(2021) 04 DEL CK 0140

In the Delhi High Court

Case No : Firtst Appeal From Order (OS) No. 14 Of 2021

Steel Authority Of India Limited APPELLANT

Vs

M/S Mohan Steel Limited RESPONDENT

Date of Decision : 12-04-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 34

Citation : (2021) 04 DEL CK 0140

Hon'ble Judges : Vipin Sanghi, J;Rekha Palli, J

Bench : Division Bench

Advocate : Harvinder Singh Phoolka, Shaiwal Srivastava, Sriharsha Peechara

Final Decision : Dismissed

Judgement

Components,Weightage,Neutralization,Basis

Labour,10%,100%,"Min or statutory wages as per Notification of labour department

of the concerned state government

F u e l (Furnace

Oil)",20%,607,IOC Retail Outlet

Electricity,25%,60%,"Unit Electricity rate as per Electricity Provider co/ SEB in th

concerned locality

Overheads,30%,50%,"End month/ end year RBI Index on machinery and M/c Tools and

transport equipment and parts on a simple average basis

Profit,15%,Nil,-

(emphasis supplied),,,

6. Since, the appellant sought to recover Rs.3,78,74,189/- from the respondent herein on account of over-payment allegedly mistakenly made under",,,

Contract â?" II, the respondent invoked the Arbitration agreement between the parties, which resulted in making of the Award.",,,

7. The relevant extract of the impugned award may now be set out, and the same reads as follows:",,,

â??Issue no. 2,,,

As per the Claimant, escalation charges are typically inbuilt in the contract to cover to cover year-to-year inflation and to ensure that the",,,

contract becomes attractive for potential bidders/conversion agent. The SAIL quantified and approved the first escalation rates after the,,,

conclusion of one year of work contract, the Respondent quantified and approved the same vide letter dated 05.02.2010 which was duly",,,

informed vide letter dated 24.05.2010 marked as Annexure IV of the petition. At the end of the second year as well, the said escalated",,,

amount was approved on 05.02.2011 and was duly paid by the SAIL vide their letter dated 08.02.2011. As alleged by the Claimant, the",,,

conversion charges were paid after due approval of Regional Office of the Respondent. The Respondent has however raised the recovery,,,

of the second escalation amount amount of Rs. 78,74,189.00 when they failed to make the payment, the said amount was recovered by the",,,

Respondent and communicated to them vide there letter dated 14.10.2014 issued by SAIL as the same was paid inadvertently.,,,

The Respondent submits that the Agreement dated 05.02.2009 is sacrosanct and is valid for three years from 05.02.2009 to 04.02.2012 and,,,

it is pertinent to mention as per their version the escalation rates in dispute shall be applicable only once after one year of date of work,,,

order. The Respondent has also referred to the various master circulars (for internal circulation) to show that the language of master,,,

circulars pertaining to the Escalation rates were different for different years indicative where the intent was to give for every year, the same",,,

was duly provided by the Respondent as in the Master Circular No. of 2003. Further, the Respondent clarifies that the terms and conditions",,,

towards escalation charges keep varying as per the changing price indices.,,,

Perusal of the escalation clauses of the previous years show that the Respondent is explicit in mentioning about its intentions that the,,,

escalation rates are to be revised at the end of one year alone. The principle of interpretation of contract essentially signifies that the words,,,

in the contract are to be construed in their ordinary and popular sense. The underlining principle being that parties to a contract, as",,,

reasonable men must have intended to use the word in its commonly used sense. If the wording of a clause is ambiguous, and one reading",,,

produces a fairer result than the alternative, the reasonable interpretation should be adopted. In view of the same, I am of the opinion that",,,

present contract is clearly non-ambiguous for this clause based on perusal of the circulars placed on record, therefore, the doctrine of",,,

Contra Proferentum relied by the Claimant has no basis and the argument of the Respondent that the said escalation charges were paid,,,

inadvertently and the same is liable to be returned as it would cause loss to public exchequer, is allowed. I see no merit in the plea to",,,

interpret the clause by stretch of imagination to extend the explicit escalation clause to mean otherwise. Further, the Arbitrator has no",,,

power to write the contract between the parties to give it a interpretation desired by either party except for a role to interpret the clause of,,,

the contract as per law. Further, the Conversion Agent was fully aware of the terms and conditions of contract. Simply an inadvertent",,,

payment/payment made under mistake of fact, if made by a party in a contract would not mean, that the clause in the contract would be",,,

interpreted differently. Additionally, the Claimant has not placed on records any law that prevent recovery of payment of dues under a",,,

contract determined by time. They only state the same is void ab initio but fail to draw attention and therefore the argument has no basis to,,,

stand.,,,

Award,,,

In view of the above, the deductions are justified on part of the SAIL done under mistake of fact and it has rightfully adjusted the amount",,,

under clause 19.9 of terms and conditions of Annexure IV of the agreements provided under contract dated 05.02.2009 and 18.02.2012.,,,

Hence the claim petition is dismissed. Regarding the loss of working capital incurred by the Claimant as alleged, the Claimant has only",,, provided the details and no other cogent evidences to the same and hence the same is not allowed under the present petition.â??,,,

(emphasis supplied),,,

8. While setting aside the impugned award, the learned Single Judge takes note of the fact that, firstly, the appellant had sought to place reliance on",,,

certain internal master circulars which were produced before the Arbitral Tribunal. These internal circulars were neither incorporated in the terms and,,,

conditions of the tender, nor in the contract entered into between the parties. The learned Single Judge, therefore, finds this to be a clear error on the",,,

part of the Arbitral Tribunal to have relied upon documents which do not form part of the binding contract between the parties. Secondly, the learned",,,

Single Judge observes that by reading Clause 8 of Contractâ?"II â?"â?" with which we are concerned, such that, at the end of the words â??at the",,,

end of one yearâ? , the word â??aloneâ? or â??onlyâ? should be understood to have been inserted, the Arbitral Tribunal has sought to vary the terms",,,

and conditions of the Contract. Clause 8 of the Contract â?" II with which the Arbitral Tribunal was concerned reads as follows:,,,

Escalation of Rates",,,

The conversion charges finalized in the tender shall be kept firm for 1 year w.e.f. the date specified for commencement of the work in the,,,

work order. At the end of one year, the conversion charges will be revised based on the following weightage and neutralization for each of",,,

the components: ... The base indices for the above elements will be considered as On date which is 60 days prior to the date of opening of,,,

tender, except for fuel which shall be deemed to be a date which is 15 days prior to the date of opening of the tender."" (emphasis supplied)",,,

9. The submission of Mr. Phoolka, learned senior counsel for the appellant is that the Escalation that the contractor was entitled to under Contractâ?"I",,,

amounted to only about 2% increment every year. However, under the formula adopted under Contract â?" II, the Escalation after the first year itself",,,

amounted to 11%. He submits that, in view of the higher escalation which the respondent was entitled to under Contract â?" II, the Escalation",,,

provided in Clause 8 of the Contract â?" II was only for one year, and not for the second year.",,,

10. We do not find any merit in this submission of Mr. Phoolka for several

reasons. Firstly, this was not even pleaded before the Arbitral Tribunal; this",,,

does not form the basis of the reasoning adopted by the learned Arbitral Tribunal for rendering the award. Moreover, as to what would be the",,,

escalation at the end of one year was something that neither party could have predicated upon, since the Escalation itself was based on rising prices of",,,

labour etc in the future.,,,

11. The submission of Mr. Phoolka is that though this argument was raised before the learned Single Judge, she has not dealt with the same. We are",,,

not impressed by this argument for the reason that it is for the appellant to raise its defences before the Arbitral Tribunal, and none could have been",,,

added at the stage of hearing of objections under Section 34 of the Arbitration and Conciliation Act, 1996. The learned Single Judge was, therefore,",,,

not obliged to examine the said submission of the appellant/ objector. Even in an appeal against an order or a judgment, the Court may not permit",,,

raising of fresh pleas â?" though, an appeal is considered as a continuation of the original proceedings, and â?" unless the scope is restricted, the",,,

appellate Court may re-appreciate the facts and legal submissions. However, that is not the scope of objections under Section 34 of the Act. The",,,

Court while dealing with the objections to the award does not sit as a court of appeal and the scope of its enquiry is undertaken within the bounds of,,,

Section 34.,,,

12. We find ourself in complete agreement with the reasoning adopted by the learned Single Judge while setting aside the Award by the impugned,,,

judgment. We are, therefore, not inclined to interfere with the impugned order, and dismiss the present appeal.",,,

13. The result of the impugned Award being set aside is that the respondents have failed to provide any justification for the recovery of Rs.,,,

378,74,189/- sought to made from the respondents in respect of the Contractâ?" II. Resultantly, the respondent is entitled to the said amount from the",,,

date of recovery at Simple Interest @ 9% per annum till the amount is recovered.,,,

