

(2008) 02 DEL CK 0086
In the Delhi High Court
Case No : CS (OS) 2311A of 1995

Vijaypower Generators Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-02-2008

Acts Referred:

Citation : (2008) 1 ARBLR 475 : (2008) 101 DRJ 561 : (2008) 6 ILR Delhi 141

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : S.K. Chandwani, for the Appellant; Monika Garg, for the Respondent

Judgement

S. Ravindra Bhat, J.—In these proceedings, the plaintiff seeks filing of an arbitration award dated 10.9.1995; the defendants have filed objections to the award being I.A. 1026/1999. Initially, there was a controversy as to whether the respondents had filed objections within the stipulated time; however, that was set at rest by the order of this Court dated 13th November, 2007 whereby their application u/s 5 of the Limitation Act was accepted on condition of their paying Rs. 10,000/- as costs.

2. The facts as emerging from the pleadings are that the petitioner was awarded a contract towards "supply and erection of 2x100 KVA D.G. Set for 50 KW SW (Short Wave) AIR Transmitter" at Srinagar, in Jammu and Kashmir. A condition in the contract i.e. Clause 25 stipulated that disputes between the parties would be adjudicated by an Arbitrator. The contract was awarded on 29.8.2007. It required completion of the supply and erection of agreed equipments within five months.

3. The petitioner sought reference and preferred 9 heads of claims including withholding of balance amount of Rs. 1,24,335/- payable from the final bill (Claim No. 1), interest on that amount at 24 per annum for the period 18.10.1988 to 17.12.1991 (Claim No.2); loss of interest (Claim No.3); differential Sales Tax amounts at 6% on the basis of a stipulation in the contract (Claim No. 4) for the sum of Rs. 29543/- with interest and other claims towards

interest loss on three bank guarantees (Claims 5 to 7) and counsel's fee at Rs. 10,000/- being Claim No. 9. The Arbitrator made and published his award on 10th September, 1995. In its terms, the petitioner claimant succeeded in part in Claims 1 and 2 were allowed to the extent of Rs. 67,140/- and interest on that amount for a period 5.6.1989 to 17.12.1991, was granted. The other claim awarded was Claim No. 4 to the extent of 50%; the amount quantified was Rs. 31,390/-. The Arbitrator declined all other claims.

4. The objections to the Award center around the alleged infirmity in it. According to the respondent Union of India (which is the objector) the first claim and consequentially the second claim were clearly inadmissible. Ms. Monika Garg, learned for the respondents referred to the pleadings and adverted to the documents, particularly, documents marked in the arbitration proceedings such as show cause notices and other letters being R-2 (dated 8.3.1988), R-4 (dated 2.5.1989) to state that although time was indicated for the performance of the agreement, the contractor did not adhere to it and was repeatedly warned; even show cause notices were issued. Therefore, the Arbitrator, it is claimed, fell into an error in awarding any amount much less the sum of Rs. 67,140/- in respect of claim No. 1. She also adverted to the defective performance of the contract, concerning the supplying of a 0.8 power factor alternator in stead of the agreed 0.9 power factor. It was submitted that for the same reason, there was no question of granting any interest on the amounts.

5. Learned Counsel contended that so far as the award concerned to Claim No. 4, the petitioner could not have been given those amounts. She referred to terms of the contract and submitted that the respondent's liability was conditioned on the petitioner's demanding furnishing of the Form-C or for-D, as the case may be, towards Sales Tax. In the absence of any demand (during the performance of the contract or even in close proximity of it), the petitioner could not have claimed any amount, or the differential 6% Sales Tax amounts. It was contended that in any event, the Arbitrator could not have, in the absence of proof or material documents awarded any amount and certainly not the amount of 50% of the claim which was not supported by evidence.

6. Learned Counsel, relying upon the allegations in the objections, submitted that the Arbitrator unjustifiably turned down the entire counter claim which was to the extent of Rs. 2,68,828/-. It was submitted that the counter claim was crucial for consideration in so far as the aspect of delay and the performance of the contract, as far as it concerned justification of Claims 1 & 2 of the petitioner contractor were concerned.

7. The petitioner contractor on the other hand resisted the objections. It was contended that the award was justified and that the Court should not substitute its reasoning and examine minutely the nature of evidence or the terms of contract. So long as, there was some material to justify the finding in the award, the Court should lean against the tendency to intervene and substitute its opinion as an appellate body.

8. Adverting to specific claims, learned Counsel urged that Claim No.1 was allowed on the basis of an admission by the respondent objector. Learned Counsel referred to the arguments/rejoinder on account of counter claims made by the respondents in writing; it was filed before the Arbitrator on 12.5.1999. Learned Counsel submitted that according to para 2 of the said written arguments, the respondents admitted their liability to the extent of Rs. 67,140/-. Learned Counsel also invited reference to Annexure-1 to the Written Statement signed by the Executive Engineer; in the third column while referring to their running and final bill, it admitted that the sum of Rs. 67,140/- was payable to the claimant. It was submitted that in these circumstances the Award cannot be faulted. Learned Counsel also claimed that the award of interest was justified since there is no dispute about the performance of the contract on 5.6.1989 and that the claim was in fact preferred on 17.12.1991.

9. Learned Counsel submitted that onus of the proving justification for withholding Rs. 67140/- the sum awarded in claim No. 1-or any other amount such as Rs. 32533/- was squarely with the respondents which it fails to discharge. It was submitted that a mere reference to extension of time (EOT) compensation was not sufficient and the respondents were under a further obligation to disclose, in the arbitration proceedings how they were deprived or the extent of legal injury caused to them which entitled the withholding of such amounts. Therefore, the Arbitrator, he submitted, was justified in concluding as he did that Rs. 67140/- with interest according to claims 1 & 2 were payable, by the respondents.

10. Mr. Chandwani, learned Counsel further submitted that so far as the 4th Claim was concerned, the award was justified. He referred to the concerned condition, namely, Clause 2 of the offer which was finally accepted. That condition reads as follows:

4% extra against Form-C or D due which shall be provided by the Purchaser/Consignee

It was submitted that the stipulation cast a primary obligation upon the respondents to pay 4% over and above the duty to furnish the D-Form. Nowhere did the respondents indicate that the D-Form was ever furnished. Although, the petitioner claimant did not furnish proof of having paid the amounts, the claim was a matter of law, based on interpretation of contract. Learned Counsel referred to the decision of this Court reported as Haryana Paper Mills v. Union of India 1995 (35) DRJ to state that in almost similar circumstances, in the absence of proof of payment the Court upheld an award where 50% of the Excise Duty, which had been awarded in the proceedings was affirmed.

11. So far as the averments on counter claims were concerned, learned Counsel submitted that Clause 14 of the contract (in the terms of conditions which bound the parties) required the respondents purchaser to indicate, within a period of 6 months the defects, if any, and also correspondingly make a claim within that

period. It was submitted that no such claim, or even the claim of Rs. 2,68,828/- made during the arbitration proceedings was ever preferred or demanded from the claimant within that period. In the circumstances, the Arbitrator was justified in rejecting the counter claim. Adverting to the power factor, learned Counsel relied on the same condition and further submitted that no document or material was placed or pressed into service by the respondents to show that the notice about the power factor was ever alleged within the time stipulated. It was, Therefore, submitted that the claims as adjudicated and upheld and the rejection of the counter claim of the respondents were justified. Counsel submitted that in these circumstances, the Court should make the Award Rule of Court and also direct post award interest from the date of the filing of petition till its realization.

12. A look at the Award in question shows that undoubtedly it does not contain detailed reasons. However, what is significant is that out of nine Claims made by the petitioner, only three were allowed, and in part. The first Claim by the petitioner was to the extent of Rs. 1,24,355/- towards balance amounts due and payable in their final bill. The Arbitrator went by the admission of the respondents as is evident from the following extract:

The respondents admitted in their Written Statement dated 16.3.94 that Rs. 67,140/- is due for payment in respect of the same. Again the Respondents confirmed and admitted in their arguments/Rejoinder on account of Counter-claims dated 12.5.95 that a sum of Rs. 5,27,617/- was payable to the Claimants out of which Rs. 4,60,675/- was paid up to the second R.A. Bill as on 9.12.1988. This left a sum of Rs. 67,140/- with the Department. The Claimants have also agreed this claim. Accordingly I award an amount of Rs. 67,140/- in favor of the Claimants under this claim.

13. The admission apparently adverted by the Arbitrator is to be found in the arguments of the respondents in its written note on counter claims. The same reads as follows:

2. The claimant did work amounting to Rs. 4,87,543/- up to the 3rd & final bill plus Loading charges amounting to Rs. 7,000/-, CST amounting to Rs. 17,272/- and the amount payable for extra NTC 495 Engine is Rs. 16,000/-. Thus a sum of Rs. 5,27,815/- was payable to the claimant out of which Rs. 4,60,675/- was paid up to the Second R.A. Bill as on 9.12.1988. This has left a sum of Rs. 67,140/- with the department.

14. The averments or contentions in the para immediately succeeding para 2 mentions that the sum of Rs. 32,533/- was adjusted against the EOT compensation leaving the balance of Rs. 34,607/- with the respondents. This prima facie discloses that the respondents admitted their liability. The question is what was the quantum. Now, the reasoning of the Arbitrator is premised on the admission of the respondents which is also apparently supported by Annexure-1 to the written statement which adverted that the amounts admitted to be payable to the petitioner were Rs. 67,140/- as against the sum of Rs. 32,533/-

which was shown in the foot of the said annexure under the head "recoveries".

15. There perhaps can be two opinions as to the exact amounts payable by the respondents to the petitioner. One plausible view would be that the respondents did not unambiguously admit their liabilities to be Rs. 67,140/- but stated that it was Rs. 34,607/-. On the other hand, the view taken by the Arbitrator is apparently that the counter claim of the respondents was not supported by any material. If one takes this into account and the further fact that no material has been shown in support of the allegation that the sum of Rs. 32,533/- could be adjusted against EOT and for what reason, the other view was preferred by the Arbitrator is in an equally feasible one.

16. If two such views are possible, even while not discounting the reasonableness of the claim in para 3 of the respondents' arguments, the fact that the Arbitrator has chosen to prefer one which does not admit the petitioner's claim in totality and is indeed supported by the materials on record, by itself cannot entitle the Court to infer the award is arbitrary or that the Arbitrator misconducted himself in preferring one view. Likewise, on the issue of interest, the Arbitrator has preferred to award 17.5% on the said amount of Rs. 67,140/- for the period 5.6.1989 till the 17.12.1991. This is based on the finding by the Arbitrator that the date of the completion of the work as recorded by the respondents was 5.6.1989. For the same reason, as in the case of Claim No. 1, this Court finds no infirmity with this approach. Although the rate of 17.5% per annum made seems excessive now but it would be well to remember that at that time the prime lending rate of the banks for commercial advances was considerably high and even in excess of 20% per annum. Being a commercial contract, withholding of the principal sum and the award of interest at 17.5% cannot be called unreasonable.

17. The only item of claim which survives consideration is No. 4. Here, the claimants had contended successfully that the contract required the Respondents to furnish Form-D or C as the case was, for onward transmission to the Sales Tax and in addition they were entitled to 4%. It is not in dispute that the petitioner did receive 4% of the agreed quantum. In these circumstances, the obligation to furnish Form-D was, in terms absolute. There is again no serious dispute-and indeed it had not been even urged in this regard-that at the rate of Sales Tax was 10% at the relevant time in the event of the dealer/assessed not furnishing the concerned form, (which would have entitled him to a lower levy). Here, the respondents' plea is that the petitioner did not call upon them to furnish the Sales Tax Forms. The Arbitrator in the opinion of the Court reasonably rejected this untenable proposition. The condition clearly stipulated that the respondents had to furnish the C and D Forms, which was not done. In the decision in Haryana Paper Mills(supra), a similar question was considered. The Court there held that in the absence of any stipulation requiring the claimant to render proof of payment (where actual excise duty had to be paid), the amount had to be awarded. In this case, also there is no dispute that the goods were in fact

supplied. In these circumstances, in the absence of the respondents' furnishing the concerned forms, the finding of their having breached that condition, cannot be characterized as illegal or untenable so as to amount to mis-conduct by the Arbitrator. In any event, the Arbitrator has awarded 50% of the claim like in the case of Haryana Paper Mills.

18. As far as the counter claim concerned, the respondents had raised them against specific heads; they are extracted as follows:

Sl. Nature of claim in brief Amount No. 1. As per agreement of 8 P/F in stead of 50,000 0.9 P/F was to be supplied but agency supplied 8 power factor recovery thereof. 2. None providing of Tools 2,000 3. Fuel transfer pump 2,000 4. Non providing heater ij oil sump 4,000 5. Non-providing of water jackets 4,000 6. Non providing of cold weather starting equipments. 3,000 7. Not providing space heater in alternator 46,676 8. 25% less space in panel 14,188 9. One No. KW Moter broken 500 10. Cable laying charges paid to other agency 10,890 11. Non providing of fuel pipe 5,000 12. Non providing of sump lubricating oil 184 13. Non supplying of H.S. Diesel for DG Set 2,050 14. Providing and replacement of fuel fitter element 4,960 15. Repairing of 100 KVA alternator 43,905 16. Commissioning of DG Set i/c removal of defects and replacement of work out point 26,000 17. Synctronizing and testing of DG Set 34,500 18. Recovery of trained representative of our staff. 10,000 19. Special repair and maintain of fuel feeding of diesel equipment 4,975 _____ 2,68,828 _____

19. Annexure-1 to the written statement, had indicated some amounts against the expression "recoveries" and claimed that this was on account of work done at contractor's risk and cost. Such being the case, the onus lay upon the counter claimant/respondents to satisfy the Arbitrator as to the feasibility of such demands or liability of the petitioner on each head. Apparently, beyond making the claim, the counter claimant did not furnish any materials in that regard. Further more, counter claims were also used as a justification for withholding amount ultimately awarded in respect of Claim Nos. 1 & 2. In the overall conspectus of fact that the Arbitrator declined to award any amount towards the counter claim, such findings cannot in the opinion of this Court be termed as illegal or unreasonable.

20. The parameters of a Court's jurisdiction u/s 30 and 33 of the Arbitration Act, 1940 to interfere with an Award are far too well settled. The jurisdiction of the Court is neither appellate nor supervisory. It cannot second guess findings of an Arbitrator, who is a nominated and agreed adjudicator by the parties. The Court has generally satisfy itself that the approach of the Arbitrator conformed to the law and that the Award does not disclose any patent or manifest ill-legality in the findings or in the application of law. The Supreme Court in its decisions reported as State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, and the previous decision in Sudarsan Trading Co. Vs. Government of Kerala and Another, ruled that the Court cannot substitute its evaluation of the conclusion of the law or fact to conclude that the findings of the Arbitrator were contrary to the

bargain between the parties. It was also held that whether any particular amount was liable to be paid by within the competence of the Arbitrator. The Court, Therefore, cannot take upon itself the burden of saying that what was actually found was contrary to the contract and as such beyond jurisdiction of the Arbitrator. More importantly it had been held (in State of Rajasthan v. Puri Construction Co. Ltd. and Anr.) that if a view taken by the Arbitrator on certain amount is a possible view though not perhaps only ones the Award still cannot be examined by the Court; where reasons are furnished the correctness of reasonableness cannot also be subject of scrutiny.

21. The above approach has found consistent favor in all succeeding judgments of Supreme and has been adopted and applied by various High Courts including this Court. On an application of the rule enunciated by the Supreme Court in its above decisions and consistently applied by all Courts, all this while, this Court is of the opinion that the findings of the Arbitrator in the award impugned as regards the claims of the petitioner and to the extent that declined the counter claims of the respondents cannot faulted. They are neither arbitrary nor contrary; they also do not disclose any patent illegality or manifest injustice. The objections, Therefore, have to fail.

22. In view of the above findings, the Award is made Rule of the Court. The petitioner shall also be entitled to the post award interest at 10% from the date of filing of the present petition till its realization. I.A. 1026/1999 is dismissed. Suit decreed in the above terms. No costs.