

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 15.03.2017

+ **O.M.P. 427/2015 & IA Nos.6351-6352/2016**

BHARAT HEAVY ELECTRICALS LIMITED

..... Petitioner

versus

AARTI STEEL LTD. (STEEL & POWER)

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Somiran Sharma and Mr Raghu Chandra.

For the Respondent : Mr Abhinav Agarwal and Mr Rohit Jolly.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Bharat Heavy Electricals Limited (hereafter 'BHEL') has filed the present petition assailing the arbitral award dated 25.04.2015 (hereafter 'the impugned award') entered by the arbitral tribunal comprising of Mr Ashwini Mata, Senior Advocate, Mr V.K. Uppal and Justice P.K. Bahri (Retired) as presiding arbitrator. The impugned award was rendered in context of the disputes that had arisen between the parties in connection with a contract dated 04.08.2005 (hereafter 'the Agreement'), whereby BHEL agreed to supply 1x40 MW Steam Turbine Generator (STG) for the captive power plant of the respondent (hereafter 'ASL') at Ghantikhal, Cuttack. The Agreement was terminated as ASL failed to settle BHEL's invoices. The disputes between the parties, essentially, relate to the quantification of cancellation charges.

2. By the impugned award, the arbitral tribunal has directed BHEL to pay a sum of ₹1,86,00,000/- (Rupees One Crore and Eighty Six Lacs) - being the amount refundable after deduction of cancellation charges - along with interest at the rate of 9% per annum with effect from 01.10.2009 till the date of the impugned award. The arbitral tribunal has further awarded future interest at the rate of 12% per annum from the date of the impugned award till the date of payment. Such interest would be payable if BHEL failed to pay the awarded amount within a period of three months from the date of the impugned award. The counter claims made by BHEL were rejected. BHEL has preferred the present petition being aggrieved by the impugned award.

3. Briefly stated, the relevant facts necessary to address the controversy involved in the present petition, are as under:-

3.1 ASL invited offers for purchase of 1x 40 MW Steam Turbine Generator (STG). Pursuant to the aforesaid invitation, BHEL submitted its technical offer on 10.02.2005, which was accepted by ASL and a Letter of Intent (LOI) was issued on 19.03.2005. In terms of the LOI, the ex-works supply price for the STG was agreed at ₹24,75,00,000/- and consideration towards supervision of erection and commissioning was agreed at ₹35,00,000/-. Subsequently, the parties entered into the Agreement on 04.08.2005.

3.2 In terms of the contract between the parties, ASL paid 10% of the contract price as initial interest free advance (amounting to ₹2,47,50,000/-).

3.3 BHEL commenced work on the STG and in terms of the Agreement, raised invoices dated 28.05.2005 and 10.06.2005 for a sum of ₹2,47,50,000/-

each. However, at the material time, ASL was facing financial difficulties and by a letter dated 09.06.2005, ASL expressed difficulty in releasing the aforesaid payments. Initially, ASL requested for deferment of the payment and extension of the delivery period. However, it is not disputed that ASL did not make the payments as agreed. Finally, on 16.12.2005, ASL sent a letter requesting BHEL to keep the project on hold till such time as ASL gave its clearance to go ahead with the project. Thereafter, BHEL sent several communications calling upon ASL to release the hold put on the project and also to make further payments. Certain meetings were also held between the parties and at those meetings, ASL agreed to release payments and also pay interest. However, ASL defaulted in making the payments as agreed.

3.4 Finally, by a letter dated 17.11.2008, BHEL cancelled the Agreement and called upon ASL to enter discussions for settlement of the “cancellation charges”. ASL responded by denying any liability to pay cancellation charges and by its letter dated 05.12.2008, called upon BHEL to refund the initial advance of ₹2.45 crores.

3.5 Thereafter, on 04.03.2009, BHEL sent a letter explaining that the cancellation charges were on account of (i) Engineering Costs incurred; (ii) Costs of equipment lying in stock; and (iii) Inventory carrying costs of equipment and called upon ASL to once again enter discussions for settlement of the cancellation charges. Thereafter, a meeting was held on 12.03.2009 between the representatives of the parties wherein BHEL claimed that it has incurred ₹42.89 lacs as engineering charges; ₹179.11 lacs for procurement of material; and ₹145.86 lacs as inventory carrying costs.

BHEL also stated that it had reduced the cost of material, which was diverted to other projects, while computing the aforesaid cancellation charges. ASL disputed the aforesaid computation and requested BHEL to review the same. ASL also requested BHEL to divert the unused items or in the alternative, buy back the said items.

3.6 On 26.03.2009 BHEL once again confirmed that the cancellation charges were ₹367.86 lacs and called upon ASL to visit the office and finally “*discuss and settle the cancellation charges*”.

3.7 On 02.06.2009, BHEL sent another letter confirming that they had reviewed the cancellation charges and also confirmed that BHEL was ready to pay the interest charges on the advance calculated at the rate of 11.5% p.a. up to 15.05.2009. BHEL further confirmed that the amount refundable to ASL was ₹72 lacs, calculated upto 15.05.2009. BHEL also called upon ASL to lift the balance material and invited ASL for a meeting on 08.06.2009 for “*final negotiations*”.

3.8 At the meeting held between the representatives of the parties on 08.06.2009, BHEL confirmed that it would refund a sum of ₹72 lacs to be treated as full and final settlement as on 15.05.2009. BHEL also assured ASL that efforts were being made to divert/utilize Gear Box and Coupling for which formal confirmation would be sent subsequently. This was followed by BHEL’s letter dated 20.06.2009, whereby they affirmed that BHEL would retain Gear Box and Turbine loose items at a value of ₹1.14 crores.

3.9 The aforesaid letters were acknowledged by ASL and under cover of

its letter dated 26.06.2009, ASL sent an invoice for the refund of ₹1.86 crores (₹72 lacs as agreed on 08.06.2009 and ₹1.14 crores on account of the agreed value of Gear Box and Loose items). However, BHEL failed to make the said payments and asserted that the understanding that BHEL would refund ₹72 lacs, confirmed at the meeting held on 08.06.2009, was subject to “*management approval*”. This was again reiterated by BHEL in its letter dated 08.02.2010.

3.10 On the failure of BHEL to pay the aforesaid amount, ASL invoked the arbitration clause on 10.09.2010 and subsequently filed its statement of claims before the arbitral tribunal claiming a sum of ₹1,86,00,000/- along with interests at the rate of 15% from 01.07.2009 till the date of payment, in addition to costs. BHEL disputed the aforesaid claims and also raised counter claims including ₹42.89 lacs on account of Engineering Expenses; ₹65.11 lacs for equipment and stock; ₹235.33 lacs as work in progress; ₹113.56 lacs as inventory carrying costs; ₹103.08 lacs as storage costs; ₹627.68 lacs as interest on progressive payments; and ₹519.32 lacs towards loss of business opportunity and loss of profit. Thus, in aggregate, BHEL raised claims of ₹1737.80 lacs. After adjusting ₹251 lacs admittedly due to ASL, BHEL claimed an aggregate amount of ₹1486.80 lacs. BHEL also claimed *pendente lite* and future interest at the rate of 18% per annum.

3.11 The arbitral tribunal, after considering the pleadings and the evidence led by the parties, allowed ASL’s claim for a sum of ₹1,86,00,000/- and rejected the counter claims made by BHEL. The arbitral tribunal held that BHEL had entered into negotiations with ASL and settled the cancellation charges and after deducting the same, had agreed to pay ₹72 lacs. In

addition, BHEL had also agreed to take over Gear Box and Turbine loose items at ₹1.14 crores. In so far as the counter claims are concerned, the arbitral tribunal rejected the same as BHEL was unable to substantiate the same. The counter claims were also held to be barred by limitation.

4. Mr Somiran Sharma, learned counsel appearing for BHEL sought to assail the impugned award on essentially two grounds. First of all, he submitted that the arbitral tribunal had grossly erred in relying on the correspondence between the parties as well as minutes of meeting held on 08.06.2009 for making the impugned award. He contended that the correspondence and the meetings between the representatives of the parties were with a view to explore the possibility of an amicable settlement and thus could not be relied upon as admissions on the part of BHEL; therefore, the impugned award was contrary to the public policy as embodied in Section 23 of the Indian Evidence Act, 1872 (hereafter ‘the Evidence Act’)

5. Secondly, he submitted that the arbitral tribunal had drawn an adverse inference against BHEL for not producing any evidence to substantiate the cancellation charges. According to him, no such adverse inference could be drawn as the arbitral tribunal had framed no issue with regard to the actual expenses incurred by BHEL and, therefore, BHEL was not enjoined to establish the actual expenses incurred by it. He earnestly contended that ASL’s claim was based on alleged admissions made by BHEL and in absence of any issue regarding the charges incurred by BHEL, no adverse inference could be drawn on the basis that BHEL had not established the expenses incurred by it.

6. Mr Somiran also relied on the decision of the Orissa High Court in the case of **Sri Bauribandhu Mohanty and Another v. Sri Suresh Chandra Mohanty and Others**: AIR 1992 ORISSA 136 and of the Calcutta High Court in the case of **Prakash Chandra Gangoly v. Nawan estates Private Limited**: 1968 (1) ILR (Cal) 670 to contend that the arbitral tribunal could not have relied on the minutes of the meeting dated 08.06.2009, as that was contrary to Section 23 of the Evidence Act. He also relied on the decision of the Supreme Court in **Oil And Natural Gas Corporation Limited v. Western Geco International Limited**: (2014) 9 SCC 263.

Conclusions and Reasons

7. At the outset, it is necessary to observe that no submissions were advanced for assailing the arbitral tribunal's decision to reject BHEL's counter claims. Plainly, BHEL had failed to establish its counter claims and the decision of the arbitral tribunal to reject the same cannot be faulted. In addition to rejecting the counter claims on the ground that BHEL had failed to establish the same, the arbitral tribunal also held that the counter claims were barred by limitation. No arguments were advanced for assailing the aforesaid conclusion of the arbitral tribunal either.

8. Thus, the principal controversy to be addressed is whether the impugned award, inasmuch as arbitral tribunal had relied on the correspondence and the letters dated 02.06.2009 and 20.06.2009 and minutes of meeting dated 08.06.2009 in accepting ASL's claim, runs contrary to the provisions of Section 23 of the Evidence Act.

9. It is necessary to observe that the provisions of the Evidence Act do not apply to arbitral proceedings and the arbitral tribunal was not bound by the provisions of the said Act. Thus, the impugned award cannot be assailed on the ground that the impugned award runs contrary to the provisions of the Evidence Act. The only aspect to be examined is whether the substratal rationale of Section 23 of the Evidence Act has been disregarded by the arbitral tribunal.

10. At this stage, it is relevant to refer to Section 23 of the Evidence Act, which reads as under:-

“23. Admission in civil cases relevant

In civil cases no admission relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should both be given.

Explanation- Nothing in this section shall be taken to exempt any barrister, pleader attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.”

11. A plain reading of the said provision indicates that admissions made on an express condition that evidence of it is not to be given, would not be relevant. In the present case, concededly, BHEL had not qualified any of its correspondence or discussions in the meetings with any condition that the same would not be led in evidence. None of the letters sent by BHEL were without prejudice to its rights and contentions.

12. The principal contention advanced was that the arbitral tribunal ought

to have inferred from the circumstances that the correspondence exchanged and the minutes of the meeting recorded were only in aid of exploring a possibility of an amicable settlement and therefore, should have ignored the same while making the impugned award. The arbitral tribunal had considered the aforesaid contention and rejected the same. The arbitral tribunal reasoned that clause 15.2 of the Agreement expressly provided that in the event of termination, BHEL would be paid for the equipment and the services delivered, work completed/work in progress and work ordered on the sub-vendors as advised; thus, it was necessary for BHEL to finally determine the cancellation charges. In the backdrop of the aforesaid contractual provisions, the arbitral tribunal read the correspondence between the parties as well as the minutes of the meeting held, as being in the context of determining the charges to be paid by ASL on termination.

13. This court finds no infirmity with the aforesaid view. Indisputably, BHEL was to ascertain the cancellation charges and in fact had communicated the same to ASL. The letter dated 02.06.2009 sent by BHEL was in the context of the discussions that were held between the parties for arriving at an agreed value of the cancellation charges.

14. The reliance placed by Mr Somiran Sharma, on the decision of ***Sri Bauribandhu Mohanty and Another v. Sri Suresh Chandra Mohanty and Others*** (*supra*) is not applicable in the facts of the present case. In the said case, the parties to the suit had filed a joint compromise petition, which was not acted upon. The petitioner therein applied for recall witness for proving the admissions in the joint compromise petition, which was disallowed. There is no dispute that in that case, the admissions made by the parties were

towards compromising the suit and therefore, fell within the four corners of Section 23 of the Evidence Act. In the present case, the correspondence and meetings were held for the purpose of determining the cancellation charges, in aid of the contractual obligations of the parties. Admittedly, ASL was obliged to pay the charges on termination of the Agreement and BHEL was obliged to advise ASL as to the amount payable.

15. Similarly, the decision of the Calcutta High Court in ***Prakash Chandra Gangoly v. Nawan estates Private Limited*** (*supra*) also turned on the facts of that case. In that case, the court observed that all that is said in negotiations for amicable settlement is generally without prejudice, even if the said words are not expressly used. There is no dispute as to the proposition that offers and counter offers made to amicably resolve the disputes would generally be without prejudice to the rights and contentions of the parties. However, the question whether an assertion made or an offer made, is without prejudice or not, has to be discerned from the context in which it was made. In the present case, the arbitral tribunal, which has the final word on appreciating the evidence and material placed on record, has come to a specific finding that BHEL's offer to refund ₹72 lacs, was in the context of determining the cancellation charges as required under the terms of the Agreement. The said finding is neither perverse nor patently illegal and, therefore, cannot be interfered with in these proceedings.

16. The reliance placed by Mr Somiran Sharma, learned counsel for BHEL on the decision of the Supreme Court in ***Oil And Natural Gas Corporation Limited v. Western Geco International Limited*** (*supra*) is wholly misplaced. There is no merit in the contention that the arbitral

tribunal did not follow a judicial approach while adjudicating the disputes.

17. The next issue to be examined is whether the arbitral tribunal had grossly erred in proceeding on the basis that BHEL had not established the costs incurred. BHEL had made a grievance that no issue with regard to the charges incurred by it had been framed. It was further contended that ASL's claims were based solely on the premise that BHEL had agreed to pay the sum of ₹1.86 crores and therefore, there was no occasion for BHEL to lead any evidence as to the costs incurred by it.

18. The said contention is also unpersuasive. First of all, there is no necessity for an arbitral tribunal to frame issues. The entire dispute before the arbitral tribunal was regarding the amounts payable/recoverable by ASL. Whereas, ASL had claimed that it was entitled for refund of a part of the amount paid as advance, BHEL had made counter claims. There was no dispute that ASL had paid the initial advance of ₹2,47,50,000/-. In absence of the supply of the STG as contracted, ASL would be entitled to claim refund of the same. BHEL could always resist the claim by establishing the costs incurred by it or even by establishing the damages suffered. The Agreement also provided that on termination, BHEL would advise ASL as to the amounts owed for work on account of "*equipment and the services delivered, work completed/work in progress and work ordered on the sub-vendors as advised*". Thus, in order for BHEL to resist refund of the advance received, it was necessary for BHEL to establish the costs incurred. In the present case, the ASL had not claimed the entire refund but it merely prayed for refund of the amount as agreed by BHEL. Thus, even if BHEL was to dispute the same, it would nonetheless be expected to establish the

costs incurred by it. This court finds no infirmity with the approach adopted by the arbitral tribunal. It is also necessary to observe that this court does not sit as an appellate court to review the decision of the arbitral tribunal. In the present case, this court is unable to accept that the impugned award is perverse or patently illegal. The contention that BHEL did not have opportunity to lead evidence on the costs incurred by it as no issue was framed, is unmerited as there is no requirement for an arbitral tribunal to frame issues for trial.

19. The petition and the pending applications are, accordingly, dismissed. No order as to costs.

MARCH 15, 2017
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VIBHU BAKHRU, J

