

(2020) 02 DEL CK 0363

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) 112 Of 2020, Miscellaneous Application No. 7720 Of 2017

Union Of India & Anr

APPELLANT

Vs

M/S Annavaram Concrete Pvt Ltd

RESPONDENT

Date of Decision : 27-02-2020

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2020) 02 DEL CK 0363

Hon'ble Judges : Prateek Jalan, J

Bench : Single Bench

Advocate : Geetanjali Mohan, R.K. Sanghi, Ishan Sanghi, Satyendra Kumar, Anugrah Niraj Ekka

Final Decision : Dismissed

Judgement

Prateek Jalan, J

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter, 'the Act'] has been filed by the Union of India

[hereinafter, 'UOI'] against an award dated 08.02.2011, passed by a sole arbitrator.

Facts

2. The UOI issued a tender [Tender no. CS-160/2007] for supply of sleepers, pursuant to which the respondent submitted a bid on 06.12.2007. An

order for 10,000 sleepers was placed upon it on 12.09.2008/15.09.2008. The time for supply of the sleepers was fixed at four months from the date of

the said order. In the meantime, by a communication dated 22.12.2008, the respondent requested the petitioner for an enhancement in the quantum of

the order under the aforesaid tender. The petitioner issued an amendment on

27.01.2009, enhancing the quantity to 1,50,000 sleepers and extending the time for supply until 14.07.2009.

3. In tender no. CS-160/2007, there was also a reference to a new tender to be issued by the UOI for supply of sleepers. The new tender [Tender no.

CS-162/2008] was in fact issued on 11.12.2009 and the respondent was awarded a contract for 4 lakh sleepers under CS-162/2008. CS-160/2007 was

terminated on 08.04.2010. At the time of termination, the UOI sought to impose liquidated damages on the respondent, as the respondent had

undisputedly not supplied any sleepers under CS-160/2007. Liquidated damages amounting to Rs. 1,22,38,125/- were deducted from the dues of the

respondent under other contracts.

4. The respondent challenged the imposition of liquidated damages by invoking the arbitration clause contained in CS-160/2007. At the instance of the

respondent, this Court granted the UOI time to appoint an arbitrator, pursuant to which a sole arbitrator was appointed and the impugned award has

been rendered.

5. The sole arbitrator has accepted the claim of the respondent herein and awarded the refund of the sum of Rs. 1,22,38,125/-, which has led to the

institution of the present petition.

Submissions

6. Ms. Geetanjali Mohan, learned counsel for the UOI, has taken me through the award to submit that the award does not disclose any reason for

coming to the conclusion that the respondent was entitled to refund of the amount of liquidated damages, which was withheld. She has drawn my

attention to the findings recorded by the arbitrator regarding the reasons for which the respondent was unable to supply any sleepers under CS-

160/2007. In particular, Ms. Mohan submits that the finding of the learned arbitrator that the completion period of six months given at the time of

enhancement of quantum of the contract was against the principle of natural justice, is entirely unwarranted, and misconceived in the context of

a contractual relationship.

7. Mr. R.K. Sanghi, learned counsel for the respondent, has defended the impugned award principally relying upon clause 1.2 of CS-160/2007, which

was inserted into the contract vide letter dated 27.01.2009. The said clause

reads as follows:-

1.2 On finalization of the new tender, the ordered quantity in CS-160/2007 shall be reduced to the number of sleepers manufactured till the date of issue of LOA for the new contract. If the rate accepted in the new tender is higher than the updated rate of CS-160/2007 on the date of issue of LOA and the manufactured quantity is less than the pro-rata quantity then the supplier will have to recoup the shortfall in the quantity on the same rate terms & conditions. This updated rate will be frozen on the date of issue of LOA for the shortfall quantity.

(Emphasis supplied)

8. Mr. Sanghi submits that clause 1.2 clearly stipulates that when the new tender is finalized, the quantity in CS-160/2007 shall be reduced to the number of sleepers manufactured till the date of issuance of letter of acceptance. It is his submission that since the letter of acceptance for the new contract was issued on 11.12.2009, the rights and obligations of the parties under CS-160/2007 stood extinguished and therefore, the respondent was not liable for liquidated damages under the said contract. Mr. Sanghi has also relied upon clause 1.2.1 of the letter of acceptance dated 11.12.2009 in CS-162/2008 which reflects the same position. The said clause is set out below:-

1.2.1. On finalization of the new tender, the ordered quantity in CS-160/2007 shall be reduced to the number of sleepers manufactured till the date of issue of LOA for the new contract.

9. With regard to clause 1.2 of CS-160/2007, Ms. Mohan's principal submission is that the clause was inapplicable to the present case as CS-160/2007 had already come to an end by efflux of time, prior to the issuance of the letter of acceptance in CS-162/2008. She submits that CS-160/2007 lapsed on 14.07.2009, whereas the letter of acceptance in CS-162/2008 was issued on 11.12.2009. According to Ms. Mohan, clause 1.2 could have applied only in the event CS-160/2007 was valid and subsisting at the time the letter of acceptance in CS-162/2008 was issued and not after its expiry.

Analysis

10. In the impugned award, the amendment of the contract by the letter dated 27.01.2009 has been noticed, both with regard to the enhancement in

the quantity of sleepers and the incorporation of clause 1.2. After extracting clause 1.2, the arbitrator recorded as follows:

“This is very important condition of letter of acceptance. The period of acceptance was extended from 14.01.2009 to 14.7.2009 i.e.

approximately for 06 months. It should be noted that completion period for 10,000 sleepers was given 4 months and for the remaining

1,40,000 sleepers, the completion period was given 6 months which is against the principle of natural justice.”

11. The arbitrator has thereafter entered into a discussion regarding delays on the part of the railway authorities and referred to the letter of

acceptance dated 15.11.2009 in respect of CS-162/2008. While dealing with CS-162/2008, the arbitrator records as follows:

“There is only marginal difference of rate between both the parties. But it is concluded that rate in latest award i.e. in new contract

CS162 is much lower side as compare to disputed CS160 contract. Hence, as per the acceptance letter, pre-condition 1.2, respondent has to

cancel/reduce remaining quantity of the tender CS160. In this case the respondent has closed the tender as it where is basis in place of

terminating the contract.”

(Emphasis supplied)

12. As mentioned above, the arbitrator has ultimately allowed the claim of the respondent herein. In the operative portion of the award, it is held as

follows:

“19. Award:- In view of the fact narrated above Rs. 1,22,38,125/- will be refunded to the claimant. The contract has to be closed as it

where as basis, so other claim of the claimant is also not to be considered. The above amount will be refunded to the claimant within three

months of publication of the award.”

(Emphasis supplied)

13. Ms. Mohan is right in submitting that the reasoning offered by the arbitrator in the impugned award is somewhat sketchy. However, it is in my

view adequate to discern the basis upon which the arbitrator has arrived at his conclusion. The operative portion of the award refers to the contract

being closed on “as is where is basis”, which is essentially the arbitrator's interpretation of clause 1.2 of the contract [CS-160/2007] read with

clause 1.2.1 of CS-162/2008 [the relevant portions of which have been extracted above]. On a point of interpretation of the contract, the arbitrator's

decision will be amenable to interference under Section 34 of the Act only if it is manifestly arbitrary or perverse. The limited nature of the inquiry to

be made under Section 34 is well settled. The judgments of the Supreme Court inter alia in Associate Builders vs. Delhi Development Authority

(2015) 3 SCC 49 and MMTC Limited vs. Vedanta Limited (2019) 4 SCC 163 [particularly paragraphs 11 to 13] make this position clear. In Steel

Authority of India Limited vs. Gupta Brother Steel Tubes Limited (2009) 10 SCC 63 [paragraph 18], decided under the Arbitration Act, 1940, the

Court has expressly held that an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction.

14. The arbitrator has applied clause 1.2 of the contract to the factual situation and come to the conclusion that upon the letter of acceptance being

issued for CS-162/2008, the scope of CS-160/2007 stood reduced to the number of sleepers actually manufactured until that date. Ms. Mohan's

argument is that the said clause could not have been applied after the lapse by efflux of time of the original contract. However, the incorporation of

clause 1.2.1 in the subsequent contract, which in essence mirrors clause 1.2 of CS-160/2007, negates this argument. Consequently, the arbitrator's

interpretation of the contract cannot be said to be absurd or perverse, justifying interference under Section 34 of the Act.

15. The consequence, as held by the arbitrator, is that the quantity ordered under CS-160/2007 stood reduced "in this case, to nil" as the

respondent had not manufactured any sleepers at all prior to 11.12.2009. The arbitrator's conclusion that liquidated damages under CS-160/2007

were wrongly imposed by the UOI is in these circumstances, a plausible one.

16. Mr. Sanghi submits at this stage that although the arbitral award was rendered on 08.02.2011, and the amount was to be paid to the respondent

within three months thereafter, it has not in fact been paid. He relies upon the judgments of this Court in Amar Industries vs. Union of India 2006 (88)

DRJ 361 and M/s. Siemens Ltd. vs. M/s. South India Cements Ltd. 2009 SCC OnLine Del 2154 to submit that interest may be awarded in favour of

the respondent for the period the petition remained pending in this Court. In the facts and circumstances, the principle enunciated in the judgments is

squarely applicable to the present case also.

Conclusion

17. In the result, the petition alongwith pending application is dismissed. The awarded amount will be refunded by the UOI to the respondent with simple interest @ 6% per annum from 08.05.2011 until the date of payment. There will be no orders as to costs.