IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

FAO No. 3727 of 2009
Date of decision : September 15, 2015

Uttar Haryana Bijli Vitran Nigam, Ltd.
.... Appellant
Versus
M/s Avon Meters (P) Ltd.
.... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Sudhir Kumar Hooda, Advocate
for the appellant.

Mr. Aftab Singh Khaira, Advocate
for Mr. Ashwani Talwar, Advocate
for respondent No.1.

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1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

Amit Rawal, J (oral).

The challenge in the present appeal is to the order dated 9.12.2008 whereby the objections under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the award dated 15.10.2003 at the behest of the appellant-UHBVN Ltd.has been dismissed.

As per the grounds, it has been alleged in the appeal that both the courts did not appreciate the fact that the appellant-Nigam had right to terminate the contract as they could not wait indefinitely for the supply of material. In essence, the respondent-contractor did not adhere to the supply schedule and the contract was rightly terminated. As per the terms and conditions of the agreement the appellant has levied the liquidated damages on unsupplied quantity of 13300 meters at the rate of 5% of the cost of material, which is in accordance with the contract, was sought to be recovered in view of Section 74 of the Indian Contract Act, 1872. The arbitrator as well as the objecting court did not take into consideration the provisions of Section 73 of the Indian Contract Act, 1872, in order to estimate the loss or damage arising out from the break of contract. Since as per clause 23 of the Schedule-D the purchaser can terminate the contract without notice to the supplier at any stage, thus, the arbitrator acted in an illegal manner, much less exceeded jurisdiction to go beyond the terms and conditions of contract.

Learned counsel appearing on behalf of the respondent submits that the award of the arbitrator is well reasoned and arbitrator was none else but retired Director of the appellant-Nigam and after examining the documents on record gave a reasoned award holding that the penalty of the liquidated damages was not in consonance with the provisions of Section 74 of the Indian Contract Act, 1872 as the Nigam was instrumental in causing delay.

He further submits that the objections were not within the parameters of Section 34 of the Arbitration and Conciliation Act, 1996 and were general in nature and the same cannot be entertained in view of catena of judgments rendered by the Hon'ble Supreme Court.

He further submits that there is no illegality and perversity in the award and the award does not suffer from capriciousness, much less, can be termed to be fallacious.

I have heard learned counsel for the respondent and appraised the paper book.

It would be apt to reproduce the relevant portion of award:

I have heard both the parties and gone through the documents submitted by them carefully during the arbitration proceedings and issue-wise findings are as under:-

The respondent Nigam issued PO dated 10.8.1999 (P 8) for the supply of 17000 single. phase electro mechanical energy meters with cup boards in response to claimant's tender dated 28.5.1999 and the connected correspondence. The claimant agreed to supply special type of MCBs of deep drawn type as per their letter dated 7.7.99 (P 2) in response to respondent's pre-order query dated 7.7.99. The respondent vide their letter dated 24.7.99 (P 4) submitted two copies of drawings of the special type MCBs and requested for early approval of the drawing as it would take minimum 45 days for -preparing the sample after approval of the drawing by the Nigam. The respondent approved the drawing on 27.8.1999 (P -11) and sample on 18.11,1999 (P 14) in response to the claimant's letter dated 25.10.1999 (P-13) vide which the sample of the meter/M.CB was forwarded to the Nigam. The claimant vide their letter dated 28.1.2000(P 18) informed the Nigam that the production of the material had been taken in hand and delay in supply had been on account of approval of sample required for starting the mass production. The approval of the sample was required as the Nigam was required to be supplied special MCBs for the first time. The claimant firm earnestly requested the respondent for rescheduling of *the delivery period of the PO.*

Whereas the original delivery period expired on 10.12.99 the respondent offered 3700 Nos meters on 28.1.2000 (P-19). SE/MM deputed XEN/MM, Panchkula on 14.2.2000 to inspect the offered quantity of meters (3700 Nos) which was inspected and cleared by the inspecting officer on 20.2.2000 (P 21). As a sequel to the dispatch authorization by CE/MM vide his letter dated 24.2.00 (P 22) the material was sent by the claimant and received by the respondent in Dhulkot stores on 24.2.2000 and 13.3.2000 (P23 & P 24). Chief Engineer/MM in response to the claimant's request dated 28.1.2000 (P-18) informed that the claimant should execute the supplies against the PO No. HH-4879 dated 10.8.1999 and rescheduling of delivery period would be considered thereafter on merit(P- 26). On reconsideration, the MCBs were got checked up in the central stores, Dhulkote from SE/M&P, Delhi as per CE/MM letters dated 3.5.2000(P 27 & P 28). Firstly the checking was done by a committee headed by XEN/M&P, Kurukshetra (P 29 to P 31) and further by a bigger committee headed by SE/M&P, Delhi (P 32) and in which, the MD of the firm also participated. In the meanwhile, the claimant vide letters 6.7.2000 (P-34) and dated 2.8.2000 (P 37) again requested for rescheduling of delivery period to enable them to dispatch the material. The MOM dated 13.6.2000 of the committee suggesting certain modifications in the supplies already received and the balance quantity was approved by CE./MM vide his letter dated 26.6.2000 (P 33). As per MOM dated 13.6.2000 the necessary modification of 3700 Nos meters was carried out by the firm and the firm further gave inspection call for 5300 Nos. single phase 5-20A meters vide their letter dated 11.08.2000 and letter dated 24.8.2000 (P-38 & P-

39) Neither any inspecting officer was deputed for the purpose nor inspection of the material was carried by the respondent despite various reminders issued from the claimant firm addressed to CE/MM,FinancialCommissioner/Power,&Chairperson,Director/Projects and Managing Director, UHBVN (P 40 to P.49).

The respondent, however, cancelled the PO vide their letter dated 19.1.2001 (P 50)and later on, on the representation of the firm dated 21.2.2001 (P- 54) regarding extension of delivery period, the respondent vide letter dated 8.10.2001 (P 55) extended
the delivery period by 99 days i.e. the extra time for finalizing the details of sealing arrangement of meters/MCBs and inspection delays. The same letter also stipulated that the cancellation of thePO would be treated with levy of liquidated damages on the undelivered portion of the material in terms of the 'Supplier's Default Liability" clause of PO. The claimant firm hectically represented to all the high ups of the organization as per letters placed at P 52,53,56,57,59,60, 61 and 62 against the injustice meted to the firm and in the last few communications the firm even requested invoking the arbitration clause of the contract.

7.2 The claimant from the very beginning- made efforts to remain with time schedule that is how the firm submitted drawing for MCB for approval on 24.7.99 well before the issue of the PO. The claimant even indicated well in advance that it would take 45 days in the preparation of the sample after approval of the drawing. With the approval of drawing on 27.8.99, the claimant submitted sample of MCB on 25.10.1999, which was approved by the Nigam on 18.11.1999. Thereafter steps were taken by the claimant for the production of single *phase electro-mechanical meters with MCBs expecting the same to be ready in the last week of December 1999 or in the Ist week of January 2000 (P 16). The claimant further sounded the respondent through their letter-dated 28.01.2000 (P 18) that the production has been taken in hand and delay in supply had been due to approval of sample required for starting the mass production. It was also requested for rescheduling the delivery period of the PO whereas the claimant offered 3700 meters for inspection in*

January 2000 and the same were received in the respondent's stores at Dhulkote during. February/March 2000. The respondent informed in response to earlier request of the claimant, while asking for the execution of the supplies against the PO that rescheduling the delivery would be considered thereafter on merit (P 26). This communication of the respondent had been made in a total positive mode and that is how the respondent went ahead with the planning of material for total supplies of meters/MCBs and their mass production. In fact, the post facto inspection by a committee after inspection of meters/MCBs by the inspecting officer (who happened to be the expert of meters and protection) and later meetings of various committees showed that the respondent was not clear about the apt design of the equipment as this type of special MCBs were being purchased for the first time by the Nigam. Concurrence of the claimant for providing modifications on 3700 Nos of meters/MCBs already supplied and balance quantity of meters/MCBs, was in fact a consent given in the meeting held on 13.6.2000 (P 32) with the fullest hope that as a goodwill gesture no future problem would arise and there would be smooth sailing for the. supplies of balance quantity of meters. The stony silence on the part of the *respondent all along after the receipt of call for inspection of 5300 Nos meters made as early as in August 2000 remained on hold till the cancellation of the order by the respondent at a belated stage i.e. January 2001. No response to numerous requests made by the claimant for inspection of 5300 Nos meters for about five months, puts the pointer to conclude that the respondent was not interested to receive the material despite compliance of modifications as desired by the respondent vide letter dated 26.6.2000 (P 33). The claimant hectically persued for inspection of ready 5300 Nos meters/MCBs during all this period and also later requests for consideration of the matter and personal hearing fell on deaf ears. The claimant's contention too sounds intelligible that the respondent declined to accept further supplies of meters due to change in their strategy/policy as in the year 2001, the Nigam went ahead for the purchase of electronic meters instead of electro mechanical meters.*

The court during counter arguments on 6.9.2000 asked the respondent to supply a photo copy of noting/document of relevant case file of the purchase department of the Nigam where the decision to cancel the PO had been taken to facilitate the court for taking right view of the matter. The requisite documents were not put on record and as per application dated 19.9.2003, the respondent contended that the said noting of the concerned file of the purchase section was an internal document and its contents could not be disclosed being a privileged document. The contention of the respondent was not accepted and rather it reinforces the claimant's contention that the order was cancelled at belated stage due to change in the policy of the Nigam. Nevertheless, it is open secret that there have been mass demonstrations by the public in various districts of Haryana against the *replacement of electromechanical meters with electronic meters at the premises of the general consumers during 2001-2002. So it could be safely inferred that the cancellation of the PO was not on account of so called delayed supplies of material by the claimant rather on account of extraneous reasons, for which the claimant can not be held responsible. Otherwise, the 5300 Nos meters offered in August 2000 should have been inspected/accepted by the Nigam especially when modifications were decided and approved by the Nigam as late as on 26.6.2000. Therefore, the liquidated damages levied on the unsupplied material would be unlawful. Furthermore, since the claimant was geared with the production of balance quantity of meters and had procured various components including MCBs from various suppliers they would stand to loose totally;* ***as in case*** *no heed was paid and the matter was kept in melting pot without consideration of time. It can be concluded that the early delays in finalisation of the drawing/sample and modifications after approval/receipt of 3700 Nos of meters by the technically qualified inspecting officer, might have been due to lack of experience of both the parties as the meters with special type of M.CBs were purchased by the Nigam for the first time. Asking for post facto modification by the respondent after inspection of 3500 meters & MCBs conforming to specifications and approved- dewing could be ample proof for this situation. Besides the essential delay occurred in the approval of drawing and sample, supplies by the claimant got further delayed as 3700 number meters and MCBs supplied to the respondent in February/March 2000 were put on hold. The matter could* ***only be*** *settled between both the parties on 26.6.2000 after series of meetings. That too after claimant agreed* *the modifications of total quantity of MCBs even when this was not warranted in reference to technical specifications and drawings. Obviously, the claimant had to agree to modifications in the interest of goodwill and smooth sailing in the execution of the order for times a head. Nigam's letter dated 8.3.2000 intimated that execution of the order first and extension in delivery (P 26) period to be considered thereafter coupled with approval dated 26.6.2000 (P-32) of CE/MM in regard to modifications had been enough signal to ahead with mass production and supplies. Taking all this in stride, the claimant offered 5300 number meters on 8th August 2000 which were never inspected by the respondent despite vigorous requests by the respondent. While upto June 2000, the respondent kept on pressing for early supply of meters (P 33) to meet with the urgent requirements in the field. Instead of inspecting the offered lot of 5300 number of meters the respondent preferred to observe a stony silence for several months and went ahead with the cancellation of PO for the balance quantity of 13300 number of meters without any*

mentioning of liquidated damages. But on the representation dated 21.2.2001 (P 54) of the claimant, the respondent ordered levy on liquidated damages on the unsupplied portion of material in terms of Suppliers Default Liability clause of the contract. Keeping the matter on hold by the respondent and later cancellation of the order after a lapse of several months would lead to a positive conclusion and this was resorted due to change in policy/strategy and not due to expiry of delivery period. As the material been not supplied, as per delivery schedule, they would have invoked the risk purchase clause of the contract or atleast serve a show cause notice for delay in supply.

In view of the above reasons, onus for cancellation of PO by the respondent without any fault on the part of the claimant lies on the respondent. Therefore, the claimant would have to be compensated lawfully by the respondent besides refund of liquidated damages already recovered from the claimant. Therefore the claim-wise status in this regard is given as under:

Item No. 1. The Arbitral Tribunal during the visit to the works of the firm on 26.9.2003 noted that a heap of around 5000 Nos MCBs were lying in the open. However, 5-20 A 5300 Nos meters earlier offered for inspection by the claimant during August 2000 could be found. Therefore, compensation for 5300 Nos meters is not accepted. However, the compensation for 5300 No MCBs to be payable by the respondent on the following basis is accepted.

Assuming cost of MCB @ 40% of the cost of meter with MCB i.e Rs. 705.10. Further deducting scrap value @ 6% of MCB cost, the total compensation in respect of 5300 Nos MCBs comes to Rs. 14,05,123 payable by the respondent."

The court while dismissing the objections imposed special costs amounting to ₹5000/- by holding that the award of the arbitrator was well reasoned and the objections had been filed for the sake of objections.

It is now a settled law that as to under what circumstances the award has to be interfered with. The question which has now been raised in the aforementioned appeal has already been answered by the Hon'ble Supreme Court in catena of judgments wherein it has been laid down that until and unless the award suffers from illegality as statutorily prescribed under Section

31 (3) of the Act, the same cannot be interfered with. In this context I intend to refer the judgments of Hon'ble Supreme Court in **Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49 and Navodaya Mass Entertainment Ltd. Vs. J. M. Combines (2015) 5 SCC 698.** In the aforementioned judgment the Hon'ble Supreme Court had culled out the ratio decidendi by holding that until and unless there is error apparent on the face of record or the arbitrator has not followed statutory legal position, it is only in these circumstances it would be justified interfering with the award. The High Court should not act as a Court of appeal and reappraise the material/evidence and embarked on a path by substitution in its own view. It is not the case of the appellant that the award is against the public policy or has violated the principles of judicial approach, much less against the statute and other provisions of Section 34 of the Act. The Arbitrator has dealt with the dispute which was contemplated and was within the scope of it.

In my view, no error of law arise from the award. The award is perfect and justified and all the objections filed against the same were wholly misconceived.

There is no merit in the aforementioned appeal.

The appeal is accordingly dismissed.

(AMIT RAWAL)
JUDGE

September 15 , 2015
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