

R-20

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P. NO.181/2004**

Date of Decision: 07th July, 2010

M/S BELLARY STEELS & ALLOYS LTD. Petitioner
Through: Mr. C. Mohan Rao, Advocate

versus

M/S OJSC POWER MACHINES – ZLT, LMZ Respondent
Through: Mr. Amar Gupta, Mr. Mayank
Mishra & Mr. Chetan Chopra,
Advocates

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may
be allowed to see the judgment? No
2. To be referred to Reporter or not? No
3. Whether the judgment should be reported
in the Digest? No

% **JUDGMENT (Oral)**

VIPIN SANGHI, J.

1. In challenge in these proceedings under Section 34 of the Arbitration and Conciliation Act is the award dated 11.12.2003 made by an arbitral tribunal consisting of three learned arbitrators. The respondent herein was the claimant before the arbitral tribunal. The petitioner had also raised certain counter claims. The arbitral tribunal

substantially awarded the claims of the respondent.

2. The parties had entered into an agreement whereunder the respondent agreed to supply one complete 12 MW Turbo generation set with auxiliaries for a total consideration of US\$ 1,600,000.00 (One Million Six Hundred Thousand US Dollars only). The equipment under the agreement was to be delivered at the Madras port. The same was, however, delivered at Bombay port. Under the terms of the agreement a sum of US\$ 1,440,000.00 (One Million Four Hundred Forty Thousand US Dollars only) stands paid to the respondent. The last instalment of 10% of the value, amounting to US\$ 160,000 (One Hundred and Sixty Thousand US Dollars Only) was, however, not paid. Under the contract, the payment was made through the mechanism of a letter of credit.

3. It appears that the last instalment of US\$ 160,000.00 could not be paid due to delay in the shipment of the equipment, caused as a result of the change of port from Madras to Bombay and the expiry of the validity of the letter of credit in the meantime.

4. As the petitioner failed to make payment of the balance consideration of US\$ 160,000.00, the respondent invoked the arbitration clause contained in the agreement between the parties. The matter was referred to the arbitral tribunal consisting Mr. Justice Attamjit Singh Nehra, Presiding Arbitrator, Mr. Justice J.K. Mehra, Arbitrator and Mr. Justice N.C. Kochhar, Arbitrator. The arbitral tribunal

rendered a unanimous award in favour of the respondent.

5. The respondent raised three claims in the arbitration proceedings. The first claim was towards the payment of the balance amount of US\$ 160,000.00 towards the cost of the turbo generator set and accessories. The second claim was for US\$ 65,000 towards expenses stated to have been incurred in maintaining the performance bank guarantee provided by the respondent to the petitioner. The third claim was for interest @ 3.1% per annum amounting to US\$ 17,773/- till the date of filing of the statement of claim, besides the claim for pendente lite and future interest. The respondent, apart from denying the liability towards payment of the amount claimed by the respondent also raised its counter claim in the sum of Rs.75,22,000/-, the details whereof are as follows:

1. Value of missing generator parts	6 lakhs
2. Custom duty and penalty paid on Engineering drawings for non-assessment/ improper assessment	13.72 lacs
3. Demurrage charges	4 lacs
4. Legal expenses & other litigation charges, additional freight, L/C amendment charges etc.	1.5 lacs
5. Loss suffered by the respondent in completing the project due to breaches committed by the Complainant	50 lacs

6. Before the arbitral tribunal the parties relied on documents filed by them along with their pleadings and admitted the documents filed by the opposite party and did not lead any evidence. The tribunal heard the counsels for the parties and on the basis of the record and

the written arguments submitted before it, proceeded to pass the award. The arbitral tribunal allowed the claim of the respondent for US\$ 160,000 with interest @ 3.1% per annum w.e.f. 03.06.2003 i.e. the date of filing of the statement of claim, till realisation. It also allowed the claim towards legal expenses incurred by the claimant/respondent herein amounting to Rs.2,94,300/-. The tribunal, however, disallowed the counter claim preferred by the petitioner herein in its entirety. For disallowing the counter claim preferred by the petitioner, the tribunal adopted the reason that no such claim had ever been asserted by the petitioner and, consequently, it could not be said that a dispute had been raised by the petitioner in respect of its claims which had been repudiated by the respondent. It was held that no dispute arose which could be arbitrated, so far as the counter claim was concerned. The tribunal found that the counter claims had been raised for the first time in the reply/counter statement filed before the arbitral tribunal.

7. Mr. Rao, learned counsel for the petitioner/objector, does not challenge the rejection of the counter claim by the tribunal as not being maintainable. His submission, however, is that while allowing the claim of the respondent the tribunal has not considered the defence of the petitioner that the amount claimed was not payable to the respondent.

8. Before proceeding to examine the award on this aspect, it would be useful to refer to some of the contractual terms. Article 3 of

the contract provided that the delivery of the equipment under the contract shall take place within 10 months of the opening of the letter of credit. The date of bill of lading was to be considered as the date of delivery. Article 4 provided the terms of payment. The payment was to be made through an irrevocable confirmed letter of credit which was to be opened by the petitioner within 10 days of the signing of the contract for the total contract value. The payment was to be made in four instalments, the last being 10% of the contract value i.e. US\$ 1,60,000 within 7 days of the presentation of the following documents: (i) invoice in three copies, (ii) copy of guarantee of the respondent in favour of the petitioner for the equivalent amount for the guarantee period. The bank guarantee was to be issued by the respondent in favour of the petitioner in the prescribed proforma.

9. The letter of credit opened at the instance of the petitioner provided the destination of the shipment as Madras port. A perusal of the award shows that the claimant/respondent herein had written to the petitioner herein that though the generators were ready, but since no vessel was going to Madras port in the near future, it was not possible to send the same to Madras port and the same could be transported to Mumbai port, for which the vessel was available. The petitioner vide letters dated 18.02.1998 & 03.03.1998 requested the respondent to send the generator sets to Mumbai port. Consequently, the destination port was changed to Mumbai port from Madras port at the instance of the petitioner vide amendment of the letter of credit

dated 26.02.1998. The generator was accordingly sent to Mumbai port where delivery was taken by the petitioner herein.

10. Reference may also be made to Article 8A which dealt with claims on quality and quantity. The claims on quality and quantity of the delivered goods was to be sent by the petitioner directly to the respondent. Clause 8.2 provided that the claims on quality and quantity of the goods could be made within two months from the date of receipt of equipment at site, but not later than three months from the date of delivery. Clause 8.3 further provided that claims of shortage of goods, if responsibility of the carrier is excluded, could be made within two months from the date of receipt of equipment at site, but not later than three months from the date of delivery. The claims both on quality and quantity of goods were required to contain the description of the goods, the contract number, the nature of the petitioner's claim and demands. The same was to be forwarded by registered post along with the necessary documents.

11. The submission of learned counsel for the petitioner is that in its reply and counter claim preferred before the arbitral tribunal, the petitioner had raised various defences to deny the claim of the respondent. The petitioner had asserted that there was delay on the part of the respondent in the shipment of the equipment which led to the expiry of the letter of credit. According to the petitioner the change of port from Madras to Bombay led to the petitioner incurring

additional charges and damages. The petitioner further asserted that it incurred demurrage charges, penalty and litigation charges since the equipment was sent to the Bombay port. It was further asserted that the respondent had failed to supply the engineering drawings with proper declaration the shipped equipment. This also led to delay in the release of the equipment and led to the petitioner incurring additional customs duty, demurrage, additional transportation etc. As aforesaid, the submission of learned counsel for the petitioner is that none of these defences have been considered by the arbitral tribunal while allowing the claim of the respondent.

12. On the other hand, learned counsel for the respondent has supported the award in its entirety. He submits that the petitioner never raised any of the disputes which form the basis of the counter claim and also did not, at any stage, raise any of the defences as were sought to be raised for the first time in the reply and counter statement before the arbitral tribunal. He submits that, on the contrary, the petitioner repeatedly promised that the balance of US\$ 160,000 would be released to the respondent shortly and the reason for the delay in release of the said amount was stated to be the financial stringency of the petitioner.

13. Having heard learned counsels for the parties and perused the impugned award, I am of the view that there is absolutely no merit in the objections raised by the petitioner and the same deserve to be

dismissed. The award passed by the arbitral tribunal is well reasoned and does not call for any interference. There is no merit in the submission of learned counsel for the petitioner that its defences have not been considered by the arbitral tribunal. Mr. Rao has not been able to point out any material whatsoever from the record to suggest that in support of the petitioners aforesaid defences even a shred of paper had been produced as evidence before the tribunal to substantiate the petitioners plea that there was any delay or default on the part of the respondent in their performance of the agreement. Not an iota of evidence appears to have been led, and no document was produced to substantiate the plea that the petitioner has incurred additional costs due to any act or omission of the respondent. So far as the change of port of destination is concerned, from the award itself it is evident that the same had been changed as there was no vessel available to take the equipment to Madras port, whereas a vessel was available which could deliver the shipment at Bombay port. On this being informed, the petitioner itself had instructed the respondent supplier to ship the equipment to Bombay port. The consent of the petitioner to the change of the port is also evidenced from the amendment in the letter of credit as aforesaid. Obviously, the additional expenses, if any, incurred by the petitioner on account of the change of port could not have been claimed from the respondent in these circumstances. The decision to change the port of the dispatch was that of the petitioner. In any event, the petitioner, it appears,

produced no material whatsoever to substantiate its claim towards demurrage, higher duty, transportation charges etc. on account of change of port from Madras to Bombay.

14. Learned counsel for the petitioner has also not been able to show that the petitioner produced any material before the tribunal in support of the submission that the respondent had failed to supply the correct engineering drawings and thereby breached the contractual obligations. No correspondence appears to have been brought on record to show the raising of any grievance in this regard by the petitioner. No particulars of the damages claimed to have been suffered were stated before the tribunal.

15. I have already referred to the contractual terms, which required the petitioner to raise its claims regarding the quality and quantity of the goods being deficient within two months, and certainly not later than three months from the date of delivery. There is nothing to show that any such grievance or claim was ever raised by the petitioner. In this background, obviously the tribunal could not have been expected to deal with the wholly unsubstantiated defence of the petitioner.

16. Learned counsel for the respondent has submitted that the respondent had placed before the arbitral tribunal correspondence to show that the principal claim of the respondent stood unconditionally admitted. He has referred to the letters sent by the petitioner on

31.01.2000, 06.04.2000, 15.05.2001, 16.06.2001 etc. and lastly on 06.03.2002 wherein the petitioner repeatedly expressed its regret for not being able to release the last instalment of 10% of the equipment cost and assured the respondent that the same would be released very soon.

17. For all the aforesaid reasons, I find no merit in this petition. The same is, accordingly, dismissed.

VIPIN SANGHI, J.

JULY 07, 2010
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