(2005) 11 DEL CK 0151

Delhi High Court

Case No: OMP 133 of 2001

Union of India (UOI)	APPELLANT
Vs	
Arctic India	RESPONDENT

Date of Decision: Nov. 8, 2005

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34
- Constitution of India, 1950 - Article 299

Citation: (2005) 125 DLT 478

Hon'ble Judges: Anil Kumar, J

Bench: Single Bench

Advocate: A.K. Bhardwaj, for the Appellant; Milanko Chaudhary, for the Respondent

Judgement

Anil Kumar, J.
This order will dispose of objections of the petitioner, Union of India, u/s 34 of the Arbitration and Conciliation Act 1996, against the award dated 23rd January, 2001 published by the sole Arbitrator, Shri G.S. Mehta, vide letter No. SPA/1720/GSM/107/E8 dated 23rd January, 2005.

2. An agreement was executed between the petitioner and the respondent being agreement CEDZ-18/93-94 for provision of Central air-conditioning to certain technical/administrative building at Delhi Cant. The amount of the contract was Rs. 1,41,96,000 and the date of commencement was 31st March, 1994. The agreement was accepted on 19th March, 1994. The original date of completion of the work was 30th November, 1994, however, the time was extended and first phase was completed on 27th June, 1995 whereas second phase was completed on 21st September, 1996.

3. Under the contract, the respondent had to design, supply and install the air-conditioning plant consisting of various equipments, i.e., water chilling plant with screw type compressors, water pumps, cooling towers, AHUs (Section I), Cold

storage plant (Section II), chilling water system and hot water and normal water system (Section III).

4. On account of differences and disputes which had arisen between the parties, Mr. G.S. Mehta was appointed as an Arbitrator. Before the appointment of Mr. G.S. Mehta as an Arbitrator, the respondent had raised claims by letter No. 3/293/8th dated 4th March, 1999 raising three claims. The claims were replied by letter reference No. 8103/18/529 dated 15th May, 1999 and another claim referred by respondent vide their letter No. B-293/111 dated 17th May, 1999 was also replied by the petitioner vide their letter No. 8103/18/836/E8 dated 5th June, 1999.

5. After the Arbitrator was appointed, the claims were specifically raised by the respondent and the petitioner. The respondent raised claims for payment of Rs. 17,13,388.10 as the balance amount due; compensation for loss and damages suffered for delay in making payment of the final bill in disregard to the relevant contract condition amounting to Rs. 4,75,350; interest on the amounts due and the cost of the arbitration.

6. The petitioner also raised claims before the Arbitrator. The petitioner claimed an amount of Rs. 7 lakhs on account of non-provision of micro-processors panel as per CA provisions and an amount of Rs. 50 lakhs for replacement of damaged screw type compressors and interest @ 24 per cent per annum on the amounts claimed and cost.

7. The learned Arbitrator in regard to claim no.1 of the respondent for Rs. 17,13,388.10 as the balance amount, awarded Rs. 2,61,725 to the respondent and towards the compensation of loss and damages suffered in making the payment of the final bill amount, the arbitrator awarded a sum of Rs. 20,000 against a claim of Rs. 4,75,350. Towards the cost of arbitration, the amount claimed by the respondent was Rs. 90,000, however, no amount was awarded and towards the claim of interest at 24 per cent, the arbitrator awarded interest at 12 per cent with effect from 1st January, 1999 up to the date of award and 15 per cent per annum simple future interest.

8. Towards the claim of Rs. 7 lakhs of the petitioner for non provision of micro-processors and for the claim of Rs. 50,00,000 for replacement of damaged screw type compressors, for a total claim of Rs. 57 lakhs, the arbitrator awarded a sum of Rs. 1,80,000. For the claim of interest at the rate @ 24 per cent per annum the arbitrator awarded interest at @ 12 per cent per annum with effect from 1st January,1999 up to the date of award and future simple interest @ 15 per cent per annum. For the cost of stamp, it was decided by the arbitrator that the petitioner has supplied the stamps of Rs. 50 and the respondent had also supplied stamps of Rs. 50 which would be the cost borne by the parties.

9. The learned Counsels for the parties were heard at length on the objection filed by the petitioner. Since all the claims of the petitioner and the claims of the

respondent were objected to and argued by the counsels for the parties, the objections are considered claim wise.

10. The petitioner claimed a sum of Rs. 7 lakhs for non provision of micro-processors and claimed Rs. 50,00,000 for replacement of damaged screw type compressors. For a total claim of Rs. 57 lakhs, the arbitrator awarded a sum of Rs. 1,80,000. The petitioner contended that the microprocessor control unit was not as per the catalogue of the manufacturer as the Microprocessor panel provided by the respondent was not having the requisite parameters and technical facilities/controls and as per the recommendations of the manufacturer. The system provided was not of standard make. The petitioner also contended that the arbitrator failed to appreciate letters dated 1st May, 1995; 18th May, 1995; 19th May, 1995 etc bringing to the notice of the respondent major defects which had arisen during the installation and before the initial tests were carried out including the microprocessor unit and the screw type compressors. Petitioner asserted that the provisional certificate dated 27th June, 1995 was issued subject to the rectification of certain defects and Therefore the petitioner was entitled for damages from the respondent.

11. The Learned Arbitrator noted the contentions and pleas of the petitioner regarding the specification and manufacturing standards of the equipment in para 5.1.2 and 5.1.3 of the award. The plea of the petitioner regarding his complaints were noted by the Arbitrator in paras 5.1.4 and 5.1.5 of the award. The arguments of the petitioner and respondent were noted in detail and considered. He considered the notices given from time to time and referred to some of the subsequent notices in para 5.1.16 other than of 1995 which have been complained by the petitioner that they have not been considered. Relevant portion of the award in this regard is extracted for reference:

5.1.16: I find that several notices had been given from time to time. Perusal of some of the notices given by the Union of India to the contractor reveal as under:

a) Notice, GE''s letter dated 27 Jun 95 (Exh.1)

Microprocessor panel is not fully functional and needs rectification.

b) Notice, AGE''s letter 8 Mar 96 (Exh. R-2)

The second compressor not brought back after repairs, users facing lot of problems. The points brought to the knowledge of Shri J.S.Verma many times.

c) Notice, GE''s letter dated 19 Mar 96 (Exh. R-1)

Defects not rectified, shall be got rectified at your risk and cost.

e) Notices dated 02 Jul 98 (Exh.III)

3. Your particular attention is drawn to the defects of microprocessor provided by you on electric control board. Please rectify the defects as the microprocessor control panel provided is not as specified in CA and is not as recommended by M/s. Dunham Bush, the manufacturer of the sealed screw compressors.

4. The defects of control panel provided by you have not been rectified even after repeated insistence.

f) Notice, GE''s letter dated 30 Sep 98 (Exh.IV)

Para 3 to 6: Your contention is not agreed to as only a control panel (referred to you as microprocessor control panel) was repaired by you and confirmed vide your letter No. A1/WO/293/32/97 dated 9th April, 1997. The control panel provided by you along with the vertical sealed screw compressor (Make: Dunham Bush Inc.) are not housing any clip known as "microprocessor" which is the CPU (Central Processing Unit) for any control panel to provide total protection to the said compressor unit against any variations in input/out parameters beyond the present tolerance limits. These panels are normally custom made as per manufacturers specifications. The Temperature load controller (TLC) provided by you is only a integrated circuit (IC) based circuit which repeated by ml functions and thus totally fails to provide effective protection needed to these sophisticated compressors. This fact is brought to your notice repeatedly. However, you failed to replace the said control panel as provided by you by customised microprocessor based control panel as recommended by the manufacturer (M/S. Dunham Bush Inc).

g) Notice GE''s letter dated 08 Jan 99 (Exh.V)

2. Due to non working of control panel (referred by you as "microprocessor control panel) already intimated under various letters two screw type compressors under the contract have failed and plant is not functioning. You are accordingly advised to replace the compressor as well as microprocessor based control panel as recommended by the manufacturer (M/S Dunham Bush) immediately without any further delay latest by 30 Jan 99.

h) Notice GE''s letter dated 26 Feb 99 (Exh. VI)

2. Your contention is not agreed to. Under condition 46 of General conditions of the contract (IAFW 2249) forming part of the contract, you are liable to rectify/replace the defects. As you have failed to replace/rectify the compressors as well as microprocessor based control panel which has made the plant non functional as already intimated under this office letter No. 8103/18/804/E8 dated 8th January, 1999, same are being replaced/rectified at your risk and cost.

12. From the award it is apparent that the all the contentions and the documents and their effect has been considered. The Arbitrator categorically stated that a number of notices were given and referred to some of them. It does not lead to any inference that other notices given in 1995 as objected to by the petitioner were not

considered by the Arbitrator and his decision is based on non-consideration of same.

13. The Arbitrator had concluded that the doubts about microprocessors had persisted/notified right from phase I test. He did not acceded to the contention of the respondent that the petitioner deemed to have checked physically all the equipment for conformity with the contract before the issue of completion certificate. The findings of the arbitrator are reproduced for reference:

5.1.18: I have considered the exhaustive and long arguments of both the parties and their written submissions which had been repeated time and again by the parties. I find that the contractor was insisting that he had provided the equipment as described in the contract and the Union of India was deemed to have physically checked all the equipments for conformity with the contract before the issue of completion and Therefore could not ask for any thing more than that after the issue of completion certificate Phase I on 25 Jun 95, cannot be justifiably accepted because as per condition 46 of IAFW 2249, with regard to defects the decision of GE was final and binding. In this specialist type of equipment I cannot agree with contractor''s argument specially when notices indicated defect right from inception. Further, I find that the contractor was relying on 3 months defect liability period mentioned in the contract and was arguing that since last of phase II test was carried out on 14 Jun 96 his defect liability period was over on 6 Sep 96. This argument of the contractor also cannot be acceded because the Union of India accepted phase II test completion only on 25 Sep 96 and that indicated some dissatisfaction from 14 Jun 96 up to 21 Sep 96.

5.1.19: Further I find that the Union of India argued that it was an air conditioning contract given to a specialist contractor who was to design and install and commission total plant with the latest know-how and since the equipment did not function satisfactorily, though accepted, the contractor had defaulted on that. Further I find that the contractor himself carried out "operation and maintenance" of the plant for 3 months after the completion and there after was further given the contract for one year for "operation and maintenance" of the plant and all that proves that the contractor had himself run the plant and Union of India cooperated in all manners. Thus the contractor should have ensured that the equipment supplied was of specifications as per the standards even though not elaborated in the contract. Further, I find that the contractor argued, giving reference to some of his letters, that he had rectified the defects but Union of India had forcefully replied that there was no confirmation of such defect rectification by the GE whose decision was final and binding as per condition 46 of IAFW 2249. Further I find that while the defects persisted, the Union of India had not been specific in their requirement right from beginning and Therefore union of India has to share the default equally. Further, the contractor''s argument that the defect indicated was that the "microprocessor to be re-tested" meant Union of India wanted some re-testing goes

against Union of India, although notifying exact nature of defect in any part of such electronic equipment with certainty without opening and examining the part of the supplier himself or the specialist, may not be easy. Though it was contended by Union of India that AGE/GE, who could only administratively control the running of the plant, may not have been competitive but they should have been vigilant. Further, I find that the contractor had taken out some parts of the microprocessor and also the compressor for repairs and Therefore that indicated weakness on the part of the contractor himself. Further, I find that the Union of India might be weak in their arguments based on contract/contract provisions but their argument, that this was a specialised work based on contractor''s design and the contractor was to ensure that the plant was worth functioning for that minimum period of 9 to 10 years, cannot be ignored. Further I find that Union of India was examining the case to agitate before the consumer court indicating their gross dissatisfaction on the equipment. Further, I would like to keep in mind that the Union of India had accepted the microprocessor and compressor and in case the performance of contractor''s plant would have been OK even though the microprocessor did not have all the functions, there would not have been any dispute.

14. The Arbitrator considered that the petitioner did not produce proof regarding change or repair of the microprocessor and the defaults on the part of the petitioner also. From the consideration of the award it is apparent that the default on the part of the petitioner and the respondent were considered by the arbitrator in great details. He has awarded amounts to the petitioner on the basis of difference of cost of certain functions which the contractor did not provide in the microprocessors. He justified the adjustment and reduction in the cost of microprocessor by 30 per cent and awarded a sum of Rs. 1,80,000 to the petitioner. The relevant portion of the award is extracted for reference:

5.1.20: Further, I consider that there is adequate strength in contractor''s argument that the Union of India has not incurred expenses since no proof of change or repair of microprocessor has been produced by them and in case they wanted to claim, they should have got the microprocessor either repaired or changed at contractor''s risk and cost and also should not have run the plant in case those control equipment were not functioning since that resulted in failure of compressors and that the contractor should not be held responsible for consequential losses as per Contract Act. This has to be considered as a default on the part of Union of India and Therefore it is not possible to uphold their claim No. 1 fully.

5.1.21: With regard to Union of India''s claim No. 2 with respect to compressors, I find that the Union of India was staking a claim for replacement of compressors against this very contractor through arbitration in CWE''s contract CA No. CWE (U)/D-14/96-97 (Notice invoking arbitration served by CWE (U) on 30 May 2000). Further, I find that the Union of India notified failure of compressors for the first time only on 08 Jan 99 (Exh.V) which is after the defect liability period and Therefore

cannot be contractually upheld. Further the contractor''s argument, that the Union of India replaced the two screw type compressors of 150 TR capacity with 3 Nos reciprocating type compressors of 100 TR capacity and that was a departure from the contract specification and he could not be held responsible for that, is also a contractually and legally valid argument. Further, Union of India''s argument, that screw type compressor of 150 TR are not manufactured in India and Therefore they had to replace two compressors of 150 TR capacity with 3 compressors of 100 TR and the total capacity remained the same, cannot be accepted contractually.

5.1.22: To sum up I conclude that for the two microprocessors, Union of India should be awarded the difference of the cost of certain functions which the contractor did not provide in the microprocessors. However, now the decision to be taken is how much is Union of India''s responsibility and how much, contractor''s, who gave the microprocessor but all functions were not there. To settle the aspect, I consider that an adjustment or reduction in cost of microprocessors for say 30 per cent would be very reasonable and justified which means adjustment of Rs. 1,80,000. Thus, Union of India''s claim No. 1 is partly sustained for Rs. 1,80,000. Regarding claim No. 2, I reject the claim as not sustained.

15. Rejection of claim no.2 for Rs. 50,00,000 by the arbitrator of the petitioner was on account of petitioners'' failure to produce any document and evidence to support his claim. The finding of the arbitrator can not be faulted on any of the grounds raised by the petitioner. The arbitrator has considered the respective contentions of the parties and the documents produced before him. Since the parties selected their own forum, Therefore the power of appraisement of evidence has been conceded to the arbitrator. The petitioner not only filed the reply but participated in the arbitration proceedings and filed the evidence and the documents which have been considered in detail. This court u/s 34 of the Arbitration and Conciliation Act will not consider the reasonableness of the reasons given by the arbitrator as the arbitrator is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge on the evidence before the arbitrator.

16. Reliance can be placed on Food Corporation of India Vs. Joginderpal Mohinderpal, Puri Construction Pvt. Ltd. Vs. Union of India (UOI), Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, M/s. Hind Builders Vs. Union of India, Hind Builders v. Union of India holding that when the parties have chosen a forum to refer their disputes to be adjudicated not under a common law forum or under a statute by filing a suit, the court while exercising appellate power will not substitute its opinion with than that of the arbitrator. Even if the facts and circumstances of a case are open to two plausible interpretations, it is legitimate for the arbitrator to accept one or the other available interpretation and even if the Court may think that the other view is preferable, the Court will not or should not interfere with interpretation of the Arbitrator until and unless the

decision of the arbitrator is manifestly perverse or has been arrived at on the basis of wrong application of law. Similarly in Sudarsan Trading Co. Vs. Government of Kerala and Another, , the Apex Court had carved out the distinction between error within jurisdiction and error in excess of jurisdiction and also held that reasonableness of the reasons given by the arbitrator, cannot be challenged and that appraisement of evidence by the arbitrator is never a matter which the court questions and considers.

17. Resultantly, it can not be said that the arbitrator has acted in excess of his jurisdiction or that the rejection of claim of Rs. 50,00,000 for damages on failure of the petitioner to produce any documents and evidence for the same and awarding Rs. 1,80,000 instead of Rs. 7,00,000 for non provision of microprocessor panel is manifestly perverse or has been arrived at on wrong application of law. The findings of the arbitrator can not be faulted in the facts and circumstances.

18. The award of interest and costs also can not be faulted in the circumstances and the Therefore the adjudication of the claims of the petitioner are not liable to be reviewed and enhanced as claimed by the petitioner.

19. The arbitrator has considered the award of pendent lite and future interest and has awarded interest. In view of the decision of the Supreme Court in Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, the arbitrator was competent to award pendente lite and future interest. The rate of interest of 12 per cent per annum pendent lite and future 15 per cent to the petitioner on the amounts payable by the respondent to the petitioner has not been challenged by the petitioner. The respondent has not file any objections to award of interest at these rates. From the perusal of the award, it is also apparent that petitioner has claimed interest on the amounts which were claimed by him. The finding of the arbitrator can not be termed perverse and/or based of wrong application of law in the facts and circumstances.

20. Claim Nos. 1 and 2 of the respondent:

The learned Counsel for petitioner/objector has contended that there was no agreement in respect of extra items and in absence of any agreement, the respondent is not entitled for the amounts for the extra items and the arbitrator has misconduct in awarding the amount for the extra items. The learned Counsel also relied on Article 299 of the Constitution of India to contend that there is a definite procedures according to which the contracts are made and since there was no contract in respect of extra items, the same could not be awarded by the learned Arbitrator.

21. While dealing with payment of Rs. 17,13,338.10, the learned Arbitrator has dealt in detail with the extra items. He has considered the contention that the additional work had to be carried out based on instructions given and that could not have been a work of gratis. He had directed both the parties to reconcile and check the agreed

figures of the final bill. The additional items were installation of two hot water generators and eight pumps and a fuel tanks located in a separate room; location of cooling towers and make of water tanks on account of taking chilled water piping in a circuitous underground route in lieu of over the ceiling. The petitioner himself conceded to extra items 1, 2, 7 and 14 for a total amount of Rs. 3,20,943.80. Once the petitioner has conceded for some extra items, he can not contend that there was no agreement for the extra items. Not only this, the petitioner before the arbitrator left it on the arbitrator to take any decision as may be deemed fit by him. The learned Arbitrator commented about it that the petitioner''s attitude of leaving the decision on the arbitrator was not a conducive attitude. He, however, considered the correspondence and the agreement and awarded a sum of Rs. 50,000 instead of Rs. 2,82,822 as demanded by the respondent/contractor. The arbitrator rejected the claim of Rs. 52,500 for provision of seven sets of main earthing station. He also rejected the claim of Rs. 10,000 for the foundation of mixing water tank and awarded a sum of Rs. 15,000 for providing extra panel. He has taken into consideration the correspondence and the provisions of the agreement and after detailed consideration has awarded a sum of Rs. 2,61,725 instead of a sum of Rs. 17,33,388 as claimed by the contractor.

22. The plea that there was no agreement in respect of extra item and under Article 299 of the Constitution of India which lays down a procedures for entering into a contract with the government, no amount could be awarded, was not taken before the arbitrator. The dispute was expressly referred to the arbitration and the extra items claimed by the contractor pertained to the work executed by him on account of deviations which were at the instance of the petitioner which has not been denied. Some of the extra items had been conceded before the Arbitrator and the decision of others had been left to the Arbitrator. The arbitrator has given detailed reasons why payment was required to be made to the contractor for this work as extra work, some of which were conceded by the petitioner. The petitioner can not contend that for some of the extra work no separate agreement was required or they were not outside the scope of the work whereas others are outside the scope of work. This Court will not examine the correctness or otherwise of the conclusion inferred by the arbitrator after due consideration of the material before him and the terms of the agreement. Apex Court in the matter of Ram Nath International Construction Pvt. Ltd. v. State of U.P, 1997 (2) Arb. L.R 589 had held that payment of extra item of work awarded by the arbitrator was justifiable and the arbitrator had not traveled beyond the scope of agreement and reference. In Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, it was held that a party cannot be allowed to blow hot and cold simultaneously. Long participation and the acquiescence in the proceedings preclude such a party from contending that the proceedings were without jurisdiction.

23. The respondent/contractor had claimed a sum of Rs. 4,75,350.00 on account of compensation for loss and damages suffered by him on account of delay in payment

of final bill. This amount consisted of medical expenses claimed by the contractor on account of mental distress in delay in payment of final bill and for extension of bank guarantee. The claim for medical expenses was disallowed and the amount for extension of bank guarantee was allowed. It is apparent that the arbitrator has applied its mind and considered all the relevant material before him. The petitioner has not been able to raise any meaningful argument to show that the arbitrator has committed any error of law or any perversity in the award. It is only an error of law and not a mistake of fact committed by the arbitrator which can be adjudicated in the objection before the Court. If there is no legal proposition either in the award or in any document annexed with the award which is erroneous and the alleged mistakes or alleged errors are only mistakes of fact and if the award is made fairly, after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement, the award is not amenable to corrections of the Court.

24. The arbitrator has considered the award of pendent lite and future interest and has awarded interest of 12 per cent per annum pendent lite and future interest @15 per cent to the respondent which rate of interest has also been awarded to the petitioner on the amounts found due to the petitioner from the respondent. The arbitrator had power to award interest on the amount found due to a party despite no stipulation about the interest in the agreement. The petitioner has also been awarded interest on the amounts found due to him from the respondent. There was no specific stipulation in the agreement that even if any amount remained due or found due to any parties, no one will be entitled for any interest. In the circumstances the finding of the arbitrator can not be termed perverse and/or based on wrong application of law or contrary to any stipulation of the agreement.

25. In view of the aforesaid, there is no merit in the objections filed by the petitioner u/s 34 of the Arbitration and Conciliation Act, 1996 and the objections against the award dated 23rd January, 2001 are dismissed. The parties are however, left to bear their own costs.