
(2015) 06 BOM CK 0136

In the Bombay High Court

Case No : Appeal No. 581 of 2005 in Arbitration Petition No. 184 of 2003

Union of India

APPELLANT

Vs

Kesharia Concrete Products Pvt. Ltd.

RESPONDENT

Date of Decision : 26-06-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2015) 6 BomCR 825

Hon'ble Judges : M.S. Shah, C.J.;A.K. Menon, J

Bench : Division Bench

Advocate : T.J. Pandian and Suresh Kumar, for the Appellant; Snehal Shah, Mahek Bookwala and Z.A.Jariwala instructed by Thakore Jariwala and Ass., Advocates for the Respondent

Final Decision : Dismissed

Judgement

A.K. Menon, J.—The present Appeal is directed against the order of the learned Single Judge disposing of the challenge under Section 34 of the Arbitration and Conciliation Act, 1996 to an Award dated 18 November 2001.

2. The Claimant in the Arbitration was manufacturing and supplying PSC Sleepers to the Appellant. Disputes arose in relation to a contract between the Appellant and the Respondent. The Respondent made three claims before the Arbitrator which are as follows:-

(a) Difference in rate payable for each Sleeper amounting to Rs.1,14,63,222.84 arrived at by computing the difference between Rs.351.50 (the old rate) and Rs.283.50 (the new rate);

(b) The second claim is for Rs.91,20,000/-for the loss and profit compensation on account of reduction in the quantity;

(c) Amount claimed Rs.48,00,000/-being loss on account of closure of the Appellant's unit for about three months and 16 days.

3. The Arbitrator awarded Rs.94,50,776/- towards the first claim and rejected the second and the third claim. The Award therefore directed payment of sum of Rs.94,50,776/-with simple interest at the rate of 18% p.a. from the date of the Award. The Respondent has not challenged the Award. The appellant before us is the original Respondent in the Arbitration viz the Petitioner in the petition under Section 34 of the Arbitration and Conciliation Act.

4. Before we proceed to deal with this Appeal, it would be necessary to refer to the factual background briefly.

i) The Respondent has been supplying PSC Sleepers to the Railways since 1988. In May, 1995 order for supply of 50,000 PSC Sleepers were placed. The order was repeated in 1996 ("Repeat Order"/ "RO"). Condition (x) also hereinafter referred to as the "Fall Clause" provided as follows:-"

(x) In case of open tender invited for manufacture and supply of PSC sleeper on Central Railway in future during currency of this repeat order and low rates are accepted against that tender, that rate would also be applicable in this present repeat order from the date of acceptance of such rate. "

ii) The rates at which supplies were to be made under the Repeat Order was arrived at by mutual agreement following negotiations. Effectively, clause (x) quoted above entailed that during the currency of and pending performance of the Repeat Order, if a subsequent tender for manufacture and supply of broad gauge concrete sleepers resulted in lower rates being quoted, such lower rates would apply to the Repeat Order as well. In other words, if the tender resulted in a quote lower than the negotiated rate, the lower rate would apply. The converse was not true, inasmuch as if the tender resulted in a higher rate, the higher rate would not apply to the Repeat Order but would be confined to the tender at hand.

(iii) The Appellants published a Tender Notice No.CS120/1997 dated 26/6/1997. In the tender form, the following note was incorporated :-

Note

1. Existing firms (those who are already supplying concrete sleepers to Railways) can quote rate Ex. their works against the Railway where their factory is situated. They can also quote against the adjoining Railways to be supplied from their existing factories, in that event the rate quoted shall include the freight element upto the nearest station on the Railway for which rate has been quoted. They can quote for setting up new units also on any of the Railway. When it is proposed to supply from existing factories, they should clearly bring out how they propose to supply over and above the on-going ordered quantity. They may note that the rates in the on-going contracts will not be disturbed even if lower rates are finalised in this tender. "

(iv) Thus, by this "Note" the tenderer was put to express notice that even if the rates quoted under this fresh tender were lower than the rates for supply under the RO, the higher rates in the RO would continue to apply for all supplies under

the RO. The lower rates would apply prospectively i.e. for supplies to be made pursuant to the fresh tender. For ease of reference, we would continue to refer to the contract under performance as the Repeat Order or RO and the subject matter of the new tender as the New Order.

(v) The tender resulted in a lower rate. The rate under the Repeat Order was Rs.351.50 per Sleeper whereas under the new tender the rate quoted was substantially lower at Rs.283.50 The Appellant thereafter and for reasons difficult to fathom in the face of of the Note, began insisting that the lower rate would apply. This insistence led to disputes which was referred to arbitration of an Officer of the Appellants themselves. The Award itself has been dealt with above.

5. The award was assailed on numerous grounds. According to the Appellant, the award was not justified in view of the fact that by virtue of the Fall Clause, which provided that should lower rates be arrived at for a subsequent contract (a.k.a New Order), such lower rates would apply to the current contract (a.k.a. Repeat Order) as well.

6. The learned Single Judge held that although the tender condition was issued in November, 1997 for the reduced rates in the existing contract under which supplies were being made, the acceptance letter in relation to that tender was issued only in September, 1998. A formal agreement was entered into only in April, 2001 well after the date of the tender. However, the Appellant started making payments to the Respondent at the reduced rates from June, 1998. After having considered the contractual position and having noticed the view taken by the Arbitral Tribunal, including the conclusion that the stipulations in the New Order that quoting lower rates will not effect the rates in the Repeat Order, the learned Single Judge found the view taken by the Arbitrator to be a possible view and hence rejected the challenge to the Award of Rs.94,50,776/-.

7. The learned Single Judge however modified the rate of interest awarded and reduced it from 18% p.a. to 12% p.a. Thus, having partially modified the Award, the petition was disposed off. Being aggrieved by the impugned order, the Appellant has appealed.

8. We have heard Mr.Pandian, learned counsel appearing for the Appellant and Mr.Shah, learned counsel appearing for the Respondent. Mr.Pandian, learned counsel for the Appellant submitted that the impugned order deserves to be set aside inter alia for the reason that the arbitration proceedings before the Arbitrator were in relation to the Repeat Order which contained the Fall Clause. He submitted that the subsequent tender was only an invitation to an offer and the Note could not override the Fall Clause. According to Mr.Pandian, the Fall Clause was never withdrawn from the Repeat Order and by virtue of the New Order resulting into lower rates, the Fall Clause in the Repeat order was activated and the Appellant would be liable to pay the Respondents only a sum of Rs.283.50 per sleeper instead of Rs.351.50. According to him, the Fall Clause having come into operation, there is no justification for the Appellant being

required to continue to pay for the supplies of the old, albeit higher rate.

9. Mr.Shah, the learned counsel for the Respondent supports the impugned order. He submitted that the impugned order cannot be faulted inasmuch as, it upholds the validity of the terms of the New contract to the effect that the existing rates for the repeat order cannot be disturbed even if the lower rates are finalised in the fresh tender. It transpires that the Note in the tender conditions which was produced by the Appellant was not specifically incorporated in the contract which came to be executed on 6 April, 2001. According to Mr. Shah, there is no justification for the Railways refusing to pay the higher rates in the existing Repeat Order. According to Mr.Shah, the Arbitral Tribunal has sufficiently dealt with this aspect of the matter and submitted that the Fall Clause will not operate in case of the Repeat Order and even if the new contract specified a lower rate, the obligation of the Railways to pay the existing rate for the Repeat Order cannot be unilaterally withdrawn.

10. Mr.Pandian relied upon the decision of the Supreme Court in the case of *Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others*, AIR 1954 SC 236 : (1954) 1 SCR 817 and submitted that the Court observed that where the parties are ready to do business with each other if and when orders were placed and executed. As soon as an order was placed and accepted a contract was formed. The Court held that it was true that contract would be governed by the terms set out in the letters but until an order was placed and accepted there was no contract.

11. Mr.Pandian then relied upon the judgment of the Supreme Court in the case of *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, AIR 2003 SC 2629 : (2003) 2 ARBLR 5 : (2003) 3 CompLJ 1 : (2003) 4 JT 171 : (2003) 4 SCALE 92 : (2003) 5 SCC 705 : (2003) 44 SCL 89 : (2003) 3 SCR 691 : (2003) 2 UJ 1035 . Adverting to the contention that the tender was only an invitation to the order he submitted that the Award will be contrary to the public policy in India on this ground alone.

12. Mr.Shah relied upon the decision of the Supreme Court in the case of *Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran*, AIR 2012 SC 2829 : (2012) 2 ARBLR 171 : (2012) 191 ECR 269 : (2012) 3 RCR(Civil) 720 : (2012) 4 SCALE 588 : (2012) 5 SCC 306 : (2012) 26 STR 289 : (2012) 50 VST 443 : (2012) AIRSCW 2713 and submitted that in paragraph 43 the Court observed that even if the clause in a contract was capable of two interpretations, the view taken by the Arbitrator was clearly a possible if not a plausible one. It is not possible to say that the Arbitrator had travelled outside his jurisdiction or that the view taken by him was against the terms of the contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation of the Arbitrator. The judgment of the Apex Court in the case of *Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.*, (2009) 4 CompLJ 12 : (2009) 12 JT 135 : (2009) 12 SCALE 393 : (2009) 10 SCC 63 : (2009) 15 SCR 253 was also discussed. In paragraph 28 it is held that

the view of the Arbitrator being possible view of construction and having not been found absurd or perverse or unreasonable by the Courts below, no interference was called for.

13. Having heard both the sides at length and having proceeded to consider the facts, we find that we are unable to agree with Mr.Pandian for the following reasons.

14. Firstly, Mr.Pandian had submitted that the rate under the repeat order was a negotiated rate. In other words, the parties came to a consensus whereby the Appellant agreed to pay certain rates to the Respondent. However, a Fall Clause was incorporated as condition No.12-x. The new tender condition incorporated a clarificatory note in respect of the existing firms which were already supplying concrete Sleepers to the Railways. Apart from specifying how they proposed to supply the additional quantities over and above the on-going order quantity it specified as follows "the rates in the on-going contracts will not be disturbed even if lower rates are finalised in this tender".

15. Secondly, the Respondent acted upon the provision which we find was a firm commitment on behalf of the Appellant. In the meantime a Contract Agreement No.188C870/C.O/1 came to be executed. A copy of the contract which was admittedly before the Tribunal has been produced before us by the Appellant today by consent of the parties. This document is admittedly executed by the Appellant and Respondent. The contract contains all standard conditions and terms, including the special conditions of contracts followed by the Indian Railways. In fact, the arbitration agreement is incorporated in the Standard Conditions of contract. It is pertinent to mention that clause no.3000 is the Fall Clause which reads as follows:-

"3000. Fall Clause

The contract if and when placed will be subject to following fall clause :-

3001. The price charged for the stores supplied under the Contract by the contractor shall in no event exceed the lower price at which the contractor sells the stores or offer to sell stores of identical description. To any persons / organisations including the purchaser or any Department of Central Government or any Railway Office or any Railway Undertaking, as the case may be during the period till performance of all Supply Orders placed during the currency of the contract is complete. The lower price will be applicable to supplies made after the date of coming into force of such reduction or sale or offer to sell at a reduced rate. "

16. What the Appellant obviously seems to have overlooked is the fact that this Fall Clause No.3000 was deleted by a Corrigendum to the Condition of contract which is evident from page 6/40 and which appears after clause No.4100 in the compilation handed over to us. Thus, it is evident that the Fall Clause stood deleted from the standard conditions, in the new tender contract. This deletion

has its genesis in the Note in the tender that the existing rate would not be disturbed. In this view of the matter, we have no hesitation in holding that Mr.Pandian's submission is misconceived. The Fall Clause stood deleted in line with the note which forms part of the tender condition. The deletion of the Fall Clause was given effect to in the standard conditions of contract which was applicable to both the Repeat Order as well as New Contract.

17. In our view, the Fall Clause was given a go-bye by the existing tender since in the standard terms and conditions published by the Railways itself the Fall Clause had been deleted by way of corrigendum. The appellant's contention that the Note in the tender notice was only a part of the invitation to tender and, therefore, of no consequence cannot be accepted. The said note was a reflection of the change in the Appellant's policy and contractual conditions. The Appellant having held out such a representation and the Respondent having acted upon the same, the Appellant could not have retracted from the same. In fact, the Appellant also acted upon the new policy by incorporating it in the new contract by deleting the Fall Clause. The change in policy was intended to apply both to the new contract and to the Repeat Order. The Appellant's attempt to explain away the conduct and attempt to enforce the Fall Clause is in breach of terms agreed between the parties. The Fall Clause was not operative. The Fall Clause had been deleted. In view of this narrow compass of the matter, we find no reason to interfere with the impugned order. The appeal has no merits. The appeal is, therefore, dismissed. There will be no order as to costs.