**(2009) 09 DEL CK 0081**

**In the Delhi High Court**

**Case No :** OMP No. 372 of 2009 and IA No. 8585 of 2009

Power Grid Corporation of India Ltd. APPELLANT

Vs

ABB Limited RESPONDENT

**Date of Decision :** 01-09-2009

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 34

**Citation :** (2009) 09 DEL CK 0081

**Hon'ble Judges :** Rajiv Sahai Endlaw, J

**Bench :** Single Bench

**Advocate :** A.T.M. Rangaramanujam, Pawan Upadhyay and Anish K. Maggo, for the Appellant; Jayant Nath Mukhopadhya and Ayush Agrawal, for the Respondent

## Judgement

Rajiv Sahai Endlaw, J.

1 This OMP u/s 34 of the Arbitration Act, 1996 with respect to an arbitral award dated 11th January, 2009 has been preferred along with the application for condonation of 57 days delay in re-filing the OMP. The respondent/caveator in response to the caveat appeared and stated on 26th August, 2009 that though no case for condonation of delay in re-filing is made out but even if the OMP was to be considered, no ground for issuance of notice is made out. In the circumstances, the senior counsels for both parties were heard on 26th August, 2009 and 27th August, 2009.

2. The respondent was the claimant before the arbitral tribunal. Three claims of the respondent were for consideration before the arbitral tribunal i.e. (i) on account of non-issuance of C Forms under the Sales Tax Act; (ii) for recovery of Rs. 20,03,792/- deducted by the petitioner from the invoice of the respondent; and (iii) for reimbursement of Service Tax.

3. The arbitral tribunal allowed all the three claims of the respondent. The respondent had also claimed interest on the amount claimed towards reimbursement of Service Tax. The same was declined. The respondent was

 

awarded interest at 10% per annum on the amount of the Service Tax with effect from 13th July, 2007 i.e. the date of the reference of disputes and on the amount of Rs. 20,03,792/-. Though the petitioner has in the OMP raised grounds with respect to the award on all the three claims but the contentions of the senior counsel for the petitioner were directed only towards the award on account of non-issuance of C Forms.

Re.: non-issuance of C Forms

4. The award records and there is no challenge thereto, that in response to a tender floated by the petitioner, M/s A.BB. Utilities A.B, a foreign party was the lowest bidder; it, as permitted by the agreement and as agreed, assigned the on shore supply and on shore service part of the contract to the respondent, while retaining the offshore supply part of the contract to itself. The C Forms were demanded by the respondent with respect to the interstate sale of goods made by the respondent to the petitioner under the On Shore supply contract and also with respect to the goods invoiced by the respondent but which were directly consigned by the sub-suppliers of the respondent to the petitioner.

5. The arbitral tribunal allowed the said claim for three reasons. Firstly it was held that the petitioner under the contract was bound to issue the said C Forms. Secondly it was held that the petitioner had issued the C Forms to the respondent for the financial year 2003-2004 and was estopped from denying the liability to issue C Forms for the subsequent years. Thirdly, it was held that the petitioner even under the law i.e. the Central Sales Tax Act was liable to deliver the said C Forms to the respondent.

6. The arbitral tribunal with respect to the first of the aforesaid reasons held that the initial bid pursuant whereto the contracts were executed, was made by M/s. ABB Utilities AB, a foreign party bidder within the meaning of the invitation for bids; that the respondent, though an Indian company was an assignee of the said foreign bidder and the same was held to be inconsequential inasmuch as under the terms of the contract the ultimate responsibility for performance of the parts of the contract with respect whereto the contract was directly with an Indian company i.e. the respondent as an assignee of the foreign bidder also, the ultimate responsibility for good performance and for default was of the foreign bidder only. The arbitral tribunal thus held that the clauses in the contract relating to the foreign bidder and which provided for issuance of the said C Forms would apply and not clauses relating to the Indian bidder (and which did not provide for issuance of such C Forms). In fact the arbitral tribunal held that even the clause relating to Indian bidders did not prohibit or bar the issuance of such C Forms.

7. Though the arbitral tribunal has on a construction of the terms of the contract held the respondent entitled to the C Forms, the arbitral tribunal also found that the clarifications given by the petitioner with respect thereto also placed the matter beyond the scope of any ambiguity.

8. Qua the reason of estoppel, the arbitral tribunal found that though the petitioner had in the first instance refused the C Forms for the year 2003-2004 but subsequently issued the same; that the petitioner by such conduct made the respondent alter its position to its detriment i.e. by incurring the liability of penal rate of interest and penalties which it otherwise would not have had to bear. The arbitral tribunal further found that the petitioner had at no time earlier denied the liability for issuance of the said C Forms and this plea was taken for the first time in the arbitration, as an afterthought. The arbitral tribunal in this regard also considered the cross-examination of the witness of the petitioner wherein it was admitted that there was no letter denying the liability of the petitioner to issue C Forms under the contract.

9. The petitioner before the arbitral tribunal took a plea that the C Forms for the year 2003-2004 had been issued by mistake. The arbitral tribunal found that the plea of mistake had no substance.

10. On the third reason of liability of the petitioner to issue C Forms under the Central Sales Tax laws, the arbitral tribunal found that the respondent as well as the petitioner are registered dealers within the meaning of the Central Sales Tax Act; that the High Court of Andhra Pradesh within whose jurisdiction the sales were affected has in Modern Proteins Ltd. v. Food Corporation of India (1983) 52 STC 403 held that even where the sales were inclusive of sales tax, the registered dealer is liable to issue the C Forms under the law. The arbitral tribunal found the said judgment to be applicable to the facts of the case.

11. The arbitral tribunal noticed that the appeal preferred by the respondent pertaining to assessment of Sales Tax for the year 2004- 2005 was pending and it was the contention of the respondent that if the C Forms are issued before the disposal of the appeal, the respondent shall make an attempt to have the assessment order set aside and matter remanded for consideration in the light of C Forms issued by the petitioner and which was likely to result in reduction of Sales Tax and the liability for interest and penalties. The arbitral tribunal in the circumstances held that if the petitioner fails to issue the C Forms it would also be liable to pay damages to the respondent levied by the department in this regard. Reliance was placed by the arbitral tribunal on Hindustan Vegetable Oils Corporation Limited Vs. Progressive Industries and Others, dicta of the Supreme Court.

12. The senior counsel for the petitioner has urged that the arbitral tribunal has not considered the letter dated 27th November, 2001 of the foreign bidder whose assignee the respondent is, to the petitioner and wherein an unconditional acceptance was given of the clauses of the contract and amendments thereto and the deviation, alterations, objections thereto were withdrawn. It was argued that there is no whisper at all of the said document in the award and had the arbitral tribunal considered the said important document on record of the arbitral tribunal, the finding with respect to the C Forms would not have been reached. It is urged that non- consideration of material evidence amounts to misconduct and

 

which even under the 1996 Act is a ground for setting aside of the award. K.P. Poulose Vs. State of Kerala and Another, laying down that an award ignoring the material documents amounts to misconduct by the arbitrator is cited in this regard.

13. I however, do not find the said contention to be factually correct. Though the arbitral tribunal has not given the date of the letter but I find that in Para 26 of the award the said letter has been dealt with. The arbitral tribunal has recorded that they are unable to accept the contention of the petitioner that the clarifications stood withdrawn; the arbitral tribunal held that the foreign bidder had withdrawn the deviations from the tender conditions and not any clarifications given by the petitioner. The senior counsel for the petitioner has been unable to show that the reference in Para 26 of the award is to any withdrawal other than that in the letter dated 27th November, 2001. Thus it cannot be said that the said documents, even if material, has been ignored by the arbitral tribunal.

14. The senior counsel for the petitioner has next handed over in the court the copy of the affidavit by way of evidence of Mr. Milind B. Belsare, witness of the respondent and has contended that even though the said witness had nowhere deposed about the C Forms, the arbitral tribunal has erred in granting the claim for C Forms in favour of the respondent. This argument is met by the senior counsel for the respondent by contending that the respondent had besides the said witness examined two other witnesses also and one of which had deposed with respect to the C Forms. The senior counsel for the petitioner responds by stating that he has no idea whether a total of three witnesses were examined by the respondent. I may record that at this stage of the hearing, the option of calling for the arbitral record was considered. However I am of the view that since the pendency of a petition u/s 34 of the Act makes the arbitral award inexecutable, no hard and fast rule can be laid down for the court to before disposing of such petitions being always required to call for the arbitral record. The party which desires to challenge the arbitral award is required to place before the court the copies of the arbitral records sought to be relied upon. The petitioner in the present case has had ample opportunity. In fact the petition was adjourned on the request of the petitioner on 30th July, 2009, 11th August, 2009 and 26th August, 2009. The petitioner has filed voluminous records stated to be forming part of the arbitral record before this Court. However the petitioner did not choose to file the depositions of the witnesses of the respondent and chose to at the time of hearing hand over the deposition of one of the witness in the court. The petitioner, who by mere institution of the petition succeeds in making the award inexecutable, cannot be permitted to indulge in such dilatory practices of having the hearing adjourned for calling for the arbitral record. Even otherwise, upon the petitioner feigning ignorance of the other witnesses examined by the respondent, no case was found for deferring the hearing of the petition or of calling for the arbitral record. In a given case, where the court for passing the judgment/order requires the arbitral record, the same can be called

 

for but no ground/contention raised requires this Court to call for the arbitral record for adjudication of this petition.

15. The senior counsel for the petitioner also drew attention to Clause 45 titled "Taxes, Permits and Licenses "in the "General Conditions of Contract", whereunder the contractor has been made liable for all non-Indian taxes, duties levies, assessed against the owner or the contractor in pursuance to the contract as well as for payment of all Indian dues, levies and taxes lawfully assessed against the contractor for his personal interest and property only. However in my view the same does not apply to the controversy in hand and in any case expressly provides that the said clause shall be read in conjunction with Clause 22 of the invitation to bid and which clause has been interpreted by the arbitral tribunal.

16. The senior counsel for the petitioner next drew attention to the amendments in Clause 22.2 of the contract. However the same relates to the taxes payable on transaction between the contractor and his nominee or assignee and his sub-contractor and has no relevance to the controversy. Similarly, attention was invited to amendment to Clause 22.10 of the invitation to bid; the same provides that the bidder shall include the Sales Tax on works contract, turnover tax or any other tax under the Sales Tax Act for services to be performed in owner''s country as applicable, in their quoted bid price and owner would not bear any liability on this account. The said argument is met by the senior counsel for the respondent by contending that the respondent is not calling upon the petitioner to bear any liability for Sales Tax but is only calling upon the petitioner to issue the C Forms which the petitioner is obliged to issue in terms of Clause 22.3 relating to foreign bidders as well as their assignee, nominee and in relation to the supply portion of the contract. In view of the express obligation in Clause 22.3 of the contract, considered by the arbitral tribunal, the reliance by the petitioner on the amendment to Clause 22.10 is of no avail. The senior counsel for the petitioner has next drawn attention to the "Clarifications of Technical and Commercial Bids and Review of Bidder''s Proposed Deviations and Alternative Solutions" paragraph 28.1.4 to 28.1.4.2. However the same only provides for clarification meetings to be held by the petitioner and has no relevance to the controversy at hand.

17. The senior counsel for the petitioner has placed reliance on

a) West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, in support of the proposition that instructions to bidders are to be adhered to;

b) Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another, laying down that for waiver there must be an intentional relinquishment of a known right.

c) Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, (Supreme Court) in support of the proposition that where the award travels outside the permissible territory and the arbitral tribunal exceeds its jurisdiction in making the award or where the same is in conscious disregard of the law or the provisions of the contract, the same is to be set aside.

d). Durga Laxmi Builders v. Vice Chancellor University of Delhi 2009 (6) AD (Delhi) 125 also to the effect that the arbitral award is inconsistent with the contract, the same is liable to be set aside.

e). Union of India v. A-1 Sanat & Co. Pvt. Ltd. 2009 (2) Arb LR 520 (Delhi) again laying down that award overriding the contractual terms is opposed to public policy.

f). Kay Bee Alums P. Ltd. v. Union of India 2009 (2) Arb LR 35 (Delhi) (DB) again holding that the award contrary to the express terms of the contract between the parties is liable to be set aside.

However neither of the said judgments persuade me to accept any of the contentions of the petitioner.

18. Though none of the contentions of the petitioner with respect to the award has been found tenable but I may record that the senior counsel for the respondent has urged that the grounds argued are not taken in the OMP and also that the petitioner suffers no prejudice whatsoever by issuance of C Forms. On this query being put to the petitioner, though the senior counsel for the petitioner first sought to state that the petitioner would have to bear the tax liability if issues the C Forms but subsequently on going through the grounds taken in the OMP stated that though the petitioner will not suffer any prejudice by issuing the C Forms and/or will not be required to pay any tax but was contesting the same because issuance of C Forms will result in loss to the public exchequer and the petitioner being a public sector undertaking was obliged to prevent the same and such an award in any case is contrary to public policy. However I do not find any merit in the said contention. The arbitral tribunal on an interpretation of the contract has held the petitioner liable to issue the C Forms. The question of the same being contrary to law or resulting in loss to the public exchequer is not to come in the way in the present proceedings. If at all it is found by the departments concerned that any tax has been evaded, the concerned department is entitled to proceed separately with respect thereto. Else the law is clear; the Supreme Court in BOC India Ltd. Vs. Bhagwati Oxygen Ltd., has held that when the arbitrator has taken a plausible view for interpretation of contract, it is not open to the court to set aside the same on the ground of misconduct. To the same effect is the judgment in State of U.P. Vs. Allied Constructions, as well as in McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, . The interpretation of the contract by the arbitral tribunal is found to be a plausible one and hence is not interferable by this Court.

19. The senior counsel for the petitioner also could not tell as to why the judgment of the Division Bench of Andhra Pradesh High Court relied upon by the tribunal would not apply to the facts of the case. The reliance placed on M/s. Ethiopian Airlines Vs. M/s. Stic Travels (P) Ltd., on the proposition that the

 

statute steps in aid of the agreement not in derogation of it and when the agreement is silent against the public policy or any party does not perform its obligation under such agreement, the statute steps in to fill up such gaps and issues where necessary in this regard is not understandable.

20. The findings of the arbitral tribunal qua estoppel and mistake are findings of fact. The arbitral tribunal has held that mistake has not been established and thus the principle of estoppel will apply. The senior counsel for the petitioner referred to Sukumar Chatterjee Vs. Kiran Chandra Mitter, on the proposition that where the conduct Constituting estoppel was founded on a mistake of facts, the party is not estopped. But the said proposition has no application, where mistake has not been established as a fact, as held by the arbitral tribunal. It has been held in M.P. Housing Board Vs. Progressive Writers and Publishers, , M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro, and DDA v. Al Karma 22(1982) DLT 113 (DB) that in challenge to the award, the court cannot foray into sufficiency or insufficiency of evidence.

21. The Supreme Court in Transmission Corporation of A.P. Ltd. and Others Vs. Lanco Kondapalli Power Pvt. Ltd., though in relation to interim relief observed in para 49 of the judgment that conduct of parties is a relevant factor. If the parties had been acting in a particular manner for a long time upon interpreting the terms and conditions of the contract, pending final decision, ordering them to continue doing so was held to be not arbitrary. Thus it cannot be said that the view taken by the arbitral tribunal on the issue of estoppel and mistake is a non-plausible one.

Re: Claim for deduction of Rs. 20,03,792/- from the invoice of the petitioner

22. The senior counsel for the petitioner did not address any arguments on this aspect. However since in the OMP, in grounds (x) to (xiii) challenge is made with respect thereto, it is felt appropriate to deal with the same. The said claim was on account of cost of constructing the site office under the On Shore services contract. The respondent did not make payment of the said item in the invoice of the respondent for the reason of the respondent having not delivered the possession of the site office to the petitioner.

23. The arbitral tribunal found that lump sum price was payable under the contract; that the respondent was required to construct the site office and the initial advance was to be released by the petitioner to the respondent only thereafter; that the price paid by the petitioner to the respondent was shorter than the lump sum agreed price by the said amount; that the said amount was thus payable to the respondent.

24. Even in the grounds aforesaid in the OMP it is not disputed that the petitioner under the contract was to pay the lump sum price or that the said lump sum price has not been paid to the extent of the amount aforesaid. Once that being the position, it cannot be said that the amount is not payable for the reason of

 

the site office having not been delivered to the petitioner. Moreover nothing contrary to substantial law, so as to be against the public policy is shown in the said award.

Re: Reimbursement of Service Tax

25. The petitioner did not dispute the liability for Service Tax. However the only argument is that the amount of the said Service Tax is to be worked out. However that is precisely what was to be done before the arbitral tribunal. The arbitral tribunal has worked out the liability for service tax. Neither in the grounds in the OMP nor during the course of hearing has it been shown as to which amount included in the said computation is not payable/reimbursable. Merely by raising a bogey of the calculations being required to be done, this Court in the exercise of jurisdiction u/s 34 cannot be called upon to undertake such exercise. The senior counsel for the respondent has drawn attention to the certificate of the Chartered Accountant produced by the respondent before the arbitral tribunal containing computation of service tax and on the basis whereof the award with respect thereto has been made. The petitioner has neither pleaded nor argued any defect in the said computation.

26. Again though not urged, in the OMP ground has been taken with respect to exorbitant rate at which interest has been awarded. However interest has been awarded at the rate of 10% only and cannot be said to be exorbitant or requiring interference by the court.

27. Lastly, it is unfortunate that the petitioner, a public sector company is persisting with the challenge to the issuance of the C Forms. As observed by the arbitral tribunal also, the C Forms if issued in time would avoid the liability for penalties and interest being levied on the respondent and which also under the award have been made reimbursable by the petitioner to the respondent. In fact this was one of the grounds urged by the senior counsel for the respondent for expeditious disposal of the petition inasmuch as any further delay in this Court would lead to a further liability on the petitioner.

28. Accordingly, no case u/s 34 of the act having been made out, the petition is dismissed. IA. No. 8585/2009 for condonation of delay in refiling has become infructuous in the circumstances, but to complete the formality, the delay in refiling is condoned and application disposed of. Costs of Rs. 35,000/- to the respondent for these proceedings.