

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 83 of 2003

Reserved on: March 1, 2012

Decision on: March 28, 2012

UNION OF INDIA

..... Petitioner

Through: Mr. R.V. Sinha with
Ms. Sangita Rai, Advocates.

versus

MODI INDUSTRIES LIMITED & ANR

..... Respondents

Through: Mr. B.P. Aggarwal, Advocate for R-1.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

28.03.2012

1. The Petitioner, Union of India through Director General Supplies & Disposal ('DGS&D'), has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('1996 Act') challenging the Award dated 29th August 2002 followed by corrigendum dated 12th September 2002 passed by the learned Sole Arbitrator arising out of the dispute between the Petitioner and Respondent No. 1 Modi Industries Limited pertaining to the Running Contract dated 26th February 1979 for supply of two items of "branded Enamel Synthetic Exterior".

2. Pursuant to the tender notice issued by DGS&D, the above contract was entered into between the parties for the period from 1st February

1979 to 31st December 1979. The value of the contract was Rs. 13,42,269.70. The delivery schedule prescribed in the running contract was at 50,000 litres per month commencing from 30th April 1979 and completion by 31st August 1979. The contract also provided an increase or decrease of the quantity by 25% at purchaser's option. It was stated that in exercise of the tolerance clause provided in the running contract, further quantities were ordered by amendment letters dated 31st May, 21st July and 26th November 1979.

3. As regards the two letters dated 26th November 1979, placing orders for 16027 and 20874 litres respectively, Respondent No. 1 stated that sufficient time was not allowed to effect those supplies. However, the Petitioner by its letter dated 3rd December 1979 informed Respondent No. 1 that in case of their failure to accept the amendment orders, the Petitioner would take further action in terms of the contract. It is stated that in view of failure by Respondent No. 1 to supply the aforesaid quantity of 36,901 litres, this quantity was cancelled at the risk and cost of Respondent No. 1 by letter dated 17th April 1980. The date of the breach of contract was taken as 4th December 1979 being the date of refusal to accept the order for additional quantity. It is stated that the extra expenditure involved on account of risk purchase was worked out at Rs. 3,31,193.86 which was recoverable from Respondent No. 1. The Petitioner also claimed liquidated damages ('LD') in respect of the

delayed supplies. Recoveries were effected by the Petitioner from the subsequent bills of Respondent No. 1.

4. Aggrieved by the withholding of the amounts from its bills, Respondent No. 1 sought reference of the disputes to arbitration. This Court passed an order dated 9th August 2001 appointing a sole Arbitrator. The aforesaid order was passed in OMP No. 111 of 1986 filed by Respondent No. 1 under Sections 5, 11, 12 and 33 of the Arbitration Act, 1940 ('1940 Act'). Respondent No. 1 in the said petition challenged the appointment of Dr. B.N. Mani as Arbitrator. By the time the petition came up for hearing, the Petitioner informed the Court that since Dr. Mani had retired, another Arbitrator had to be appointed. Accordingly, the Court appointed Mr. B.L. Nishad, Additional Legal Advisor, Ministry of Law, who was the arbitrator in cases of the DGS&D, as Sole Arbitrator in the present case. Subsequently, Mr. B.L. Nishad was transferred on promotion as Joint Secretary. As will be noticed hereafter, the parties agreed before the Arbitrator that he should treat the proceedings as being under the Arbitration and Conciliation Act, 1996 ('the 1996 Act'). He however continued acting as an Arbitrator.

5. The first claim raised by Respondent No. 1 was for a sum of Rs. 3,31,193.86 plus Rs. 1,82,058.66 along with interest Rs. 17,48,703.58/- and Rs. 7,42,800.14 as simple interest @ 24% per annum. In awarding

the aforementioned claim to the extent of Rs. 5,13,252.52 (Rs. 3,31,193.86 + Rs. 1,82,058.66), the learned Arbitrator gave the following reasons:

“1. The Respondents have admitted in their reply dated 17th April 2002 in para 19A to statement of claim that they had withheld the bills of the claimant on account of their claim of risk purchase loss and liquidated damages.

2. The claimant has filed documents in support of their claims but Respondents despite of several opportunities had failed to file any documents/evidence in support of their claim of risk purchase and prove the delay. It was for the Respondents to prove their claim of risk purchase loss and liquidated damages that same is valid and in accordance with the law. In absence of evidence to prove the justification of their claim of withholding of claimant's bills for their loss, I reject the claim of the Respondent and award that claimant's bills withheld in pursuance of the demand in the contract in question be released forthwith.

Since the amount had been illegally withheld, I allow the interest @ 8% per annum on the amount withheld from the date of withholding till realization.”

6. The learned Arbitrator negated the Claim No. 2 of Rs. 5,00,000 towards damages/loss as Respondent No. 1 had failed to prove the said claim.

7. The counter claim of the Petitioner in the sum of Rs. 3,21,193.86, being the risk purchase loss, and Rs. 56,420.52 as LD along with interest from the date of claim till the date of payment and cost of arbitration proceedings, were all rejected.

8. It is stated by the Petitioner that it had filed all supporting documents for its counter claims before the learned Arbitrator on 19th September 1981. Since those documents were readily available, the Petitioner had filed a further application on 24th April 2002 before the learned Arbitrator appointed by this Court directing Respondent No. 1 to supply copies of the documents with it.

9. A perusal of the proceedings before the learned Arbitrator shows that on 19th April 2002 the Petitioner herein (Respondent before the learned Arbitrator) sought time to file documents in support of the counter claims. The learned Arbitrator allowed this request and granted the Petitioner time till 26th April 2002 to file its documents with a copy thereof to the opposite party. On 15th May 2002 an application was filed by the Petitioner seeking 10 more days' time to file the documents. This was considered by the learned Arbitrator and time was extended up to 27th May 2002. On 19th July 2002 both the parties informed the learned Arbitrator that "they are agreed to proceed this case under the new Arbitration and Conciliation Act, 1996." The learned Arbitrator agreed to this request and adjourned the case on 26th July 2002 for final arguments. Thereafter the arbitration took place on the said date and the final Award was passed on 29th September 2002.

10. The arbitral record shows that Respondent No. 1 failed to file

documents in support of its counter claims despite several opportunities. The documents filed earlier by the DGS&D on 10th September 1981 were not brought on record. In the absence of the Petitioner filing documents in support of its counter claims before the Arbitrator, it cannot be permitted to assail the impugned Award. The learned Arbitrator was justified in proceeding on the basis of the documents made available by the parties.

11. The impugned Award gives clear reasons why Claim No. 1 of Respondent No. 1 was allowed and Petitioner's counter claims were rejected. No grounds have been made out to interfere with the impugned Award.

12. The petition is dismissed, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J.

MARCH 28, 2012

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