
(2012) 03 DEL CK 0651
In the Delhi High Court
Case No : O.M.P. 428 of 2005

Sur Iron and Steel Company (P) Ltd. APPELLANT
Vs
M/s Era Construction (India) Ltd. RESPONDENT

Date of Decision : 13-03-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Sales of Goods Act, 1930 — Section 21, 28(1), 32, 36, 37

Citation : (2012) 03 DEL CK 0651

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Raghavendra M. Bajaj and Mr. Samar Singh Kachwaha, for the Appellant; Manoj K. Singh, Nilava Banerjee and Ms. Niharika Singh, for the Respondent

Judgement

Justice S. Muralidhar

1. The challenge in this petition is u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act") is to an Award dated 8th September 2005 passed by the learned Sole Arbitrator in the dispute between the Petitioner M/s. Sur Iron and Steel Company (P) Limited and the Respondent M/s. Era Construction (India) Limited arising out of a purchase order ("PO") placed by the Respondent with the Petitioner by its letter dated 30th November 2000 for the supply of 12 TPH Automatic Crushing and Screening System.

Background Facts

The PO aforementioned set out the price schedule of the goods to be supplied as well as the terms and conditions. The payment terms laid down in the PO were as under:

Payment Terms:

Advance equivalent to 10% in value of equipment within 7 days of acceptance of

order.

70% of the value of equipment within 7 days from the receipt of the plant at our NTPC site Talcher.

10% of the value of equipment within 7 days from the date of commissioning.

Balance 10% shall be released after 6 months of successful commissioning of the plant, after a B.G. against performance of plant for further period of 6 months

2. According to the Petitioner, by a letter dated 4th December 2000 it accepted the above PO placed by the Respondent and accepted the price schedule. However, it is stated that other terms and conditions were accepted subject to certain modifications. The changes made by the Petitioner were to the following effect:

- an express provision stipulating that storage bin, chutes and hoppers and civil work for crusher house, screen and storage bin would be constructed by the Respondent;

- the last 10% payment would be paid within seven days from commissioning subject to a bank guarantee being executed by the claimant;

- 70% of the equipment value along with 100% excise duty would be kept ready along with the details of the draft, whereupon the claimant would dispatch the equipment;

- rotary screens would provide certain aggregates (not applicable to the facts of the present case);

- warranty for 12 months, excluding fast moving items.

3. The case of the Petitioner was that the PO was essentially a supply order and there was no provision therein requiring the Petitioner to undertake erection and commissioning of the equipment. The Petitioner claims that the Respondent received the above letter dated 4th December 2000 on 8th December 2000 and by advancing the first installment of 10% of the contracted amount of Rs. 1,98,450/- on or around 27th December 2000 the Respondent impliedly accepted the modified terms and conditions of the contract for supply of the machinery as communicated by the Petitioner on 4th December 2000.

4. The case of the Respondent however was that it never received the letter dated 4th December 2000 and that the express terms and conditions of the PO included erection and commissioning of the machinery by the Petitioner to the satisfaction of the Respondent.

5. The Petitioner states that on 13th January 2001 it sent the Respondent the civil drawings. This was however denied by the Respondent. The Petitioner states that on 27th February 2001 the equipment was dispatched by the Petitioner to the Respondent through M/s. Reliable Roadway Wings. According to the

Petitioner, the equipment was dispatched in three trucks. According to the Petitioner, on 7th March 2001 the three trucks downloaded the equipment at the Talcher site of the Respondent. Reliance is placed on the receipt stated to have been contained stamp of the Respondent which has been produced in the arbitration proceedings.

6. The case of the Petitioner is that with the Respondent having received the equipment it is obliged to pay the Petitioner 70% of the value of the equipment within seven days from its receipt at site. However, the Respondent failed to make such payment. According to the Petitioner, in March 2001, its representative Mr. J. Ganguly handed over the mechanical drawings to the Respondent. The Petitioner stated that by this time the foundation work at the site had not been completed by the Respondent. In June 2001 two engineers, Mr. J. Ganguly and Mr. Subrata Maithy visited the Talcher site of the Respondent. According to the Petitioner, on that date, i.e., 13th June 2001 a joint-site observation was undertaken by both the Petitioner and the Respondent. The Petitioner was represented by Mr. S. Maithy and Mr. J. Ganguly and the Respondent by Mr. D.C. Mandolia and Mr. Manoj Kumar Sinha. According to the Petitioner, the minutes of the joint-site observations meeting which revealed that the civil work at the site was not completed and that 100% of the material supplied by the Petitioner was ready. However, it was agreed that commissioning would begin only after the foundation was completed.

7. According to the Petitioner, on 18th July 2001 a meeting was held between Mr. C.R. Bose representing the Petitioner and Mr. P.P. Mainra representing the Respondent. Mr. Mainra informed Mr. Bose that the foundation work had been completed. However, on actual inspection, it was not found to be true. On 12th September 2001 Mr. S.C. Chandra representing the Petitioner visited the site and found that the site was not yet ready. Mr. Chandra informed the Respondent that unless the foundation work had been completed it could not be possible to commence the erection and commissioning. The Petitioner stated that it again wrote to the Respondent on 15th September 2001 seeking confirmation whether the Petitioner's engineer could be sent on 21st September 2001 for erection of the plant. There was no response from the Respondent that the site was ready. On 15th October 2001 the Petitioner reminded the Respondent about balance amount of 70% of the contract price.

8. The case of the Respondent was that they had written three letters dated 26th March, 21st June and 4th November 2001 to the Petitioner. However, only photocopies of these letters were produced in the arbitral proceedings. The Petitioner denied the receipt or the existence of these letters.

9. With the Respondent not making payment, the Petitioner invoked the arbitration clause. The Managing Director of the Respondent appointed Mr. J.L. Khushu as the sole Arbitrator. He was the Director (Technical) of the Respondent. The Petitioner filed a statement of claim in the sum of Rs. 37,21,695.99. Although the learned Arbitrator passed an interim order on 26th April 2003

appointing a Receiver to take charge of the goods of the Petitioner lying at the site, the said order could not be worked out since the parties failed to agree on the name of an independent Receiver. By way of evidence, the Petitioner filed in the arbitral proceedings the affidavits of Mr. R. Sur, Mr. J. Ganguly, Mr. S.C. Chandra and Mr. C.R. Bose. The Respondent filed affidavits of Mr. V.K. Walia, Mr. P.P. Mainra and Mr. D.C. Mandolia. The witnesses of both parties were cross-examined.

The arbitral proceedings

10. In the impugned Award dated 8th September 2005 the learned Arbitrator addressed the following issues:

- (i) Were the rights and obligations of the parties to be decided by a supply order dated 30th November 2000 or the Petitioner's letter dated 4th December 2000?
- (ii) Was there any breach of contract by the Respondent on account of failure to make payment of 70% of the cost of machinery to the Petitioner?
- (iii) Was there any breach committed by the Petitioner on account of delay in supply of equipment to the Respondent?
- (iv) Who is the owner of machinery supplied but not paid?

11. The learned Arbitrator, in response to issue No. (i), held that there was no common agreement finally reached between the parties as regards the changes suggested to the PO by the Petitioner in its letter dated 4th December 2000. Consequently, the rights and obligations of the parties were to be governed by the PO dated 30th November 2000. In regard to issue Nos. (ii) and (iii), after referring to Sections 21, 32 and 41 of the Sale of Goods Act, 1930 ("SGA"), it was held that the first breach of contract was by the Petitioner in not giving proper delivery of the equipment to the Respondent. It simply "dumped" machinery in the form of wooden boxes at the delivery site. u/s 32 SGA, delivery of the goods and payment of the price were to be performed concurrently. As regards issue No. (iv), it was held that the delay in supply by more than four weeks could not be considered as breach by the Petitioner as time was not the essence of the contract. The title in the goods had not passed from seller to the buyer since Sections 21, 32 and 41 SGA had not been fulfilled with. The unpaid seller had a lien on the goods and a right of resale u/s 46 SGA. Since the property in the goods did not pass to the buyer, the sale of goods by seller could not be at the risk of purchaser.

12. As regards Claim No. 1 in the sum of Rs. 37,21,695.99 the learned Arbitrator awarded the Petitioner a sum of Rs. 53,635/- for freight of goods. Claim No. 2 for pre-reference interest, pendente lite interest and future interest at 30% per annum and Claim No. 3 for cost of arbitral proceedings and cost of incidentals were rejected. As regards the counter claim No. 1 of the Respondent for advance payment of Rs. 1,98,450/- along with interest of Rs. 62,512/- at 18% per annum from 1st January 2001, the learned Arbitrator awarded Rs. 1,98,450/-. Counter

claim Nos. 2, 3 and 4 were rejected. Correspondingly, the learned Arbitrator held that the Petitioner was to receive a sum of Rs. 53,635/- from the Respondent as claim No. 1 and the Respondent was to receive payment of Rs. 1,98,450/- under counter claim No. 1. Consequently, the Respondent was to receive the net sum of Rs. 1,44,815 from the Petitioner.

Submissions of counsel

13. Mr. Raghavendra M. Bajaj, learned counsel appearing for the Petitioner laid much emphasis on the joint-site observation meeting which showed that the machinery had been received and was accepted by the Respondent in the presence of representatives of both the parties. Since the foundation work was not ready, the erection and commissioning could not begin. It is submitted that the learned Arbitrator only partially relied upon the documents to conclude that the site was not ready. The Respondent had alleged short supply of the equipment. This was later given up by the Respondent in the written arguments before the learned Arbitrator. The originals of the three letters dated 26th March, 21st June and 5th November 2011 relied upon by the Respondent were never produced by it. In particular, it is submitted that findings that there was no joint verification of the goods and that the equipment was not opened was contrary to the joint-site observations dated 13th June 2001. In any event there was no requirement in the contract to undertake any such joint site verification. It is submitted that the finding that the Petitioner had filed to supply all the equipment was contrary to the depositions of the Petitioner's witness Mr. J. Ganguly which showed that the goods were lying in an unpacked condition when he visited the site. Further there was no request made by the Respondent for inspection/inventory of the goods. The finding that the equipment was dumped at the site was contrary to the contemporaneous correspondence between the parties. It showed the receipt of the equipment by the Respondent at the site on 7th March 2001. It is submitted that the finding that there was no proper delivery under Sections 21 and 41 of the SGA and that the contract was governed by Sections 32 of the SGA thereby not requiring the Respondent to pay 70% balance payment was patently incorrect. Lastly, it is submitted that on issue No. (iv) while the learned Arbitrator treated the Petitioner as an "unpaid seller" with a lien over the goods and the right to resell the goods, the Petitioner was erroneously denied the entitlement to receive any monies for the difference in the resale value. It is further submitted that even assuming that there was wrong delivery in terms of Sections 36 and 37 of the SGA it was apparent that the goods were accepted on 2nd/7th March 2001 and again on 13th June 2001 and had to be accordingly paid for by the Respondent. It was contended that u/s 42 of the SGA the retention of the goods after a lapse of a reasonable period of time without rejecting them would amount to deemed acceptance. Under Sections 45 and 46 of the SGA the seller only exercises a lien on the goods if it was in possession thereof.

14. It is pointed out by learned counsel for the Petitioner that during the

pendency of the present case the Petitioner was directed to take back the equipment and having sold with the depositions and that the proceedings be deposited in this Court. However, despite advertisement, the equipment could not be sold and the Petitioner therefore claims the balance amount with interest.

15. On behalf of the Respondent, it is pointed out by Mr. Manoj K Singh, learned Counsel, that the letter dated 28th February 2001 of the Petitioner made it clear that only one truck out of the three trucks left for the destination and the remaining two trucks were still at the godown of the Petitioner. There was in fact no documentation to show that the entire consignment in the three trucks reached the location and that the equipment was thereafter handed over to the Respondent. Ultimately on 5th November 2011 the Respondent rejected the equipment which reached the site. It was further pointed out that notice in the present petition was confined to the limited question whether there was any joint inspection of the consignment as contended by the Petitioner. It is maintained that there was no joint inspection of the consignment allegedly supplied by the Petitioner. It was only a joint-site observation to finalize the sequence of the work to be done by both the parties. It is submitted that the learned Arbitrator was required to decide the dispute in accordance with the substantive law in force in India in terms of Section 28 (1) (a) of the Act. This substantive law was the SGA which the learned Arbitrator correctly applied it. Consequently, the impugned Award did not call for any interference.

Scope of the present petition

16. As regards the scope of the present petition, the learned counsel for the Respondent is right in his contention that the order dated 23rd November 2005 of this Court restricts it. The said order which reads as under:

Heard learned counsel for the Petitioner at length. A number of grounds sought to be raised by the Petitioner do not fall within the parameters of Section 34 of the Arbitration and Conciliation Act, 1996.

After some hearing, learned counsel for the Petitioner confined his submission to the plea that the Award is against the public policy inasmuch as a concession is recorded on behalf of the Petitioner of their being no joint inspection while no such concession can be found from the material on record. It is submitted that the consequence of that finding is that the Arbitrator came to the conclusion that the material was lying packed and physical possession of goods had not been handed over. The legal conclusion arrived at under the Sales of Goods Act is based on the presumption that both the parties agree that they did not have any joint inspection.

Learned counsel in this behalf has referred to the records, before the Arbitrator, more specifically at page 32 of Volume -1 to contend that such a joint inspection had in fact occurred and this document had been put to the witnesses.

Learned counsel for the Petitioner in this context also makes a submission that

the Arbitrator has come to a finding that the Petitioner is entitled to freight and in view thereof the property in goods had passed to the Respondent.

Let notice issue to the Respondent restricted to the aforesaid issues through ordinary process, registered AD post, courier and dasti as well, returnable on 10th March 2006.

A copy of the order to accompany the notice so that the reply, to be filed, should be confined only to the aforesaid issues.

17. Later on 6th March 2007 this Court was informed that despite the order dated 10th March 2006, the Petitioner could not sell the equipment.

Joint site inspection

18. The document dated 13th June 2006 on which a considerable reliance has been placed by learned counsel for the Petitioner reads as under:

Joint site observation held at Crusher Site, NTPC, Kaniha on 13th June 2001:

Person present

1.

Mr. D.C. Mandolia (P.M)

1.

Mr. Subrata Maity, Sr. Engineer

2.

Mr. Manoj Kr. Singh Era Constn (I) Ltd. NTPC/Kaniha

2.

Mr. J. Ganguly, Sr. Engineer (Sur Iron & Steel Co. (P) Ltd. 15, Convent Road, Kolkata-14.

Observation (Point wise)

Sequence of System Installation

a) Storage bin

b) Feeder

c) Primary Crusher

d) Rotary screen with stock piling conveyers & over sizefeeding conveyer (the secondary crusher)

e) Secondary crusher

f) Return conveyor (To screen)

Pending jobs (By Era Constn.)

Jobs

Remarks

1.

Storage bin

Drawings study complied Foundation yet not completed.

2.

Feeder

Material ready (by Sisco) Foundation not ready.

3.

Primary Crusher

Material is ready by Sisco. Foundation under progress.

4.

(i) Rotary screen

Material ready (by Sisco) Chutes are not ready. Foundation needs partly rectification. (Over size conveyor pocket).

(ii) Stock piling conveyors

Material is ready (by Sisco) but not fitted. Chutes are not ready.

(iii) Oversize feeding Material is ready (by Sisco) conveyor but not fitted. Chutes are not ready.

5.

Secondary Crusher

Material ready (by Sisco) Foundation is also ready.

6.

Returned in conveyor from Secondary to rotary screen

Foundation is ready. Material ready (by Sisco).

7.

Return chutes

Material is not ready.

Over all Remarks

1. All chutes should be fabricated.
2. All foundation should completed properly.

Commissioning will be done as mentioned in the sequence discussed at the beginning, otherwise misalignment would be happened and waste the material, labor and time.

Sd/-

sd/-

Mr. D.C. Mandolia (P.M)

Mr. Subrata Maity, Sr. Engr.

Era Constn (I) Ltd. NTPC/TSTPP/Kaniha

Sur Iron & Steel Co.(P) Ltd. Kolkata-14.

Sd/-

sd/-

Mr. Manoj Kr. Sigh

Mr. J. Ganguly, Sr. Engr.

Era Constn (I) Ltd. NTPC/TSTPP/Kaniha

Sur Iron & Steel Co.(P) Ltd. Kolkata-14.

19. It requires to be noticed straightway that document is titled as "joint-site observation" and "not joint inspection of the equipment". The second point is that the above note sets out the sequence of system installation and various parts of TPH. However, there is nothing to indicate that each of those parts was in fact received in a good condition. In the list of pending jobs of the Respondent, as regards the most of equipments it is stated either that the "material was ready" or that "foundation was not ready". It is not clear from the above note whether in fact the equipment received at the site was actually unpacked, opened and inspected.

20. In his cross-examination, Mr. Sur mentioned that civil works for crusher house, storage bin and foundation was part of the scope of the Respondent's work and that document dated 13th June 2001 mainly dealt with it. Mr. J. Ganguly a witness of the Petitioner deposed as under:

I state that I was a part of the joint meeting between the parties on 13th June 2001. It was decided therein that as the Respondent had not completed the foundation work as per the drawing supplied by us, the erection and commissioning would only take place after the said work was completed by the Respondent. At the said meeting the sequence of work to be done by both the parties was also agreed upon.

21. In his cross-examination, Mr. Ganguly gave the following answers to certain specific questions:

Question No. 8: Did you unpack the machine in the presence of the officials of the Respondent?

Answer: When I visited the site the machine was lying in an unpacked condition.

Question No. 9: Did you give anything in writing at the site to the officials of the Respondent informing them that the machine was lying in an unpacked condition?

Answer: No, however they were verbally informed.

Question No. 10: Did you make inventory of the machine in the presence of the officials of the Respondent?

Answer: No.

Question No. 11: Did you inform your own officials that the machine at site was lying in an unpacked condition?

Answer: Yes.

Question No. 12: Who did you tell this?

Answer: I had informed our General manager (Marketing) Mr. R. Sur.,

Question No. 13: Did you inform him in writing or verbally?

Answer: Verbally.

22. Then there is the evidence of Mr. Mandolia, a witness for the Respondent. In his affidavit by way of examination-in-chief he stated in para 4 as under:

4. I state that the claimant admittedly unduly delayed in the dispatch of equipment. As against the stipulated four weeks of delivery period of the equipment was supplied 13 weeks later, and that too only one third part, thus causing irreparable loss to the Respondent, by disrupting execution of work and for which the claimant is liable to compensate the Respondent, as also intimated vide letter dated 26th March 2001 as Exhibit (E-1). As per bill No. 25040/2/2011 dated 28th February 2001 & Challan No. 3274 dated 27th February 2001 the claimant has supplied only one set of stock piling conveyors along with motor reduction gear, structural compete with nylon belt whereas it was ordered for three sets. The short supply of two sets amounting to Rs. 2,60,000/- only has not been supplied till date. The contention of claimant is thus malafide and contravene to the normal course of business (Annexure P-4 dated 28th February 2001 submitted by the claimant proves that the part consignment is still lying in their godown on dated.

23. Mr. Mandolia was cross-examined and he was shown a note of joint- site observation dated 13th June 2001 (which was at pages 24 and 25 of the statement of claim). He admitted his signature on the said document. However,

he stuck to his stand that the entire equipment had not been received. The following answers to the questions were as under:

Q-46: Is it correct to say that the equipment was packed as it is?

Ans.: Yes

Witness is shown page 24 and 25 of the statement of claim titled joint site.....

Q-47: Except for the Serial No. 7 - titled return chutes, all the materials supply by SISCO were ready?

Ans.: No. My affidavit stating that there was short supply is correct.

Q-48: Did you ever raise any objection that there was short supply?

Ans.: Yes.

Q-49: Is there anything in the joint site observation that you raised objections?

Ans.: No.

Q-50: Who did you raise this objection with?

Ans.: It is not my job but the job of the Project Manager.

24. On a reading of the above evidence it is possible to conclude, as the learned Arbitrator has, that while there was a joint site inspection, there was no inspection of the equipment as such. The other conclusion that the equipment received was not complete, and that in any event it was lying in an unpacked condition at the site, is also a possible one to deduce on the documents placed on record and the depositions of the witnesses.

25. There is some merit in the contention of learned counsel for the Respondent that although it is contended the consignment was sent by way of three trucks, in fact it was not. The relevant portion of the letter dated 28th February 2001 sent by the Petitioner to the Respondent reads as under:

Now the transporter is insisting for 2 more waybills as they have provided one for each truck. It is also gathered from them that one truck has already left for destination with the said waybill and other two trucks are still detained at their godown for want of waybill.

Please provide us immediately with two other waybills to enable us to hand over them to the transporter.

26. The above letter indicates that if the other two waybills were not handed over to the Petitioner then the entire equipment could not reach the site. The invoices accompanying the lorry did not bear any stamped receipt of the Respondent. Nothing appears to have been elicited from the witness for the Respondent to dislodge the statement in para 4 of his affidavit that the Petitioner had supplied only one set of stock piling conveyor along with motor reduction gear etc.

whereas the Respondent had ordered three sets. The only question asked was as under:

Q-45: I put it to you that the statement in paragraph 4 of your affidavit that the supply of the equipment in March 2001 led to a disruption in the execution of work and caused irreparable loss is, therefore, incorrect?

Ans.: Your suggestion is wrong. I stand by my statement.

27. In the circumstances, the conclusion drawn by the learned Arbitrator in the impugned Award that the first breach of contract was by "claimant seller" by not giving proper delivery of equipment to the Respondent under Sections 21 and 41 of the SGA cannot be said to be erroneous.

28. Section 21 of the SGA provides that where the contract is for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them "into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof." The note of the joint-site observation dated 13th June 2001 does not constitute sufficient notice of compliance by the Petitioner with the requirement of Section 21 of the SGA. Again u/s 41 of the SGA the "buyer's right of examining the goods" envisages "a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract." The evidence before the Arbitrator did not conclusively demonstrate that the Respondent had an opportunity of inspecting the complete equipment as envisaged in the above provision.

29. The Petitioner also was unable to prove that the letter dated 4th December 2000 suggesting modifications to the PO was actually delivered to the Respondent. As pointed by the learned Arbitrator, the Petitioner itself relied on the PO dated 30th November 2000 and 10% advance has also been paid on the basis of the PO. Further, since Section 21 of the SGA and 41 of the SGA had not been fulfilled, the property in the goods did not pass to the buyer. Therefore, the condition preceding the payment of 70% of the value of equipment had not been fulfilled. The impugned Award cannot be stated to be contrary either to the terms of the contract or the governing law which is the SGA. As regards the decision in regard to the counter claims, the learned Arbitrator was justified in requiring the Petitioner to return the earnest money and security deposit after adjusting the freight charges payable to the Respondent. There are no grounds made out for interference with the impugned Award dated 8th September 2005. The petition is accordingly dismissed with costs of Rs. 20,000 which will be paid by the Petitioner to the Respondent within four weeks.