

THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 30.10.2013

OMP 1085/2013

UNION OF INDIA & ANR.

.....PETITIONERS

Vs

M/S. V.S. SETHIA AND CO.

....RESPONDENT

ADVOCATES WHO APPEARED IN THIS CASE:

For the Petitioners: Mr. Ruchir Mishra and Ms. Shipra Shukla,
Advocates

For the Respondent:

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

IA No.17477/2013 (Exemption)

Allowed subject to just exceptions.

OMP 1085/2013 and IA No.17474/2013 (condonation of delay in filing the petition), IA No.17475/2013 (condonation of delay in re-filing the petition) and IA No.17476/2013 (stay)

1. There is a delayed but a sustained challenge to the award dated 07.03.2013, passed by a sole arbitrator. There is a delay of 26 days, in the first instance, that is, in the initial institution of the petition under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act), followed by a delay of 81 days, in re-filing the petition.

1.1 In both applications, the petitioners have been blissfully vague in so far as explanation for the delay is concerned. The initial delay is sought to be explained by merely adverting to the fact that after the receipt of the award on 12.03.2013, steps were taken for nomination of counsel and approval of the draft of the petition, without adverting to dates with regard to each of the events, referred to in the application. It is further averred that upon completion of the preliminaries, the nominated counsel filed a petition under Section 34 of the Act on 06.07.2013.

1.2 In so far as the delay in re-filing is concerned, the averments are equally bald; lacking in material particulars. There are general averments made that the petition was returned to the counsel on account of objections pointed by the Registry of this court. This involved taking corrective steps, and since, the petitioners are Government departments, the administrative formalities and approvals required, delay in removal of objections. There is no reference as to how the file was moved and, what approvals had to be sought and, by whom. The application seems to have been drafted in a mechanical manner as if, the delay occasioned, would be condoned for the asking. This is despite the fact that two separate Division Benches of this court have passed judgments laying emphasis on the fact that explanation given for delay in re-filing has to be examined closely keeping in mind the purpose and the intent of the legislature in providing a definitive time frame for institution of a petition under Section 34 of the Act. (see judgment dated 12.11.2010 passed in FAO(OS) 665/2009 in the case of *The Executive Engineer (Irrigation and Flood Control) Vs. Shree Ram Construction Co.*, and judgment dated 11.07.2012 passed in FAO(OS) 295/2012 in the case of *Delhi Transco Ltd. and Anr. Vs. Hythro Engineers Pvt. Ltd.*). Pertinently,

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the Special Leave Petition filed in the case of *Shree Ram Construction Co.*, was dismissed.

1.3 Keeping the explanation set out in captioned applications in mind, there is no case made out by the petitioners for condonation of delay both at the initial institution of the petition as well as in re-filing of the petition. The consequences of this logically would be that the main petition would also have to be dismissed. Since the counsel for the petitioners, Mr. Ruchir Mishra, has also, vehemently, argued the merits of the case, I have decided to examine the same as well.

2. In order to appreciate the challenge laid to the award on merits, the following broad facts need to be noticed.

2.1 Petitioner no.2 floated a tender for procuring 73,585 litres of NIV Mineral Turpentine Oil (in short MTO). This tender was opened on 30.05.2006. The respondent filed its bid which contained the following commercial terms :-

Price : 86.79 per Litre
Excise Duty : Nil
Sales Tax : Nil against form 'D'.."

2.2 It is not in dispute that the respondent's quote was considered as L-1 on account of the fact it chose to absorb Central Sales Tax (CST). The other competing contender, one M/s. Pushker Paint Industries, had quoted a basic price of Rs.76/- per litre. The price quoted by M/s. Pushker Paint Industries did not include CST and other taxes and charges. In other words, M/s. Pushker Paint Industries, had indicated that it will recover over and above the price quoted, inter alia, other taxes and charges, which included Excise Duty, State Development Tax, and Central Tax at the rate of 4% against "form D". Decidedly, upon a comparative analysis being made, the

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petitioners came to the conclusion that the rate offered by the respondent was, in effect, lower than that, which was offered by M/s. Pushker Paint Industries.

2.3 Accordingly, the petitioners entered into a contract dated 07.08.2006, with the respondent, for supply of 73,585 litres of MTO. This quantity was, however, increased by another 8859 litres by an order placed by the petitioners, on 12.09.2006.

2.4 Undisputedly, as per the terms of the contract, supplies were required to be completed by 31.08.2007. There is no dispute also with regard to the fact that the respondent was sourcing its supply of MTO from Vishakhapatnam, in Andhra Pradesh, to four (4) different consignees located in four (4) different locations as per instructions of the petitioners. Accordingly, the petitioners were required to deliver 7200 litres of MTO to OD Talegaon Dabhade; 12000 litres of MTO to FOD C/o. 56 APO; 6385 litres of MTO to OD Allahabad; and 48000 litres of MTO to 223 ABOD Suranussi Jalandhar.

2.5 Pertinently, what is noticed by the learned arbitrator, a fact which is not disputed before me, is that, with effect from 01.04.2005, Value Added Tax (VAT) was introduced in the state of Andhra Pradesh, in place of, Andhra Pradesh General Sales Tax. As per the prevailing regime, at that point in time, VAT was leviable in Andhra Pradesh at the rate of 12.5%, in respect of, sale of goods effected within that state.

2.6 It is also a finding of the learned arbitrator that between 01.04.2005 and 07.08.2006 when, the parties herein entered into a contract, the assessee was liable to pay CST at the rate of 4% provided form D was submitted with it. Therefore, the fact that in the state of Andhra Pradesh, the

prevailing rate of sales tax was 12.5% had no relevance in so far as the respondent was concerned.

2.7 Admittedly, with the coming into force of the Taxation Law Amendment Act, 2007, the Central Government with effect from 01.04.2007 withdrew the facility of supplying form D qua interstate sale made to Government departments. As noted by the learned arbitrator, it is because of this circumstance that the petitioners were unable to provide form D to the respondent herein against sales made to it. The learned arbitrator also returned a finding of fact, which is also not disputed before me, that, with effect from 01.04.2007, CST on interstate sales in respect of goods in issue i.e., MTO supplied to the petitioners was fixed at the same rate i.e., the rate at which VAT was leviable qua sales made within the state, in this case, Andhra Pradesh. Therefore, in effect, with effect from 01.4.2007, the respondent was called upon to bear the burden of CST at the increased rate of 12.5%.

3. It is in the background of the aforesaid circumstances that, the respondent sought extension of the delivery period, so that the provision in the contract, which stipulated that the respondent would recover "nil" CST against form D, was suitably amended to read that CST would be charged at the rate of 8.5%; which was the difference between the increased rate i.e., 12.5% and the intended burden of CST which, the respondent had agreed to absorb i.e., 4% . In this behalf, the petitioners entered into correspondence with the respondent.

3.1 In response to the correspondence on the issue, the petitioners vide letter dated 21.09.2007 extended the delivery period from 31.08.2007 to 31.10.2007; albeit with a right to impose liquidated damages.

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4. Admittedly, deliveries were effected by the respondent to the designated consignees of the petitioners, by 16.10.2007.

4.1 The petitioners, however, vide letter dated 13.03.2009, while regularizing the delivery period imposed liquidated damages in the sum of Rs.84,447/-. As is obvious, the regularization of the delivery period was carried out after a delay of nearly one year and five months.

4.2 It appears that in the interregnum, the petitioners had initially issued two letters dated 22.10.2008 and 10.12.2008, whereby the rate of CST was amended to 12.5%, even though the respondent had sought a correction to reflect the difference between the burden of tax, which it had agreed to absorb and the additional burden which was imposed post 01.04.2007 i.e., 8.5%.

4.3 The petitioners instead of correcting the error in a manner so that it reflected the differential tax burden, which the respondent had to bear, issued a letter dated 26.08.2009, cancelling the amendments sought to be introduced in the contract obtaining between the parties vide their earlier letters dated 22.10.2008 and 10.12.2008.

4.4 It appears that the petitioners also encashed the bank guarantee furnished by the respondent towards security deposit valued at Rs.4,02,486/-, on the ground that it had been paid sums in excess of what was due to it.

4.5 Being aggrieved, the respondent issued legal notices dated 25.05.2011 and 05.08.2011, to the petitioners. Ultimately, upon the matter being carried to this court, a sole arbitrator was appointed pursuant to order dated 07.05.2012.

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5. It is in the background of these facts that Mr. Mishra assailed the award on two grounds. First, that the learned arbitrator committed an error in coming to the conclusion that the respondent was entitled to payment of monies towards the additional CST, which it was required to bear. Second, the finding of the learned arbitrator to the effect that no plea was raised by the petitioners in their statement of defence that they had suffered a loss on account of delayed delivery of the goods in issue i.e., MTO, by a period of nearly one and a half months.

5.1 It may be noted that the first plea is directed towards issue no.1, while the second plea is directed towards issue no.3, as framed by the learned arbitrator in the impugned award. There is no submission made with regard to issue nos.2, 4 and 5 possibly for the reason that they were largely consequential in nature.

5.2 As regards, the submission of Mr. Mishra with regard to the finding returned by the learned arbitrator qua CST is concerned, it is pivoted on the argument that the respondent had agreed to a "nil" rate of tax, and therefore, was awarded the contract on a comparative assessment of the petitioners that, it was economical for them to accept supplies from the respondent as against the other bidder i.e., M/s. Pushker Paint Industries. According to Mr. Mishra, the provisions of Section 64A of the Sale of Goods Act, 1930, (in short the SGA) had no applicability, in the present matter. It was further contended that since, the delivery of the goods in issue i.e., MTO had taken place after the original date of delivery i.e., 31.08.2007, the respondent was not entitled to any reimbursement towards the differential burden of tax, which purportedly, it was called upon to bear.

5.3 In so far as the imposition of liquidated damages was concerned, Mr. Mishra was aggrieved by the fact that the learned arbitrator had failed to

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notice the following submissions made in paragraph 2(u) of their statement of defence :-

"..Accordingly, this office regularized the DP by imposing LD for Rs.82,447/- vide amdt letter dated 13 Mar 2009. Further, the claimant is not supposed to predict any losses regarding the non supply of stores to the respondents. The respondent has bear the loss due to non supply of stores within stipulated time, which was intimated by consignee depot..".

5.4 Mr. Mishra thus submitted that the learned arbitrator's observations in the impugned award, to the effect, that no plea had been raised by the petitioners that they had suffered a loss on account of delayed delivery of the goods in issue was, patently erroneous.

6. In my view, both objections raised by Mr. Mishra deserve to be rejected for the following reasons :-

6.1 The arbitrator has correctly noticed that the respondent's bid quoted a rate of Rs.86.79 per litre without CST provided the petitioners supplied form D to it. The effect of such a quote was that the respondent had taken upon itself to bear CST to the extent of 4% of the assessable value of the goods in issue i.e., MIO. Since the scenario changed with effect from 01.04.2007, in as much as, the Central Government withdrew the facility of goods being sold to Central Government departments against form D, the respondent correctly claimed reimbursement of the differential tax burden. This tax burden fell upon the petitioners after the execution of the contract on 07.08.2006 but prior to the date of delivery stipulated in the acceptance of tender i.e., 31.08.2007. Accordingly both in terms of clause 33 of the contract and Section 64A of the SGA, respondent was entitled to reimbursement of the differential tax burden. I find no error of law or fact in the conclusion reached by the learned arbitrator in this behalf.

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6.2 As regards, imposition of liquidated damages, what is required to be noticed is that, the original period provided for delivery expired on 31.08.2007. At the request of the respondent, the delivery period was extended by the petitioner till 31.10.2007; albeit with a right to impose liquidated damages. The respondent, as a matter of fact, completed delivery of the goods in issue i.e., MTO, by 16.10.2007. There was, thus, a delay of nearly one and a half months. The learned arbitrator records a finding of fact that the counsel for the petitioners conceded before him that no evidence had been placed on record by the petitioners that they had suffered a loss on account of delayed delivery of the goods in issue. It is trite law that liquidated damages are no different from unliquidated damages. In both cases, the aggrieved party is required to prove injury or damage. The only difference being, where parties agree to liquidated damages, which are a genuine pre-estimate of the damages likely to be caused, the aggrieved party is entitled to recover the same to the extent they are reasonable subject to the maximum amount agreed to between the parties. Where quantification is possible, an aggrieved party is required to quantify the same even where liquidated damages are provided for in the contract obtaining between the parties. (see *UOI vs. Raman Iron Foundry*, (1974) 2 SCC 231 and *Fateh Chand vs. Balkishan Dass*, AIR 1963 SC 1405 at page no.1411 at paragraph 10).

6.3 Therefore, in the given circumstances, since the petitioners were unable to prove injury or damage, the learned arbitrator rightly ruled in favour of the respondent and against the petitioners.

7. In so far as the submission of Mr. Mishra is concerned that the learned arbitrator failed to notice that the petitioners had pleaded in their statement of defence the fact that they had imposed liquidated damages to

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the extent of Rs.82,447/- and since, it was not possible to "predict any losses", on account of the respondent's failure to supply the goods in issue i.e., MTO within the stipulated time, the imposition ought to be sustained; is a submission which lacks merit. This submission of Mr. Mishra seems to miss the three aspects with respect to which an adjudicator has to return a finding in a claim for compensation on account of breach of contract, based on the pleadings of the aggrieved party. The first aspect involves return of a finding as to whether or not a breach of contractual obligations has occurred and if so, by whom. Second, whether the breach has resulted in an injury or loss or damage. Lastly, the extent to which injury or loss or damage is required to be compensated so that the aggrieved party is put in the same position in which it would have been had the breach of contractual obligations not occurred. Admittedly, there was no averment made by the petitioners, with specificity, as to the manner in which injury or damage was inflicted on the consignees by virtue of the supply of the goods in issue being delayed by one and a half months. The manner, in which, the averments are couched in paragraph 2(u) of the statement of defence would lead one to believe that it was the petitioners' stand that, the fact that, supplies were delayed, by itself, was enough for the arbitrator to come to the conclusion that injury / damage had been inflicted.

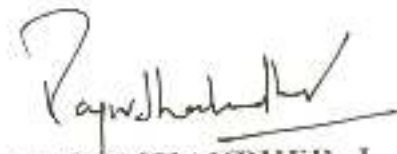
8. In any event, in my view, even if a liberal view of the averments made in paragraph 2(u) of the statement of defence is taken, the fact that the petitioners failed to produce any evidence to establish injury or damage, would be reason enough, to sustain the finding returned by the learned arbitrator, in respect of, the issue dealing with liquidated damages.

9. As indicated hereinabove, the other issues relate to encashment of bank guarantee, imposition of interest and cost. No arguments were

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advanced by Mr. Mishra qua the said issues. As a matter of fact, there is an averment in paragraph 3.23 of the petition, which seems to suggest that the petitioners have received a demand draft in the sum of Rs.4,02,486/- and the said amount appears to have been adjusted by them.

10. To be noted, there is no ground in the petition seeking to challenge the quantum of the rate of interest awarded by the learned arbitrator.

11. For the foregoing reasons, I find no merit in the petition. The same is accordingly dismissed.


RAJIV SHAKDHER, J

OCTOBER 30, 2013

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