(2014) 03 DEL CK 0057

In the Delhi High Court

Case No : OMP 113 of 2014

Union of India APPELLANT

Vs

M/s. Sri Krishna Paper Mills RESPONDENT

Date of Decision : 12-03-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(7) 31(7)(a) 34 37(b)

Citation : (2014) 03 DEL CK 0057

Hon'ble Judges : Sanjeev Sachdeva, J

Bench : Single Bench

Advocate : Jaswinder Singh, for the Appellant; Ankit Jain, for the Respondent

Final Decision : Dismissed

Judgement

Sanjeev Sachdeva, J.—The Petitioner, Union of India has filed this petition u/s 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as ''the said Act'') seeking setting aside of the award dated 30.9.2013 read with additional award dated 8.10.2013. The Respondents had bid for the tender invited by the Petitioner for supply of 305 metric tons paper. The Respondent was found to be L-1 and by acceptance dated 19.02.2010, the contract was awarded to the Respondents. As per the contract, the Petitioner could accept the goods to the extent of 305 metric tons (+/-) 5%. The Respondent delivered 307.89 metric tons paper to the Petitioner. The Petitioner released the payment though belatedly for 305 metric tons paper but did not release payment for 2.89 metric tons paper. The payments made for 305 metric tons was also delayed.

2. The Respondent invoked the arbitration clause for payment for the balance 2.89 metric tons and interest for the delay in payment for 305 metric tons paper supplied. As per the Respondent, the supplies were made during the period 16.03.2010 to 23.03.2010 and the payment for the said supplies was made on 30.11.2010. The Respondent claimed interest for the delay in release of the payment. The Under Secretary, Government of India, Ministry of Urban Development, vide letter dated 29.04.2013 appointed the arbitral tribunal to

determine the four claims of the claimant, there being no counter claim. The four claims of the claimant are as under:-

(i) Price of unpaid goods for Rs. 1,46,531/-

(ii) Interest on delayed payment of Rs. 28,94,162/-

(iii) Interest on unpaid goods Rs. 1,04,865/- and;

(iv) Litigation costs Rs. 5,00,000/-

3. The arbitral tribunal vide the impugned award dated 30.09.2013, awarded in favour of the Respondent/claimant a sum of Rs. 1,22,617/- towards the price of the unpaid goods and Rs. 10,04,687/- as interest on the delayed payments including the interest on unpaid goods plus Rs. 50,000/- as litigation costs. By correction of the award dated 8.10.2103, the tribunal has noticed that though against claim No. 1 the amount awarded was Rs. 1,26,617/-. In the calculations, the same had been written as 1,22,617/-. The said error was corrected by the supplementary award dated 8.10.2013.

4. The Petitioner has impugned the award only on the ground that the arbitrator relying upon Section 31(7)(a) of the said Act has awarded the interest by holding that the interest was payable as there was no clause in the contract prohibiting the payment of interest on the money due to the contractor.

5. It is contended by the Petitioners that arbitrator has misconstrued the terms of the contract inasmuch as there were different contractual stipulations that prohibited payment of interest. Accordingly, there was an implied prohibition in the contract prohibiting payment of interest under any circumstance.

6. Learned counsel for the Petitioner has relied on Clause 7 of the Contract pertaining to Security Deposit that stipulates that no claim shall lie against the Petitioner either in respect of interest or in depreciation in value of any security. Further he has relied on Clause 18 pertaining to Withholding and Lien in respect of sums claimed that stipulates that any sum withheld or retained under lien by the purchaser (Petitioner) would be kept withheld and retained and the contractor (Respondent) would have no claim for interest or damages whatsoever in respect of any such amount withheld or retained.

7. Learned counsel for the Petitioner has relied on the judgment of the Supreme Court in Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager (Works), Palghat and Others, to contend that the arbitral tribunal cannot award interest from the date of cause of action to the date of contract, on amounts awarded to the contractor under a contract that contained a stipulation specifically barring payment of interest. He submitted that there was an implied bar in the contract between the parties for payment of interest.

8. To resolve the controversy between the parties, it would be necessary to examine the provision of the Act. Section 31(7) of the Act lays down as under:

Section 31(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

9. In terms of Section 31(7) where arbitral award is for payment of money, the arbitral tribunal has been given the discretion to include in the sum for which an award is made interest at such a rate as the tribunal deems reasonable on the whole or part of the money directed to be paid, for the whole or any part of the period between the date on which the cause of action arose and the date on which award is made. This discretion given to the arbitral tribunal has been made subject to the contract between the parties.

10. The parties by contract can prohibit the payment of any interest or restrict the period for which interest may be payable or even stipulate or restrict the rate of interest at which such interest may be payable. While making an award, the arbitral tribunal has to take into account the contract between the parties. The award of the tribunal would be subject to the stipulations agreed upon by the parties in the contract. Section 37(b) further stipulates that unless the award otherwise directs for the period post the award till date of payment, the awarded amount shall carry an interest @ 18% p.a..

11. In terms of the said provision what is thus, relevant to examine is whether the contract between the parties prohibited, restricted or regulated the payment, the period or the rate of interest.

12. Learned counsel for the Petitioner conceded that there was no specific provision in the contract pertaining to award of interest on the unpaid amount. As per the counsel, the contract did not specifically prohibit, regulate or restrict the payment, the period or the rate of interest on either unpaid amount or the delayed release of payment. He submitted that there was an implied prohibition on the payment of interest and thus an analogy should be drawn from other clauses to infer that there was an implied prohibition in the contract for payment of interest under any circumstance. He contended that as the contract stipulated that the Security Deposit would not carry any interest and even the sums withheld under lien were to be paid without interest, there was an implied agreement that no interest would be payable under any circumstance.

13. Clause 7(3) of the contract pertaining to Security Deposit and Clause 18 pertaining to Withholding and Lien on claimed sums stipulate as under:

7. Security Deposit:

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(3) No claim shall lie against the purchaser either in respect of interest or any depreciation in value of any security. In case of bank deposit receipts the purchaser shall not be responsible for any loss that may result on account of failure of such bank.

18. Withholding and Lien in Respect of Sums Claimed

Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the contractor the purchaser shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the contractor and for the purposes, aforesaid, the purchaser shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a lien over the name pending finalisation or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the contractor, the purchaser shall be entitled to withhold and have a lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the contractor under the same contract or any other contract with the purchaser or the Government or any person contracting through the Secretary pending finalisation or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or monies so withheld or retained under the lien referred to above, by the purchaser will be kept withheld or retained as such by the purchaser till the claim arising out or under the contract is determined by the arbitrator (if the contact is governed by the arbitration clause) of by the competent court as prescribed under clause 20 hereinafter provided, as the case may be and the contactor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the contractor. For the purpose of this clause, where the contactor is a partnership firm or a limited company, the purchaser shall be entitled to withhold and also have a lien to retain towards such claimed amount or amount in whole or in part from any sum found payable to any partner/limited company, as the case may be whether in his individual capacity or otherwise.

14. Bare reading of Clause 7(3) shows that the said clause is applicable only to Security Deposit. Clause 7(3) has no concern or connection and thus application to unpaid sale consideration or interest payable thereon. Clause 18 deals with any claim or claims arising in favour of the Purchaser (Petitioner) against the Contractor (Respondent). It stipulates that the purchaser shall have lien and right to retain the sum wholly or in part from the amounts claimed and withhold it till the determination of dispute and in case any such amount withheld exceeds the amount of claim of the Purchaser (Petitioner), the Contractor (Respondent)

shall have no claim for interest or damages on the excess amount withheld. This clause also does not pertain or deal with the delay in payment of the sale consideration or interest due thereon. These clauses do not prohibit, restrict or regulate the payment, the period or the rate of interest. These clauses clearly have no application to the facts of the present case. The Petitioner neither had nor raised any counter claim before the arbitral tribunal. No amount was claimed to be withheld by the Petitioner under lien against the Respondent, so there was no question of applicability of these clauses. No specific stipulation in the contract prohibiting the payment of interest for delay in payment was pointed out or relied upon by the Petitioner.

15. Payment of interest is basically compensation for being denied use of the money during the period the same could have been made available to the claimant. To deny payment of interest even in cases of delay in release of due sums, the contract should specifically stipulate so. For such a clause to be valid the same has to be specifically agreed upon, there should be no requirement for inference of such a clause from other collateral clauses. Any stipulation that deprives a party of a right provided by a statute (Section 31(7) of the Act) must be specifically provided for. There should be no requirement of a detailed inquiry or analysis to infer such a stipulation.

16. The Supreme Court in the case of State of Haryana and Others Vs. S.L. Arora and Company, has laid down as under:

24.2 The authority of the Arbitral Tribunals to award interest u/s 31(7)(a) is subject to the contract between the parties and the contract will prevail over the provisions of Section 31(7)(a) of the Act. Where the contact between the parties contains a provision relating to, or regulating or prohibiting interest, the entitlement of a party to the contract to interest for the period between the date on which the cause of action arose and the date on which the award is made, will be governed by the provision of the contract, and the Arbitral Tribunal will have to grant or refuse interest, strictly in accordance with the contract. The Arbitral Tribunals cannot ignore the contact between the parties, while dealing with or awarding pre-award interest. Where the contact does not prohibit award of interest, and where the arbitral award is for payment of money, the Arbitral Tribunal can award interest in accordance with Section 31(7)(a) of the Act, subject to any term regarding interest in the contract.

17. The law laid down by the Supreme Court in S.L. Arora case (Supra) is that where the contract does not prohibit award of interest and where the arbitral award is for payment of money, it is within the powers of the arbitral tribunal u/s 31(7)(a) of the Act to award interest.

18. The Act makes the supervisory role of the Courts on an arbitral award very limited. The supervisory role of the Court for the review of arbitral record is only to ensure fairness. Intervention of the court is envisaged in few circumstances only like in cases of fraud or bias by the arbitrator, violation of internal justice

etc. The scheme of the Act keeps the supervisory role of the court at minimum level and this is justified as the parties to the agreement make a conscious decision to exclude the court''s jurisdiction by opting for arbitration as they prefer expedience and finality offered by it.

19. The arbitral tribunal has rightly held that there was no prohibition in the contract between the parties prohibiting the award of interest. As there was no prohibition in the contract with regard to award of interest, the arbitral tribunal has rightly awarded interest in terms of Section 31(7)(a) of the Act. If two view are possible and the arbitral tribunal has taken one of the two possible views, the Court while examining the award on the touchstone of Section 34 of the Act would not substitute its view for the view of the Arbitral tribunal if the view taken by the arbitral tribunal is plausible even if the Court were to take a different view.

20. I am also in the agreement with the view taken by the arbitral tribunal that there was no stipulation between the parties prohibiting, regulating or restraining the payment, the period or the rate of interest. I find no infirmity in the impugned award. The objections of the Petitioner are, thus, without any merit and are, accordingly, dismissed. No costs.