

(2000) 08 DEL CK 0001

In the Delhi High Court

Case No : Suit No.1006-A of 1997 and IA. No. 6536/97

M/s. KEI Industries Ltd.

APPELLANT

Vs

Delhi Vidyut Board and Others

RESPONDENT

Date of Decision : 28-08-2000

Acts Referred:

Arbitration Act, 1940 — Section 14, 17, 30, 33
Sales of Goods Act, 1930 — Section 11

Citation : (2001) 1 ARBLR 140

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : Mr. B. Mohan, for the Appellant; Mr. Jayant Nath and Mr.B.C Pandey, for the Respondent

Judgement

Mukul Mudgal, J.—This is a petition under Sections 14 & 17 of the Arbitration Act, 1940 to make the Award dated 23.4.1997 published by the Joint Arbitrators a Rule of the Court. The respondent No.1/Delhi Vidyut Board, previously known as Delhi Electric Supply Undertaking has filed the present Objections in IA. No. 6535/97 under Sections 30 & 33 of the Arbitration Act, 1940 to the Award.

2. On 20.11.1992, the respondent No.1 awarded a contract for supply of 750 K.M of "Control Cables" and the period of delivery under the Contract was from 19.5.1993 to 19.11.1993. On 10.8.1993 pursuant to the formal contract in writing, two bank guarantees were executed by the petitioner towards advance payment of 5% per cent each and the third bank guarantee towards performance for 10 per cent of the contract price, i.e., total value of Rs.1,05,99,906/ was executed by the petitioner.

3. The petitioner's case is that the several reminders were sent by the petitioner to the respondents to open the Letter of Credit and in between , from the period 27.1.1994 to 24.6.1994 190 K.M of cables of the value of about Rs.1.50 cores which are about 1/7th of the contracted amount of 750 K.M of cables, were supplied by the petitioner and accepted by the respondent.

4. The petitioner's case is that the respondent was asked repeatedly to open the letter of Credit but no letter of Credit was opened by the respondents. The petitioner's case is that from the period 27.11.1994 to 10.7.1995, the petitioner asserted its readiness and willingness to perform the contract and insisted upon the opening of the letter of Credit. On 9.6.1995, the respondents terminated the contract leading to the reference to arbitration on 20.10. 1995 by this Court. On 23rd April, 1997, the Award impugned in the present proceedings was made by the learned Arbitrators.

5. The main plea of the respondent DVB in challenge to the aforesaid Award is that the petitioner who was to supply 760.2 KM of cable in one year supplied only 195.219 K.M. of cables and the contract was terminated on 1.11.1995 pursuant to the notice given by the respondents on 9.6.1995. On that day, the petitioner had supplied only 1/7th of the order placed in spite of the passage of almost two years from the date of expiry of the delivery period. The Award has been impugned by the respondent DVB by averring errors of law and facts on the face of the Award.

6. The findings in Paras 15.1 and 16 have been challenged by the respondent DVB. The learned counsel for the respondent has impugned the findings of the Arbitrator that the cancellation of the contract by the respondent is invalid as the respondent had failed to open a Letter of Credit on the ground that though under the clause 6 of the contract between the parties, the respondents were to open an irrecoverable letter of credit in favor of the petitioner, it is an admitted position that 7 lots of cables were supplied even without opening the Letter of Credit and payment for supply of the said 7 lots were received by the petitioner subsequently after a delay of 3 to 5 months. It is submitted that in this view of the matter and in view of the mandate of Section 11 of the Sale of Goods Act, 1930 the petitioners had no excuse not to fulfill the contract. Reliance has been placed on Section 11 of the aforesaid Act to contend that the time fixed for making of payment was not the essence of contract. The plea of the respondent Therefore, is that the whole Award is based on the findings of the Arbitrators that the cancellation of the contract by the respondent was unsustainable in view of the fact that the respondents failed to open a Letter of Credit in favor of the petitioner. The respondent submits that this was done by ignoring the mandate of Section 11 of the Sale of Goods Act which clearly vitiates the Award as the time of payment was not the essence of the contract. It is contended on behalf of the respondent that both sides had acted upon the contract by giving a go-by to the requirement of opening of Letter of Credit and thus it is clear that the contracting parties themselves regarded the condition of opening of Letter of Credit as an inessential part of the contract. It is also submitted by the respondent that this is demonstrated by the fact that the first lot of cables was supplied on 27.1.94 only after the expiry of the period of supply originally fixed in the contract as 19.11.93. The petitioner was duly intimated that the Letter of Credit was not to be opened and the petitioner has even thereafter proceeded to supply the cables to the respondent. The Award is thus challenged as it

completely ignores Section 11 of the Sale of Goods Act.

7. The second challenge of the respondent DVB/objector is to the direction by the arbitrators to refund the performance bank guarantee given by the Award as the petitioner had given a performance bank guarantee of Rs.53,11,996/-. In view of the bank guarantee and on the failure of the petitioner to complete the terms of the contract the bank guarantee was encashed. The Award also directed the refund of bank guarantee amount Along with interest at the rate of 14.5% per cent per annum from the date of encashment i.e., 16.8.1995 up to the date of award. This finding in the Award is challenged on the ground that the terms of the bank guarantee have completely been ignored by the Award in directing the refund of the amount covered by the bank guarantee. It is submitted that the bank guarantee obliged the bank to pay the amount without demur on mere demand of money payable by the petitioner. It is also submitted that to challenge the encashment of the bank guarantee, a Suit No.1608 A/95 was filed before this Court by the petitioner which inter alia sought a stay of the encashment of the bank guarantee and by the order dated 7.8.1995 this Court dismissed the injunction application seeking restraint of encashment and in appeal the aforesaid order dated 7th August, 1995 of this Court was upheld by the Division Bench of this court and the Hon'ble Supreme Court.

8. It is submitted that in the light of the above facts, the liability to return the bank guarantee amount Along with interest is totally uncalled for and consequently the Award is contrary to law qua this direction too.

9. The other two challenges by the respondent DVB are: (i) Allowing of loss of profit of Rs.7,74,160/ in favor of the petitioner and the refund of Rs.4,31,052/ on account of the liquidated damages deducted by the respondent and (ii) The price variation claim though not quantity has also been allowed to the petitioner on the presumption that the respondent was guilty of breach of contract and if this court comes to the conclusion that the respondent DVB/objector was not guilty of breach of contract, this direction of the Arbitrators cannot stand. The last objection is to the quantum of interest on delayed payment and the bank guarantee commission which was awarded by the Arbitrators and is dependent upon the decision of this Court on the aforesaid issues. It is submitted that this claim will also fail if the respondent's plea regarding the Arbitrators finding about the wrongful cancellation of the contract are accepted.

10. The learned counsel for the petitioner has submitted that in a speaking award the Court should not sit in appeal and review the reasonableness of reasons nor reappreciate the evidence and should interfere only if a legal proposition on the face of the award is erroneous and the Court should not interfere if the arbitrator's view of the construction of the clause in the contract is a plausible view. In support of this, the learned counsel for the petitioner has relied upon the judgments in Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, ; Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd., ; Food Corporation of India Vs. M/s. Veshno Rice Millers, ; Trustees of The Port of

Madras Vs. Engineering Constructions Corporation Limited, . He has also relied upon a judgment in Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others, to submit that where the reasons given by the arbitrators have rational nexus with the conclusions, the court ought to support the award.

11. The pleas advanced by the learned counsel for the petitioner claimant are unexceptionable. However even in view of the law laid down in the aforesaid judgments if there is a legal proposition on the face of the award which is erroneous then the Court can interfere and set aside such Award. This is the submission of the learned counsel for the respondent who also relies upon Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, ; State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, to contend that an award based on an erroneous proposition of law is liable to be sent aside. The law laid down by the Hon"ble Supreme Court in the aforesaid judgment as follows :

IOC Vs. Amritsar Gas Service (Supra)

"The finding in the award being that the Distributorship Agreement was revocable and the same being admittedly for rendering personal service, the relevant provisions of the specific Relief Act were automatically attracted. SubSection (1) of Section 14 of the Specific Relief Act Specifies the contracts which can not be specifically enforced, one of which is a contract which is in its nature determinable". In the present case, it is not necessary to refer to the other clauses of subsection (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellantCorporation is contrary to the mandate in Section 14(1) of the specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to "the law governing such cases". The grant of this relief in the award cannot , Therefore, be sustained."

State of Rajasthan Vs. Puri Const.(Supra)

"An erroneous decision of a court of law is open to judicial review by way of appeal or revision in accordance with the provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a Judge by choice of the parties, and more often than not, a person with little or no legal background, the adjudication of disputes by an arbitration by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act.

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"In recent times, error in law and fact in basing an award has not been given the

wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of any arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law Constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid".

12. I am of the view that law laid down in the aforesaid judgments relating to a legal error by the arbitrators would apply to the facts of the present case as for the reasons stated hereinafter it is very clear that the arbitrators have proceeded on the assumption that time of payment was the essence of the contract. The holding of the arbitrators that the termination of the contract was unlawful has failed to take into account the position of law to the effect that the time of the payment was not the essence of the contract as per Section 11 of the Sale of Goods Act 1930. Section 11 of the Sale of Goods Act reads as follows:

"11. Stipulations as to time unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract".

13. The respondent DVB/Objector is right in contending that time of payment was not the essence of the contract. This is evident from the fact that there was admittedly supply of 1/7th of the contracted amount in lots without the opening of the Letter of Credit which shows that the contracting parties themselves regarded the condition of opening of the Letter of Credit as an inessential part of the contract.

14. As perusal of the Paras 15.1 and 16 of the Award shows that the award has the contract to be wrongly terminated as the delay in supply by the petitioner has been held to be justified as Letter of Credit was not opened. However, the learned Single Judge's judgment dated 7th August, 1995 in the application for injunction impugning the encashment of bank guarantee by the petitioner is significant. The learned Single judge in the Order dated 7th August, 1995 which was upheld right up to the Hon'ble Supreme Court held as follows :

"The petitioner made the very first supply after the expiry of the period of contract and through almost two years have passed by even thereafter, major party of the contract still remains unfulfilled. It is not that the respondent has not been making the payments to towards the cables supplied. It has been and keeping in view the erratic and delayed supplies, the refusal of the respondent to open L/C sounds reasonable more so when it has not withheld payments. Not only this, the respondent has advanced to the petitioner a sum of Rs.52,85,905/ out of this huge amount only about Rs. 8 lacs stand recovered. The remaining amount is still lying with the petitioner who is enjoying the interest accruing

thereon. How can thus the petitioner be taken to have made out case of Special Equity?"

15. The relevant portions of paras 15 and 16 of the impugned Award read as follows :

"15.1 TERMINATION OF CONTRACT

The claims are based on the allegations that the respondent had wrongfully terminated the contract. It is contended that the opening of a L/C by the respondent was an essential term of the contract which they failed to comply with but went on assuring the claimant till as late as 19.9.94 that the L/C would be opened. Though the contract period for completion of supplies expired on 20.11.93, but as would appear from their conduct, the parties kept the contract alive until 09.06.95, when according to the claimant, the respondent illegally repudiated the contract and finally terminated vide their letter dated 01.11.95. The ground on which the termination of the contract is challenged as invalid is that though the respondent failed to open a L/C which was an essential term of the contract, they wrongfully insisted that the claimant must maintain the supplies or the bank guarantees would be encashed.

Having considered the matter , we agree with the view that the termination of the contract was unlawful. The reason given to justify the termination was that the claimant had delayed in submitting the necessary documents & drawings but as will be presently seen that the respondent was equally, if not more, responsible for the delay. Though the respondent failed to open a L/C which would have guaranteed prompt payment to the claimant, the respondent insisted on supplies being maintained by the claimant which was unjustified having regard to the terms and conditions of the contract.

"16.0 LETTER OF CREDIT :

The main contention of the claimant is that the respondent failed to open a letter of credit in terms of the contract according to which 85% payment against each consignment was payable through irrevocable letter of Credit on production of material dispatch clearance certificate (M.D.C.C) and other supporting documents. The respondent claims that it was agreed between the parties that the L/C condition be waived. This was, however, repudiated by the claimant and we find no evidence on record to show that such an agreement had been reached between the two parties.

16.1 As regards payment against supplies made, the delay in payment was between 3 to 7 months. It has been stated by the claimant, that they had participated in the tender in view of L/C provision and had based their offer accordingly.

16.2 In view of above, and particularly with the experience of unusual delay in receiving payments against 7 lots already supplied, the claimant appears to be justified in not making further supplies without assurance of payments in the

form of L/C.

16.3 Documents furnished by the claimant include letter form Engineering Department of the respondent indicating that the Accounts Department had been asked to establish letter of Credit which, however, was not done clearly indicating that the respondent failed to establish Letter of Credit because of certain internal problems."

16. Thus the finding given in the Award to hold that the termination of the contract was unlawful is based upon the respondent's failure to open a Letter of Credit and it was also held that though the respondent was equally, if not more responsible for the delay. Thus the Arbitrators have found that the petitioner was also responsible for the delay. The Arbitrators then go on to hold that the materials were supplied by the petitioner for a long time after the supply. The arbitrators finding that there was no evidence to support the plea that the parties agreed to a waiver of the conditions of opening of Letter of Credit ignores the fact that the first supply of cables on 27.1.94 was well after the expiry of the period of supply originally stipulated in the agreement, i.e., 19.11.93. This vital factor having been ignored this finding is a clearly erroneous finding on the face of the award amounting to legal misconduct invalidating the award as per the decision in State of Rajasthan Vs. Puri Construction (Supra).

17. The aforesaid findings of the Arbitrators also clearly ignores the mandate of Section 11 of Sale of Goods Act which was pleaded by the respondent in contending that both the parties had regarded the opening of letter of Credit as an inessential part of the contract and this could not, Therefore, be the foundation of the impugned award for holding against the respondent.

18. In support of his plea, the learned counsel for the respondent DVB has relied upon the two judgments in Orissa Textile Mills Ltd. and Another Vs. Ganesh Das Ramkishun, ; Sunder Singh Vs. Krishna Mills Co.Ltd. AIR 1914 Lah 298.

19. In the Case of Orrisa Textile Mills, (Supra), it was held that stipulation as to the time of payment is not the essence of contract.

20. In so far as Sundar Singh(Supra) is concerned, in the above case the court held that when the contract stipulated supply on reimbursement by cash and the defendant continued to supply the goods without payment it was held that the failure of the plaintiff to pay for the goods delivered in cash did not amount to a renunciation of the contract and the defendant was bound to perform his part of the contract.

21. In reply to the above plea of the respondent the petitioner in its written submissions merely stated as follows :

"The counsel for the respondent Orissa Textile Mills Ltd. and Another Vs. Ganesh Das Ramkishun, to support the contention that ordinarily time for payment is not the essence of the contract. However, said decisions on facts and in law have no applications, because, in this case the contract provided for the contrary by

imposing the opening of the L.C as condition precedents for performance under the contract."

22. This reply is not sufficient to counter the plea of the respondent that the requirement of opening a Letter of Credit had been given a go by both the parties. I am of the view that the law laid down by the aforesaid judgments relied upon by the respondent clearly applies.

23. In this view of the matter, since the Award is based on an erroneous proposition of law as is evident from a perusal of Para Nos.15.01 and 16 of the Award, the Award is unsustainable in view of the law laid down by the Hon"ble Supreme Court in State of Rajasthan Vs. Puri Construction Co. Ltd (Supra) and Indian Oil Corporation Ltd. Vs. Amritsar Gas Service (Supra).

24. In the light of the learned Single Judge's findings dated 7th August, 1995 upheld right up to the Hon"ble Supreme Court that the first supply was resumed after the initial period of the contract was over , clearly makes the arbitrators' reasoning about the wrongful termination of the contract unsustainable in view of the position of law laid down by the above cases cited by the learned counsel for the DVB. In this view of the matter, the findings of the Arbitrators about the wrongful termination of the contract by the respondent cannot be sustained. The whole award having been founded on the above findings thus cannot stand. Consequently the objections raised by the DVB in IA.6536/97 are upheld and the Award dated 23.4.1997 is accordingly set aside.

25. Suit & application are accordingly disposed of.