

(2014) 02 MAD CK 0196

In the Madras High Court

Case No : O.P. No. 430 of 2011 and A. No. 1647 of 2012

M/s. Pearlite Liners Pvt. Ltd.

APPELLANT

Vs

The Controller of Stores and Shri Pradeep Ambare, Chief
Materials Manager-Mech

RESPONDENT

Date of Decision : 10-02-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(7) 34
Sales of Goods Act, 1930 — Section 61

Citation : (2014) 2 ARBLR 494 : (2014) 3 MLJ 213

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V. Ramasubramanian, J.—The main petition is filed u/s 34 of the Arbitration and Conciliation Act, 1996, challenging one portion of the award passed by the sole Arbitrator, whereby the price payable to the petitioner under the contract that they had with the respondent was varied. I have heard Mr. K.V. Subramanian, learned Senior Counsel for the petitioner and Mr. M. Udayakumar, learned counsel for the respondent.

2. By a tender notification dated 29.9.2005, the respondent invited offers for the supply of semi finished cylinder liners and finished cylinder liners, of the quantity of about 5,185 numbers. The petitioner has submitted a quotation and by a letter of acceptance dated 25.1.2006, the offer of the petitioner was accepted by the respondent, at the negotiated price terms and conditions detailed in the letter of acceptance. Some of the terms and conditions subject to which the offer of the petitioner was accepted, are as follows:-

Quantities to be supplied

-

5,185 Nos.

Basic rate- Rs. 6,050/

-

per liner

Total all in cost per number

-

Rs. 7,508.85 per No.

Delivery period

-

Delivery to commence after 1.4.2006 and will be supplied at 650 Nos. per month in 8 months.

30% option clause

-

Applicable

Total value of the contract

-

Rs. 3,89,33,387.25.

3. The letter of acceptance clearly indicated that it shall constitute a binding and concluded contract. The letter of acceptance was followed by a firm order dated 24.2.2006. But subsequently, a Modified Purchase Order was issued on 10.3.2006, indicating that the applicant was to supply the entire quantity at the rate of 650 Nos., per month from 1.4.2006 upto 30.11.2006.

4. As per the Confirmed Purchase Order, the petitioner started supplying 650 Nos. of cylinder liners from April 2006. The supplies continued from April to August 2006, for 5 months. It appears that on 4.9.2006, the respondent floated another tender and the respondent received a quotation for a total all-in-cost of Rs. 6,354.61. Unaware of the same, the petitioner supplied 650 Nos. on 4.9.2006, another 650 Nos. on 18.9.2006 and yet another consignment of 325 Nos. on 25.9.2006.

5. After receiving those materials, the respondent seems to have informed the petitioner by a communication dated 23.11.2006 that in the tender opened on 4.9.2006, an offer for a lower rate had been received and that if the petitioner agreed to accept a lower rate, the excess quantity of about 975 liners supplied on 18.9.2006 and 25.9.2006 could be accepted. But the petitioner sent a reply dated 24.11.2006, pointing out that the original Purchase Order did not envisage any variation in price. There was no response to the said letter.

6. Therefore, by a letter dated 28.3.2007, the petitioner called upon the respondent either to accept those 975 liners at the rate as contracted or to return back those goods. But there was no response even to this demand.

7. After repeated correspondence, the respondent sent a communication dated 3.10.2007, taking a stand that part of the quantity had been consumed and that therefore, it is not possible to return the material. However, the respondent reiterated their offer to pay the reduced rate of Rs. 6,354.61.

8. Therefore, left with no alternative, the petitioner invoked the arbitration clause. As per the General Conditions of Contract, the Chief Materials Manager of the respondent was appointed as the Sole Arbitrator. He commenced arbitration proceedings and the petitioner filed a claim. Strangely, the respondent filed a counter claim for reducing the rate.

9. After considering the claim and the counter claim and after taking into account, the records, the Arbitrator passed an award. As per the award, the Arbitrator divided the 975 liners supplied after 4.9.2006 into two portions viz., one comprising of 650 liners supplied on 20.9.2006 and the other comprising of the balance 325 liners. In so far as the consignment of 650 liners is concerned, the Arbitrator directed the respondent to pay the original contracted rate. In so far as the balance quantity of 325 liners is concerned, the Arbitrator allowed the respondent to pay the reduced rate. Therefore, as against that portion of the award, granting a reduced rate for 325 liners and the failure of the Arbitrator to award interest, the petitioner has come up with the above original petition. It must be noted that the respondent has not come up with any petition, challenging the other portion of the award, whereby they have been directed to pay the original rate for the 650 containers.

10. As seen from the award and the documents taken into account by the Arbitrator, it is seen that the whole dispute revolves around only one thing. In the month of September 2006, the petitioner supplied a total quantity of 1,625 liners. Out of them, 650 liners were supplied on 4.9.2006, before a fresh tender was opened on 4.9.2006. Therefore, the parties have no dispute that the petitioner is entitled to the contracted rate for this 650 Nos.

11. But in respect of the balance supply of 975 Nos., made after the opening of the fresh tender, the case of the petitioner is that the respondent should have either returned the material or paid the price as originally agreed. According to the petitioner, the original rate is incapable of modification at the instance of either of the parties. The respondent does not dispute the fact that the rate cannot be modified. But the respondent takes shelter under the fact that the original Purchase Order contains a clause for 30% option on quantity. In other words, the respondent reserved the right under the contract to reduce the total quantity for which orders were placed, upto about 30%. Therefore, the stand taken by the respondent is that after the opening of the fresh tender on 4.9.2006, the respondent had the option to reduce the total quantity for which

orders were placed, by 30%. The total quantity for which the original Purchase Order was issued, was 5,185 Nos. 30% of the same works out to 1,555. Therefore, according to the respondent, the total quantity for which the original Purchase Order was issued, could be lawfully reduced to 3,630. The petitioner had admittedly supplied material at the rate of 650 Nos., per month for 6 months, including the supply made on 4.9.2006. This works out to 3,900 Nos. Therefore, the respondent has taken a stand that the remaining quantity of 975 Nos. supplied on 18.9.2006 and 25.9.2006 falls within the 30% option that could have been exercised by the respondent.

12. But the Arbitrator found that as on 18.9.2006, when the second consignment of 650 Nos., was supplied by the petitioner for the month of September 2006, the respondent did not object. It was only by a letter dated 24.9.2006 that the respondent advised the petitioner to defer despatch. This advise to defer despatch was considered by the Arbitrator to be not even a notice in writing for the invocation of the 30% option clause. As per the contract, the 30% option clause (for reduction of quantity) can be invoked provided a notice is issued. Such a notice was issued only on 17.10.2006. Therefore, the Arbitrator found that for the second consignment of 650 Nos., supplied on 18.9.2006, the petitioner is entitled to full payment.

13. But in so far as the third consignment of 325 Nos., is concerned, the Arbitrator held that those supplies were due to be made only after October 2006 (or November 2006) and that the petitioner would have had sufficient notice of the exercise of 30% option, if they had supplied it only in October/November 2006 without making the supply in advance. Therefore, the Arbitrator awarded reduced rate for 325 Nos.

14. From the above, it is clear that the main disputes that arise for consideration in this petition are (i) as to whether the petitioner is entitled to the original contracted rate of Rs. 7,508.85 or to the reduced rate of Rs. 6,354.61 per number for the 325 liners and (ii) as to whether the petitioner is entitled to award of any interest.

15. There are no disputes about the following facts:-

(i) that as per the original letter of acceptance dated 25.1.2006, the total quantity for which orders were placed, was 5,185 Nos.;

(ii) that the delivery of the said quantity was to commence after 1.4.2006 and had to be at the rate of 650 Nos., per month for 8 months; and

(iii) that the Railway had the option to reduce the quantity by 30%.

16. The contract itself did not stipulate as to how the clause relating to 30% option for reduction in quantity could be exercised by the respondent. But as the Chief Materials Manager of the Southern Railways, the Arbitrator was aware of the guidelines issued by the Railway Board, as per which a Contractor is to be given reasonable time/notice for exercising the option for increase or decrease in

quantity. What is reasonable time is not specified. But the Arbitrator concluded that the Contractor certainly has a right to be communicated in writing about the reduction in quantity.

17. The Arbitrator also found that the Modified Purchase Order reducing the quantity from 5,185 Nos., to 3,900 Nos., was issued only on 17.10.2006. Therefore, the Arbitrator held that the supply of 650 Nos., made on 18.9.2006 cannot be taken to be a supply made in violation of the Modified Purchase Order, as it should be adjusted towards the supply for October 2006. But since the supply of 325 Nos., made by way of third consignment in September 2006 was considered by the Arbitrator to be a supply intended for November 2006, the learned Arbitrator held that inasmuch as the said supply was made after the exercise of the 30% option by the Railways, it was not open to the petitioner to claim the higher rate.

18. But it is contended by Mr. K.V. Subramanian, learned Senior Counsel for the petitioner that the quantity required to be supplied in November 2006 was also 650 and that if at all, 30% option could be exercised, it could have been exercised only for the supply to be made in November 2006. In other words, it is his contention that the supply to be made for November 2006 could have been reduced from 650 to 455 Nos. (70%). But since the petitioner supplied only 325, which was lesser than the said quantity, the rate for 325 liners could not have been reduced even after applying 30% reduction.

19. But the above contention of the learned Senior Counsel for the petitioner cannot be accepted. The letter of acceptance dated 25.1.2006 merely makes a reference to 30% option clause. The manner in which the said option is to be exercised by the respondent, is not made clear anywhere, in the pleadings or in the award. The respondent has applied the said clause relating to 30% option, to the total quantity of 5,185 Nos. But the petitioner seeks to apply the said option, only to the quantity that remained unsupplied as on the date of exercise of the option.

20. The manner in which 30% option for the variation of the quantity is to be exercised by the respondent, is to be traced only to the terms and conditions of contract. If the terms and conditions of contract are capable of being interpreted in 2 different manners and the Arbitrator has adopted one method, then this Court exercising jurisdiction u/s 34 cannot interfere with the same. It has been categorically held by the Supreme Court that it is within the domain and jurisdiction of the Arbitrator to interpret contractual terms and conditions and that the said interpretation cannot be interfered with by the Court u/s 34. Therefore, the interpretation given by the Arbitrator to the clause relating to 30% option, which has resulted in the reduction of the rate for 325 liners, cannot be interfered in a petition u/s 34.

21. The scope for interference with an arbitral award, u/s 34 was summarised by me in a decision rendered recently. The principles laid down therein are-

(i) that this Court cannot re-appreciate evidence [see Ravindra Kumar Gupta and Company Vs. Union of India (UOI),];

(ii) that reasonableness of the reasons given by the Arbitrators cannot be challenged and there is no power for reappraisal of evidence [see Sudarsan Trading Co. Vs. Government of Kerala and Another,];

(iii) that once there is no dispute as to the contract, what is the interpretation of that contract is a matter for the Arbitrator and the Court cannot substitute its decision thereupon [see Sudarsan Trading Co. Vs. Government of Kerala and Another,];

(iv) that the power of this Court u/s 34 is not the same as that of an Appellate Court [see Lal Builder Vs. Union of India (UOI) and Others];

(v) that the Arbitrator is the sole Judge of quality and quantity of evidence adduced and the approach of the Court should be to support it rather than destroy it [see Tamil Nadu Civil Supplies Corporation Ltd. Vs. G.S.N. Exporters and Thiru L.M. Janakiraman DRO (Retd.) Arbitrator]; (vi) that the Arbitrator is the sole Judge of the facts as well as law and had the right to interpret the contract and that the Court cannot substitute its own opinion for that of the Arbitral Tribunal with regard to quality, quantity and appreciation of evidence, import of documents and interpretation of contract [see Samho Gunyoung Co. Ltd. Vs. Flakt (India) Ltd. and Others]; and

(vii) that the interpretation of a contract may fall within the realm of the Arbitrator and the Court will not interfere unless the reasons adduced by the Arbitrator are found to be perverse or based on wrong proposition of law [see G. Ramachandra Reddy and Co. Vs. Union of India (UOI) and Another,]

22. After all, the sole Arbitrator is an employee of the Southern Railways. Yet he had been very fair as well as courageous to pass an award in favour of the petitioner in respect of 650 liners out of 975 liners. The Arbitrator has also granted to the petitioner, the refund of the excise duty and sales tax paid by the petitioner on the original value, in respect of all the 975 liners. The sense of fairness and courage exhibited by the Arbitrator has to be appreciated and the conclusion that he derived about the price to be paid for 325 containers cannot be interfered with. Hence the first question relating to the rate to be applied to 325 liners, is answered against the petitioner.

23. Coming to the next question relating to the award of interest, it is seen that the Arbitrator has not awarded any interest for the pendente lite period. As a matter of fact, the award is silent about interest.

24. In so far as the period post award is concerned, there is no difficulty, inasmuch as the statute itself takes care of the same. But in so far as the interest for the pendente lite period is concerned, the learned counsel for the respondent relies upon clause 16(3) of the General Conditions of Contract. As per the said clause, no interest is payable upon the earnest money deposit and

security deposit or on the amounts payable to the Contractor under the contract. Therefore, relying upon the decision of the Supreme Court in *Sree Kamatchi Amman Constructions vs. The Divisional Railway Manager (Works), Palghat* {decided in Civil Appeal Nos. 6815-6816 of 2010 dated 20.8.2010}, it is contended by the learned counsel for the respondent that no interest is allowable for the pendente lite period.

25. But the learned counsel for the petitioner relies upon certain decisions, which I shall take up now.

26. In *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*, , two questions arose for consideration, one of which was as to whether the Arbitrator had no jurisdiction to award pendente lite interest or not. The question was actually referred to a Constitution Bench, in view of a doubt as to whether an earlier decision by a 3 Member Bench in *Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others*, , reflected the correct position or not. The Court held that where the agreement between the parties does not prohibit the grant of interest and where a party claims interest and that dispute is referred to the Arbitrator, he shall have the power to award interest pendente lite.

27. In *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, Vs. N.C. Budharaj (Dead) by Lrs. etc. etc.*, , a question was referred to a Constitution Bench by a 3 Member Bench. The question was "whether in the absence of any prohibition to claim or grant interest under the arbitration agreement, the Arbitrator had no jurisdiction to award interest for the pre-reference period under the general law or on equitable principles, although such claim may not strictly fall within the provisions of the Interest Act, 1839". Therefore, the said decision is with respect to the pre-reference period and not the pendente lite period. The question that we are considering in this case is about the pendente lite interest and not interest for the pre-reference period. It was held in *N.C. Budharaj, that Jena*, laid down the correct position of law and that an Arbitrator had no competence to award interest for the pre-reference period unless any of the following conditions is satisfied viz., (i) if the agreement entitles the Arbitrator to award interest; (ii) if there is a usage of trade having the force of law; and (iii) if there are other provisions of the substantive law enabling the award of interest.

28. In *State of Haryana and Others Vs. S.L. Arora and Company*, , the Supreme Court held that in the absence of any provision in the contract and in the absence of specific provision relating to interest in the contract, the Arbitral Tribunal can award simple interest at such rates as it deems fit, from the date on which the cause of action arose till the date of payment. The Court also pointed out that by virtue of statutory prescription, the award holder is entitled to interest at 18% per annum from the date of the award till the date of payment, if the award is silent.

29. In *South Eastern Coalfields Ltd. Vs. State of M.P. and Others*, , the Supreme

Court referred to Section 61 of the Sale of Goods Act, 1930 and indicated that it incorporates a rule of equity, justice and sound logic and that interest is also payable in certain circumstances. Therefore, the Court held that in the absence of any prohibition either in law or in contract, a party can be compensated by payment of interest, for the period for which the amount due to them was not paid.

30. In *State of Orissa Vs. B.N. Agarwalla, etc.,*, the Supreme Court made it clear that if the terms of the contract expressly stipulate that no interest is payable, then notwithstanding the provisions of the Interest Act, 1978, an Arbitrator would not get the jurisdiction to award interest.

31. In *Sayeed Ahmed and Co. Vs. State of U.P. and Others,* the Supreme Court pointed out that by virtue of Section 31(7) of the Arbitration and Conciliation Act, 1996, the difference between pre-reference period and pendente lite period has disappeared in so far as the award of interest by Arbitrator is concerned. The Court made it clear that the decisions of the Supreme Court with reference to awards under the 1940 Act, making a distinction between the two periods, are not applicable to arbitrations governed by the 1996 Act. Consequently, the Court held that any provision in the contract barring interest will operate till the date of the award, but not thereafter.

32. Therefore, it is clear that even the decisions of the Constitution Benches in *G.C. Roy* and *N.C. Budharaj*, may not be of any relevance, after the decision in *Sayeed Ahmed & Co.* More than *Sayeed Ahmed & Co.*, the Supreme Court has categorically held in *Sree Kamatchi Amman Constructions*, with reference to an identical contract that incorporates clause 16(3) of the General Conditions of Contract prohibiting any claim for payment of interest. Therefore, even the claim for interest is unsustainable. In view of the above, there is no legally valid ground to interfere with the award. Hence, the original petition is dismissed. However, there will be no order as to costs. Consequently, Application No. 1647 of 2012 is also dismissed.