
(2007) 09 DEL CK 0307

In the Delhi High Court

Case No : O.M.P. No. 361 of 2007 and I.A. No. 11001 of 2007

Narendra and Co.

APPELLANT

Vs

Brig. Sudhir Kumar and Another

RESPONDENT

Date of Decision : 25-09-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34(2)

Citation : (2007) 09 DEL CK 0307

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Ajay Gaiind, for the Appellant; Nemo, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.

IA No. 11001/2007

1. The application for placing on record the documents is allowed. OMP No. 361/2007

2. Respondent No. 2 placed an order with the petitioner dated 31.3.2000 for Safety Fuse. The goods were supplied by the petitioner. Another order was also placed for additional quantities. The agreement between the parties contained the standard arbitration clause and since disputes arose between the parties, Brig. Sudhir Kumar was appointed as the sole arbitrator vide an order of respondent No. 2 dated 24.5.2006 to adjudicate the disputes between the parties. The arbitrator passed an award dated 28.3.2007 rejecting the claim of the petitioner, leaving the parties to bear their own costs. It is this award which is sought to be challenged by the petitioner u/s 34(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act).

3. In order to appreciate the scope of the challenge, certain facts need to be set out. The documents placed on record show that initially an advertisement dated

5.11.1999 was issued for such Safety Fuse and a supply order was placed on the petitioner for 8,84,000 meters Safety Fuse. It appears that an urgent requirement was felt for an additional quantity of such fuse and it is in those circumstances that a letter dated 4.1.2000 was addressed by the petitioner referring to the aforesaid and stating that during the course of price negotiation for supply of the original amount of 8,84,000 meters Safety Fuse, they were given to understand that there was additional urgent requirement of 5,00,000 meters of such Safety Fuse. The petitioner requested for placement of the order for the same with them at a discounted unit price of Rs. 18.50 per meter. In response to the said letter, respondent No. 2 addressed a letter dated 6.3.2000 to the petitioner stating that the offer of the petitioner for supply of additional quantity at a discounted unit price of Rs. 18.50 per meter was under active consideration of the Ministry but the competent authority desired the confirmation of the petitioner of accepting this price provisionally as the maximum ceiling price which would thereafter be finalised based on a cost study by the department. The petitioner, in turn, confirmed the same vide a letter dated 8.3.2000.

4. In pursuance to the aforesaid letters, the advance supply order dated 31.3.2000 was placed on the petitioner for 4,00,000 meters with respondent No. 2 reserving the right to place the order for additional 25% quantity at the same rate, terms and conditions during the currency of the contract. The price was stipulated at Rs. 18.50 per meter ceiling price subject to cost study and the order was, thus, for a total value of Rs. 74,00,000/-. This advance supply order was accepted by the petitioner vide a letter dated 4.4.2000. A formal supply order was placed on 6.6.2000. The delivery schedule prescribed four months as the period of delivery.

5. The aforesaid quantities were supplied by the petitioner and an invoice for the same was raised on 12.6.2001. The goods were inspected and were accepted. The payment was made vide a cheque dated 11.7.2001.

6. The petitioner addressed a letter dated 24.8.2000 in respect of the original supply of 8,84,000 meters of Safety Fuse and the subsequent supply of 4,00,000 meters and requested to confirm the placement of the order for additional 1,00,000 meters of Safety Fuse. A reminder was sent in this behalf on 4.5.2001.

7. Respondent No. 2 issued an amendment letter dated 19.4.2002 for the existing supplies fixing the basic price at Rs. 16.30 per meter and, thus, held that the total amount payable to the petitioner would be Rs. 65,20,000/-. This revision was in pursuance to the original agreement whereby the price of Rs. 18.50 was fixed at a maximum ceiling price subject to cost study. Soon thereafter on 13.6.2002 an order was placed for 1,00,000 meters under the option clause. The delivery was not made within the time stipulated and, thus, on 6.2.2003 the period for completion of bulk supplies was extended up to 30.6.2003.

8. The basic grievance of the petitioner before the arbitral tribunal, as urged by the learned Counsel for the petitioner, was the re-fixing of the price as mentioned aforesaid as also the placement of the order of 1,00,000 meters as additional supply even though the original supplies had been made and the order for such additional quantity could only have been placed during the currency of the contract. Since the original supplies were made, it was stated that the expression 'currency of contract' would be the period of delivery of the supplies made within the stipulated period of four months.

9. A perusal of the award shows that the contention of the parties has been noticed and the conclusions are contained in para-16 of the award. The arbitrator came to the conclusion that the petitioner at no stage during the currency of the contract objected either to the cost fixed initially at Rs. 18.50 per meter as the maximum ceiling price subject to cost study for 4,00,000 meters with option clause of 25% within the currency of the contract. No such objection was raised even when the cost was reduced to Rs. 16.30 per meter for the entire quantity of 5,00,000 meters. The contract was executed as per contractual clauses and its amendments. The bill raised by the petitioner was for 95% of the cost of 4,00,000 meters which was cleared and the balance 5% price was also cleared subsequently and paid vide a cheque dated 23.1.2003. The increase in the quantity to 5,00,000 meters was as per the contract and as per the request of the petitioner.

10. The petitioner even raised a bill for 95% of the amount payable in respect of 1,00,000 meters on 22.10.2003 which amount was cleared on 31.12.2003 @Rs.16.30 per meter after adjusting the excess amount already paid to the firm at the rate of Rs. 18.50 per meter. The time period for performance was also extended. The final payment was made. It was in these circumstances that it was held that the petitioner has been paid fully for the amount of supplies.

11. Learned Counsel for the petitioner seeks to bring the objections filed within the purview of Section 34(2)(b)(ii) of the Act on the ground that the award is opposed to public policy since once the contracted amount was supplied, there could be no question of any further placement of order in 2002 at the same price. Such an order could be only during the 'currency of the contract' which would be the period for supply stipulated as four months.

12. A perusal of the objections show that the challenge is really factual in nature inasmuch as the petitioner claims that the interpretation of the communications by the arbitrator are not correct. It is stated that the communications were exchanged on a presumptive basis and the additional quantity of 1,00,000 meters supplied was accepted beyond the date of the currency of the contract.

13. It is also the plea of the petitioner that once the supplies were made, there could be no question of revision of prices.

14. In my considered view, the aforesaid do not fall within the purview of the challenge permissible u/s 34(2) of the said Act. To just state that the award is

contrary to public policy of India would not suffice. This Court is not sitting as a court of first appeal. The legal position is clearly explained in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , wherein it has been held as under:

Objections against the Awards, unless and until against the Public Policy and totally against the terms of the contract, are not to be maintainable as this Court does not sit in appeal over the said Awards.

15. The arbitrator is also the judge of the interpretation of the clauses of the contract unless an absurdity comes to light. In the present case the arbitrator has relied on the clauses of the contract to come to the conclusion that respondent No. 2 was well within its rights to revise the price. The purchase order itself stipulated that the price of Rs. 18.50 per meter was only the maximum ceiling price subject to cost study. There was no restriction that such cost study must be within the time period of the supply stipulated or ?during the currency of the contract?. Thus, no defect can be found with the revision of price.

16. As far as the question of additional supplies of 1,00,000 meters are concerned, respondent No. 2 had exercised the option for seeking such supply in view of the provision for additional 25% quantity at the same rate. The petitioner did not even object to the same and supplied the additional quantity, raised the bills in that behalf and received payment. Having repeatedly requested respondent No. 2 for additional supplies over a period of time on the basis of being a small unit and having availed of the benefit, the petitioner seeks to raise the issue of the price subsequently on completion of supplies, which cannot be considered. In fact, such request for supply order was made by the petitioner even after supply of 4,00,000 metres was complete and thus even otherwise the petitioner cannot claim that the order for 1,00,000 metres was to be placed before completion of supply of 4,00,000 metres.

17. A question was posed to the learned Counsel for the petitioner that if the supplies were not made under the original supply order, then what was the contract under which such supplies were made. Learned Counsel sought to answer it by saying that the same was only under an oral arrangement. If that be the position, there would have been no question of arbitration since there is no arbitration clause in case of such oral supply. It really cannot be doubted that the supplies were made by the petitioner under the original supply order and that is why recourse was taken to the arbitral proceedings.

18. In view of the aforesaid, I find no merit in the objections. Dismissed.