
(2007) 08 DEL CK 0183

In the Delhi High Court

Case No : OMP No. 331 of 2006 and is No. 7983 of 2006

NTPC Limited

APPELLANT

Vs

Areva T and D India Limited

RESPONDENT

Date of Decision : 22-08-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 33(1), 34, 34(2)

Citation : (2007) 08 DEL CK 0183

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : R.P. Bhatt and Chirag M. Shroff, for the Appellant; Kum Kum Sen and Vinayak Burman, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—A contract was executed between the parties on 12.5.1990 containing an arbitration Clause 25 of the general conditions of contract. In view of the disputes having arisen between the parties, an Arbitral Tribunal of three arbitrators was constituted to adjudicate the disputes between the parties, who have made and published the award dated 14.12.2005 by two arbitrators with a partly dissenting award of one of the arbitrators of 2.1.2006.

2. The petitioner was aggrieved by the majority award and filed objections u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act). These objections were heard in OMP No. 113/2006 on 24.3.2006 when the following order was passed. Learned senior counsel for the petitioner advanced submissions at length. After hearing, learned senior counsel for the petitioner seeks to withdraw the petition as according to him appropriate remedy would be to approach the arbitral tribunal u/s 33 of the Arbitration and Conciliation Act, 1996 to correct what is claimed to be a typographical error/calculation mistake. Liberty granted. Dismissed as withdrawn.

3. The petitioner thereafter filed an application u/s 33(1) of the said Act for

correction as mentioned aforesaid, which have now been dealt with by the award dated 29.5.2006. The petitioner now seeks to challenge the same.

4. It may be noted at the inception that learned senior counsel for the petitioner fairly stated that his submissions would have to be confined to only such matters that arose out of the subsequent award dated 29.5.2006 in view of the order passed on 24.3.2006 in OMP No. 113/2006. Learned senior counsel for the petitioner made submissions in respect of two aspects.

5. The first submission made is in respect of original claim No. 2 for supply of HPC and IPC category nozzles. In respect of IPC nozzles some of the same were lost and could not be located and it is the case of the petitioner that like the HPC nozzles the same were procured from BHEL and the petitioner was entitled to the cost incurred for purchase of the said IPC nozzles from BHEL.

6. The Arbitral Tribunal in terms of the original award held that insofar as HPC nozzles are concerned, procurement cost from BHEL should be allowed while in case of IPC nozzles, the Arbitral Tribunal took cognizance of a letter addressed by the petitioner to the insurance company on 3.11.1992 giving the anticipated loss of Rs. 7.00 lakh. Thus, it is this Rs. 7.00 lakh which has been found payable to the petitioner.

7. Learned senior counsel for the petitioner contends that while even examining the issue of mistake in the original award, the Arbitral Tribunal has failed to take note of the fact that what was a good method for determination for HPC nozzles was equally good for IPC nozzles. Learned Counsel contends that no doubt the Arbitral Tribunal in its reasoning has held that the IPC nozzles cost is to be re-compensated on the basis of the insurance claim letter but when the purchase order, delivery challan and ledger account of the petitioner were available, that should have been the basis for determination of the amount. In the alternative it is pleaded that there was actual lodgment of the claim by the petitioner with the insurance company of Rs. 24.57 lakh that could have been taken as the basis.

8. On hearing learned senior counsel for the petitioner and perusing the award dated 29.5.2006, I am unable to persuade myself to agree with the said submission. The reason for the same is that from paragraph 24 of the said award it is obvious that a conscious decision was taken by the Arbitral Tribunal to take the basis of the anticipated loss claim of the petitioner to determine the amount payable in respect of the IPC nozzles which was admittedly mislocated/lost. In case of IPC nozzles this evidence was available but in case of HPC nozzles in the absence of any other evidence it is the replacement cost which has been taken into account. The claim stated to be lodged with the insurance company of Rs. 24.57 lakh was admittedly not pursued and thus could not be the basis as no determination took place. The initial anticipated loss has, thus, been taken as the basis.

9. It is trite to say that this Court cannot substitute itself with the arbitrator and determine as to what decision would have been taken if this Court was acting as

an arbitrator. This Court does not sit as a court of first appeal to reappraise evidence or re-evaluate the same while determining such objections to the award. It is not for this Court to interfere with an award merely on the basis that this Court would have come to a different conclusion on the material available before the arbitrator. It is only in the eventuality of an award being totally perverse that an interference is called for. The Apex Court has, in fact, observed that in the absence of an award being absurd, reasonableness is not a matter to be considered by the Court as appraisal of evidence by an arbitrator is not ordinarily for the court. This legal position emerges from the judgments of the Apex Court in Food Corporation of India Vs. Joginderpal Mohinderpal, and Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, . This was the legal position insofar as Arbitration Act, 1940 is concerned and would be more so in the case of a more restrictive approach applicable in the present case of 1996 Act.

10. In Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , the Apex Court expanded the scope of scrutiny by the Court under the phrase "public policy of India" as appearing in Section 34(2)(b)(ii) of the said Act. Instead of a narrow meaning it was held that the Court can set aside an award if it is contrary to the fundamental policy of Indian law, interest of India, justice or morality, is patently illegal or is so unfair and unreasonable that it shocks the conscience of the Court. However, illegality of a trivial nature was held to be liable to be ignored.

11. If the aforesaid parameters are applied to the submissions of the learned senior counsel, it would emerge that at best what is canvassed by learned Counsel could have been one view or one methodology for determination of the amount payable to the petitioner by the Arbitral Tribunal. It could not be the only methodology. That being the position one cannot say that the methodology adopted by the Arbitral Tribunal is patently illegal or is so unreasonable that it shocks the conscience of the Court.

12. The second submission of the learned senior counsel for the petitioner is based on the findings arrived at in paragraph 30 of the award dated 29.5.2006. It is the case of the petitioner that the claim of the respondent has wrongly been taken as Rs. 26.40 lakh while it should have been considered as Rs. 22,11,480.00. The Arbitral Tribunal has noted that these aspects have been examined in paragraph 75 to 80 of the original award where a finding was reached that there have been different amounts specified by the respondent in this behalf but the amount of claim made in the legal notice would be taken as the claim of the respondent. It is thereafter that the Arbitral Tribunal proceeded to adjudicate upon the claim and decided the same on merits. Once again, the challenge to the same, in my considered view, would not fall within the parameters laid down in ONGC v. Saw Pipes Ltd. case (supra).

13. There is no other aspect urged by learned senior counsel for the petitioner and in view of the facts set out hereinabove I find no merit in the aforesaid two aspects. The petition and the application are dismissed leaving the parties to

bear their own costs.