
(2012) 05 DEL CK 0165

In the Delhi High Court

Case No : CS (OS) 1242 of 1991 and IA No. 13851 of 1992

Union of India

APPELLANT

Vs

Peeco Hydraulic Pvt Ltd.

RESPONDENT

Date of Decision : 01-05-2012

Acts Referred:

Arbitration Act, 1940 — Section 28, 30, 33
Contract Act, 1872 — Section 7

Citation : (2012) 189 DLT 264

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Girish Aggarwal and Mr. Y.R. Sharma, for the Respondent

Judgement

Justice S. Muralidhar

1. These are objections by Peeco Hydraulic Private Limited ("PHPL") under Sections 30 and 33 of the Arbitration Act, 1940 ("Act") to an Award dated 18th January 1991 passed by the sole Arbitrator in the disputes between the parties arising out of an acceptance of a tender by the Directorate General of Supplies & Disposal ("DGS&D") issued on 23rd June 1980 whereunder PHPL was to supply an Oil Hydraulic Spring Testing Machine. According to the objector, Clause 14 of the tender documents contained a question whether the tenderer agreed to sole arbitration by an officer of Ministry of Law to be appointed by the DGS&D as provided in Clause 24 of the General Conditions of Contract ("GCC") Form DGS&D- 68 (Revised). It was stated that omission to answer the question would be deemed as acceptance to the Clause. PHPL answered the question in the negative.

2. On 7th August 1992, the DGS&D cancelled the tender and invited fresh tenders in which PHPL again was the lowest. DGS&D reinstated the old tender of 30th December 1982 and cancelled it again on 14th June 1983.

3. One of the objections to the impugned Award by PHPL is that inasmuch as it

never consented to the arbitration by an officer appointed by the Ministry of Law, the arbitration proceedings were bad in law. This issue came to be decided against PHPL by this Court by an order dated 11th January 2002 of this Court. It was held in paras 17 and 18 as under:-

17. The conclusions therefore from the aforesaid are clear and unambiguous. u/s 7 of the Contract Act the acceptance of the offer has to be absolute but need not be conditional. However, if there is a conditional or counter offer and it is acted upon without protest and the acceptance has been conveyed subject to that, to which there is no dispute raised, this amount to a concluded contract.

18. With this backdrop one can refer back to the present case again. Even if while filling the document for tender the objector had stated that he does not agree to arbitration but still when the contract was accepted and conveyed it contained an arbitration clause. Admittedly, the objector at no stage protested to it and acted on the same. In that view of the matter once acceptance contained an arbitration clause to which there was no protest an attempt was made to complete the contract. The conclusion would be that it was an accepted contract with the said stipulation pertaining to the agreement. It is too late in the day to rake up this plea at this stage in court for the first time. It must therefore be held in the peculiar fact of the present case that there was an arbitration agreement between the parties and it is decided accordingly.

4. Aggrieved by the above order, PHPL filed FAO (OS) No.53 of 2002 in which there was a stay granted of the further proceedings in the suit. The appeal was disposed of by the Court ultimately on 5th January 2012 with the following order:

After arguing for some time, learned counsel for the appellant does not press the appeal and the application and states that he will argue his objections on merit to the award before the learned Single Judge.

Dismissed as withdrawn.

Interim order dated 14.02.2002 stands vacated.

Parties to appear before the learned Single Judge in suit no.1242/1991 on 23.01.2012.

5. Consequently, the above objection to the impugned Award no longer survives.

6. It is next submitted on behalf of PHPL that the first Arbitrator (earlier to the one who passed the impugned Award) had passed an order dated 27th September 1989 adjourning the proceedings sine die after noting that the time for pronouncing the Award had expired and that parties had to seek extension of time. That Arbitrator continued till his resignation on 26th July 1990. It is submitted that thereafter only a competent court could have appointed an arbitrator and not the persona designata in terms of Clause 24 of the conditions of the Contract. Moreover, PHPL never mutually agreed to extend the time as was contemplated in the order dated 27th September 1989.

7. In reply to the above averments, it is stated by the Union of India that the Arbitrator succeeded the earlier Arbitrator who passed the order on 27th September 1989 was legally appointed was under the terms and conditions of the contract. As regards the consent of the parties to the extension of time, it is simply averred by the Union of India "it is only with the mutual consent of the parties the arbitration proceedings continued beyond a specified time and cannot be said that the defendant never mutually agreed." This, of course, is vehemently denied in the rejoinder where PHPL has reiterated that it had never consented to the extension of time for passing the Award.

8. According to PHPL, the events that took place after the resignation of Mr. R.K. Gupta as Arbitrator on 26th July 1990 were as under:

1.37 That Shri C. Achuthan, the learned Arbitrator entered upon reference on 27th of September 1990 and it appears that ignoring the order dated 27th September 1989 passed by Shri R.K. Gupta as the Sole Arbitrator and without complying with the conditions laid down therein, directed the Defendant to file the counter-statement before him.

1.38 It is pertinent to note that the Defendant had never agreed for the mutual extension of time nor the Plaintiff had obtained any extension of time from a civil court nor for the appointment of Shri C. Achuthan as the Sole Arbitrator and the appointment of the learned Arbitrator remained without jurisdiction and unilateral.

9. In para 1.39 of the objections, it is stated by PHPL that a letter was sent on 26th October 1990 by PHPL to the Arbitrator by registered post stating that it had never agreed to extension of time. Another letter was sent on 7th November 1990 to the learned Arbitrator by PHPL by registered post. Copies of both letters have been enclosed with paras 1.39 and 1.41. The specific averment in para 1.42 is that the above communications were ignored by the Arbitrator who fixed the hearing for 17th January 1991. Thereafter, on 18th January 1991 the learned Arbitrator passed the impugned Award.

10. In reply to the above paragraph there is only a bald denial by the DGS&D. It is asserted that the appointment of Shri Achuthan was legal and that he had "every right to process the case the way it was considered appropriate by him." Receipt of the two letters of PHPL by registered post by the Arbitrator is not denied. The reply to both paras 1.39 as well as 1.41 is that "this para needs no rejoinder (sic reply) it being a matter of record".

11. The above submissions have been considered. The arbitral proceedings were under the 1940 Act. The parties had to seek extension of time for the Arbitrator to pass the Award. There is absolutely nothing on record to show that the parties agreed to any extension of time. On the other hand, the order dated 27th September 1989 passed by the earlier Arbitrator makes the position clear. It reads as under:

Shri Lal submits that the case should be proceeded with ex-parte as the contractor has not appeared for today's hearing. I am afraid, in the absence of a notice to proceed with ex-parte. Moreover, the claim statement has been filed by the Union of India only on 25.9.1989.

It is stated by Shri Lal that a copy of the statement is being sent to the contractor. In the circumstances, it will be against all cannons of justice to proceed exparte.

Four months period is expiring on 30.9.89. Unless the parties agree for enlargement of the time or the claimant gets the time enlargement from the Civil Court, the case stands adjourned sine die.

12. The time fixed under Clause 3 of the Schedule to the Arbitration Act 1940 can be extended only by the Court and not by parties. The Arbitrator had no jurisdiction to make an Award after the expiry of the time for making the Award unless the parties sought extension by applying to the Court u/s 28. [See Hari Krishna Wattal Vs. Vaikunth Nath Pandya (Dead) by Lrs. and Another, and State of Punjab Vs. Hardyal,]. With there being no consent of the parties for the extension of time, and no order of the Court extending the time for making the Award, the entire arbitration proceedings before the succeeding Arbitrator, Mr. Achuthan, stood vitiated in law. The specific objection to this effect raised by PHPL before the learned Arbitrator by two letters, as noted above, were not dealt with by him. On this short ground, the impugned Award dated 18th January 1991 is set aside.

13. The objections of PHPL in IA No.13851 of 1992 are accordingly allowed. The suit is disposed of in above terms.