(2012) 09 CAL CK 0100

Calcutta High Court

Case No: A.P.O. No. 280 of 2012 and A.P. No. 583 of 2009

Swan Gold Mining Ltd.	APPELLANT
Vs	
Hindustan Copper Ltd.	RESPONDENT

Date of Decision: Sept. 19, 2012

Hon'ble Judges: Shukla Kabir Sinha, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Surajit Nath Mitra, Mr. Raja Basu Chowdhury and Mr. Sayantan Bose, for the Appellant;Sourya Sadhan Bose, for the Respondent

Final Decision: Dismissed

Judgement

Ashim Kumar Banerjee. J.

1. Hindusthan Copper Limited (hereinafter referred to as HCL) had several mines rich with natural resources being metallic ores. HCL floated a global tender for extraction of copper ore at their mine at Surda. The work was named as "Operation of Surda Mine and Mosaboni Concentrator Plant of HCL". The appellant being an Australian party became successful in obtaining the tender. The tender would stipulate bid to be given in two parts being Techno Commercial Bid and Price Bid. On January 2, 2007, appellant submitted their first bid that was opened on January 18, 2007. Their Techno Commercial Bid was accepted in a meeting held on January 18/19, 2007. After crossing the first hurdle, appellant got opportunity to participate in the price bid that was opened on January 19, 2007. On negotiation appellant gave their second bid on January 27, 2007. HCL asked for clarification that was replied to. The modified terms were given on February 13, 2007. Ultimately, the final offer was accepted on February 15, 2007 appearing at page 137. The Letter of Intent was issued on March 3, 2007 appearing at page 152 and ultimately the parties entered into a formal contract appearing at pages 153-155. HCL issued a Work Order on April 14, 2007 that permitted the appellant to commence extraction. The parties were on cordial terms up to December 2007 when the dispute for the first time arose on submission of the first invoice. In fact, the dispute took a concrete shape in

March 2008 when HCL declined to pay the Excise Duty. On a close examination of the documents referred to above, we would find, initially the bids that were given from time to time always included Excise Duty to be borne by HCL. When the final offer came on February 15, 2007, the parties were silent on Excise Duty. The formal contract also did not mention anything on that score. The Work Order would suggest Excise Duty to be borne by the appellant. The appellant would contend, their representative at the site missed out clause 4.9.1 that would shift the burden of taxes on the appellant. The dispute arose when the invoice included Excise Duty to be paid by HCL. Initially there was no response. On reminders, HCL for the first time raised the dispute in March 2008 to contend that the Work Order did stipulate as above that would bind the parties. The dispute was thus referred to arbitration. We are told, the appellant would still involve itself in the operation however, the issue would still remain unresolved. The arbitrator, a retired Judge of this Court held, it was the obligation of the appellant. The learned Single Judge affirmed. Hence, this appeal by the appellants.

2. Mr. Surajit Nath Mitra, learned Senior Advocate, while referring to the relevant dates mentioned above, would contend, the parties knew that the bid initially given by the appellant would exclude Excise Duty as categorically mentioned in their price bid. He would refer to page 123 wherein we find the following clause :

Royalty will be reimbursed separately as actual. Any Excise Duty/Service Tax or levy presently applicable or any variation or new levy in future to be reimbursed on actual basis

3. Citing the aforesaid clause, Mr. Mitra would contend, subsequent incorporation of clause 4.9.1 in the Work Order and omission to mention the clause quoted supra in the contract was contrary to the conduct of the parties. He referred to the minutes to say, this issue was never discussed at the price negotiation stage foisting liability on the appellant. One particular clause incorporated in the Work Order contrary to the earlier documents, was not binding upon the appellant. According to him, it got unnoticed by the local representative who missed out the same. He placed emphasis on the cost analysis that did not include Excise Duty to be paid by the appellant. Continuous mention of the clause quoted supra by the appellant was never objected to by HCL at any point of time.

4. On the conduct of the arbitration proceeding, Mr. Mitra would refer to the Supplementary Paper Book filed by him with the leave of this Court to show the minutes of the meeting and the deposition wherein we find no suggestion was given to the witness of the appellant to contend, it was consciously deleted by the appellant at the time of final offer. He referred to the age old decision in the case of AEG Carapiet -VS- A.Y. Derderian reported in All India Reporter 1961 Calcutta Page-359 to say, the respondent was not entitled to take the plea of deletion that too, being said by their last witness without making any suggestion to the appellant-witness who was at the witness box at the relevant time. Pertinent to

mention, the appellant produced Mr. Eoin Rothery as their witness when HCL did not give any suggestion to Rothery to contend that the appellant''s local representative Mr. Ahlawat deleted the clause that would obligate them to bear the Excise Duty. Such evidence came through Mr. Sengupta, the second and last witness of HCL. Hence, the appellant did not get any opportunity to contradict the same by calling Mr. Ahlawat. Mr. Mitra would say, learned Judge committed an error in observing that appellant did not call Ahlawat to adduce evidence. According to him, question would only come when the respondent would put their case to the appellant-witness as and by way of suggestion. The appellant was rather taken aback when Sengupta for the first time contended so. He referred to the counter statement of fact to show that such averment was not there at all. As and by way of alternative submission, Mr. Mitra would contend, Ahlawat did not have the authority to delete such clause that was categorically put in the bids consistently. He referred to Apex Court decision in the case of Bonder Singh and Others -VS- Nihal Singh and Others reported in 2003 Volume-IV Supreme Court Cases Page 161 and in the case of Rajgopal (Dead) by Lrs. Vs. Kishan Gopal and Another, to contend that the evidence contrary to pleadings must not be looked into. According to Mr. Mitra, Sengupta''s contention to the effect that Ahlawat deleted the clause did not find place in the pleadings. Hence, the appellant did not get any opportunity to confront the same. He referred to paragraph 7 of the former case where the Apex Court observed, "there is nothing to support this plea except some alleged revenue entries. It is settled law that in absence of a plea no amount of evidence laid in relation thereto can be looked into." In the latter case, the Apex Court upheld the decision of the High Court that refused to consider evidence where no plea was taken.

5. Mr. Mitra discussed the scope of judicial scrutiny by relying upon the decision in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., of the said decision would provide as follows :- "The 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."

6. According to Mr. Mitra, the arbitrator overlooking the above aspect would result in miscarriage of justice that would come within the scope and ambit of judicial scrutiny. Mr. Mitra would refer to page 124 of the main Paper Book to contend, learned arbitrator did not dispose of the application made by the appellant inter alia praying for consideration of the minutes of the meeting held on January 18 and 19, 2007. Initially, the appellant asked HCL to produce the original minutes of the said meeting to which they expressed their inability. Hence, the appellant prayed for taking on record the photostat copy that was with the appellant. The arbitrator did

not dispose of the said application. He referred to page 202 of the Paper Book to show that in the affidavit HCL did not deny the minutes of the meeting that did not put the burden of Excise Duty on the appellant. He prayed for setting aside of the award and remitting the same back to the arbitrator by giving opportunity to the appellant to adduce further evidence by producing Ahlawat in case this Court would feel it proper.

7. Opposing the appeal, Mr. Sourya Sadhan Bose, learned counsel appearing for HCL contended that initial discussions and submissions of bids from time to time culminated in the contract followed by a Work Order that would obligate the appellant to take the burden of Excise Duty. He referred to the format appearing at page 114 that did not incorporate the clause mentioned above. The appellant duly accepted the terms of the contract and the Work Order by signing those documents that would put the burden of Excise Duty on the appellant. He also referred to clause 4.9.1 as contained in the notice inviting tender wherein the burden of Excise Duty was specifically put to the intending bidders. The parties accepted the same and submitted their respective bids that might contain additional terms, however, the final offer did not include such clause that prompted HCL to select the appellant as successful bidder. The appellant accepted the Work Order and executed the work. Hence, their subsequent claim on Excise Duty incorporated in the invoice was without any authority of law. He contended that the price bid was to be given in a format that having no such clause incorporated, incorporation at an insignificant place would have no consequence. According to him, the appellant knew about the controversy. Having knowledge of the same, they did not produce Ahlawat as their witness. Having not done so, they could not contend otherwise.

8. While replying, Mr. Mitra contended, Format F referred to by Mr. Bose was restricted to Techno Commercial Bid and would have no relation to the price bid. He referred to question 46 at page 98 of the Supplementary Paper Book wherein Mendiratta, the General Manager, Operation, admitted that price bid could only be opened when Techno Commercial Bid was finalized. Hence, the contention with regard to incorporation of such clause in Format F would not arise at all.

9. We have considered the rival contentions. Even if we give full credence to Mr. Mitra''s submission relying upon the Carapiet''s case we would still be in difficulty to accept his contention that question of producing Ahlawat did not arise at the initial stage. The issue would relate to payment of Excise Duty. The parties may initially contend, their price would be exclusive of any duty however, when the price was negotiated and terms were fixed through negotiation, the final contract that was entered into would be the final important document to be looked at, that did not specifically provide, HCL would bear the Excise Duty. The notice inviting tender also did not stipulate such clause. NIT says otherwise. When the parties entered into a contract, if such clause was specifically excluded they should have made a mention of the same in the contract. Contract was silent. The contract was followed by Work

Order issued by April 14, 2007 incorporating clause 4.9.1. It is true that Mr. Sengupta for the first time contended, Ahlawat deleted the clause. Having not given any suggestion to the claimant''s witness, the arbitrator should not have considered such evidence. Even if we ignore such evidence we would still be in difficulty to find out justification in setting aside the award that was refused by the learned single Judge. Learned Single Judge in His Lordship''s judgment and order appearing at pages 293-299 observed as follows :-

The arbitrator has passed his award on not only the deposition of the witnesses but has examined the documents annexed to the pleading and has also considered its relevancy.

The arbitrator has found that Mr. Rothery the only witness of the claimant had signed the work order whose terms was in consonance with the clauses in the NIT and based his award thereon.

No document was found on record by the arbitrator disputing the authorization of Ahlawat. It is only not cross-examination that Mr. Rothery stated that Mr. Ahlawat was not authorized but this again according to the arbitrator is belied by the Price Bid signed by Mr. Michael Kiernan, Managing Director of the petitioner who mentioned the name of its representative as Wind Commander Y. Ahlawat.

Mr. Rothery had signed the work order and therefore had accepted all terms thereon on behalf of the petitioner. The cases relied on by the petitioner is also not applicable to the facts of this case. More so, as 2003 Volume-IV Supreme Court Cases Page-161 was a case of Second Appeal and distinguishable on facts.

10. Learned Judge might have upheld the view of the arbitrator on the issue of production of Ahlawat. Even if we ignore the same we would still not be in a position to disagree with the observation of His Lordship quoted supra. We would still say, notice inviting tender categorically imposed Excise Duty on the appellant, Work Order was consistent. Rothery being the only witness of the claimant had signed the Work Order. Whether or not Ahlawat being the local representative missed the issue, is immaterial. The Managing Director that also did not finally incorporate the clause mentioned above, signed the price bid.

11. We do not find any scope of interference.

12. The appeal fails and is hereby dismissed.

13. There would be no order as to costs.

14. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir Sinha, J.

I agree.