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

Judgment reserved on : 23.09.2013
% Judgment delivered on: 31.10.2013

\+ **OMP No. 898/2013**

THE INDURE PVT. LTD. ..... Petitioner

versus

SIEMENS LTD. ..... Respondent

Advocates appeared in this case:

For the Petitioner: Mr Abhishek Manu Singhvi, Sr. Advocate with Mr Prashant Mehta & Ms Priya Pathania, Advocates.

For the Respondent: Mr C. Mukund and Ms Ekta Bhasin, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. This is a petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) for setting aside the award dated 24.05.2013.

2. It must be stated at the very outset that there are several legal submissions raised in the petition, which admittedly had no foundation in the pleadings filed before the learned sole arbitrator. As a matter of fact, even at the stage of arguments, the legal submissions on the basis of which the award is sought to be assailed, were not advanced before the

learned arbitrator. These legal submissions, to which I would be making a reference hereinafter, were raised for the first time in written submissions on behalf of the petitioner after oral argument had concluded before the learned arbitrator and that too by a new set of advocates. Broadly, these legal submissions pertain to the non-consideration of the provisions of Sections, 10, 14 and 41 of the Specific Relief Act, 1963 (in short the S.R. Act). It is the case of the petitioner that the relief accorded by the learned arbitrator to the respondent, could not have been granted if, the said provisions of the S.R. Act, had been kept in mind.

3. In order to appreciate the various contentions raised before me by counsels for parties, the broad facts which led to passing of the award and its challenge in this court, require to be noticed.

4. The petitioner, entered into a contract with a company by the name of Ispat Energy Ltd. (in short IEL) to set up on EPC basis 2 x 55 MW BF Gas Fired Power Plant Project at Dolvi, Geetapuram, Distt. Raigarh in the state of Maharashtra (hereinafter referred to as the Project).

4.1 For this purpose, a letter of intent (LOI) dated 20.07.2007, was issued by IEL in favour of the petitioner. This was followed by three (3) agreements of even date, i.e., 24.07.2007, executed between the petitioner and IEL.

4.2 The setting up of the project required installation of two (2) Generator Transformers (in short GTs). The petitioner, for this purpose, entered into a contract with the respondent. This contract is the subject matter of the LOI dated 30.08.2007. It is pertinent to note at this stage that it is the case of the petitioner, that the LOI dated 30.08.2007, was issued by the petitioner in favour of the respondent at the say so of IEL.

An argument was sought to be raised both before the learned arbitrator and myself that the petitioner was acting as an agent of the IEL.

4.3 As per the terms of the LOI dated 30.08.2007, the respondent was to provide inspection and / or despatch the first GT within ten (10) months of the LOI, while the second GT had to be made ready for inspection/ despatch within eleven (11) months of the LOI. The total consideration for supply of the two GTs was fixed at Rs. 8.60 crores with an additional cost to be paid for supervision of erection and commissioning.

4.4 The respondent furnished a bank guarantee in the sum of Rs. 86 lacs in favour of the petitioner in lieu of advance it was to receive for the manufacture, supply and commissioning of the two (2) GTs. The petitioner released the advance in two tranches of Rs. 43 lacs each. The first tranche was released of 27.09.2007, while the second tranche was released on 09.05.2008.

4.5 The petitioner, evidently, also entered into a second contract dated 14.07.2008 with the respondent involving manufacture and supply of an equipment, known as, Switchyard. It is the case of the petitioner that the GTs by themselves are useless without the switchyard. The petitioner claims that this contract was also executed with the respondent at the say so of the IEL, after terminating the contract previously entered into with an entity known as M/s. Voltech.

4.6 According to the petitioner, since the execution of its contract with IEL was being delayed due to reasons solely attributable to the latter, it had requested the respondent to delay the delivery of the two (2) GTs. It is the petitioner's case that despite such an intimation the respondent issued an inspection notice dated 26.12.2008, calling upon its officers to

inspect the GTs manufactured by it. The suggested date indicated for inspection was 05.01.2009.

4.7 Since, the petitioner, took no steps pursuant to the aforementioned communication, by another communication dated 04.09.2009, the respondent called upon the petitioner to fulfil its obligation under the LOI dated 30.08.2007.

4.8 It appears that in the interregnum the validity of the bank guarantee furnished by the respondent was extended till 31.07.2009, with the claim period valid till 31.01.2010.

4.9 Though, the respondent, did not receive any response to its communication referred to above, the petitioner vide its letter dated 07.03.2011, requested the banker to extend the validity of the bank guarantee in issue till 30.10.2011, with the claim period being made valid till 31.04.2012.

5. The respondent, having failed to make the petitioner comply with its obligations under the LOI dated 30.08.2007, issued a notice dated 11.05.2011 through its advocates. By this notice the respondent called upon the petitioner to take delivery of the two (2) GTs manufactured by it on its behalf against payment of the balance sum of Rs. 7.74 crores. The petitioner was also put to notice that upon its failure to comply with the request made, the respondent would dispose of the two GTs in open market, while reserving the right to recover the amount due and payable to it with interest, at the rate of 24% per annum.

5.1 It must be noticed that after the issuance of the legal notice in May, 2011, negotiations opened up between the parties herein and the IEL. It appears that these negotiations were held, more particularly, between

September and November, 2011. This is an aspect on which the petitioner has placed considerable reliance, to demonstrate, that the LOI dated 30.08.2007 was substituted by a new contract purportedly entered into between the respondent and IEL. It is the petitioner's case that the substituted contract required the respondent to supply the two GTs to IEL at a reduced consideration of Rs. 6.60 crores. For this purpose, the petitioner relied upon the Emails dated 19.11.2011, 22.11.2011, 23.11.2011, 24.11,2011 and two letters dated 05.12.2011. It is important to note, in so far as the Emails are concerned, there is no dispute as between the parties that they were exchanged and received. In so far as one of the letters dated 05.12.2011 is concerned (which was addressed to the respondent), the respondent claimed that it never received the said letter. The respondent claimed instead that, what was filed in the arbitration proceedings was a fabricated document.

5.2 The learned arbitrator, while dealing with the petitioner's submission that the contract between itself and the respondent was discharged by virtue of its substitution with a new contract forged between the respondent and IEL, has squarely dealt with these Emails. The learned arbitrator has also returned a finding of fact that the petitioner's claim that Email dated 05.12.2011 was despatched to the respondent, was not believable.

5.3 It may be relevant to note at this stage, according to the petitioner, on the very same day, i.e., 05.12.2011, two letters were generated. One was sent to the concerned bank for extension of the bank guarantee in issue, while the second letter of even date was sent apparently to the respondent conveying its no-objection to the respondent supplying the two

(2) GTs directly to IEL. It is the second letter dated 05.12.2011, which the respondent says, it never received. The petitioner in order to demonstrate delivery ended up, as if by Freudian slip relying upon a courier receipt which was addressed to the bank. As a matter of fact, as noticed by the learned arbitrator, a peculiar stand was taken by the petitioner that by mistake both letters, were put in one envelop. If this, rather curious, explanation is accepted, then obviously the respondent did not receive the communication dated 05.12.2011 addressed to it.

6. It is in this background that the respondent approached this court by way of a civil suit. The suit was numbered as : CS(OS) 490/2012. In the suit the respondent sought directions in the nature of mandatory injunction qua the petitioner as also in the form of prohibitory injunction. In so far as the former was concerned, the respondent required this court to call upon the petitioner to take delivery of two (2) GTs, albeit on payment of the balance price. Simultaneously, as indicated above, a restraint was sought on the petitioner encashing the bank guarantee in issue.

6.1 It appears, unknown to the respondent, on 06.03.2012, the petitioner had already invoked the bank guarantee in the sum of Rs. 86 lacs. Unmindful of this fact, the respondent, on 07.03.2012, agreed to the disputes being adjudicated upon by an arbitrator. Accordingly, a sole arbitrator was appointed, which culminated in passing of the impugned award.

7. It must be noticed that the respondent having come to know about the invocation of the bank guarantee moved an application under Section 17 of the Act before the learned arbitrator for stay of encashment of the bank guarantee. This request was made, inter alia, on the ground that

there was no occasion to seek encashment of the bank guarantee when, it was valid till 31.07.2012, while time for lodging a claim was available till 31.01.2013. The learned arbitrator, however, declined the prayer sought by the respondent in its application under Section 17 of the Act.

8. Accordingly, the respondent filed its statement of claim before the learned arbitrator and claimed reliefs keeping in mind the fact that the bank guarantee in the sum of Rs. 86 lacs stood encashed by the petitioner.

8.1 The petitioner, on its part had also moved an application for extending the time for filing its defence on the ground that it had filed an application under Section 11 of the Act in the Bombay High Court against IEL. The learned arbitrator, however, vide order dated 14.06.2012, dismissed the application of the petitioner, inter alia holding that its dispute with the respondent were totally unconnected with the disputes obtaining between the petitioner and the IEL.

9. The petitioner avers that in its petition filed in the Bombay High Court, which is numbered as Arb. P. No. 564/2012, an interim order has been issued qua IEL restraining it from alienating its assets. It is further averred that an arbitrator has been appointed to adjudicate the disputes between itself and IEL. The petitioner, apparently, has lodged a claim in a sum of Rs. 126 crores or thereabouts against IEL.

10. The learned arbitrator after allowing parties to file pleadings and evidence in support of the pleadings, heard arguments in the matter. Liberty was granted to both sides by the learned arbitrator to file written submissions in the matter. It was at this stage, as indicated above, the learned arbitrator discovered that the petitioner had changed its advocates and had filed written submissions which were beyond the case set up by it

either in the pleadings or in the oral submissions made before him. The learned arbitrator has noted this aspect, in paragraphs 39 and 78 of the award.

11. After a detailed discussion qua various submissions before him, the learned arbitrator proceeded to pass the award; which is impugned in the present proceedings.

SUBMISSIONS OF COUNSELS

12. Dr. Singhvi, learned senior counsel for the petitioner, in support of the petition argued that notwithstanding the fact that submissions were made, which found no mention either in the pleadings or at the stage of oral arguments, the learned arbitrator was duty bound to consider the same having allowed parties to file written submissions in the matter. It was the learned senior counsel's submission that the submissions made were pure questions of law, and therefore, the learned arbitrator ought to have decided the same. Dr. Singhvi went further, by submitting, that the learned arbitrator ought to have re-opened the case by putting the petitioner to terms, and thus, in effect, granted a de novo hearing to both parties.

12.1 It was Dr. Singhvi's contention that the relief sought by the respondent and granted by the learned arbitrator, was in the nature of a specific performance, which could not have been granted in the facts and circumstances of the case. He submitted that the relief granted was contrary to the provisions of Section 10, as no specific performance could be granted vis-à-vis movable property. It was stated that since, the contract was determinable, specific performance was barred under Section 14(c) of the S.R. Act. Dr. Singhvi also took recourse to the provisions of

Section 41(e) of the S.R. Act.

12.2 This apart, Dr. Singhvi also submitted that the contract between the petitioner and the respondent stood substituted by the new contract arrived at between the respondent and the IEL. Dr. Singhvi, in order to demonstrate the same, took recourse to the Emails and the communications referred to in this behalf in the foregoing paragraphs of my narration hereinabove.

12.3 It was Dr. Singhvi's contention that the despatch of letter dated 05.12.2011, in the same envelope in which a letter of even date, i.e., 05.12.2011, was sent to the bank, was a genuine mistake, and that, no fraud was sought to be played, as was contended by the respondent.

13. On the other hand Mr Mukund, who advanced arguments on behalf of the respondent, submitted that was no patent illegality or error in the award had occurred which would call for interference by this court under Section 34 of the Act. Mr Mukund relied upon the findings of facts returned by the learned arbitrator to demonstrate that: there was privity of contract obtaining only between the petitioner and the respondent; the contract between the parties herein required respondent to manufacture and supply two (2) GTs to the petitioner for a total consideration of Rs. 8.60 crores; the respondent having manufactured the two (2) GTs suited to the petitioner's need and as per its specifications, was entitled to the relief prayed for in its statement of claims filed before the learned arbitrator; though there were negotiations held between the parties herein and IEL, at one stage, so as to reduce the financial burden of the petitioner, no concluded contract was arrived at between the respondent with IEL; and lastly, that the learned arbitrator had dealt with each and every defence

raised by the petitioner in the pleadings and in the oral submissions, made before him.

REASONS

14. Having heard the learned counsels for the parties and perused the record, what clearly emerges is as follows:

(i) a LOI dated 30.08.2007, was issued by the petitioner in favour of the respondent, which required the respondent to supply two (2) GTs at a total consideration of Rs. 8.60 crores;

(ii) the two GTs were required for IEL's captive power plant situate at Dolvi in the State of Maharashtra;

(iii) the petitioner's contract with IEL was subject matter of a separate LOI dated 20.07.2007, to which, the respondent was not a party;

(iv) the respondent in consonance with its obligation had manufactured the two (2) GTs and offered the same for inspection to the petitioner vide communication dated 26.12.2008. This offer was reiterated vide communication dated 14.09.2009;

(v) the petitioner, as a matter of fact, had requested the respondent to delay the manufacture of two (2) GTs in view of the slow progress it was making in the execution of its contract with IEL, though according to the petitioner the delay in respect of the same was solely attributable to IEL;

(vi) the respondent had issued a legal notice dated 11.05.2011, seeking to convey to the petitioner that it should fulfil its obligation qua the LOI dated 30.08.2007, to which, no reply was received;

(vii) there were negotiations held between September and November, 2011 between the representatives of the petitioner, respondent and the IEL. These negotiations, however, did not reach fruition. There was, in

fact, no contract concluded between the respondent and the IEL. The consequences of which, was that, the LOI dated 30.08.2007, continued to subsist. There was, thus, no novation of the contract which subsisted between the petitioner and the respondent. As noted by the learned arbitrator, the fact that the petitioner agreed to an arbitration itself demonstrated that the contract between the petitioner and the respondent continued to subsist. (See paragraphs 59 to 67 of the award);

(viii) there were no averments made in the pleadings filed before the learned arbitrator by the petitioner that the respondent's claim was barred under the provisions of Section 10, 14 & 41 of the S.R. Act. As a matter of fact, petitioner did not make any submission with regard to the same even in the course of oral arguments before the learned arbitrator (see paragraph 69 of the award);

(ix) the plea that the petitioner was an agent of IEL, had no foundation in the pleadings filed before the learned arbitrator (see paragraph 72 of the award);

(x) that the LOI dated 30.08.2007 was dependent on a back-to-back arrangement with IEL, which obliged the respondent to take delivery of the two GTs on behalf of IEL only after the same were inspected and cleared by IEL, was not the stand taken by the petitioner in the pleadings or in the oral submissions advanced before the learned arbitrator. Furthermore, the LOI dated 30.08.2007, made no reference to such an arrangement (see paragraph 74 of the award);

(xi) that the supply of switchyard was inextricably related to the supply of the GTs and in that sense the two contracts were composite in nature, was not correct. (See paragraph 75 of the award);

(xii) that the contract between the petitioner and the respondent was terminable in nature, was not a stand taken in the pleadings or in oral submissions made before the learned arbitrator. (See paragraph 71 of the award).

15. Having regard to the above, in my view, it cannot lie in the mouth of the petitioner to contend that the learned arbitrator committed a patent error in not considering the legal pleas of the petitioner. Undoubtedly, the learned arbitrator had given full opportunity to the petitioner to place its case before him. Therefore, the suggestion that there was a lack of opportunity tantamounting to breach of principles of natural justice, has to be rejected outrightly.

15.1 Dr. Singhvi's contention that the relief granted to the respondent tantamounted to specific performance of the contract and hence could not have been granted in view of the provisions of Section 10, 14(1)(c) & 41(e) of the S.R. Act, is misconceived for two reasons: First, as rightly held by the learned arbitrator, there was no such foundation in pleadings of the petitioner, filed before the learned arbitrator. It is trite to say that evidence can be led before an adjudicating authority, for its consideration, which has its foundations in the pleadings. In the present case, admittedly, the petitioner in its statement of defence at no stage raised the plea that the relief for specific performance was not available to the respondent for the reason that: (a) relief was sought in respect of movable property; (b) the contract obtaining between the parties was determinable; and (c) the only remedy, if at all, which was available to the respondent was by way of damages, which it was required to prove, and in that behalf it was required also to show that, it had taken steps to mitigate the losses

caused on account of alleged breach of contract by the petitioner.

15.1 Had the petitioner taken such a plea, the respondent would have averred in the rejoinder or, otherwise demonstrated that, the goods in issue were not ordinary articles of commerce; that the aspect of determinability of the contract would have to be demonstrated by reference to a provision in the contract in its applicability to the facts and circumstances of the case; and lastly, if the petitioner had pleaded that the only remedy available to the respondent was by way of damages, it would only then have become incumbent for the respondent to demonstrate, as to why, the arbitrator should exercise the discretion vested in him, to order specific performance in the facts and circumstances of the case presented before him, for adjudication. Since, there was no such defence taken, it was not incumbent on the respondent to plead an alternative case for damages, and then, demonstrate mitigation of loss and prove what would be the reasonable compensation payable to it by the petitioner.

16. I must, however, note that the respondent had in the pleadings sowed the seeds of the uniqueness of the goods by making a specific averment in its statement of claims to the effect that it was unable to sell the goods in issue in open market due to their specific technical specifications, which did not fit the requirement of any purchaser in the open market. This assertion has been made in paragraph 3(xii) of the statement of claim. As a matter of fact, the petitioner's own witness Mr. V.N. Gupta bears out the truth of this averment in his deposition which reads as follows: "***The customised GT for the above referred project cannot be diverted to any other similar rated power plant as it is customized to voltage rating***…." Though the witness was attempting to

link the supply of switchyard to that of the supply of the two (2) GTs in issue, what does, however, clearly come through, is that, the two (2) GTs were so customized that they were not ordinary articles of commerce. In view of these pleadings, and the evidence on record, in my opinion, it can hardly be contended on behalf of the petitioner that it was not possible for the learned arbitrator to grant the relief which he granted in the matter. In my opinion, it was a plausible view given the state of the pleadings.

17. Before I conclude, though, I must record a footnote to this judgment with respect to the submission of Dr. Singhvi that the learned arbitrator having entertained the written submissions ought to have decided each and every submission even if it did not have its foundation in the pleadings filed before the learned arbitrator. Dr. Singhvi made an impassioned plea that if equity were to prevail in the matter the learned arbitrator would have done the right thing by re-opening the matter and conducting a de novo hearing as, the petitioner undoubtedly had a very strong case.

18. As has been often said, equity must succeed law and not preceded it. Justice, according to law, is the pole star which courts must follow. Equity is, as is often said, an unruly horse. The learned arbitrator, in my view, went strictly by the mandate of law in not straying into an area which was outside the bounds of the pleadings. This was not a case where pure questions of law arose in respect of which there was sufficient foundation in the pleadings, filed before him. Whether or not such a foundation was laid, must depend on the appreciation of material by the learned arbitrator alone.

19. This apart, I have also attempted to look at the matter from the point of view of equity. The facts of the case would clearly demonstrate that,

there is no equity in the stand taken by the petitioner. The petitioner had entered into a contract with the respondent for supply of two (2) GTs, which were required to be used in a captive power plant, in respect of which, in turn, it had entered into a contract with IEL. The respondent, discharged its obligation by manufacturing the two (2) GTs in time qua which, it sought permission to deliver and receive its due remuneration for the work done. The petitioner, on the other hand, refuses to pay the money owed on some woolly argument that it was acting as an agent of IEL, and therefore, would pay only if, it were to receive money in that behalf from IEL. According to me, neither law nor equity can come to the aid of the petitioner. The petitioner's stand is both unfair and iniquitous.

20. That apart, if the learned arbitrator had proceeded in the manner as suggested by Dr. Singhvi's, in my opinion, it would have given rise to unnecessary chatter. The learned arbitrator wisely abjured from taking any such step. The judicial system, in present times, is under grave strain and sometimes under scrutiny of the kind, which is best avoided.

21. It is perhaps, the lack of discipline, in the legal profession which, emboldens parties to change advocates at the eleventh hour and / or file written submissions which are not based on averments made in the pleadings or what is argued in court. Such an approach leads to delays, as courts are called upon to consider, what was not the stand of the party before the adjudicating authority; which in the first instance tried the case. This reminds me of the pointed observations of Hon'ble Mr Justice D.A. Desai, (as he then was) in the case of ***M/s Guru Nanak Foundation vs M/s Rattan Singh & Sons (1981) 4 SCC 634*** wherein he remarked that : "***the way in which proceedings under the Act (Arbitration Act of 1940)***

are conducted and without exception challenged in courts has made lawyers laugh and legal philosophers weep".

22. Thus, having regard to the discussion above, I find that there is no merit in the petition. Consequently, the same is accordingly, dismissed. Costs in the matter will, accordingly, follow the result.

RAJIV SHAKDHER, J.

OCTOBER 31, 2013
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