

(2019) 02 DEL CK 0407

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 243 Of 2015

M/S Dhampur Sugar Mills Ltd

APPELLANT

Vs

Bharat Petroleum Corporation Ltd

RESPONDENT

Date of Decision : 20-02-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 43(4)

Citation : (2019) 02 DEL CK 0407

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Prasenjit Keswani, Raghvendra Pratap Singh, S.S.Ray, Vaibhav Gulia, Kirti Mewar, Alkanshree Dahar

Final Decision : Allowed

Judgement

Navin Chawla, J

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 01.12.2014 adjudicating the disputes that have arisen between the parties in relation to the following Agreement(s):

Sl. No.

Date

Territory

1.

01.02.2007

Delhi

2.

15-18.06.2007

State of Haryana

3.

29.06.2007

State of Haryana

4.

29.06.2007

State of Punjab

5.

11.10.2010

State of Uttar Pradesh

2. The primary dispute between the parties is that upon the alleged failure of the respondent to give the 'C Forms' for the inter-state supplies of Ethanol made by the petitioner to the respondent under the 2007 Agreements mentioned hereinabove, the petitioner had stopped the supply of Ethanol. In this regard, the petitioner had also made various representations to the respondent inter alia alleging that the Trade Tax Department of the State of UP was imposing trade tax on the petitioner at the rate of 32.5% in absence of such 'C Forms'. It was further alleged that infact, a demand of Rs.2,41,43,235/- had already been raised by the Trade Tax Department on the petitioner which though the petitioner was contesting, but according to orders passed by the Authorities, certain portions of the same had to be deposited by the petitioner.

3. The parties had thereafter entered into a fresh Agreement on 11.10.2010 and the petitioner made further supply of Ethanol under the said Agreement.

4. The respondent, while making payment for such supply, relying upon Clause 3 of the 2007 Agreements, deducted alleged liquidated damages /penalty on account of non-supply of Ethanol under the 2007 Agreements.

5. The petitioner, therefore, claimed that the respondent could not unilaterally impose such damages/penalty on the petitioner or recover the same under Clause 15 of the Purchase Order issued under the 2010 Agreement.

6. The Arbitrator in the Impugned Award, on the question of breach of the Agreement by the petitioner due to non-supply of Ethanol under the 2007 Agreements, has held as under:

"The claimant in its claim petition has admitted that it put in abeyance, the supply of ethanol to the respondent. As per clause 9 of the terms and conditions of the agreements, Time and Date of delivery were the essence of the contract. The claimant unilaterally should not have kept the supply in abeyance. The claimant, as per aforesaid agreements, had failed to make supplies despite

several communications of respondent. This unilateral stoppage of supply attracts penalty in terms of the 'Take or Pay clause /Supply or Pay Clause' of the above said agreements. Even otherwise the claimant vide its letter dated 13.9.2010 had requested the respondent for waiving off the damages under take or pay /supply or pay clause. This letter clearly established that the respondent was right in deducting the amount under 'Take or Pay clause or Supply or Pay clause' of the aforesaid agreement. For the above said reasons, the claimant claim No.1,5 and 6 are rejected. Since claim No.5 & 6 are rejected, there is no question of interest being given to the claimant and similarly the claim No.7 is also rejected."

7. A reading of the above finding of the Arbitrator would show that the Arbitrator has not considered whether the petitioner was entitled to stop the supply of Ethanol due to the failure of the respondent to submit the 'C Forms' in time or in the alternative give any undertaking that it would pay any liability that may be fastened on the petitioner due to the non-supply /delayed supply of such 'C Forms'. This in my view was the primary dispute to be adjudicated by the Arbitrator.

8. On the other hand, the Arbitrator has placed his entire reliance on the letter dated 13.09.2010 addressed by the petitioner to the respondent and has considered the same as an admission of the petitioner to its alleged breach of the Agreement and liability for damages/penalty.

9. A reading of the said letter does not in any manner lead to the conclusion which has been arrived at by the Arbitrator. The said letter clearly alleged a default on part of the respondent in non-supply/delayed supply of 'C Forms' leading to a hold in the supply of ethanol by the petitioner. It was giving a justification for such non-supply of ethanol and alleging breach of the Agreement on part of the respondent and not otherwise. The last paragraph of the letter which seems to have persuaded the Arbitrator in coming to the above conclusion is reproduced herienunder:

"We, therefore, request that the imposition of damages under the said 'Take or Pay/ Supply or Pay' clause be waived. It is further submitted that necessary directions be issued that pending decision, any adjustment from our fresh bills shall not be made."

10. A reading of the letter would clearly indicate that the last paragraph was only a consequence of the assertion of the breach made earlier in the letter. The letter clearly and unequivocally asserted that there is no justification for the respondent to levy such damages/penalty and pending issuance of a direction to waive such demand, no further adjustment should be made against the bills raised by the petitioner for supplies under the 2010 Agreement. Use of word 'waiver' cannot denude the letter of its true purport.

11. The Arbitrator has therefore, clearly erred in relying upon the said letter as an admission of the petitioner to its alleged breach of the Agreement or liability

for damages/penalty.

12. Counsel for the respondent has submitted that the petitioner had given up its Claim Nos.3 and 4 made before the Arbitrator, which are reproduced hereinbelow:

"(3) The Claimant is entitled to and the Respondent is liable to pay forthwith the Trade Tax demanded by the Trade Tax Department of the State of U.P. against the Claimant on account of the supplies of Ethanol made under the agreements dated 1/2/2007 (for the State of Delhi), 15-18/6/2007 (for the State of Haryana), 29/6/2007 (for the State of Rajasthan), 29/6/2007 (for the State of Punjab). The breakup of amounts payable by various State Offices is as follows:

(a) Delhi State Office:

Rs.1,31,97,023/-

(b) Haryana State Office

Rs.21,40,240/-

(c) Punjab State Office:

Rs.8,92,743/-

(d) Rajasthan State Office:

Rs.79,13,229/-

Total

Rs.2,41,43,235/-

(4) The Claimant is entitled to and the Respondent is liable to pay the amount of Rs.57,33,075/- already deducted by the Trade Tax Department of the State of U.P. from the Claimant along with interest @24% per annum compounded annually from the date of deduction by the State of U.P. till the date of repayment. The breakup of amounts payable by various State Office is as follows:

(a) Delhi State Office:

Rs.31,33,777/-

(b) Haryana State Office:

Rs.5,08,223/-

(c) Punjab State Office:

Rs.2,11,992/-

(d) Rajasthan State Office:

Rs.18,79,083/-

Total

Rs.57,33,075/-"

13. Counsel for the respondent submits that once the petitioner has given up its claim for recovery of trade tax, the justification given by the petitioner for non-supply of Ethanol would also be deemed to have been given up by the petitioner.

14. On the other hand, counsel for the petitioner submits that Claim nos.3 and 4 were given up as during the arbitration proceedings, by orders dated 29.06.2012 and 01.08.2013 final assessment orders were passed by the Trade Tax Authorities by which these demands were withdrawn by the Department. As these orders were passed during the pendency of the arbitration proceedings, the petitioner has fairly not insisted on the said claim before the Arbitrator.

15. I have considered the submissions made by the counsels for the parties. Admittedly, at the time of 2007 Agreements and also at the time of the adjustment of the amounts by the respondent under 2010 Agreement, the demands of the Trade Tax Department were in existence. The petitioner had therefore, made a claim for such demands in the arbitration proceedings in form of Claim nos.3 and 4. Once the Trade Tax Department withdrew the demands, the petitioner also dropped its demands before the Arbitrator. However, the same can have no effect on the justification being offered by the petitioner for its decision to put all supplies in abeyance under the 2007 Agreements, as at that time the petitioner could not have been aware that these demands would be quashed or dropped by the Department. It is also relevant to note that at that stage, the petitioner was only insisting upon an undertaking to be given by the respondent that incase these demands are upheld, the same shall be borne by the respondent and it is only when the respondent did not give such an undertaking that the petitioner claims that it stopped the supply of Ethanol.

16. In my view, therefore, dropping of Claim Nos.3 and 4 by the petitioner would have no effect on the respective case set up by the parties. In any case, this is not a reason given by the arbitrator for rejecting the claim of the petitioner.

17. In view of the above, the Impugned Award cannot be sustained. The same is set aside leaving it open for the parties to agitate their claims by way of appropriate proceedings and in accordance with law. In such proceedings, the petitioner shall be entitled to claim the benefit of limitation under Section 43(4) of the Act.

18. The petition is allowed in the above terms with no order as to costs.