

(2012) 05 DEL CK 0705
In the Delhi High Court
Case No : O.M.P. No. 80 of 2005

M/s. J.K. Cement Works

APPELLANT

Vs

Delhi Jal Board

RESPONDENT

Date of Decision : 18-05-2012

Acts Referred:

Arbitration Act, 1940 — Section 28, 30, 33

Citation : (2012) 5 AD 168 : (2012) 189 DLT 587 : (2012) 130 DRJ 441

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Rajesh Banati with Mr. Sunil Verma, Mr. Sanjiv Saraf, for the Appellant; Suresh Tripathi, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—These are objections by M/s J.K. Cement Works under Sections 30 and 33 of the Arbitration Act, 1940 ("1940 Act") challenging an Award dated 7th April 2004 of the sole Arbitrator in the disputes between the Petitioner and the Respondent Delhi Jal Board (" DJB") arising out of an Agreement dated 31st October 1990 whereunder the Petitioner was to supply the Respondent 40000 metric tonnes (" MT") of cement at a total cost of Rs. 6.84 crores. By the impugned Award dated 7th April 2004 the Respondent DJB was awarded a sum of Rs. 66,51,390 together with pendente lite and post-Award interest at 10% per annum and the costs of Rs. 2,95,500. Pursuant to the Agreement, a Work Order was issued by the DJB on 10th October 1990. The Petitioner was to supply 8000 MT of cement every month. Till 8th March 1991 only 5235 MT of cement was supplied and thereafter the supply stopped. Despite several letters, when no cement was supplied, DJB served a show cause notice dated 12th March 1991 and required the Petitioner to pay it a sum of Rs. 68,40,000. Thereafter a decision was taken on 11th April 1991 to rescind the contract. According to the DJB, it purchased the balance cement from other suppliers at the risk and cost of the Petitioner under Clause (3) of the Agreement dated 31st October 1990.

2. There were eight items of claim preferred by DJB before the learned Arbitrator. Claim No. 1 was for a sum of Rs. 68,40,000 as compensation for breach of contract. Claim No. 2 was for a sum of Rs. 1,97,48,368 being the additional expenditure incurred in purchasing short full cement from other firms. Claim No. 3 was for Rs. 29,56,637.51 being the aggregate sums paid to various firms on account of escalation payable under the Agreement. Claim No. 4 was for interest at 18% p.a. pm the amount recoverable as damages for withholding payments. Claim No. 5 was for interest at 18% p.a. on the amount claimed under Claim No. 1 from 11th August 1991. Claim No. 6 was for interest on the sums claimed under Claims 2 and 3. Claim No. 7 was for Rs. 17,69,804.16 towards charges @ 12% and Claim No. 8 was for arbitration expenses.

3. The conclusions of the learned Arbitration were as under:

(i) The supplies were made by the Petitioner to DJB in terms of the Work Order or even by the general terms and conditions.

(ii) There was a breach on the part of the Petitioner of the Work Order. The Petitioner was also in breach of the conditions of the Agreement. Although the DJB was entitled to liquidated damages (LD) in the sum of Rs. 66,51,390, it was not entitled to any amount on account of risk purchase since there were significant variations in the terms and conditions as compared to the original contract placed on the Petitioner. Consequently only the said amount was awarded together with 10% pendente lite and post-Award interest as well as costs.

4. This Court has heard the submissions of Mr. Rajesh Banati, learned counsel for the Petitioner and Mr. Suresh Tripathi, learned counsel for the DJB.

5. Mr. Banati first submitted that since the DJB opted for risk purchase it could not have also claimed LD and the learned Arbitrator erred in awarding the DJB, LD as claimed by it. In support of his submissions, Mr. Banati relied upon the decisions in Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd., ; State of Punjab Vs. Hardyal, (1) Arb.LR 253 (Del) (DB); Sudhir Gensets Ltd. v. Indian Oil Corporation Ltd. 2011 (1) Arb. LR 351 (Del) and Oil and Natural Gas Corporation Limited Vs. Oil Country Tubular Limited, (Bom). Moreover, it was submitted that the DJB failed to prove the actual loss suffered by it for the purposes of LD. Consequently it was submitted that despite the DJB making a statement before the Arbitrator that it did not wish to pursue its claim for interest, the learned Arbitrator awarded pendente lite and post-Award interest. Thirdly, it was submitted that it was the DJB which was in breach of the contract since it failed to make the payment to the Petitioner in terms of the Agreement. With the cancellation of the contract, DJB could have resorted only to risk purchase and not LD. Since the claim of risk purchase was disallowed, the claim for LD ought to have also been rejected. Referring to Para 29 of the Affidavit of the evidence of the Petitioner dated 29th April 2008, Mr. Banati submitted that the Arbitrator failed to seek extension of time after expiry of four months after entering the terms of

reference. Therefore, the Award is bad in law. Referring to the decision in *State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd.* (2009) 3 Arb. LR 104 (SC), it was submitted that the notice for termination was violative of the provisions of the Agreement inasmuch as it was not a notice under Clause (3) of the Agreement but under Clause (2).

6. As regards the last submission, it was pointed out by Mr. Tripathi, learned counsel for DJB that the learned Arbitrator had been appointed by the Order dated 23rd July 1999 by this Court in OMP No. 8 of 1993. That was an order by consent. Consequently, the jurisdiction of the learned Arbitrator could not be questioned at this stage. As regards the question of extension of time, it had been understood between the parties that the proceedings will be in accordance with the Arbitration and Conciliation Act, 1996 ('1996 Act') and therefore, neither party thought it necessary to seek extension of time under the 1940 Act. As a result the arbitration proceedings continued for about four years. It was now not open to the Petitioner to challenge the Award on that ground. As regards interest on LD, it was submitted that the LD in this case was in the nature of genuine pre-estimate of damages and was, therefore, admissible. Mr. Tripathi relied on the decisions in *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, and *Madnani Construction Corporation (P) Ltd. Vs. Union of India (UOI) and Others*, On the question of extension of time for passing the Award, he relied on the decision in *State of Punjab v. Hardyal*. He further submitted that no grounds have been made out by the Petitioner for interference with the impugned Award. Reliance has also been placed on the decision in *State of Rajasthan Vs. Puri Construction Co. Ltd. and Another*,

7. As regards the objection of the Petitioner to the failure of the Arbitrator to seek extension of time, there is merit in the contention of the Respondent that the parties appear to have proceeded throughout on the basis that the arbitral proceedings were under the 1996 Act. In fact, this contention was raised before the Court when the objections were filed under Sections 30 and 33 of the 1940 Act and were negated by this Court in its order dated 23rd March 2006. That order was challenged in the Supreme Court by way of SLP (Civil) No. 7973 of 2006 but was dismissed by the Supreme Court by its order dated 25th April 2007.

8. One of the issues framed in the present petition is whether the proceedings should be conducted under the 1996 Act. The present proceedings commenced under the 1940 Act. The fact that the parties agreed before the learned Arbitrator that the proceedings could be under the 1996 Act is not denied. The fact remains that the proceedings continued as such for more than four years during which neither the Petitioner nor the Respondent applied to the Court for extension of time u/s 28 of the 1940 Act. It has been held in *State of Punjab v. Hardyal* by the Supreme Court as under (SCC @ p.635)

"14. The policy of law seems to be that the arbitration proceedings should not be unduly prolonged. The arbitrator therefore has to give the award within the time prescribed or such extended time as the court concerned may in its discretion

extend and the court alone has been given the power to extend time for giving the award. As observed earlier, the court has got the power to extend time even after the award has been given or after the expiry of the period prescribed for the award. But the court has to exercise its discretion in a judicial manner. The High Court in our opinion was justified in taking the view that it did. This power, however, can be exercised even by the appellate court. The present appeal has remained pending in this Court since 1970. No useful purpose will be served in remanding case to the trial court for deciding whether the time should be enlarged in the circumstances of this case. In view of the policy of law that the arbitration proceedings should not be unduly prolonged and in view of the fact that the parties have been taking willing part in the proceedings before the arbitrator without a demur, this will be a fit case, in our opinion, for the extension of time. We accordingly extend the time for giving the award and the award will be deemed to have been given in time."

9. Consequently, although the parties ought to have applied to this Court for extension of time but failed to do so, in the peculiar facts and circumstances of this case, that by itself will not make a difference to the validity of the impugned Award. This Court, in exercise of its powers under the 1940 Act, as explained in the above decision in *Hardyal*, extends the time for the learned Arbitrator to make the Award till the date of the Award.

10. As regards the claim for LD is concerned, the relevant clause in the contract does envisage payment of LD in the event of failure to make supplies. As noticed by the learned Arbitrator in the impugned Award, the records produced before the learned Arbitrator clearly showed that the supplies were not made in terms of the contract. As against the supply of 8000 MT per month and the total supply of 40000 MT of cement, the Petitioner could supply only 5235 MT of cement up to 8th March 1991. Consequently the finding that the Petitioner was in breach of the contract is based on the evidence before the learned Arbitrator and does not call for interference.

11. Turning to the actual clause concerning LD, the learned Arbitrator observed as under:-

"Coming to the question of liquidated damages, the notice sent to the Respondent refers to Clause 2 of the Agreement. What is that Clause? It finds place at page 14 and runs as under:

"The Contractor is to deliver the materials on or before the dates mentioned in the Tender failing which he shall be subject to pay or allow one percent of the total amount of the Contract for every day not exceeding ten days that he shall exceed his time, as and for, liquidated damages".

The case of the Claimant is that since the Respondent had not complied with the terms of the Agreement and had supplied cement which was far less than the required quantity, and that too without any cogent reason, the Board had rightly issued Notice dated 12th of March, 1991 and thereafter a final notice dated 27th

of March, 1991 under Clause 2 and that keeping in view Clause 2 as referred to above and as the total value of the Contract was Rs. 6,84,00,000/- the liquidated damages as per the said Clause would come to Rs. 68,40,000/- (10% of Rs. 6,84,00,000/-). However, the pleadings of the Board would show that the actual amount of liquidated damages claimed is Rs. 66,51,390/- . This amount has been arrived at obviously after deducting a sum of Rs. 20,000/- deposited by the Respondent as Earnest Money. The Board has also, while calculating the liquidated damages given an adjustment of Rs. 1,68,602/- which the Board says was payable to J & K on account of the difference of price of the material actually received from J & K and the total payments made to the Respondent. As I have held that the Respondent was at fault and had committed breach of the terms and conditions of the Agreement & had failed to fulfil its obligation without any reasonable cause, therefore, and for the reasons already spelled out, I hold the Board to be entitled to the liquidated damages as claimed."

12. This Court finds merit in the contention of the learned counsel for the DJB that the above LD clause was based on a genuine pre-estimate of damages on account of loss and did not require any further proof of such loss having to be produced by the Respondent. The decisions of the Supreme Court in *Fateh Chand Vs. Balkishan Das*, and *Maula Bux Vs. Union of India (UOI)*, have been analyzed in great detail in the recent judgment of this Court in *Vishal Engineers & Builders v. Indian Oil Corporation Ltd.* as well as the judgments in *Airports Authority of India v. R.K. Singhal* 2011 (126) DRJ 250 and *Sudhir Gensets Ltd. v. Indian Oil Corporation Ltd.* Consequently, the impugned Award of the learned Arbitrator to the extent of award of LD does not call for interference. As regards the payment of interest thereunder, again the award of pendente lite and post-Award interest at 10% per annum is reasonable and cannot be held to constitute a valid ground to set aside the Award under Sections 30 and 33 of the 1940 Act.

13. For the aforementioned reasons, this Court is unable to find any ground having been made out by the Petitioner warranting interference with the impugned Award of the learned Arbitrator. The objections of the Petitioner are accordingly rejected. The Award is made a rule of the court. Decree sheet be drawn up accordingly.