(2014) 08 DEL CK 0283

In the Delhi High Court

Case No : O.M.P. No. 415/2013

Union of India APPELLANT

Vs

Manoj Cable Company Pvt. Ltd. RESPONDENT

Date of Decision : 11-08-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2014) 08 DEL CK 0283

Hon'ble Judges : Deepa Sharma, J

Bench : Single Bench

Advocate : Nitish Gupta, Proxy Counsel for Ravi Prakash, Advocate for the Appellant; Amit Singh Narag, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Deepa Sharma, J.—Vide this petition a challenge has been placed to an award dated 30.11.2012 whereby while rejecting the claim of the petitioner, learned arbitrator has allowed the claim of the respondent and held that the act of the petitioner by not allowing the price variation beyond March, 2009 was contrary to the terms of the contract and therefore contractually and legally not justified and issued directions to Northern Railway, COS''s office to suitably settle the claim of the respondent.

2. The admitted brief facts of the case are that the petitioner had floated a tender for the supply of cable against which three Pos were awarded to the respondent. These Pos were numbered as 08089519194045 dated 14.01.2009 for the supply of 414.50 km quantity of cable, P.O. No. 08089519193100 dated 14.1.2009 for the supply of 90.25 km quantity of cable and P.O.No.0809519163176 dated 24.02.2009 for supply of 24.00 km quantity of cable. The Delivery Period of the said P.Os was upto 15th June, 2009, 15th June, 2009 and 30th July, 2009 respectively. The respondent manufactured the cable quantity and had offered the material for inspection vide their call letter dated 24.03.2009 in respect of 528.75 km quantity of cable. Meanwhile the respondent

had also participated in the fresh bids invited by petitioner for supply of cables and the new tender was opened by the petitioner on 13.03.2009. The petitioner found that the rates quoted by the respondent in its subsequent fresh tender, which was opened on 13.03.2009, were much less than the rates quoted by the respondent in its previous tenders which was awarded vide above mentioned P.Os. Accordingly, the petitioner, instead of inspecting the 528.75 km quantity of cable which they were required to inspect pursuant to call letter dated 24.3.2009, wrote a letter dated 6.4.2009. In the said letter the petitioner had written as under:

"As per the provisions contained in `IRS Conditions of Contract'', `General & Financial Rules'' and `Manual on Policy & Procedures for procurement of Goods'' issued by Ministry of Finance, as a Railway approved vendor you are expected to be fair and transparent in your business dealings with the Government, insofar as the pricing of the product is concerned. Since the price of the subject item has gone down considerably, as is evident from your offer against the tender opened on 13.03.09, as a Railway approved RDSO Part-I source, it will be in the fitness of things to supply the entire quantity against the existing POs cited above at the prevailing rates, in tune with your offer against the tender opened on 13.03.09. In addition to being a gesture of goodness and equity, it will also avoid a violation of the provisions contained in IRS Conditions of Contract, General and Financial rules & other conditions governing a contract between Union of India and a private contractor. It will be pertinent to mention here that in the event of your not offering to supply the entire quantity at the lower/prevailing rates, Railways shall be at liberty to invoke, inter-alia, the book examination clause and/ or to exercise the option of reduction in order quantity by 30%."

3. It was this communication of the respondent which is the basis of the counter claim of the petitioner before the arbitrator.

4. The said letter was replied by the respondent vide their letter dated 10.4.2009 asking the petitioner to supply the copies of the conditions of contract, General and Financial Rules and Other Conditions, authorising the railways to invoke the book examination and to exercise the option of reduction in rates unilaterally. The respondent had challenged the authority of the petitioner to unilaterally change or deviate from the accepted conditions of the tender. This letter of the respondent dated 10.4.2009 was duly replied by the petitioner vide its letter dated 5.5.2009 informing the respondent that the contract was governed by IRS Conditions of Contract, and clause 3300 of IRS Conditions of Contract, General and Financial Rules and Other Conditions give the purchaser the right for book examination as well as the right to reduce the contract price and also enclosed the copy of the relevant clause. The petitioner also asked the respondent to confirm acceptance of the lower rates as mentioned in their letter dated 6.4.2009 vide their letter dated 5.5.2009. The letter is reproduced as under:

"

NORTHERN RAILWAY

Headquarters Office ,

Baroda House,

New Delhi

Dated 05.05.2009

No.08079516193002

M/s Manoj Cable Company Pvt.Ltd.,

90/3, Industrial Complex,

Haidarpur, Delhi 110088

Fax No.011-27499055

Sub.: Acceptance of lower rate

Ref.(i) (a) PO No.08089519.194045 dated 14.01.09 for 414.5 Km

(b) PO No.08089519.193100 dated 14.01.09 for 90.25 Kms

(c) PO No.08089519.163176 dated 24.02.09 for 24.00 Kms

For supply of Underground Railway Signalling Cable Size 19 Core x 1.5 sq. mm issued against tender No.4008086431 Opened on 27.06.08

(ii) Your letter No.MCCPL/N.RLY/POS19C/839-840-853/09-10/22 Dated 10.04.2009

In reference to your letter cited above, it is informed that the above contracts are governed by IRS Conditions of Contract, and Clause 3300 of IRS Conditions of Contract gives the purchaser the right for Book Examination, as well as the right to reduce the contract price. A copy of the relevant clause is enclosed herewith.

You are again requested to confirm acceptance of lower rates as mentioned in this office letter of even no. dated 06.04.2009. In the event of your not offering to supply the entire quantity at the lower/prevailing rate, Railways shall be a liberty to take further necessary action in accordance with the terms and conditions of the contract.

Sd/-

(Rajesh Abrol)

Dy.CMM/Sig/C-I"

5. Since as per the terms of the P.Os, the delivery date was 15.6.2009 for two P.Os dated 14.1.2009, the respondent wrote to the petitioner a letter dated 15.6.2009, alleging that despite they being in continuous touch with them and

corresponding the delivery was not taken by petitioner. The respondent further informed the petitioner that the last date of delivery period was approaching and that they were finding it difficult to hold the material for so long, requested the petitioner to re-fix the delivery date. In response of the said letter, the petitioner wrote a letter dated 21.7.2009 and refixed the delivery date by extending it for 45 days i.e. upto 8.9.2009 with advise to supply the material at the earliest and complete the delivery within the refixed delivery period. They also wrote to respondent (the relevant portion is reproduced):

"You have stated in your letters cited above that you had offered the entire ordered quantity for inspection on 24.03.09. Thus the material was due for inspection during the month of April 09. Therefore, in accordance with the contract conditions, for the purpose of price variation the final price payable shall be the IEEMA prices prevailing on the 1st working day of March, 2009, and any subsequent variation in the IEEMA prices of raw materials shall not be applicable."

6. The inspection was done subsequently and the goods were supplied by the respondent to the petitioner within the re-scheduled period. The respondent, however, did not agree to the proposal of petitioner for taking the date of first working day of March, 2009 as date for reckoning the IEEMA price for calculation of price variation and raised the dispute. The dispute was referred for arbitration and the learned arbitrator gave its findings which are under challenge.

7. It is a settled law that an arbitration award can be challenged only on the grounds mentioned in Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as `the Act''), that is, on the ground that there is an error apparent on the face of the award or that the award is against the public policy or that the arbitrator exceeds its jurisdiction.

8. The argument of the learned counsel for the petitioner is two- fold. The first argument is that the learned tribunal has wrongly held that the petitioner was not entitled to calculate the price variation as per the rates of IEEMA prevalent on first working day of March, 2009. It is submitted that the inspection could not be done due to the fault on the part of the respondent. It is also argued that vide letter dated 21.7.2009, when the petitioner had extended the delivery period, all the propositions in the letter were accepted by the respondent unconditionally. It is also argued that the findings of learned arbitrator on clause 0402 of IRS of the Conditions of Contract are erroneous.

9. It is settled principle of law that this court cannot sit as an appellate court over the award. The award can be challenged only on the grounds mentioned in Section 34 of the Arbitration and Conciliation Act, 1996, that is when a party is incapacitated, when the learned arbitrator has violated the procedure, when the award is contrary to the arbitration agreement or when the learned arbitrator has travelled beyond the reference, or the award is patently wrong, against substantive law of land or shocks the conscience and is suffering with an illegality which goes to the very root of the award. The award can also be challenged on

the ground that it is against the public policy. The Supreme Court in the case Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . had the occasion of discussing the expression "Public Policy" and after extensive discussion concluded as under:

"31. Therefore, in our view, the phrase ''Public Policy of India'' used in Section 34 in context to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varies from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ''public policy'' in Renusagar''s case (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be award could be set aside if it is contrary to:-

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

10. In view of the settled law the petitioner is required to show that award is patently wrong, against public policy or there is an error apparent on face of award. The award shows that the learned arbitrator has dealt with each and every contentions of parties.

11. While dealing with clause 0402 of IRS conditions of contract, General and Financial Rules and Other Conditions, the learned arbitrator has quoted the clause 0402 of the Conditions of Contract, General and Financial Rules and Other Conditions and has given the following findings:

"As per clause 0402 of IRS conditions of contract also "Any variation or amendment of the contract shall not be binding (on the purchase) unless and until the same is duly endorsed on the contract incorporated in a formal instrument in exchange of letters and signed by (both) the parties." The amendment in this case is therefore unilateral as not signed by both the parties and, therefore, not binding."

12. The petitioner has totally failed to bring on record the fact that the respondent had consented to the offer of petitioner to calculate the price

variation on the basis of IEEMA base price on the date 1.3.2009. So this offer remained unilateral and clause 0402 of IRS conditions of contract, General and Financial Rules and Other Conditions clearly prohibits unilateral amendment in contract. It is a fact that although on receiving letter dated 21.7.2009 the respondent supplied the goods within extended period of delivery but the offer of the petitioner to calculate the price variation by invoking the IEEMA price prevalent on first working day of March, 2009 was not accepted by respondent and he raised the dispute. It, therefore, cannot be said that the respondent agreed to fixation of price variation as per IEEMA price on 1.3.2009.

13. It is also an undisputed fact that under the original contract the petitioner had no authority to change the terms of the contract unilaterally. Even the clause 0402 of IRS Conditions of contract prohibits the unilateral variation or amendment in any contract. The findings of the learned tribunal, therefore, cannot be said to suffer with any infirmity or illegality or against the substantive laws.

14. The next contention of petitioner is that the provisions of clause 3300 and clause 300 were binding on the parties and that under these clauses the petitioner was at liberty to invoke inter alia the book examination clause (Clause 3300 of IRS conditions of Contract, General and Financial Rules and Other Conditions) and exercise the option of reduction of tender quantity by 30%.

15. The learned tribunal has also dealt with these contentions and has given the findings that "the respondent itself did not follow its own chartered course of action by initiating action against the claimants under IRS Conditions 0300 and 3300 which resulted in delay in supply of material by claimant". From content of the letters dated 6.4.2009 and 25.5.2009 of the petitioner written to respondent and discussed in earlier part of this judgment, it is apparent that the petitioner although informed the respondent about his rights to book examination and exercise of option of reduction in tender quantity by 30% but at no stage the petitioner cared to invoke those options.

16. The contention of petitioner is that the award is liable to be set aside since learned arbitrator has wrongly taken the date of inspection as August, 2009, when delay in inspection is attributable to respondent.

17. The learned arbitrator has elaborately dealt with this aspect of case and did not find any merit in contentions of petitioner. It is not in dispute that the actual date of inspection by the petitioner was in August, 2009. As per the price variation formula for railway signaling cable, which is binding on both the parties, the price variation has to be calculated after taking IEEMA price of the goods on the date one month prior to the date of inspection. The award does not suffer with any infirmity and is based on the rules, regulations, binding the parties under the contract. The learned tribunal has not travelled beyond the four corners of the Contract which has given it the authority to act.

18. The petitioner has further argued that learned tribunal has wrongly rejected

his claim. The rejection of his counter claim is against public policy as it affects the public exchequer as the payment is required to be made by petitioner from public exchequer. It is stated that the respondent obtained the work order of Rs.1,22,679.09 while the respondent had himself quoted a much lower all inclusive rate of Rs.1,06,783.52 per km against the tender opened on 13.3.2009 and the difference in the two rates works out to be Rs.87,59,057.64.

19. There is no dispute to the fact that Annexure II to purchase order, determines the terms and conditions governing the contract between the parties. Clause no.17 clearly on this Annexure clearly states that the FALL CLAUSE: NOT APPLICABLE. The learned counsel for the petitioner has failed to point out that the reliance of the learned arbitrator on the fall-clause at item no.17 in annexure II to the purchase order amounts to travelling beyond the terms and conditions of the contract/tender/purchase order which had created the legal relationship between the parties. Since, as per clause 17, the fall-clause was not applicable, the tribunal has held that the respondent was not entitled for difference in two rates, and has thus rejected the counter claim. In the light of these facts it cannot said to be against the public policy, causing loss of public money since money was paid to respondents in term to the contract. Learned arbitrator has relied upon the table showing the IEEMA basic price circular issued every month by petitioner and has observed that there was always a substantial amount of price variation from month to month. It is also observed that the tender against which the P.Os were granted to the respondent were submitted in June, 2008 and the rates quoted in the tender were based on raw material rates as per IEEMA price index, which were significantly higher at that time, and a contractor while submitting a tender is required to calculate its price of the raw material on the basis of the prevalent IEEMA rate of the raw material. It is not in dispute that the rates so quoted by the respondent in its tender were accepted unconditionally by the petitioner and thereafter P.Os dated 14.1.2009 and 24.2.2009 were issued to the respondent. It, therefore, is clear that the contract was not fraudulently obtained by the respondent. After discussing the variations in IEEMA price of raw material, the learned arbitrator concluded that the prices quoted in tender by respondent were as per the rates of raw material declared by petitioner from time to time. The findings of learned Arbitrator are thus well reasoned duly supported by documentary evidences on record.

20. It is further argued by the petitioner that the terms of reference was to decide the legality of the restrictions imposed by Northern Railway on price variation beyond March, 2009, but the learned arbitrator has wrongly dwelt and judged the whole matter on the aspect of whether the imposition of said restriction was justified or not and thus has travelled beyond the terms of reference.

21. To my mind, the arbitrator has considered all the relevant contentions and submissions raised by the parties in their claim and counter claim relied on the relevant documents produced and dealt with the arguments addressed by parties

on the issue, and then answered the terms of reference. At no stage, learned arbitrator has travelled beyond the terms of reference or in violation of terms and conditions of the agreement governing the parties.

22. It is also contended in the petition in clause Q and D of the petitioner that the arbitrator has shown bias in favour of the respondent, while ignoring crucial facts and invoking clause 0402 of IRS Conditions of Contract. There is no dispute to the fact that the clause 0402 of IRS Conditions of Contract, General and Financial Rules and Other Conditions governs both the parties, and so invoking the provisions of IRS Conditions of Contract cannot be said to be an act of bias, and the petitioner has failed to point out `the crucial fact'' which was ignored by learned Arbitrator.

23. The petitioner has failed to point out any error apparent on the face of award or that the award is apparently and patently illegal or that it is unfair, unreasonable and shocks the conscience of the court or is against any Public Policy.

24. No ground has been made out to interfere with the award. The petition is hereby dismissed.

25. No orders as to costs.

