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(2019) 03 GAU CK 0086

In the Gauhati High Court

Case No : Arb.A. 12 Of 2016

Union Of India And Anr — APPELLANT

Vs

M/S Jyoti Forge Andfabrication — RESPONDENT

Date of Decision : 18-03-2019

Acts Referred:
Arbitration And Conciliation Act, 1996 — Section 34, 34(2), 37

Citation : (2019) 03 GAU CK 0086

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : B N Gogoi

Judgement

1. Heard Mrs. U. Chakraborty, learned Senior Standing Counsel, N.F. Railways, appearing for the appellants. I have also heard Mr. M. Biswas, learned counsel representing the respondent.

2. This appeal has been preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter, in short, the Act of 1996) assailing the judgment and order dated 19.05.2014 passed in Misc. (Arbitration) Case No.598/2009, whereby the learned District Judge, Kamrup (Metro), Guwahati had rejected the application filed by the appellants under Section 34 of the Act of 1996 praying for setting aside the arbitral award dated 24.08.2009.

3. The facts of the case, briefly stated, are that the appellant No.1/ N.F.Railway had entered into a contract agreement bearing No.CON-LD/75 with the respondent on 08.11.1995 for execution of the contractual work viz. "Strengthening/modifying existing MG Steel Plate Girder Clear Span 18.30 meter 15(fifteen) numbers of total spans to suit BG Station, fabrication, supplying and erecting grillage steel, fixing bearing (elastomeric pad or Steel Slide Bearing) linking mixed gauge BG & MG Tract complete with guard rails including painting girders for conversion of Lumding-Dibrugarh into BG". The original value of the contract was Rs.55,45,125/-. However, after the signing of the contract

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agreement, there was substantial change in the scope of the work which had envisaged variation of the quantity beyond 25% of the scheduled quantity. Notwithstanding the change in quantity, the respondent/ contractor had executed the work with the changed specification and completed the same on 31.03.1998.In view of the fact that there was change in the scope of the work envisaged by the original contract, the Tender Committee of the N.F.Railway had met on 27.02.1998 so as to consider the variation of the items and for discussion of rates based on negotiation with the contractor. In its resolution dated 27.02.1998, the Tender Committee (T.C.) had noted that there was vitiation of an amount of Rs.11,12,198/- due to execution of quantity 25% in excess of scheduled quantity. The Tender Committee was of the view that the overall value of the contract agreement stands at Rs.1,95,50,065.20 and therefore, after deducting the rebate of Rs.1 lakh and the vitiation amount under the contract, the respondent would be entitled to receive a sum of Rs.1,94,50,065/-.

4. It appears that in terms of the recommendation made by the Tender Committee in its meeting held on 27.02.1998, a subsidiary contract agreement (SCA) was entered into by and between the parties on 29.06.2000. As per Clause 5 of the SCA, which was signed by the respondent, the vitiation amount in the contract was Rs.10,12,198/- after deducting the sum of Rs.1 lakh as rebate and the said amount was to be recovered from the contractor's final bill as per the decision of the Tender Committee taken on 27.02.1998. As such, the N.F.Railway authorities had deducted a sum of Rs.10,12,198/- along with a rebate of Rs.1 lakh, totalling to Rs.11,12,198/-, from the final bill of the contractor on account of vitiation of contract. Since the respondent did not agree with the said deduction, a dispute had arisen by and between the parties. In view of Clause 63 of the GCC which contains an arbitration agreement, the dispute was referred to a three member Arbitral Tribunal for settlement. The arbitral tribunal published its award on 24.08.2009 allowing the claim of the contractor assailing the deduction on account of vitiation of contract.

5. Challenging the arbitral award dated 24.08.2009, the appellants had filed an application under Section 34 of the Act of 1996 inter-alia contending that by awarding the Claim No.4A in favour of the contractor, the Arbitral Tribunal had acted without jurisdiction by entertaining a claim which was beyond the terms of reference to the tribunal. It was also contended by the appellants that the respondent/contractor, having agreed to the deduction of the amount due to vitiation of contract and having signed the SCA without raising any protest, it was estopped from making any claim for waiver of the vitiation amount before the arbitral tribunal. The appellant had also taken a plea that the Arbitral Tribunal had failed to properly appreciate the materials on record thereby misdirecting itself by allowing the Claim No.4A.

6. The learned District Judge, Kamrup had dealt with the issues raised by the appellants in the application filed under Section 34 of the Act of 1996 and after discussing the law laid down by the Hon'ble Supreme Court in various decisions

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including in the case of P R Shah, Shares and Stock Brokers Private Limited -Vs- B.H.H. Securities Private Limited and others reported in (2012)1 SCC 594 and Ramchandra Reddy and Company Vs. Union of India & others reported in (2009) 6 ASCC 414 had come to a conclusion that a court in exercise of its jurisdiction under Section 34 of the Act of 1996 does not sit in appeal over an arbitral award and therefore, would not be entitled to record a fresh finding of facts upon re-assessing or re-appreciating the evidence even if two views are possible on a particular issue. Having held as above, the learned District Judge was also of the view that Claim No.4A was well within the scope and ambit of the arbitration clause as well as the terms of reference to arbitration and therefore, there was no scope for interference with the arbitral award in exercise of jurisdiction under Section 34(2) of the Act of 1996.Accordingly, the application filed by the appellants praying for setting aside the arbitral award was dismissed by the judgment and order dated 19.05.2014.

Undeterred by the aforesaid decision of the learned District Judge, Kamrup, the appellants have preferred the present appeal.

7. At the commencement of hearing of this appeal, the learned counsel for the appellants has clarified that all though a number of grounds have been taken in the memo of appeal, yet, the only ground that is pressed into service in the instant appeal is that the learned District Judge had committed manifest illegality in failing to appreciate that the arbitral tribunal had acted beyond jurisdiction in entertaining and awarding the Claim No.4Awhich was an "excepted matter". In view of the above submission of the learned counsel for the appellant the discussions and deliberations in this judgment are primarily kept confined to the said ground.

8. Mrs. U. Chakraborty, learned counsel for the appellants, submits that the change in the scope of work had altered the quantity of work and therefore, this was a clear case of vitiation of contract which would authorise the N.F. Railway authorities to deduct the excess amount from the bills of the contractor. By referring to the minutes of the meeting of the Tender Committee dated 27.02.1998 Mrs. Chakraborty submits that the amount on account of vitiation of the contract was fixed at Rs.11,12,198/-based on a negotiation held with the contractor whereafter, he had accepted the negotiated rate by putting his signature in the SCA dated 29.06.2000. Such being the position, the Claim No.4A was an "excepted matters" and hence, the arbitral tribunal did not have the jurisdiction to entertain the said claim and pass an award.

9. Refuting the said submission made by the appellant's counsel, Mr. M. Biswas, learned counsel for the respondent, has argued that his client had put his signature in the SCA dated 29.06.2000 under protest but the appellant had suppressed the said fact and produced a fabricated document before the learned District Judge, Kamrup with the sole intent and purpose of misleading the court. It is also the submission of Mr. Biswas that the amount awarded by the Arbitral Tribunal under Claim No.4A was the just claim of the respondent. Since the

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appellants have failed to make out any ground within the ambit of Section 34 of the Act of 1996 to interfere with the arbitral award, the learned District Judge had rightly dismissed the application filed by the appellants by the impugned judgment and order dated 19.05.2014.

10. I have considered the submissions advanced by learned counsel for both the parties and have meticulously gone through the materials available on record.

11. As noted above, the only dispute in this appeal pertains to the legitimacy of the arbitral award dated 24.08.2009 in so far as it relates to Claim No.4A. From the facts alluded above, it would be evident that Claim No.4A pertains to the deduction of a sum of Rs.11,12,297.67/- from the bills of the contractor on account of alleged "vitiation of contract". Since the entire controversy in this appeal revolves around the expression "vitiation of contract" hence, at the out-set, it would be necessary to make an attempt to decipher the phrase "vitiation of contract" by referring to the materials on record.

12. Clause 6.0 of the Special Condition of Contract (SCC) deals with vitiation of contract. However, the contract agreement nowhere defines the phrase "vitiation of contract". Clause 6.1of the SCC provides that "the contract shall not be vitiated by any inadvertent error of any kind in the surveys, information, specification, drawing or schedule of quantities". Save and except the above, there is no further stipulation in the GCC or the SCC dealing with vitiation of contract. The learned counsel for the appellants also could not place any other relevant material before this court to indicate the true meaning of the expression "vitiation of contract".

13. The term vitiation is derived from the word "vitiate" which, according to the Oxford (English) Dictionary, means, to impair the quality or efficiency, to corrupt, contaminate or debase. Therefore, vitiation of a contract would ordinarily mean rendering a contract void or voidable. Stating that there is vitiation of contract, the appellants in this case had deducted certain amount from the final bills of the contractor. However, from the materials available on record, it is not clear as to how exactly the contract stood vitiated merely because of change in the schedule of quantity. It is also not clear as to on what basis the tender committee had recommended deducted of a sum of Rs 11,12,198 /- from the final bill of the contractor. It would be significant to note herein that the stand of the appellants is that the vitiation of contract took place due to change in the schedule of quantity. But as per clause 6.1 of the SCA, the contract would not be vitiated due to any error in the "schedule of quantity".

14. It also appears that the arbitral tribunal was constituted of three members. Mr. B. Hazarika, Dy.CEE/Con-I/MLG was the Presiding Arbitrator whereas Mr. David Lalmalsawma, Dy. FA &CAO(G)/MLG and Shri H. C. Senapati, Dy.CE/CON-W/MLG were the other two Arbitrators. It appears from the record that all the three arbitrators were the serving officials of the N. F. Railway at the relevant point of time and they were all appointed as arbitrators by the N.F. Railway

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authorities.

15. It further appears from the record that by the letter dated 13.07.2004 issued by Sri Ajay Kumar (Dy. CE/CON-T) acting on behalf of the General Manager/Con, as many as four claims made by the respondent/contractor were referred to the Arbitral Tribunal for adjudication. Following are the claims included in the letter dated 13.07.2004 :-

"The terms of reference are under :

Contractor's claim :

1.

Payment of expenditure incurred by the contractor with the expecta- + interest @ 21% tion of doing the whole work of compounded 15 spans of schedule of items (3) quarterly of the CA. But due to reasons fully pendentelite on Rly's account, the same could not be completely done as the Rly's changed the scope of the balance work after keeping the original scope alive and pending for more than 10 months and thereby reduced the quantity by a margin of 86.6%.

Rs.12,77,851.00

2.

Payment of F/Bill, together with interest accrued on this amount @ 21% P.A. compounded quarterly pendentelite

Rs.12,55,028.69

3.

Withdrawal and waival of unduly imposed vitiation amount.

Rs.11,12,297.67

4.

ent of compensation of our loss in business caused by non-receipt in time of our dues from the Rlys together with interest @ 21% compounded quarterly pendentelite.

Rs. 9,49,000.00

Railway's counter claim:

Railway's counter claim will be submitted before

the Jt. Arbitrator by Dy. CE/Con/TSK.

(Ajay Kumar)

Dy CE/Con-T

For General Manager/Con"

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16. Upon receipt of notice from the Arbitral Tribunal, the respondent/ claimant had filed its claim and the appellant/ N.F.Railway had also filed its counter-claim. After considering the claims and counter-claims of the parties, the Arbitral Tribunal had published its award on 24.08.2009, unanimously awarding the claim No.4A in favour of the contractor. The Arbitral Tribunal had, however, rejected the counter-claim made by the appellant/N.F.Railways. The operative part of the arbitral award dated 24.08.2009 is extracted here-in-below for ready reference :-

Claim No.

Description of claim

Amount claim

Award Declared

1

Expenditure incurred in establishment for completing the whole work

Rs.12,77,851/-

NIL

2

Payment of final bill

Rs.12,55,028.69/-

Actual amount due on this account to be paid

3

Payment of compensation for loosing of business cost by non receipt in time of dues from Railways

Rs.9,49,000/-

NIL

4A

Withdrawal and waiver unduly imposed vitiation amount

Rs.10,12,297.66/-

Waival of vitiation amount of Rs.11,09,091.79/- granted.

4B

Refund of reduction of Rs.1,00,000/- given during negotiation of quantities excess/ less beyond 25% during approval of variation.

Rs.1,00,000/-

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Nil

5

Pre-reference interest @ 21% per annum w.e.f. 01.04.98 to till date of payment

Not specified

Nil

6

Interest pendent elite

Not specified

Nil

7

That the claim further for loss of business @ 25% as mentioned in claim No.3 above due to blockade of said sum till the payment w.e.f. 1.10.99 till date of payment.

Not specified

Nil

8

Interest on the entire claim amount from date of arbitration till payment

Not specified

Respondent shall pay the award amount within 60 days failing which interest @ 12% p.a. shall be payable.

9

Price-escalation for delay in work due to Railway's reasons up to the completion of work.

Not specified

Nil

10

Goodwill loss, mental harassment etc. due to late payment of Claimant's dues

Rs.10,00,000/-

Nil

17. From a plain reading of the letter dated 13.07.2004 issued by Sri Ajay Kumar, it would be established beyond doubt that the contractor had raised a claim as regards the deduction made from the final bill on account of vitiation of

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contract, which claim was duly referred by the appellants for settlement by the arbitral tribunal. Accordingly, the arbitral tribunal has dealt with the same and made an award under Claim No 4A. Appellants themselves having referred a claim for settlement by arbitration, it would not be open for them to now take the plea that it was an excepted matter.

Therefore, the contention of the appellants' counsel that claim No 4A was beyond the terms of reference to the arbitral tribunal is found to be wholly preposterous and hence, stands rejected by this court.

18. After hearing the arguments advanced by the learned counsel for the appellants, although it was not clear as to the basis for applying the "vitiation" clause, yet, it appeared that what was intended by the appellants was to off- set any excess quantity included in the original contract agreement by making proportionate deductions from the bills of the contractor. However, as noted above, the basis on which the figure of Rs.11,09,091.79/-was arrived at is not available on the record. Therefore, the deduction appears to have been made purely on a hypothetical basis. Even assuming that there was any variation of the quantity, since the contractor's bill was required to be paid on the basis of actual quantity executed under the contract, it is not understood as to how such hypothetical norms could be applied by the appellants so as to deduct substantial amount of money from the bill of the contractor.

19. As mentioned above, the contentious claim in this case was dealt by the learned arbitral tribunal under Claim No.4A. The reasons given by the learned arbitral tribunal justifying the award made in respect of the said claim is reproduced herein below for ready reference :-

" 4. Claim-4A : "Withdrawal and waiver of unduly imposed vitiation amount" amounting to Rs.10,12,297.66/- :-

As per the detail submitted by the Respondent vide their letter dated 27.01.09 and also discussion during hearing the final bill amount payable is Rs.23,141/- in which an amount of Rs.11,09,091.79/- has been deducted towards vitiation amount. The Tribunal has gone through the details of the vitiation aspect and found that the scope of the work was changed by Respondents, as originally the existing steel girders were to be strengthened but afterward it was decided to provide new steel girder and non schedule items were introduced with deletion of certain items of the C.A. After negotiation a fresh C.A. was entered into, therefore, the comparative rates to find the vitiation with original tenderers is not reasonable as scope of the work has been changed substantially and the new items added having substantial value. So comparison of rates made to find the vitiation with reference to items operated only is not justified. The reason being that the value of the work is to be considered as whole and contractor quotes rates for different items depending on his perception. Therefore, after change of scope of work, certain new items were added, and certain deleted the rates cannot be compared for vitiation purpose, as non schedule items were added for

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which rates of the other tenderers were not available. Therefore, tribunal is of the view that deduction towards vitiation is not justified and declare an award of Rs.11,09,091.79/- against this claim. This amount is taken from the final bill already submitted."

20. From a reading of the arbitral award dated 24.08.2009 it is established beyond doubt that the arbitral tribunal has found fault with the criteria adopted by the tender Committee and held that the deduction was unjustified. The arbitral award records proper reasons for awarding the Claim No.4A in favour of the respondent and the award appears to be based on proper appreciation of materials on record. As such there was no scope for the learned District Judge to interfere with the arbitral award.

21. Although there is nothing to show that the claim No. 4A was contrary to the terms of the contract, yet, since a plea has been taken by the appellants that the respondent/ contractor had accepted the decision of the Tender Committee as regards deduction of vitiation amount by putting his signature in the SCA, it would be necessary for this court to briefly refer to the said controversy.

22. From a perusal of the copy of the SCA dated 29.06.2000 it appears that the representative of the respondent had put his signature under protest. Mr.Biswas has categorically submitted that the appellants have erased the endorsement made in the contract agreement registering protest only to mislead this Court. In order to ascertain the correct factual position, this Court had passed an order on 12.02.2019 directing the Law Officer (Con), NF Railways, Maligaon Headquarters, to remain personally present before the Court on the next date fixed along with the original records. On the next date i.e. 19.02.2019, although the Law Officer accompanied by the Deputy Chief Engineer (Con) were personally present before this court, yet, they had submitted that this being a very old case, the original records are misplaced and therefore, the same could not be produced before the Court.

23. From a perusal of the observations made by the learned District Judge, Kamrup in his order dated 19.05.2014 it is apparent that a finding of fact has been recorded to the effect that the contractor had signed the SCA under protest. As per the finding recorded by the learned District Judge based on materials on record, the respondent had registered its protest by making the following endorsement in the SCA :-

"Prejudice to all our claim signature under protest. We are not agree for that deduction of the vitiation amount from the bill."

The appellants have not assailed the aforesaid finding of fact recorded by the learned District Judge in the impugned order dated 19.05.2015.

24. A perusal of the various communications available on record including the letter dated 19.05.1998 bearing No.JFF/75/98 addressed by the respondent to the Dy. CE(Con-I) of the NF Railway also goes to show that the respondent has

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consistently raised protest as regards the proposal for deduction of the vitiation amount from the bills of the contractor. Situated thus, this Court is left with no hesitation in concluding that the respondent/ contractor had signed the SCA dated 29.06.2000 under protest. If that be so, the question of waiver/estoppel operating against the respondent/claimant in the facts and circumstances of the case would not arise at all. It cannot also be said that the respondent had at any point of time consented to the proposal for deduction of a sum of Rs.11,12,198/- from its final bill on account of vitiation of contract.

25. For the reasons stated above, it would be apparent that viewed from any angle, the appellants had failed to make out any case warranting interference with the arbitral award or the impugned judgement and order dated 19.05.2014 passed by the learned District Judge, Kamrup. This appeal is therefore, held to be devoid of merit and is accordingly dismissed .

26. Before parting with the record, it would be relevant to mention here-in that law has been firmly settled by a long line of decisions of the Supreme Court of India that scope of interference with an arbitral award by the court is very limited. The object clause of the Act of 1996 itself makes it clear that one of the object of the Act is to minimise the supervisory role of courts in the arbitral process. By laying emphasis on the limited supervisory role of the courts in such matters, It has been observed by the Supreme Court in a number of reported decision that an arbitral award can be interfered only on the grounds mentioned in section 34 of the Act of 1996, when the award is found to be in violation of the substantive law of the land or in conflict with the public policy of India. Despite the same, the authorities in various governmental departments appear to have been approaching the courts assailing the arbitral awards in a routine manner by ignoring the fact that the Act of 1996 puts in place an entirely different legal regime.

27. As is evident in the present case, it appears that the decision to prefer an appeal in these matters are taken in a mechanical manner, without making proper assessments as to the existence of a legally tenable ground for challenging the award. The arbitration proceedings normally involve claims of commercial nature and as in the case in hand, the awards are, more often than not, interest bearing ones. Therefore, a mechanical approach of the departmental authorities challenging an arbitral award with a view to defer the satisfaction of the award is not only contributing to undue delay in settlement of commercial claims but is also frustrating the very purpose and object of the Act of 1996. Moreover, by delaying the implementation of an un-assailable interest bearing award, heavy burden is cast upon the public exchequers by way of interest component. Such a recourse is, therefore, not at all beneficial for the department in the ultimate analysis. In the opinion of this court, a time has come for the departmental authorities at the highest level to examine this aspect of the matter objectively and take appropriate remedial measures. The Registry to, therefore, send a copy of this order to the Chief General Manager, N.F.Railway,

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Maligaon Head Quarters, for necessary action in the matter, as may be deemed fit.

Send back the LCR.

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