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

% Judgment Delivered on: 31.05.2012

\+ FAO(OS) No. 247/2012

SUR IRON & STEEL COMPANY PRIVATE LIMITED ..... Appellant

Vs

ERA CONSTRUCTION (INDIA) LIMITED ..... Respondent

Advocates who appeared in this case:

For the Appellant: Mr. Rana Mukherjee, Mr. I.Ghosh, Mr. Samiron Borkataky, Mr. Debjahi Ghosh and Mr. Bhashkar Mukherjee, Advocates

For the Respondent: Mr. Nilava Banerjee, Advocate

CORAM :-
HON'BLE MR JUSTICE SANJAY KISHAN KAUL
HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

CM No.10317/2012 (Exemption)

Allowed subject to just exceptions.

CM No.10316/2012 (condonation of delay of 14 days in filing the appeal)

For the reasons stated in the application, the delay of 14 days in filing the appeal is condoned and the application is allowed.

FAO(OS) No. 247/2012

1. This is an appeal directed against the judgment dated 13.03.2012 passed by the learned Single Judge in OMP No.482/2005. By virtue of the impugned judgment, the learned Single Judge has dismissed the appellant's objections filed under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) to

the award dated 08.09.2005. The net result of this is that the appellant is required to pay to the respondent a sum of Rs.1,44,815/- after adjusting the amounts awarded in his favour under claim no.1.

2. The appellant being aggrieved by the impugned judgment has preferred the present appeal.

3. Before we deal with the submissions advanced before us on behalf of the appellant by Mr. Rana Mukherjee, it may be useful to briefly advert to the facts pertaining to the case. These being as follows:-

3.1 The respondent had placed a purchase order dated 30.11.2000 on the appellant for supply of 12 TPH Automatic Crushing and Screening System (hereinafter referred to as the equipment). The purchase order, amongst other conditions, laid down the terms of payment which read as follows :-

> "Payment Terms :
>
> Advance equivalent to 10% in value of equipment within 7 days of acceptance of order.
>
> 70% of the value of equipment within 7 days fom the receipt of the plant at our NTPC site Talcher.
>
> 10% of the value of equipment within 7 days from the date of commissioning.
>
> Balance 10% shall be released after 6 months of successful commissioning of the plant, after a B.G. against performance of plant for further period of 6 months……"

3.2 It would be important to note at this stage that there was an issue raised before the Arbitrator as to whether the purchase order referred to above had been accepted in its entirety or it had been accepted subject to certain modifications. The appellant had contended before the

Arbitrator that vide letter dated 04.12.2000, it had accepted the purchase order subject to modifications. To be noted, the Arbitrator had, based on the evidence produced before him, come to a contrary conclusion. Therefore, what is required to be taken into account are only the terms of the purchase order.

3.3 As would be evident, on a bare perusal of the payment terms contained in the purchase order itself that, the contract between the appellant and the respondent was for supply, erection and commissioning of equipments in question.

3.4 The appellant had however contended to the contrary. It was the appellant's case before the Arbitrator that its contract with the respondent was essentially for supply of the equipment in issue, and that, it had not undertaken the obligation to erect and commission the equipment supplied.

3.5 It is not in dispute that in terms of the purchase order, the respondent had paid an advance equivalent to 10% of the value of the equipment, that is, a sum of Rs.1,98,450/-, on and around 27.12.2000.

3.6 The case set up by the appellant before the Arbitrator was that on 27.02.2001, the equipment was dispatched with the aid of a transporter, that is, M/s. Reliable Roadway Wings. According to the appellant the equipment in issue, was purportedly transported in three trucks and was delivered at the respondent's site on 07.03.2001.

3.7 It is in the context of the above stand taken by the appellant that the equipment in issue had been dispatched that it sought release of 70% of the value of the said equipment, on the strength of it having delivered the equipment in issue, at the designated site.

3.8 There were also aspects relating to fulfilment of reciprocal obligations by the parties including despatch of civil and mechanical

drawings and the construction of the foundation work at site for erection of the equipments in issue raised before the Arbitrator.

3.9 It was the case of the appellant that the civil drawings had been sent to the respondent on 13.01.2001, while the mechanical drawings were handed over to the respondent by the appellant through its representative one Sh. J. Ganguli in March 2001.

3.10 It was also the case of the appellant that on 13.06.2001, a "***joint site observation***" had been undertaken by the representatives of both the parties.

4. It is not in dispute that pursuant to the aforementioned meeting, minutes were drawn up on which the appellant relied strenuously, both before the Arbitrator as well as before the learned Single Judge to demonstrate the veracity of its stand that it had delivered the equipment in issue, to the respondent at the designated site, and consequently, was entitled to the money as claimed, in accordance with the terms of the purchase order. The said minutes were also relied upon by the appellant to demonstrate that the respondent was remiss in fulfilling its obligation under the contract, in as much as, the civil work at site had not been completed.

4.1 It appears that correspondence was exchanged between the parties with regard to the payment of 70% of the contract value, in view of the purported stand of the appellant that it had supplied the equipment in issue. Since parties were at cross purposes with respect to even this aspect of the matter, the appellant invoked the arbitration clause under the contract. Accordingly, in terms of the contract, a sole Arbitrator was appointed.

4.2 In line with the stand taken by the appellant, it made a claim in the sum of Rs.37,21,695.99 towards price of the equipment supplied.

Claim was also made for interest at the rate of 30% p.a. in respect of pre-reference period, pendente lite, as well as, future interest. Lastly, the appellant also sought cost of arbitral proceedings.

4.3 In response, the respondent set up a counter claim qua the advance paid to the appellant alongwith interest at the rate of 18% p.a. In addition, counter claims were also made by the respondent on account of: losses for purchase of stone grit, storage charges and watch and ward expenses; and lastly, claim for cost of foundation prepared for the purposes of commissioning.

4.4 Based on the pleadings filed, the learned Arbitrator framed the following issues :-

> "(i). Were the rights and obligations of the parties to be decided by a supply order dated 30th November, 2000 or the Petitioner's letter dated 4th December, 2000?
>
> (ii). Was there any breach of contract by the respondent on account of failure to make payment of 70% of the cost of machinery to the Petitioner?
>
> (iii). Was there any breach committed by the Petitioner on account of delay in supply of equipment to the Respondent?
>
> (iv). Who is the owner of machinery supplied but not paid?"

4.5 The learned Arbitrator upon completion of pleadings and after recording evidence tendered by parties pronounced his award on 08.09.2005. In the award, the Arbitrator has returned the following findings of fact:

(i). The rights and obligations of the parties were governed by the purchase order dated 30.11.2000 and not by the alleged modification purportedly carried out vide letter dated 04.12.2000;

(ii). the appellant was in breach of its obligations under the contract

in as much as, it had failed to give proper delivery of the equipment in issue to the respondent. In this context, the Arbitrator evidently came to the conclusion that the equipment in issue were "***dumped***" in wooden boxes at the delivery site;

(iii). the title in the goods (i.e., the equipment in issue) had not passed on to the respondent and hence, the sale of goods by the appellant could not have been made at the risk of the respondent.

4.6 It is these findings made in the award, which were challenged by the appellant before the learned Single Judge. The learned Single Judge by the impugned judgment has repelled the contentions of the appellant. Being aggrieved, the captioned appeal has been filed.

5. Before us, the learned counsel for the appellant began by assailing the impugned judgment on the ground that the respondent in its written arguments before the learned Single Judge had given up its stand that the equipments were short supplied by the appellant. In this regard, Mr. Rana had pointed out the observations made in paragraph 14 of the impugned judgment. The relevant observations to which our attention was drawn are as follows :-

> "….The respondent had alleged short supply of the equipment. This was later given up by the respondent in the written arguments before the learned Arbitrator…."

5.1 We had put to Mr. Rana that if this was the case then apparently the respondent would have no defence to the claim laid by the appellant. It was also put to Mr. Rana as to whether he had filed a copy of the written arguments placed on record by the respondent. Mr. Rana, at this stage, clarified that even though in paragraph 14 there is a reference to the written arguments filed by the respondent before the Arbitrator, the stand to the said effect, was actually taken in the written

arguments filed before the learned Single Judge. Mr. Rana, however, went on to concede that in the appeal filed before us, written submissions filed by the respondent both before the Arbitrator and the learned Single Judge had not been placed on record. This being the main stay of the submissions of Mr Rana, we called for the record of the learned Single Judge.

5.2 On perusal of the record, we found that in the written submission the respondent has clearly taken a stand that out of the three trucks in which equipment was despatched by the appellant to the respondent, only one truck reached the site. The relevant assertions in this regard as made by the respondent in its submission, are as under :-

> "The petitioner claimed that the Petitioner on 28.02.2001 dispatched the entire consignment. [Page 25 of Part III] However, the reading of the second paragraph of the said letter dated 28.02.2001 makes it clear that only 1 truck out of the 3 trucks left for destination and the rest 2 trucks were still at their godown."
>
> ….
>
> Apart from the above, it is also submitted that it was also observed that the Petitioner had failed to supply 2 sets of the Stock Pilling Conveyors alongwith the Motor Reduction Gear which is manifest from the Bill No.25040/2/2001 dated 28.02.2001. [Page No.131 of Part III]"
>
> (emphasis supplied)

5.3 In order to satisfy ourselves completely as regards the stand taken before the Arbitrator, we also examined the written submission filed by the respondent, even before the Arbitrator. A perusal of the written submission confirmed our suspicion that the stand taken before us was, to say the least, incorrect. This is borne out from the following assertions made by the respondent in its written submission filed before

the learned Arbitrator.

> "a). The claimant admittedly unduly delayed in dispatch of the equipment by 13 weeks from the date of supply order and that too only part machinery was supplied to us causing irreparable loss to the respondent by disrupting execution of the work.
>
> b). No packing list and details of the equipment like test reports, inspection report and packing list etc. was supplied by the claimant along with the consignment sent to our project. The claimant also failed to supply 2 sets of Stock Piling Conveyors along with Motor Reduction Gear as shown in Bill No.25040/2/2001 dated 28.02.2001. Further the claimant also failed to supply Storage Bin, Chutes & Hoppers for the said plant as these are part of machinery items which were to be supplied with machinery and these items can never be a part of civil work as would be evident from the minutes of meeting dated 13.06.2001, signed by both the parties." (emphasis supplied)

5.4 Apart from the above, Mr. Rana sought to lay stress on the minutes of the meeting of the Joint Site Observation. Based on the minutes of the said meeting, it was contended that the appellant had supplied the equipment as against each of the jobs sequenced in the said minutes. According to Mr Rana the remark column indicated that material had been supplied by the appellant.

5.5 In order to avoid prolixity, we are not extracting the said minutes as they find a mention in paragraph 19 of the impugned judgment. Though we notice, contrary to what Mr Rana has submitted, the jobs sequenced against serial nos. 4(i) to (iii) carry the notation that "Chutes" are not ready. Similarly, job referred to against serial no. 7 carries the remark that "material" is not ready. A perusal of the extract of written submission culled out hereinabove would show that the respondent specifically took stand that, amongst others, chutes formed

part of the equipment to be supplied and not part of civil work as contended by the appellant. Therefore, the contention of Mr Rana that the minutes of joint site meeting presented an open and shut case in favour of the appellant that the equipment in issue had been delivered at site – is not quite accurate. Arbitrator, based on the evidence of parties, has to the consternation of the appellant, come to the conclusion that proper delivery of equipment is not made.

5.6 Furthermore, the learned Single Judge has dealt with other facets of the very issue quite extensively in paragraphs 20 to 28 of the impugned judgment; we do intend to repeat the same. However, if we were to summarize the observations of the learned Single Judge, based on the evidence on record, he has, in our view correctly come to the conclusion that the Arbitrator's finding that while there was a joint site inspection, there was no inspection of the equipment in issue, and that, the evidence of the witnesses cited by the parties led him to come to the conclusion that the supply of equipments was incomplete, was a possible view. Therefore, the appellant having failed to give proper delivery of the equipment in issue, the property in the goods i.e., the equipment in issue had not passed to the buyer/ respondent and hence, the claim for award of 70% of the value of the equipment could not be sustained.

6. We are in agreement with the view taken by the learned Single Judge that the evidence of the witnesses and the material on record could possibly have led the Arbitrator to come to the said conclusion. Appreciation of evidence is entirely within the domain of the Arbitrator. The learned Single Judge has correctly refrained from drawing an inference other than that which the Arbitrator has drawn as that would have led the learned Single Judge to enter an arena which

was outside his jurisdiction, while trying objections under section 34 of the Arbitration Act. We also refrain ourselves from straying on to the said path. The Arbitrator is a private judge chosen by parties. Unless a finding of the Arbitrator is perverse, which is not the situation in the present case, the court would do well in not interfering with an award of the Arbitrator.

7. In view of the above, we find no merit in the appeal. The appeal is accordingly dismissed. In the facts and circumstances of the case, there shall be no orders as to costs.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

MAY 31, 2012
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