
(2011) 04 DEL CK 0202

In the Delhi High Court

Case No : FAO (OS) No. 258 of 2010 and CM No. 7195 of 2010

Thyssen Krupp Werkstoffe GMBH

APPELLANT

Vs

Steel Authority of India Ltd.

RESPONDENT

Date of Decision : 07-04-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 18, 27, 34, 37, 37(1)(6)

Citation : (2011) 2 ARBLR 148 : (2011) 123 DRJ 724

Hon'ble Judges : Vikramajit Sen, J; Siddharth Mridul, J

Bench : Division Bench

Advocate : Rajiv Nayyar, Arvind Kumar and Shikha Sarin, for the Appellant; Sanjay Jain Ruchi Gaur Narula, Prabhsahay Kaur, Vivek Kishore and Shweta Mishra, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—This Appeal has been filed u/s 37(1)(6) of the Arbitration & Conciliation Act, 1996 (A&C Act for short) assailing the judgment dated 5.2.2010 delivered by the learned Single Judge. The disputes arose in 1995, and despite the existence of an arbitration clause, is still awaiting quietus. We may mention that the judgment is a very detailed one in which all the grounds have been meticulously and minutely dealt with, virtually as if Objections necessitated a hearing akin to that of a Regular First Appeal. In this regard, we may reiterate the prefatory observations made in Shree Vinayak Cement Clearing Agency Vs. Cement Corporation of India, to the effect that it is clearly impermissible, in view of the provisions of Section 34 of the A&C Act, to require the learned Single Judge seized with the Objections, to peruse the complete records with a view to reappraise the materials, including evidence available on the record of the Arbitral Tribunal. It had further been observed that the jurisdiction or the scope of inquiry of the Appellate Court u/s 37 of the A&C Act is even more restricted and limited.

2. Mr. Rajiv Nayyar, Senior Counsel for the Appellant, has canvassed three

grounds before us. The first pertains to the law of Discovery and as to whether it is also available in arbitral proceedings. In this regard, the Arbitral Tribunal had arrived at the conclusion that the ICC Rules do not contemplate discovery of document and that the A&C Act also does not preserve these powers for use of the Arbitral Tribunal. This opinion would certainly justify a challenge u/s 34 of the A&C Act since the view of the Arbitral Tribunal would be in conflict with the public policy in India. Arbitrators seized with disputes which relate to India would be best advised to give primacy to the legal regime prevailing in India so as to insulate their verdict/award from protracted challenge in Indian Courts.

3. While latitude is granted in the fascicules of Chapter-V of the A&C Act to the procedure to be pursued by the Arbitral Tribunal, it would not be legally sound for the Arbitral Tribunal to conclude that the provisions regarding Discovery are not available to any of the adversaries before it. The learned Single Judge, in the impugned Order, has corrected this legal error concluding that "the Arbitrator has erred in holding that the ICC Arbitration Rules did not have provision for discovery and further that the Act, 1996 did not contain any provision for discovery of documents. The Arbitrator's reasoning that Section 27 of Act, 1996 gave power for discovery only in certain circumstances is also, in my view, not correct". Indeed, the learned Senior Counsel for the parties does not challenge this legal position. Learned Senior Counsel for the Appellant, however, contends that inasmuch as the application for Discovery was turned down and rejected by the Arbitral Tribunal, Section 18 of the A&C Act has been transgressed inasmuch as the Appellant has not been given a full opportunity to present its case.

4. It would be convenient to now narrate the facts of the case. The Appellant had placed an order for the supply of Steel Plates on the Respondent. It has not been controverted that the Appellant had breached this contract although an attempt to do so had been made before us. The impugned judgment clearly states that the Appellant made no denial on this score. The Respondent conveyed a Claim for Damages to the Appellant and invoked the Arbitration Clause, as a consequence of which proceedings were conducted by the Arbitral Tribunal. The contention of the Respondent was that in order to mitigate losses, it entered into two contracts with Stemcor Ltd. London on 18.9.1995 and the third with M/s. Seco, USA. The original claim was for US\$ 1.13 million. However, on the first date fixed for cross-examination of the Respondent/Claimant Witnesses, the Claim was amended to read in the following fashion:

As a consequence of the Defendant's breach of the contract, the Claimant has suffered huge losses as indicated herein under:

A. Loss On Account of Diversion To Other Exports Contracts Loss (USD)

Contract No.C-6072 a/c M/s Stemcor, quantity diverted 1623 MT @ USD 345/MT
1623 * (408-345) 102,249

Contract No.C-6073 a/c M/s. Seco, quantity diverted 4857 MT @ USD 345/MT
4857 * (408-345) 305,991

Additional Expenses incurred for handling & transportation for above diversion
17632

Sub Total ?(A) 425872

B. LOSS ON ACCOUNT OF DIVERSION TO DOMESTIC SALES

Quantity Diverted 3772 MT

Quantity Sold in Domestic Market 2871 MT

Price realized in home sales Rs.13218 or USD 377 per MT Loss in realization on a/c of domestic sales $2871 * (408 - 377) = 89001$

Additional expenses incurred for handling and transportation for above diversion
9605

Loss on a/c of unrealized Export incentives @ 10% of FOB value $(3772 * 408) = 153898$

Sub Total-(B) 243859

C. LOSS ON ACCOUNT OF UNSOLD MATERIAL

Quantity remaining unsold 901 MT $901 * 408 = 367608$

D. Ground rent @ USD 1 per MT per month = 71079

E. Administrative expenses for the contract @ USD 2/MT $10000 * 2 = 20000$

Grand Total A+B+C+D+E = USD 11,28,418

F. Interest @ 18% from 21.10.95 till receipt of the amount claimed

G. Costs and Expenses

H. Any other amount(s) the Sole Arbitrator and/or ICC's Court of Arbitration may deem fit and proper.

5. After the conclusion of hearing, in respect of these Claims, the Arbitral Tribunal published the following Award:

52.1 (a) Under Claim A I award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL the sum of US\$ 425,872.00 made up as follows:

i) Loss on account of diversion to Exports contract C-6072 to STEMCOR UK LTD. - US\$ 102,249.00 and Contract C-6073 to SECO - US\$ 305,991.00

ii) Additional expenses for handling and transportation - US\$ 17,632.00

52.1(b) Under Claim B I award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL the sum of US\$ 93,803.50 made up as follows:

i) Loss on account of diversion to Domestic Sales - US\$ 89,001.00

ii) Additional handling and transportation expenses - US\$ 4,802.50

52.1(c) Under Claim C I award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL the sum of US\$ 183,804.00 being loss on account of unsold Materials.

The grant total from Claims (A) + (B) + (C) is US\$ 703,479.50

52.1(d) I award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL interest at the rate of 5% per annum on the sum of US\$ 703,479.50 as from 21.04.1998 (the date when Notice of Arbitration was given by SAIL to KRUPP) till full payment.

52.1(e) I award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL (a) one-half (1/2) of the sum of US\$ 80,000 constituting the costs of the Arbitration as well as (b) one-half (1/2) of the reasonable legal and other costs incurred by the claimant SAIL and parties for this Arbitration.

52.1(f) I also award and adjudge that the Respondent KRUPP shall pay to the Claimant SAIL the full costs given to them vide my order dated 03 March, 1999.

6. The question that immediately arises is whether any prejudice has been caused to the Appellant as a consequence of the Arbitral Tribunal having rejected its application for Discovery, which was made by a letter dated 4.12.1998 addressed to the Arbitrator, the salient portion of which reads as follows:

The Respondents request that necessary directions for discovery and inspection be passed by the Learned Arbitrator in respect of the following categories of documents:

- 1) All documents, books, records (including correspondence) pertaining to matters raised in the pleadings by the Claimant.
- 2) All documents, books, records pertaining to the disposal by the Claimant of the 10000 MT of steel plates that were the subject matter of the contract between the Claimant and the Respondent ("the steel plates").
- 3) All documents, books, records (including correspondences between Claimant, M/s. Stemcor, SGS and the port authorities) concerning the steel plates.

7. We are in agreement with the learned Single Judge that the application, as presented, was indeed vague being in the nature of a roving or fishing enquiry. Indian law frowns on such endeavors. It is patently clear that the Appellant was aware of the fact that the Respondent had entered into a contract with Stemcor. Mr. Sanjay Jain, learned Senior Counsel for the Respondent, has stated that the documents, of which Discovery was prayed for by the Appellant, were duly filed before the Arbitral Tribunal as annexure/accompaniments of the Amended Claim filed on 12.4.1999. Since this position has been disputed by Mr. Nayyar, we have inspected the original records filed before the learned Single Judge and we find that the submission of learned Senior Counsel for the Appellant is not correct. It was in these circumstances that the learned Single Judge has dismissed these Objections holding that even though the Arbitral Tribunal had declined to permit

Discovery on the inaccurate and specious ground that the ICC Rules as well as the A&C Act do not contemplate such directions, no prejudice had in fact been caused to the Appellant for the simple reason that the three subject Contracts were actually, even though belatedly filed in the Arbitral proceedings. The learned Single Judge has also noted the stand taken on behalf of the Appellant, viz. that since the amendment of the claims of the Respondent stood reduced, the Appellant had no objection to it being allowed. The learned Single Judge has also noted the complete absence of any cross-examination by the Appellant vis-à-vis the three contracts. In the event, the Award grants damages by deducting from the price contracted between the parties the price paid/received by the Respondent from the two contracts with Stemcore Ltd. and the third contract with M/s. Seco. The learned Single Judge was entirely correct in rejecting the Objections in all aspects pertaining to the application for Discovery. It is not the province of the learned Single Judge to go into minute details of the evidence on the record of the Arbitrator. It is well-settled, even in the context of the 1940 Act, that it is the Arbitrator who has to appreciate evidence and that minor mistakes even in this regard are not amenable to correction by the Courts. The learned Single Judge, as are we, had been confronted with a case where there was no evidence in existence. Even so, as we have already observed, by a detailed judgment spanning 52 pages and 88 paragraphs, the learned Single Judge has gone threadbare into every detail and nuance of the dispute.

8. The second ground for assailing of the impugned Order is that the amendment ought not to have been allowed when the case was fixed for cross-examination of the Witnesses. As we have already noted above, the learned Senior Counsel for the Appellant in the Arbitral Proceedings had recorded, with alacrity and for good reasons, the absence of any objection or remonstrance against the amendment of the downsizing of the claim from the side of the Appellant, obviously because the claim for Damages had been reduced. The copies of the contracts between the Respondent on the one side and Stemcor Ltd. and M/s. Seco were filed along with the application. Despite an opportunity to cross-examine the claimants/Respondent witness having been extended to the Appellant. The opportunity was not availed of. This being the position, the connection of the three contracts with the claim for damages could not have been contested. In these premises, no ground for interference with the Award is made on this score.

9. Thirdly, it is contended that there were irregularities so far as the cross-examination of the Respondent's Witnesses were concerned. This does not fall within the ambit of Objections u/s 34 of the A&C Act and certainly are not entertainable u/s 37.

10. Appeal is devoid of merits and the same is dismissed. The brevity and discipline with which Mr Nayyar conducted arguments on behalf of the Appellant persuade us not to impose Costs, even though the Appeal is against concurrent findings. CM No. 7195/2010 is also dismissed.