

(1999) 08 CAL CK 0044

In the Calcutta High Court

Case No : G.A. No. 2457 of 1999 and C.S. No. 264 of 1997

Rashtriya Ispat Nigam Ltd.

APPELLANT

Vs

Anand Bearing Co. Pvt. Ltd.

RESPONDENT

Date of Decision : 06-08-1999

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : 2 CWN 299

Hon'ble Judges : Ronojit Kumar Mitra, J

Bench : Single Bench

Advocate : B.K. Chatterjee, T. Banerjee and K. Roy, for the Appellant; D. Basu, A. Chatterjee and B. Basu, for the Respondent

Judgement

Ronojit Kumar Mitra, J.—The petitioner who was the respondent before the Arbitrator has made this application u/s 34 of the Arbitration Act, 1940 and sought to stay the suit. The suit being C. S. No. 264 of 1997 (Anand Bearing Co. Pvt. vs. Rashtriya Ispat Nigam Ltd.) had been instituted in this Court by the respondent, on July 14, 1997. The respondent was the claimant before the Arbitrator, and had instituted the suit on the basis of an alleged admission of the claim by the petitioner in its counter statement of facts". On the basis of the alleged admission of the claim, the respondent had made an application before the Arbitrator for an award in favour of the respondent, and having waited for two months the respondent had instituted this suit. The facts of the case in short were that pursuant to a contract between the parties the respondent was to supply two Russian bearings in accordance with the terms and conditions contained in the "tender" and also in the "general conditions of contract. Article 23 of the general conditions of contract" contained an arbitration agreement. The respondent had supplied and the petitioner had received and accepted the bearings. Admittedly in terms of the contract, the petitioner had paid 75% of the purchase price. By its letter dated November 6, 1995 the respondent referred to arbitration, certain disputes regarding its alleged claim for the payment of the balance 25% for the supply of the two bearings. The Chairman-cum-Managing

Director of the petitioner in accordance with the terms of the contract appointed an Arbitrator. The parties filed their statement of claim" and "counter-statement", respectively, and between September 1996 to July 1997 several meetings had been held before the Arbitrator. The petitioner also had referred to arbitration diverse alleged claims against the respondent in respect to disputes in some 34 separate contracts, all of which had been entered between the parties though not related to the contract which was presently being considered by this Court. Admittedly both the purchase orders as also the disputes in the two sets of arbitration proceedings between the parties pending as on date had nothing in common. The Arbitrator appointed in respect to both the references was however, the same person.

2. It was submitted by counsel for the petitioner that in its counter statement", the petitioner had admitted that there was no dispute that the payment by the petitioner to the respondent of the balance 25% of the value of the two bearings, remained due and outstanding. He contended on behalf of the petitioner that in the several other transactions between the parties, which were the subject matters of separate contracts as referred earlier, the respondent had supplied to the petitioner spurious bearings. The respondent had refused to replace the spurious bearings, or accept the petitioners alternative proposal. The petitioner, it was submitted in those circumstances in exercise of its rights under Article 17 of the "general conditions of contract" had. as it was entitled to. withheld the balance price amounting to a sum of Rs. 17.75.000.00. being 25% of the total price, for the supply of the two bearings. According to him. Article 17 of the contract clearly provided that the petitioner had the right to deduct any amount from what was payable by it to the respondent in respect to a contract, and appropriate that deducted amount towards the dues which may be payable by the respondent to the petitioner in respect to another quite separate contract. In support of the exercise of such right, counsel for the petitioner cited and relied on the decisions reported in A. (1984) S.C. 29 and A. (1988) A.P. 53 He argued that the respondent was fully aware of the arbitration agreement, and the Article which reserved to the petitioner the right to withhold, and that the reference to arbitration made by the respondent had been made frivolously and without any basis whatsoever. He placed Section 34 of the Arbitration Act, 1940 and submitted that an application under this section could be made at any time before the filing of the "written-statement". In support of his submissions he cited and relied on the decisions reported in A. (1978) Cal 386; A. (1984) SC 29 and A. (1988) A.P. 53.

3. The reason why the respondent had referred the matter to arbitration, submitted counsel for the petitioner, was because the respondent had believed that non payment by the petitioner of the balance 25% of the entire purchase price constituted a dispute which was referable to arbitration. He contended, that as soon as it transpired from the counter statement filed on behalf of the petitioner, that the petitioner did not dispute the fact that the balance 25% of the entire purchase price was payable by the petitioner to the respondent, and that

the amount was being withheld by the respondent as of right, the respondent filed the suit to recover its claim as there was admittedly no dispute referable to arbitration. He argued, that this was an application on April 3, 1999 and that on account of delay above his application had been made after such an inordinate delay and that too when the suit had appeared in the cause list marked as "Undefendant Suit". According to him the petitioner had been served with the writ of summons" on February 14, 1988 and the petitioner had taken out this application with a motive, because there was no explanation as to why this application ought to be dismissed. He submitted, that relief u/s 34 of the Act was a discretionary relief, and that such inordinate delay in making this application was a clear indication that the petitioner intended to stall the suit being heard and disposed of. and scuttle the endeavour of the respondent to obtain its admitted dues in accordance with the process of law. It was also contended on behalf of the respondent, that the respondent had not been furnished with a copy of the general conditions of contract" and the respondent was not aware either of the Article 23 which contained the arbitration clause or the Article 17 which contained the provision relating to withholding until the time "when the respondent was defending the petitioner"s claim for damages under a different contract." In support of his submissions, counsel for the respondent cited and relied on the decisions reported in A. (1967) S.C. 688: A. (1987) A.P. 294. and A. (1978) Cal 386.

4. The facts, material for deciding the dispute in this application would be. in my view, the admission by the petitioner, that the amount claimed by the respondent in its statement of claim", was in fact due and outstanding by the petitioner as had "been admitted in its "counter-claim", and that the petitioner had been withholding the amount by virtue of the provisions contained in Article 17 of the general conditions of contract". I quote the provisions of Article 17, hereinbelow :

"Article 17--Recovery of Sums Due--

Whenever under this Contract any sum of money is recoverable from and payable by the Contractor the Purchaser shall be entitled to detain, withhold, and recover such sum by appropriating in part or whole the security deposited by the contractor, if a security is taken against the Contract, and to sell any Government Promissory Notes, etc. forming the whole or part of such security in the event of the security being insufficient or if no security has been taken from the Contractor, then the balance or the total sum recoverable, as the case may. shall be deducted from any sum then due or which at any time thereafter may become due to the Contractor under this or any other contract with the Purchaser or any other unit, of Visakhapatnam Steel Project should this sum be not sufficient to cover the full amount recoverable, the Contractor shall pay to the Purchaser on demand the remaining balance due. This action is without prejudice to the right of the Purchaser to take legal action against the Contractor for the breach of the Contract."

5. I dare say there could be little scope for any dispute in the contention of the

respondent that once the petitioner had admitted that the balance 25% of the purchase price was in fact due and payable to the respondent, there was no dispute between the parties. The arbitration proceedings must automatically cease. There was however, specific provision in Article 17, that the petitioner shall deduct "from any sum then due or which at any time thereafter may become due..... under this or any other contract." It was indeed a fact that in the pending arbitration proceedings concerning the 34 contracts, the petitioner had alleged fraud against the respondent for its supply of spurious bearings. Significantly it was the same Arbitrator before whom both the references were pending. In the decision reported in A. (1984) S.C. 29. the Apex Court in its deliberation with regard to clause 18 of the "general conditions of contract" contained in the standard form of contract" of the Director General of Supplies and Disposals, which was in pari materia with the provisions contained in Article 17, had held :

"It is true that the Court is entitled to look at the headlines in an Act of Parliament to resolve any doubt they may have as to ambiguous words. The law is clear that those headlines cannot be used to give a different effect to clear words in the section where there cannot be any doubt as to the ordinary meaning of the words..... It does not contemplate the amount clue and, therefore, the heading of this clause which talks of only Recovers" of sums due will not control Clause 18. The clause in our opinion gives wide powers to the Union of India to recover the amount claimed by appropriating any sum the(sic) due or which at anytime thereafter may become due to the (sic) under other contracts.--

6. Section 34 of the Act of" course provides in clear terms, that in any legal proceedings instituted by one of the parties to an arbitration agreement against another, any of the parties "to such legal proceedings may at any lime before filing a written statement" or taking any other steps in the proceedings apply to the judicial authority before which the proceedings are pending to stay the proceedings." The contention by counsel for the respondent, that the petitioner ought to have made thus application before the expiry of the time to file its written statement was possibly based on the decision of Salil Kumar Roy Chowdhury (sic) reported in A (197(sic)1 Cal 352, which has since been over ruled by the Court of appeal and has been referred in a decision reported in A. (sic) Cal 386. The allegation of inordinate delay, in the petitioner (sic) to Court, would therefore appear to be of no force.

7. In those circumstances. I would be inclined to hold that as on date there existed a dispute between the parties as to whether or not the petitioner was within its rights to withhold the 25(sic) of the balance amount of the purchase price. Article 23 of the general conditions of contract for supply" provided in clear terms that. All questions, disputes and differences of any kind whatsoever arising under these conditions..... shall be referred by the parties to this contract for decision to a sole Arbitrator....." Indeed the dispute

indicated by me above, was included in "All questions, disputes and differences of any kind whatsoever.....", and consequently arbitrable by the Arbitrator. The petitioner was ready and willing to participate and complete the arbitration proceedings. I do not perceive any reason why the respondent should not also act accordingly in the circumstances. The petitioner had entered into the agreement of its own volition and it was bound by the terms and conditions of the contract.

8. For those reasons there shall be an order in terms of prayer (a) of the petition. The arbitrator shall entertain the applications of the parties before him and conclude and make and publish the award expeditiously. This application is accordingly disposed of. There shall be no order as to costs. The parties and the arbitrator shall art in terms of the xerox of the signed ropy of this dictated order and judgment on the usual undertakings.