
(2010) 01 DEL CK 0073

In the Delhi High Court

Case No : C.S. (OS) No. 958 of 1994 and I.As. 4820 of 1994 and 8830 of 1994

Union of India (UOI)

APPELLANT

Vs

The People Engineering and Motors Works

RESPONDENT

Date of Decision : 21-01-2010

Acts Referred:

Citation : (2010) 01 DEL CK 0073

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Geeta Sharma and Preeti Dalal, for the Appellant; Shiv Khorana, for the Respondent

Judgement

Manmohan, J.—Both plaintiff-Union of India and the defendant-contractor have filed objections under Sections 16, 30 and 33 of Arbitration Act, 1940 (hereinafter referred to as "Act, 1940") to the arbitral Award dated 7th May, 1992 passed by Sole Arbitrator, Mr. C. Achuthan, Additional Legal Adviser to the Government of India.

2. Briefly stated the material facts relevant for this case are that on 20th March, 1971 plaintiff-UOI accepted the defendant-contractor's tender for construction and supply of four Ferry Crafts having capacity of 150 people in accordance with the conditions mentioned in Form No. DGS&D-68 (Revised) and 72 as amended upto date. The four Ferry Crafts were to be delivered by 10th March, 1973.

3. Clause 19A of the contract provided for payment in a phased manner. While 15% payment was to be made when keel was laid, another 15% payment was to be made when frame of vessel was completed and additional 15% payment was to be made when hull was completed. Fourth payment of another 20% was to be made when the vessel was launched and another 25% payment was to be made when the vessel was completed and accepted by respondent-UOI after final inspection and/or trial. The balance 10% amount was to be paid to the defendant-contractor after expiry of the guarantee period.

4. Admittedly, Ferry Crafts were not delivered by 10th March, 1973. In fact, by April, 1973 only the third stage of construction had been completed. By that time, plaintiff-UOI had paid to the defendant-contractor a sum of Rs. 38,13,975. In fact, subsequent to furnishing of a bank guarantee, plaintiff-UOI paid a further sum of Rs. 18.11 lacs towards escalation. Till date the said bank guarantee has not been encashed. Consequently, till now plaintiff-UOI has paid to defendant-contractor a sum of Rs. 56,24,976/-.

5. As the defendant-contractor failed to deliver the four Ferry Crafts despite several extensions granted to it, plaintiff-UOI cancelled the tender in question vide letter dated 15th June, 1981 treating 31st August, 1980 as the date of breach. The plaintiff-UOI issued a risk purchase enquiry which opened on 11th February, 1982. Ultimately, plaintiff-UOI placed the risk purchase order on 27th August, 1983.

6. Since the defendant-contractor did not accept the cancellation, it filed a suit bearing Suit No. 451A/1982 u/s 20 of Act, 1940 in this Court. On 11th April, 1985, this Court directed the DGS&D to appoint an Arbitrator to adjudicate upon the claims and counter-claims raised by both the parties.

7. On 7th May, 1992, the sole Arbitrator passed his Award by virtue of which the Arbitrator ordered the defendant-contractor to refund Rs. 56,24,976/- - the amount paid by plaintiff-UOI to the defendant-contractor. The sole Arbitrator rejected all other claims and counter-claims of both the parties, including the plaintiff-UOI's claim of Rs. 3,95,82,385/- towards risk purchase.

8. Even though the Arbitrator held that the defendant-contractor had committed breach of the contract, Arbitrator did not award any amount towards risk purchase on the ground that the risk purchase order had been belatedly placed, that is nearly 35 months after the date of breach and further there were variations in the nature of description of the goods in the risk purchase contract from the original contract as awarded to the defendant-contractor.

9. Ms. Geeta Sharma, learned Counsel for plaintiff-UOI submitted that the plaintiff-UOI was entitled to difference between the risk purchase offer and the order placed upon the defendant-contractor as delay in placing the risk purchase order was not unusual keeping in view the fact that prior permission of various government agencies was required. Ms. Sharma pointed out that the plaintiff-UOI had called for risk purchase enquiry within six months from the date of cancellation of the contract.

10. Ms. Sharma lastly submitted that the Arbitrator had erred in not awarding interest on the amount directed by him to be refunded to the plaintiff-UOI. In this connection, she relied upon a judgment of this Court in Amar Industries v. Union of India reported in 2006(2) RAJ (Delhi) wherein it has been held as under:

23. Learned Counsel for the petitioner contends that there is no prayer for the grant of interest made in the present case. In my considered view once the

objections have been filed by the petitioner and are pending consideration this Court is fully empowered to grant interest both for the pendent lite period and for the future period.

11. On the other hand, Mr. Shiv Khorana, learned Counsel for defendant-contractor submitted that the risk purchase enquiry had not been floated by plaintiff-UOI within six months from the date of breach, that is, admittedly on 31st August, 1980 and, therefore, the Arbitrator had rightly held that plaintiff-UOI was not entitled to any amount on account of risk purchase.

12. Mr. Khorana however submitted that Arbitrator's direction to defendant-contractor to refund an amount of Rs. 56,24,976/- was contrary to Clause 22 of Form No. DGS&D 72 by virtue of which the ownership of the four Ferry Crafts vested in the plaintiff-UOI and the defendant-contractor was only a bailee. Clause 22 of Form No. DGS&D 72 reads as under:

22. Ownership of materials on payment of first installment -Upon payment of the first instalment of the Contract price, the vessel so far as then constructed and all machinery and materials either wholly or partially constructed or in preparation and set apart from time to time for the purpose of the Contract shall become and shall, with all additions thereto, respectively continue to be the property of the Purchaser subject to the purposes of the Contract; but the Purchaser shall not be liable for any loss or damage by theft, fire, stress of weather or otherwise howsoever. Upon the due completion of Contract all such materials which have not been actually used for the purpose of Contract shall become the property of and be relinquished to the Contractor.

13. Having heard the parties at length and having perused the impugned Award, I am of the view that before I deal with the rival contentions, it would be appropriate to first outline the scope of interference by this Court with an arbitral award rendered under Act, 1940. The Supreme Court in M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, has clearly outlined the scope of interference by this Court in petitions filed under Sections 30 and 33 of the Act, 1940. The relevant observations of the Supreme in the said judgment Court are reproduced herein below:

36. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings u/s 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

37. The common phraseology "error apparent on the face of the record" does not

itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.....

14. In fact, upon perusal of the impugned Award, I find that the Arbitrator has given cogent reasons for directing refund of Rs. 56,24,976/- and for rejection of all other claims and counter-claims. The relevant portion of the impugned Award is reproduced herein below:

It is a fact that there existed a valid and binding contract between the parties as is evident from the documentary evidence before me. This fact has been accepted by the respondents by performing the contract, by constructing the vessels upto 3rd stage. The respondents' contention that by not making full payments, for the work done upto 2nd stage, the claimants committed breach is not tenable as the non-payment was made because of certain disputes between the parties on the claim made by the respondents. Madras High Court's judgment in N. Sundareswaran Vs. Sri Krishna Refineries, relied upon by the respondents is of little help to the respondents in the light of the distinguishable features of the present case. It is an un-disputed fact that the respondents had not supplied the stores even by 1980 against the original time schedule of 10.3.1973 fixed in the A/T. It is also a fact that the time for delivery of the stores was extended from time to time to enable the respondents to supply the stores. No doubt, the respondents have submitted that those extensions were not binding on them as the extensions were subject to onerous conditions which they had not accepted. I do not think that it is necessary to go into the background of each and every extension letter and see whether the respondents had explicitly accepted the same for the simple reason that the letter dated 14.3.80 issued by the respondents to the claimants proves the conduct of the respondents with reference to the delay on their part to supply the stores and the extension of time needed by them claimants have filed this letter (pp. 146-147). From this letter there is every reason to believe that extension of time upto August, 1980 was accepted by them. The claimants too have admitted that 30th August, 1980 is the final date of breach. I do not find any reason not to accept the claimants' contention that the respondents had failed to deliver the stores even by 30th August, 1980. The respondents have not produced any clinching evidence to prove various contentions raised by them in their pleadings that they were incapacitated from performing their part of the contract and that the claimants have committed the breach. In this context the very fact that the respondents had failed to deliver the stores within time without sufficient cause proves that they committed breach. In view of this I am of the view that the respondents committed breach of contract and the cancellation of the contract on this ground, by the claimants on 15.6.1981 is legal and valid.

Coming to the claimants' claim of Rs. 56,24,976/- the factual position has not

been contested by the respondents. Since the claimants having paid the said amount and that the respondents having failed to deliver the stores in time the claimants are entitled to get back the said amount from the respondents. The learned Counsel for the respondents had stated that no one stopped the claimants from taking back the stores after completion of the 3rd stage. This is not a valid ground to absolve the respondents from their obligations. It was not the intention of the contract that the claimants will take over the un-finished stores on an "as is where is condition" in the event of the respondents failure to do their job. Further all along the respondents were giving impression to the claimants that they would do the job and the claimants were rather hopeful and accommodative. In the light of the evidence produced before me and after considering the submissions made by both the parties, I am convinced that the claimants are entitled to get back the sum of Rs. 56,24,976/- from the respondents being the actual amount paid by them to the respondents.

It is seen from the facts before me that the contract was cancelled on 15.06.81 by the claimants and by their own admission the date of final breach of contract was 31.8.80. They issued Risk Purchase Tender Enquiry on 30.11.1981 and a copy of the same was sent to the respondents on 14.12.1981. Tender was opened on 11.2.1982, Advance A/T is dated 24.8.1983 (format A/T dated 27.8.83). The claimants had taken nearly 3 years to issue a risk purchase contract (i.e. from 31.8.80 to 24.8.83) and the respondents are being held liable to pay the risk purchase loss incurred by the claimants from out of the said Risk Purchase Contract. The learned Counsel for the claimants had laboured considerably during the course of the arguments to justify the delay. He had narrated various procedures involved including inter-Ministry consultations etc. before finalizing the A/T. He had also submitted that the 6 months time stipulated in Clause 14 of the D.G.S.& D.-68 (Revised) is not applicable; that the special conditions contained in D.G.S.&D.-72 are relevant in this case.

It is an admitted fact that the conditions of contract as contained in Form D.G.S.&D. 68 (Revised) and 72 as amended upto date will apply to this contract. D.G.S.&D.-72 is supplementary to D.G.S.&D.-68. However, I could not locate any Clause in D.G.S.&D.-72 enabling the purchaser to go for a risk purchase after such a long gap of about 35 months from the date of default and fasten the liability on the supplier to pay the loss suffered in the Risk Purchase. I appreciate the necessity for following the procedural requirements. Then the question is that whether the respondents, should be made to suffer for the undue delay involved in finalizing the Risk Purchase Contract. Three years period is not too short a period not to have any effect on the cost of the materials which are to be contracted. I do not find any justification despite the fact that the respondents committed breach of contract, to hold the respondents responsible to pay the loss stated to have been suffered by the claimants in risk purchase contract placed after nearly 3 years from the date of breach of contract. I hold the Risk Purchase A/T belated. The respondents had raised several other points also claiming that the Risk Purchase is not a valid one which included variation in the

nature of description and specification of goods in the Risk Purchase A/T compared with the goods originally contracted. On a perusal of the description and specification of the goods in the two contracts, I find them not identical. On this ground also, the loss stated to have been suffered by the claimants cannot be asked to be compensated by the Respondents. In view of this, I do not think it is necessary to examine the other points raised by the respondents with reference to the Risk Purchase made by the claimants. On these two grounds, i.e. one on account of undue delay and in view of the difference in the nature of specifications and description of the goods involved in the Risk Purchase, I hold the claimants are not entitled to recover their claim of Rs. 3,95,82,385/- towards extra expenditure. I, therefore, reject the said claim of Rs. 3,95,82,385/-.

xxxx xxxx xxxx xxxx The claimant's claim for 18% p.a. interest on the amount due to them is rejected as it is found not tenable.

15. In my opinion, the Arbitrator was perfectly justified in rejecting the plaintiff-UOI's claim of Rs. 3,95,82,385/- as the offer of risk purchase was not in conformity with Form No. DGS&D 68 (Revised). Clause 14(7) of the said Form stipulates that in case of failure to deliver the stores within the period fixed for delivery, the plaintiff-UOI would be entitled to issue a risk purchase order within six months from the date of such failure. Sub-clause 7 of Clause 14 of Form No. DGS&D 68 (Revised) reads as under:

14. DELIVERY

xxxx xxxx xxxx xxxx (7) Failure and termination- If the contractor fails to deliver the stores or any installment thereof within the period fixed for such delivery or at any time repudiates the contract before the expiry of such period, the Secretary may without prejudice to the right of the Purchaser to recover damages for breach of the contract:

(i) recover from the contractor as agreed liquidated damages and not by way of penalty a sum equivalent to 2% of the price at any stores which the contractor has failed to deliver within the period fixed for delivery in the schedule for each month or part of a month during which the delivery of such stores may be in arrears where delivery thereof is accepted after expiry of the aforesaid period, or

(ii) purchase or authorise the purchase elsewhere without notice to the contractor, on the account and at the risk of the contractor of the stores not so delivered or others of a similar description (where stores exactly complying with particulars are not in the opinion of the Secretary, which shall be final, readily procurable) without cancelling the contract in respect of the instalments not yet due for delivery, or

(iii) cancel the contract or a portion thereof and if so desired purchase or authorise the purchase of the stores not so delivered or others of a similar description (where stores exactly complying with particulars are not in the opinion of the Secretary, which shall be final, readily procurable) at the risk and

cost of the contractor. If the contractor had defaulted in the performance of the original contract, the purchaser shall have the right to ignore his tender for risk purchase even though the lowest.

Where action is taken under Sub-clause (ii) or Sub-clause (iii) above, the contractor shall be liable for any loss which the purchaser may sustain on that account provided the purchase or, if there is an agreement to purchase, such agreement is made, in case of failure to deliver the stores within the period fixed for such delivery within six months from the date of such failure and in case of repudiation of the contract before the expiry of the aforesaid period of delivery, within six months from the date of cancellation of the contract. The contractor shall not be entitled to any gain on such purchase and the manner and method of such purchase shall be in the entire discretion of the Secretary. It shall not be necessary for the purchaser to serve a notice of such purchase on the contractor.

16. I also find that in a similar case between the same parties a similar type of Award had been upheld by this Court. Mr. Justice (Retd.) Anil Dev Singh, as His Lordship then was, speaking for this Court in *Peoples Engg. and Motor Works Ltd. Vs. Union of India*, has held as under:

2. The respondent/Union of India invited tenders for construction and supply of 4 Nos. 100 Ton Steel Dock Barges. The petitioner submitted its tender which was accepted on January 21, 1971. The Accepted Tender(A/T) value of the barges was Rs. 11,53,600 excluding delivery charges of Rs. 65,000/- per barge. The respondent asserts that the delivery period was extended from time to time but the petitioner failed to deliver the vessels with the result that the delivery portion of the contract was cancelled by the respondent/Union of India on June 23, 1977. A risk purchase contract was finalised on May 21, 1979 with the petitioner and the petitioner agreed to deliver vessels against R/P (risk purchase). As a result of the risk purchase, the respondent incurred extra expenditure for delivery of the vessels to the extent of Rs. 6,80,000/-....

xxxx xxxx xxxx xxxx 5. I have heard learned Counsel for the parties. I find that in so far as the construction of vessels are concerned, respondent had not raised any dispute. That means the vessels were ready in time and only the supply & delivery was not made in time by the petitioner with the result that the contract was cancelled. The learned Arbitrator has rightly considered that a period of three and a half years was taken by the respondent in making the risk purchase with the result that principles relating to mitigation of damages were not kept in view by the claimant. It is well settled that the Arbitrator is master of facts and law, and the Court should not interfere with the Award of the Arbitrator unless there is an error apparent on the face of the record. The learned Counsel for the respondent has not been able to point out any error apparent on the face of the award. Besides, reasonableness of the reasons given by the Arbitrator cannot be challenged and even appraisal of evidence is never a matter which the Court questions or considers. When the parties select their own forum to decide the disputes, that forum must be conceded power to appraise the evidence as well as

quality and quantity of same.

17. As far as the issue of grant of interest on the amount directed to be refunded by defendant-contractor to plaintiff-UOI is concerned, I find that no such ground has been taken by the plaintiff-UOI in its objection application. I further find that no prayer has been made before this Court for award of pendente lite interest. I am of the view that as the prayer for award of interest had been specifically rejected by the Arbitrator, it was incumbent on the plaintiff-UOI to either have challenged the said portion of the Award or to have filed a separate application claiming interest for the pendente lite period. I am also of the opinion that in view of the Interest Act, 1978, interest can only be awarded if a prior notice had been issued by the person claiming interest. Since all this time neither a notice had been issued nor such a ground had been taken in the objection application, I am of the view that no interest for the pendente lite period can be awarded specially when the Arbitrator had declined the prayer for interest. However, I am of the view that this Court is not powerless to award interest for the post decretal stage, as this stage is yet to arrive.

18. As far as Mr. Khorana's submission that the Arbitrator could not have directed refund of Rs. 56,24,976/- to plaintiff-UOI is concerned, I am of the view that Clause 22 of Form No. DGS&D 72 does not absolve the defendant-contractor from paying compensation/ damages to the plaintiff-UOI on account of loss caused due to breach of contract by defendant-contractor. In fact, the said Clause only absolves the defendant-contractor from any loss/damage caused by theft, fire, stress of weather or otherwise howsoever. In my opinion, the expression "otherwise howsoever" has to be read ejusdem generis with the other expressions used in the said Clause. Moreover, I am of the view that the Arbitrator's opinion that plaintiff-UOI is entitled to seek compensation on account of defendant-contractor's failure to complete its job/obligation, is a reasonable and plausible view, which requires no interference in the present proceedings.

19. Accordingly, both the objection applications filed by plaintiff-UOI and defendant-contractor are dismissed but with no order as to costs. However, it is directed that in case the amount as directed to be refunded by defendant-contractor to plaintiff-UOI is not paid within a period of four weeks from today, the plaintiff-Union of India would be entitled to simple interest at the rate of 9% per annum on the said amount from today till the date of payment.

20. With the aforesaid observations, the impugned Award dated 7th May, 1992 is made rule of the Court and Registry is directed to prepare a decree in terms thereof. Accordingly, present applications and petition stand disposed of.