
(2015) 01 DEL CK 0313
In the Delhi High Court
Case No : O.M.P. 1625 of 2014

Union of India and Others

APPELLANT

Vs

Rishi Engineering and Construction (P) Ltd.

RESPONDENT

Date of Decision : 30-01-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(3), 34, 34(2)(a)(v), 34(2)(b)(ii)

Citation : (2015) 4 AD 543

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : A.S. Dateer, for the Appellant

Judgement

Rajiv Sahai Endlaw, J.—This petition under Section 34 of the Arbitration and Conciliation Act, 1996 seeks setting aside of the arbitral award dated 1st September, 2014 of a sole Arbitrator (being the Deputy CE/C/T and C, Northern Railways, Kashmere Gate, Delhi and nominated as the Arbitrator by the General Manager, Northern Railways of the petitioner Railways, in accordance with Clause 2900 of Indian Railway Standard Conditions of Contract) to the extent the same allows the claim of the respondent in the sum of Rs. 46,67,344/- against the petitioner and dismisses the counter-claim of the petitioner Railways. The petition came up before this Court first on 22nd December, 2014 when after hearing the counsel for the petitioner Railways, orders on admissibility/entertainability of the petition, were reserved.

2. Though on going through the petition and on hearing the counsel for the petitioner Railways it appeared that no ground within the meaning of Section 34 of the Arbitration Act for setting aside of the award was made out, specially in the light of the judgments of the Division Bench of this Court in Delhi Development Authority Vs. Bhardwaj Brothers, AIR 2014 Delhi 147 : (2014) 3 ARBLR 333 : (2014) 213 DLT 675 : (2014) 144 DRJ 471 : and in State Trading Corporation of India Ltd. Vs. Toepfer International Asia PTE Ltd., (2014) 3 ARBLR 105 : (2014) 144 DRJ 220 : but on further consideration after orders were

reserved, it prima facie appears that a ground within the meaning of Sections 34(2)(a)(v) and Section 34(2)(b)(ii) of the Arbitration Act for setting aside of the award, at least insofar as it allows the claim of the respondent against the petitioner Railways in the sum of Rs. 46,67,344/-, is made out.

3. Section 34(2)(a)(v) makes an award liable to be set aside where the arbitral procedure was not in accordance with Part-I of the Arbitration Act. Section 31(3) of the Act falling in Part-I provides that the arbitral award shall state the reasons upon which it is based. There is nothing to show that the parties had agreed that no reason be given. The instant arbitral award notices that for adjudication of the claim of the respondent for Rs. 46,67,344/- towards short payment on account of non-giving of the MODVAT benefit and on which account the claim has been allowed, was based on Clauses 7.9 and 13.8 of the agreement between the parties and which are as under:

"Clause 7.9

The accepted contract rate is net of all MODVAT credits available to the firm on the date of opening the tender. All MODVAT credits available on inputs on the date of opening of tender will be fully retained by the supplier, in addition to the contract rates. Any variation in MODVAT after opening of tender and during the currency of the contract will be to the purchaser's account.

Clause 13.8

i. The liability of the purchaser to reimburse excise duty is limited to such as may be found legally due and payment in respect of contracted goods after availing full credit on all the inputs used in the manufacture of the finished product irrespective of whether the supplie(s) has in fact availed of the said credit or not.

ii. Offer of the rate is to be made after taking into consideration MODVAT/CENVAT credit available on inputs on the date of opening of tender, which is to be retained by the supplier and any variation in MODVAT/CENVAT credit after the date of opening shall be to the purchaser's account."

It was inter alia the defence of the petitioner that as per the aforesaid Clauses, the liability of the petitioner as purchaser was only for reimbursement of any variation in MODVAT after opening of tender and during the currency of the contract and that there had been no variation in excise duty on the subject goods after the opening of the tender and during the currency of the contract and the respondent had not incurred any additional amount towards excise duty and thus the question of reimbursement did not arise. However, a reading of the award shows that the Arbitrator, while adjudicating the said claim, has neither applied the aforesaid Clauses of the contract nor given any reason for non-application thereof. It prima facie also appears that Clause 13.8 takes away the benefit on account of variation in MODVAT given under Clause 7.9. The arbitral award, prima facie, also does not record the respondent having submitted any proof of having incurred any additional excise duty so as to become entitled to

reimbursement thereof. In my prima facie opinion, the requirement to give reasons on which the award is based includes a requirement to give reasons for rejecting the defence to the claim. I am further of the prima facie opinion that failure to give such reasons would amount to "arbitral procedure" being "not in accordance with the agreement of the parties" or being "not in accordance with" Part-I of the Arbitration Act within the meaning of Section 34(2)(a)(v).

4. I am also of the prima facie opinion that the Court will rarely be in a position to give a conclusive finding of the award being induced by fraud or corruption. The reason therefore is that without hearing the Arbitral Tribunal, and which is not a party to a proceeding under Section 34, no conclusive findings of award being induced by corruption can be given. However where, from a reading of the arbitral record an attempt to favour one of the parties is apparent, the Court would be entitled to invoke Section 34(2)(b)(ii) for setting aside of the award. In the present case, from the Arbitral Tribunal instead of adjudicating the claim of the respondent in accordance with the agreement between the parties, allowing the same on the basis of extraneous material and from not giving any reasons for rejecting the defence of the petitioner to the claim of the respondent, such an attempt is prima facie evident.

5. Resultantly, issue notice to the respondent by all modes including dasti, returnable on 25th March, 2015. The arbitral records be also requisitioned for the said date.