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Delhi High Court

Case No: O.M.P. No. 25 of 2002

Swadeshi Cables (I) Ltd.	APPELLANT
Vs	
National Aluminium Co. of India Ltd.	RESPONDENT

Date of Decision: May 5, 2009

Acts Referred:

- Arbitration Act, 1940 - Section 13(5), 16(6), 30, 33, 34
- Arbitration and Conciliation Act, 1996 - Section 28

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: Pramod B. Agarwala, Praveena Gautam, Manmohan Sharma and Abhishek Baid, for the Appellant; V.P. Singh and Anuj Berry, for the Respondent

Final Decision: Dismissed

Judgement

Manmohan Singh, J.
This petition has been filed by the petitioner for setting aside the award dated 1st October, 2001 whereby the learned Arbitrator awarded an amount of US$ 12698 with interest at 6% per annum from 4th September, 1998 till payment to the respondent. The respondent was also awarded cost at US$ 1000.

2. The petitioner, Swadeshi Cables Industries (in short SCI) is a company incorporated in Nepal. The respondent, NALCO is a Public Sector Enterprise. NALCO released the sale order to buy aluminium wire rod of about 300 MT at a fixed price of US $ 2070 per MT with a delivery schedule from July to December 1995, dated 17th June, 1995 to SCI containing all terms, conditions of sale, delivery, price etc. and the arbitration clause.

3. SCI issued the necessary bank guarantees, three Letters of Credit and lifted 142.057 M.T. of goods and the deliveries were scheduled to be made in the month of July, August

and September, 1995 to the respondent. However, by letter dated 13th September, 1995 SCI informed NALCO that due to political disturbances in Nepal, the deliveries scheduled for October, November and December could not be lifted and to postpone them to January, February and March, 1996. NALCO refused to reschedule the deliveries.

4. It is alleged by SCI that NALCO did not inform them that the manufactured goods were lying ready with it for delivery in January, February and March, 1996 or that they could lift them in the above said months on payment of delayed charges or damages. There were price fluctuations during the months from November to March and the price of aluminium was continuously falling. NALCO did not offer to deliver the goods during January to March, 1996. By letter dated 4th May, 1996, NALCO requested SCI to lift the goods in May to July, 1996 but SCI refused to accept the demands to take the deliveries in May to July, 1996. It is averred that neither party cancelled the contract till March, 1996.

5. Thereafter, NALCO filed an Arbitration Petition against the SCI before the learned Arbitrator which was decided in his favour holding that SCI committed the breach of the agreement by refusing to accept the supply for the months of October to December, 1995.

6. The petitioner has raised objections to the impugned award mainly contending that the award is contrary to Section 28 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"). The award is contrary to the evidence on record as it was the case of NALCO that it had already planned, produced and kept ready for delivery the said contracted goods and that they were available for delivery even on 4th May, 1996. The Arbitrator has ignored the letter dated 4th May, 1996 which expressly states that the contract was not ended till December, 1995. The damages occurred not naturally in the usual course of things but it was caused due to political disturbances in Nepal which was going on that time.

7. It is submitted in the petition in para 24 that the copy of award was given to the petitioner on 12th October, 2001 and they have filed the objection petition within 90 days of the said service of the award. The petition was filed on 15th January, 2002.

8. The respondent refuting the allegations of the petitioner, has submitted that u/s 34 of the Act, the petition is not maintainable as the scope of interference is very restricted in objection petition. He relied upon Section 5 of the Act to emphasize that under the Act of 1996, minimal judicial intervention of the Court is provided. Learned Counsel for the respondent has relied upon the case of Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, at para 17 and has argued that the scope of Section 34 of the Act to set aside the award is far less than u/s 30 and 33 of the Arbitration Act, 1940.

9. He has also argued that the Court should not reappraise the evidence intrinsically or embark on a close scrutiny of the same for arriving at the conclusion that the findings given by the learned Arbitrator are erroneous. It is only where the error of law or finding of

fact, if any, is patent or is easily demonstrable without the necessity of carefully weighing the various possible views for it, that the Courts can interfere with the award. The award made by an Arbitrator is conclusive as a judgment between the parties and the Court would be set aside only when Arbitrator has misconducted himself or the award has been made contrary to the provisions of the Contract.

10. The respondent also relied upon the case of Indu Engineering and Textiles Ltd. Vs. Delhi Development Authority, , para 6 & 7, wherein it is held that Courts endeavour should be to preserve the award as far as possible and a close scrutiny of the findings of the Arbitrator is not possible. The Hon''ble Supreme Court in this case has further held that even in the case of misconstruction or misappreciation of the material on record, if any, the award may not be interfered with, even if this Court may have come to different conclusion.

11. It is submitted by the learned Counsel for the respondent that as a measure of goodwill, NALCO despite having suffered losses gave an opportunity to SCI to mitigate their losses by lifting the goods at a later date by letter dated 4th May, 1996 which SCI refused but it cannot be pleaded as a waiver or abandonment by NALCO. The learned Counsel relied upon the case of Mangal Sen Vs. Kanchhid Mal, to contend that issue of plea of waiver cannot be allowed to be raised when not pleaded.

12. It is also argued that u/s 34(3) of the Act, limitation period of three months is prescribed for filing the objection application from the date the party received the award. The petitioner was admittedly served a copy of the award on 12th October, 2001, however, the objections to the award were filed on 15th January, 2002. In the objection petition, the petitioner submitted that the petition has been filed within 90 days of the service of the award. No application for extension of time of 30 days as prescribed u/s 34 has been filed, hence the court has no power to condone the delay even for a single day without any application having the ground of sufficient cause/reasons and thus the petition is liable to be dismissed.

13. In the rejoinder filed by the petitioner, it is stated that three months of filing the petition expired only on 15th January, 2002, 12th January, 2002 being second Saturday and 13th January, 2002 being Sunday, the court was closed. 14th January, 2002 being Makar Sankranti was also declared a local holiday and the court was closed. Consequently, the petition could be filed only on 15th January, 2002. The same is, therefore, within time. It is further submitted in the rejoinder that without prejudice to the aforesaid, even if there is a delay of a few days as alleged, in the said event this Court has ample power to condone the delay. In the present case, the petitioner is located at Kathmandu - Nepal. It takes time to communicate and to receive papers. Even though the affidavit was affirmed as early as on 29th December, 2001, it took time for papers to reach to Delhi for filing in court. Consequently, the delay, if any, was due to unforeseen reason being postal delays, for papers and documents to reach Delhi from Kathmandu. It is submitted that the postal delay being beyond the control of the petitioner, the same be considered as sufficient

cause for delay, if any, in filing the captioned petition.

14. The learned Arbitrator has considered the contentions and pleadings on record of both the parties including the letter of respondent dated 4th May, 1996 and the letter of the petitioner dated 13th September, 1995. The learned Arbitrator after considering detailed arguments and evidence held that the petitioner was guilty of breaching the contract by failing to lift the goods from the respondent.

15. The petitioner relied upon various decision in support of his submission but facts and circumstances in each case are different. None of the decisions is applicable to the facts of the present case.

16. The Apex Court in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., clearly laid down the scope of interference by the court in the award of the arbitrator u/s 34 of the Act. The relevant para is reproduced as under:

Conclusions

74. In the result, it is held that:

(A) (1) The court can set aside the arbitral award u/s 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act.

However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided u/s 13(5); and

(b) Section 16(6) of the Act.

17. The learned arbitrator considered the documents on record and objections and arguments raised by both the parties. The learned arbitrator in fact has framed an issue regarding the effect of writing letter dated 4th May, 1996 and gave his findings in that regard. The plea of the petitioner that the arbitrator ignored this letter is clearly untenable. I find no ground to interfere with the findings and reasoning given by the arbitrator on repudiation of contract by the petitioner.

18. With regard to the contention raised by the respondent that the petition is not maintainable u/s 34(3) as not filed within time, considering overall circumstances of the matter, I will not go into the question of delay as the petitioner has failed to make any case on the basis of which the Award of the Arbitrator can be set aside.

19. I find no merit in the objections, the same are dismissed. No costs.