

(2005) 09 DEL CK 0022

In the Delhi High Court

Case No : IA No. 5086 of 1990 in CS (OS) 872 of 1990

Killick Nixon Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 21-09-2005

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2005) 3 ARBLR 218 : (2006) 1 BC 34 : (2005) 124 DLT 31 : (2005) 84 DRJ 559 : (2005) 141 PLR 59

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : A.K. Jha and D.P. Mohanty, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—This is an application filed under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred to as the `said Act") in respect of the award of the sole arbitrator Mr. Shiv Prasad dated 26.12.1989.

2. The Director General of Supplies and Disposal invited tenders for supply of drilling rigs and accessories for the Engineer in Chief, Public Health Engineer Division of the Government of Madhya Pradesh, respondent No.2 on 17.01.1980. The petitioner submitted his quotation on 25.01.1980. There were certain subsequent meetings held in respect of the tender submitted by the petitioner and on 11.04.1980 the tender was accepted.

3. The supplies were made though there was delay and the petitioner sought extension of time on various accounts which was granted.

4. A limited dispute arose between the parties on account of the failure of the respondent to pay the balance price and the fulcrum of the dispute is the price preference clause in the agreement between the parties, which is as under :

"1.Price Preference Clause :-

It should be noted that on the assurance of the earlier delivery at the rates shown in the schedule/description in para one of this contract for each of the Models of Rigs, on delivery at site basis offered by you this contract has been placed on you in preference to the lowest acceptable offer of M/s Water Development Society, Hyderabad at the rates of Rs.7,46,965/- for 7" D.T.H.(150 mm) (Item No.1) extra delivery charges as per actuals subject to ceiling of Rs.6,000/-per rig, on free delivery at site basis and Rs.5,12,839/- offered by M/s Atlas Capco, Bombay for BOMBAY basis with extra delivery charges per actuals with ceiling of Rs.6,000/- per rig on delivery at site basis for item no.2 of the schedule on failure on your part to complete supplies against this contract in terms hereof within the date of delivery specified herein, you will be liable to pay the Government, the difference between the contract rate and that of the lowest acceptable tenders on the basis of final price F.O.R. Destn. Delivery at site basis including all elements of freight, sale-tax, local taxes, duties and other incidentals. This is in addition and without prejudice to the other rights of the Government to recover all other losses and damages resulting from delayed supplies and of cancellation and risk purchase in case of failure to supply the stores. In the event of such risk purchase you will be liable to pay to the Govt. in addition to other claims additional damages computed as the difference between the rate quoted by the lowest acceptable tenderer, namely M/s Water Development Society, Hyderabad, at the rates of Rs.7,46,965/- for "D.T.H. (150 mm) (Item No.1) extra delivery charge as per actuals subject to ceiling of Rs.6,000/- per rig on free delivery at site basis and Rs.5,12,839/- offered by M/s Atlas Capco, Bombay on delivery at site from item No.2 of the contract at which the risk purchase contract is placed.

5. The sole arbitrator has held in the award that the respondent is entitled to invoke the price preference clause while the petitioner is disputing the same. The claims of the petitioner flow only from this price preference clause and that is the matter in issue.

6. The submission made and synopsis filed by the petitioner is that the particular rigs could be transported only on certain trucks and the supply was dependent on the availability of these trucks. The respondent on acknowledgment of this fact, had extended time period. It has further been stated that respondent has not quantified as to what damages it has suffered and thus it cannot be recovered or retained on account of price preference clause as the same would amount to a penalty. It is stated that if the basis for seeking extension was not sustainable then extension ought not to have been granted. It has further been stated that the award is not a reasoned award as it does not set out detailed reasoning for each of the claims separately.

7. The petitioner has placed reliance on the judgment of the Apex court in Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, , to advance the proposition that where

in a contract clauses are existing for extension of time in case of certain exigencies or payment of fine or penalty, the expression that the time is the essence of the contract become ineffective.

8. It has also been submitted that the amounts have been adjusted against other contracts and such adjustment ought not to have been made. In this behalf a reference has been made to the judgment of the Apex Court in Union of India (UOI) Vs. Raman Iron Foundry, to contend that the claim for damages for breach of contract is not a claim for sum presently due and payable and the purchaser is not entitled in exercise of the right conferred upon it under such a clause to recover the amount of such claim by appropriating other sums due to the contractor.

9. In my considered view, none of the aforesaid pleas are sustainable.

10. There is no doubt on there being delay on the part of the petitioner. It is also not in dispute that the time period was extended by the respondent but at the same time what cannot be lost sight of is the fact that no damages on account of delay have been claimed from the petitioner. The submission of the petitioner are based, in my considered view, on a wrong presumption that it is only in the event of damages having been suffered that the amount in question should have been recovered. The aspect of damages on account of delay is totally a different matter.

11. The arbitrator has given the reasons though it may not be set out in detail. All that is required is that the thought process of the arbitrator should be clear and unambiguous and the arbitrator is not required to write a judgment like a Judge of a Court. In this behalf, I am fortified by the judgment of the Division Bench of this Court in DDA v. Bhagat Construction Co.Pvt.Ltd. 2004 (3) Arb.LR 481.

12. A perusal of the above referred clause shows that the petitioner was not the lowest bidder. The lowest tender was of a third party being M/s Water Development Society. The petitioner agreed to supply the rigs early. In view thereof, ignoring the normal process of giving the tender to the lowest bidder, the bid of the petitioner was accepted on the assurance of the earlier delivery. If the compliance of early delivery does not take place, the very basis of award of the contract to the petitioner would not survive. All that the price preference clause does is that in case the petitioner fails to adhere to the assurance of the earlier delivery, the bid of the petitioner is equated with the bid of the lowest tender M/s Water Development Society. This has nothing to do with the aspect of determination of damages for delay.

13. If any other construction of this clause is made, it would be a premium on a tenderer who is not the lowest bidder but seeks the tender on assurance of early delivery. The tender is not sought to be cancelled on account of the early delivery not being adhered to. The price is equated with the tenderer who had made the lowest tender.

14. In my considered view, the reading of the clause by the arbitrator is in accordance with law.

15. All the claims of the claimant really flow only from the interpretation of this clause.

16. In so far as the issue of adjustment is concerned, the balance amount was withheld by the respondent as the payment had already been made in excess. The adjustments can be made once the amount is quantified. It is not a case of damages yet to be determined and adjustment being made on account of undetermined damages for which the petitioner has referred to the judgments of the Apex Court. Thus the judgments have no application to the facts of the present case.

17. Though no submission in the written synopsis has been made, learned counsel for the petitioner seeks to rely on ground No.4 to contend that no evidence has been led that the lowest bidder was in a position to supply items in question to them. This plea is only stated to be rejected for the reason that lowest bidder had submitted a tender and there could be no question of submission of a tender without being having a capacity to supply the goods. It is also not relevant.

18. Be that as it may, the petitioner agreed to the price preference clause in the contract and it is not open for the petitioner now to state that there was no basis for the same since it is a question of reading of the contract arrived at between the parties.

19. In view of the aforesaid, I am of the considered view, that there is no merit in the application and the same is dismissed leaving the parties to bear their own costs.

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20. In view of the objections being dismissed and there being no other infirmity, the award dated 26.12.1989 of Shri Shiv Prakash, Sole Arbitrator is made Rule of the Court leaving the parties to bear their own costs.

Decree sheet be drawn up accordingly.