successfully completed. It was highlighted that the award was inconsistent inasmuch as claim towards Volume Deficit Fee (VDF) was turned down and yet pro-rata payment was made.

22. The learned Single Judge has held that judicial interference to an award is not to sit as an Appellate Court.

23. Suffice would it be for us to state that where a contract falls for interpretation, the Arbitrator is the final judge to interpret the contract and findings of fact arrived at by an Arbitrator cannot be questioned save and except as being perverse or based on no evidence or ignoring relevant evidence.

24. With aforesaid law in mind, the learned Single Judge has upheld the award.

25. As we have noted herein above ignoring whether appellant consented to two projects being postponed due to adverse market conditions, if the award would be correct that since appellant refused to pay the monthly committed fee to the respondent, the respondent would be justified in not proceeding ahead, the award and the impugned decision by the learned Single Judge would have to be upheld on account of the fact that it is settled law that if a contract contains reciprocal obligations, upon default of performing its obligation by any party, the other party is relieved of its obligations and can proceed to sue for recovery of outstanding amounts as also damages. In said situation, irrespective of there being no consent or even a consent by the appellant to postpone two projects, the Volume Deficit Fee would not be payable to the respondent inasmuch as regards the respondent it had pleaded a postponement by mutual consent.

26. Relevant would it be to note that Article 3.2 of the Agreement provides for a specific payment schedule. It stipulates that invoices towards monthly fee shall be raised every month and payment would be made within 30 days of acceptance thereof. Under Article 6.4 the appellant was to make payment of a Commitment Fee as well as Full Source Fee every month. Thus, the appellant could not have refused to make monthly payments on a mere apprehension that the respondent might not be able to achieve the ROI of 3:1. We note that as per evidence on record it was on the basis of this apprehension that monthly payments were not being made. To put it simply, running payments had to be made and at the end of the project if it was found that ROI of 3:1 was not achieved, treating the same to be a breach by the respondent, the payments would then become refundable.

27. We refuse to deal with all the contentions urged in appeal for the reason each and every contention has been dealt with by the learned Arbitrator. We are not to sit in appeal.

28. We have brought out that the Arbitrator has dealt with an issue within his mandate and assuming that the learned Arbitrator is wrong in appreciating the evidence or in interpreting the contract, still no case would be made out for judicial interference on account of the fact that pertaining to awards, the conclusions being wrong (as distinct from being perverse) cannot be urged on matters of fact and as regards the interpretation of the contract, unless it is shown that a wrong legal principle embodied in a statute has been applied to interpret the contract, it would be impermissible to challenge an award where the Arbitrator exercises his domain to interpret the contract. The appeal is dismissed but without any order as to costs.