OD-1

ORDER SHEET

APO 20 of 2019
GA 186 of 2019
In
AP 171 of 2018

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

M/S. INDUSTRIAL LAMINATES INDIA PVT. LTD.
Versus
UNION OF INDIA

BEFORE:

The Hon'ble JUSTICE SANJIB BANERJEE

The Hon'ble JUSTICE SUVRA GHOSH

Date : 6th February, 2019.

Appearance:
Mr. Sakya Sen, Av.
Mr. Debmalya Ghoshal, Adv.
Mr. Meghnad Dutta, Adv,
Mr. Arindam Pal, Adv.

Mr. L. K. Chatterjee, Sr. Adv.
Ms. Aparna Banerjee, Adv.

The Court : In view of the good grounds shown, the marginal delay in preferring the appeal is condoned.

The appeal arises out of an order dated August 17, 2018 passed on a petition under Section 34 of the Arbitration and Conciliation Act, 1996 to challenge an arbitral award of November 14, 2017. By such order, the arbitral

award has been reversed by disallowing the appellant's claim as allowed by the arbitrator and allowing the counter-claim of respondent railways despite such counter-claim having been rejected by the arbitrator.

Under a purchase order of July 17, 2006, the appellant was required to supply 72,000 units of **'K'** type non-metallic brake blocks adhering to RDSO specification No. C-9810 (Rev. 1). In terms of such purchase order, the delivery was to be made at the rate of 20,000 to 25,000 pieces per month commencing August, 2006 such that the full supply would be completed by October, 2006. The payment clause promised 95 per cent payment against issuance of the corresponding inspection certificate and receipted challan duly signed by the Depot Officer and the balance 5 per cent against the receipt note after completing the supply. The inspection clause in the purchase order stipulated that the inspection would be conducted by RITES/Mumbai at the contractor's works.

According to the appellant, 25,000 units of the goods of agreed specifications were passed for inspection in August, 2006 in two lots of 10,000 on August 2, 2006 and 15,000 on August 29, 2006. Upon the inspection certificate being furnished in respect of such 25,000 units and the delivery being completed, the full payment in respect of such goods was received by the appellant. The dispute between the parties pertains to a supply of 11,000 units which were inspected by RITES on October 13 and 14, 2006. Between the first two lots of supply and the disputed lot, there was another tranche of 22,000 units that had been cleared upon inspection, the goods delivered and full

payment received therefor. Thus, 47,000 units had been supplied and paid for before the next lot of 11,000 units ran into heavy weather.

The appellant relies on the inspection certificate issued by RITES pertaining to the disputed 11,000 units. RITES issued the certificate on October 14, 2006 indicating that out of the total quantity of 72,000 units pertaining to the purchase order dated July 17, 2006, 47,000 units had been previously inspected and passed and out of the 11,008 units presented for inspection, 11,000 units stood passed according to RDSO specification No. C-9810 (Rev. 1). The inspection certificate, in its initial page, indicated the date of call to be October 11, 2006 and the dates of inspection to be October 13 and 14, 2006. In the check-sheet appended to the inspection certificate, against the description of stores, the following is indicated:

> " 'K' Type high friction Composite Brake Block to Drg.No.ILPL-001 REV 01 To RDSO Specn No. C-9810 OF M/S. ILPL."

A few lines down in the check-sheet against the heading of specification, the following appears:

> "RDSO Spec. No. C-9810."

The parameters of hardness and coefficient of friction, the two areas which are of relevance as will be noticed later, are indicated in the check-sheet to be between 95-120 (HRX) and 0.45 +/- 0.1 μ, respectively.

It appears that on October 10, 2006 the railways modified these specifications and issued an intimation in such regard to both the appellant and RITES. As per such modification, the parameter for hardness stood revised to 70-

95 HRR and the range of acceptance for the co-efficient of friction stood revised to 0.22 to 0.35 μ.

It is the appellant's case that the appellant received the advice as to the modified specifications on October 16, 2006 at a time when the 11,000 units had already been manufactured and presented to RITES for inspection on October 11, 2006. Indeed, even RITES confirmed that it had not received the modified specification advice prior to issuing the inspection certificate pertaining to the 11,000 units on October 14, 2006 after conducting the inspection on October 13 and 14, 2006.

After the supply of the 11,000 units was effected by the appellant to the railways, a letter was issued on November 6, 2006 by the railways to both the appellant and to RITES to attend a joint inspection where the goods would be inspected to ascertain whether they adhered to the specifications according to the modification advice. Such joint inspection was conducted on December 29, 2006 and the remarks of RITES need to be noticed in the context of the remarks of the railways.

"Remarks of RITES

> "The material is manufactured and inspected before the receiving of MA No.20/5/1017/1 dt. 10-10-06 to the firm as well as RITES. Moreover, as per RITES, Western Region letter No.6 DER 03095/VSRS dt 14-11-06..... RITES has inspected the material on 13-10-06 and ..... 14-10-06 and issued IC No.W/6DER03095/VSRS on 14-10-06. During inspection of the material RITES has not received any

> modification advice from Eastern Railway's office which was issued on 10-10-06.
>
> "So the material has been accepted as per P.O. Description."

"Railways' Remarks

> "Material was not inspected and supplied as per MA No.20/05/1017/1 dt 10.10.06."

The claim pertaining to the rejection of such 11,000 units was carried to an arbitral reference in accordance with the arbitration agreement contained in the agreement between the parties. The reference was conducted by an arbitrator nominated by the railways. In course of the reference, the railways not only disputed the claim on account of the 11,000 units but also counter-claimed for refund of the money paid in respect of the previous 47,000 units supplied under the same purchase order.

It is necessary to see the case of the railways as made out in the counter-statement. At paragraph 1.04 and at paragraph 1.07 of the counter-statement, certain correspondence exchanged between RDSO and the railways and certain terms apparently agreed to between the railways and the appellant herein at the pre-contract stage are referred to :-

> "1.04. The lowered value of the hardness and co-efficient of friction was later communicated specifically by RDSO to Eastern Railway vide letter MC/APB/BMBC dated 23/26.06.06 (Annexure-II). As per RDSO the lowered values of hardness and co-efficient of friction were 70-95 HRR and 0.22-0.35 respectively. The firm was required to supply the material only with these parameters agreed by them in field trial and thus

> claim of the firm to supply the material within the values of hardness and co-efficient of friction stipulated in the PO is false and misleading.
>
> "1.07 The issue of MA is irrelevant as it does not affect the supply/rejection since these values were actually the lowered values agreed by the firm and RDSO during trial in N Railway and communicated to Eastern Railway. The hardness and coefficient of friction values were already promised to be maintained by M/S. ILPL as quoted in RDSO letter dt.06.06.06 (Annexure-III). In fact, M/S. ILPL qualified for consideration for ordered quantity of 72,000 Nos. only on assurance of improved quality as in RDSO letters. Hence, the material was rejected being not meeting the parameters already agreed by the firm jointly with RDSO."

According to the appellant, though it was evident from the railways' letter of November 6, 2006 and the remarks at the foot of the joint inspection report of December 29, 2006 that the dispute pertained to the 11,000 units not conforming to the modification advice of October 10, 2006, the railways sought to enlarge the scope of the dispute in course of the arbitral reference by suggesting that none of the goods supplied by the appellant in terms of the purchase order of July 17, 2006 even conformed to RDSO specification No. C-9810(Rev.1). According to the appellant, not only was such stand of the railways contrary to its contemporaneous stand as evident in October and December, 2006 but it flew in the face of the stand taken by RITES in the remarks in the joint inspection report and elsewhere.

The appellant contends that it is inconceivable that during the currency of a contractor manufacturing goods according to the specifications indicated in a purchase order, the specifications would be modified unilaterally and without reference to the contractor. It is the further contention of the appellant that even if the diktat of the railways were to be accepted in this case, the conduct was unconscionable since it was evident that the 11,000 units had already been manufactured, offered for inspection and duly inspected by the time the modified specifications were announced or the particulars regarding the same were communicated to the appellant or to RITES. The appellant says that in such a situation the appellant may have attempted to make the subsequent supply of goods conform to the modified specifications, but the appellant could not have altered the goods already manufactured without making a huge loss and suffering great prejudice.

It is exactly this aspect of the matter that weighed with the arbitrator as is evident from the award of November 14, 2017. The arbitrator's reasons are captured in the following paragraphs :-

> "In the inspection, RITES found not only those 47,000 units but 11,000 units of next batch to conform to the specification mentioned in the original Purchase Order. The dispute arose when the respondent Railway refused to accept the said batch of 11,000 units on the pretext that the said batch of material does not conform to the parameters mentioned in the 'MA' or 'Modification Advice' issued as a rejoinder to the Purchase Order but on a much later date, viz. On 10.10.2006 when the material was already being supplied in batches.

> "On behalf of consignee, Sr. Material Manager (Depot)/Kanchrapara advised the claimant supplier to have a joint inspection of those 11,000 units with RITES through his letter no.04/20/1057/06/RB-IV dt.06.11.2016 *(sic, 6.11.2006)* since the batch of 11,000 units did not conform to MA. RITES in this context clearly stated that during inspection of the said material, they did not receive any Modification Advice and they have inspected the material as per RDSO specification. It is, therefore, a fact on record that RITES found the material to conform to RDSO specification as mentioned in the P.O."

In the light of such finding rendered by the arbitrator in the context of the dispute between the parties and the material that was before the arbitrator, it is somewhat surprising that the arbitration court found the award and the rejection by the arbitrator of the railways' contention to be illegal or untenable or even opposed to public policy.

The order impugned dated October 17, 2018 noted several judgments that throw light upon the operation of Section 34 of the Act of 1996 and the authority of the Court to look into an award upon a challenge being thrown thereto. Despite noticing the high authorities as referred to in the order impugned, when the present award was interfered with, it was on the ground of the award being "absolutely untenable and the same results in miscarriage of justice." Elsewhere, the reasons furnished for interfering with the award are that it "is also vitiated by perversity and irrationality."

This is a case where documents emanating from inspectors appointed by the railways demonstrated that the goods supplied by the appellant contractor,

including the disputed lot of 11,000 units, conformed to the specifications as recognised in the purchase order of July 17, 2006. Indeed, even in course of the joint inspection, the inspecting agency appointed by the railways reiterated that the 11,000 units matched the specifications and needed to be paid for. RITES also indicated that the modification advice of October 10, 2006 did not reach even RITES till after the 11,000 units were inspected and the inspection certificate in respect thereof issued. Against such remarks of RITES in the joint inspection note, the railways only complained that the goods did not adhere to the modified specifications. There was no attempt by the railways to even indicate that the modification advice had reached the contractor prior to the contractor putting the goods up for inspection or such modification advice had reached the inspection agency prior to the inspection certificate being issued by such agency. At any rate, even if it was demonstrated that the modification advice had been issued to the appellant herein prior to the 11,000 units being put up for inspection and the modification advice had also been issued to RITES prior to the inspection of such units being undertaken, it would have made little difference. When the parties to a contract had bargained for a certain quality of goods and adhering to the specifications as recorded in the contract, one party to the contract could scarcely alter the specifications unilaterally. At any rate, the unilateral alteration of the specifications would be of no effect till accepted by the other party to the contract. These relevant factors weighed with the arbitrator and is evident from the award.

A ground has been urged by the railways that the check-sheet appended to the inspection certificate of RITES issued on October 14, 2006 referred to "RDSO Spec No.C-9810" and not RDSO Spec No.C-9810 (Rev.1) and, as such, it is evident from the inspection certificate pertaining to the 11,000 units that the inspection was not conducted even as per the specifications stipulated in the purchase order of July 17, 2006.

As noticed above, the inspection certificate correctly referred to RDSO Specification No.C-9810 (Rev.1) and even the initial reference to the specifications in the check-sheet against the descriptions of stores indicated "... REV 01 To RDSO Spec No.C-9810". At the highest, there was a mistake in the check-sheet in "(Rev.1)" not being included where the applicable specification particulars were to be detailed therein. At any rate, it is the substance and not the specification number which is of any relevance. It is not the railways' case that the parameters appearing in the check-sheet did not conform to RDSO Specification No.C-9810 (Rev.1). Indeed, the appellant has relied on other documents on record to demonstrate that at least two of the key parameters appearing in the check-sheet appended to the inspection certificate issued by RITES on October 14, 2006 conformed to RDSO Specification No.C-9810 (Rev.1). These parameters were in respect of the hardness and coefficient of friction.

More importantly, it was not the railways' contemporaneous grievance that the 11,000 units failed to meet the RDSO Specification No.C-9810 (Rev.1). That will be evident from the railways' remark in the joint inspection report of December 29, 2006 set out earlier. If the 11,000 units were rejected by the

railways on the ground that they did not adhere to the modified specifications issued on October 10, 2006, it was not open to the railways to later make out a case that the goods did not adhere to the specifications as stipulated in the purchase order. This is even more so since the inspecting agency engaged by the railways issued the inspection certificate on October 14, 2006 indicating that the 11,000 had passed the requisite tests as per the specifications stipulated in the purchase order.

The arbitration court has construed paragraph 1.07 of the railways' counter-statement before the arbitrator to imply that the modification advice did not really modify the original parameters pertaining to hardness and coefficient of friction, but only indicated what the parameters were in respect of the two key areas. The arbitration court proceeded on such basis without any reference to the arbitral award. It is not apparent, on a reading of the arbitral award, that such a case was made out by the railways before the arbitrator. Further, such contention of the railways, even if canvassed before the arbitrator, stands belied by the limited remarks of the railways in the joint inspection note. If, indeed, the railways had a credible grievance that the disputed 11,000 units or even the previous 47,000 units manufactured by the appellant herein did not conform to the specifications indicated in the purchase order, surely, that would have been indicated in the joint inspection note, particularly, since the RITES insisted in the same joint inspection note that even the disputed 11,000 units adhered to the specifications stipulated in the purchase order. It was an unbelievable case

that was sought to be made out by the railways in course of the challenge to the arbitral award, though such a case was not even made out before the arbitrator.

In any event, even the modification advice refers to alterations being made in the specifications as the opening lines thereof indicate as follows:

> "Please note that the following alterations have been carried out in respect of Estimate Advice/Acceptance of Tender/Purchase Order mentioned above. All the other terms and conditions remain unchanged."

If the very modification advice, which is the primary document relevant for the dispute, professed to alter the purchase order, nothing that the railways can say or do after the issuance of such modification advice can persuade any reasonable person to accept that the modification advice was only an intimation as what the two parameters were for hardness and coefficient of friction and that such parameters remained unaltered as in the purchase order. It just does not stand to reason.

It bears repetition that the purchase order was issued on July 17, 2006, more than a month after RDSO's letter of June 6, 2006 referred to in the counter-statement. The lowered values of hardness and coefficient of friction were neither indicated in the purchase order nor do they appear to have been a part of RDSO specification No.C-9810 (Rev. 1) since RITES issued four inspection certificates in respect of the four lots of goods presented by the appellant for inspection by testing the goods against the higher parameters that may have been applicable as per the specifications stipulated in the purchase order.

In the light of such untenable stand of the railways to reject the goods that had been manufactured in accordance with the specifications indicated in the purchase order, the acceptance of the appellant's claim by the arbitrator could not have shocked the conscience of any reasonable court in seisin of a challenge to the relevant arbitral award. There does not appear to be any element of perversity, even going through the award with the strictest tooth-comb of morality. In the way that the matters presented themselves before the arbitrator and the material that was before him, the conclusions evident from the award do not appear to be opposed to public policy in any manner or form.

It is evident from the order impugned that the court of the first instance went into the notes of arguments filed by the railways before the arbitral tribunal. The court erred in placing reliance on such notes without referring to how the arbitrator had dealt with the matters in issue in the award itself. Even if the exercise undertaken by the court of the first instance is regarded as akin to exercise of appellate authority – which it is not – the exercise appears to be flawed; it is completely misguided when seen in the context of the authority available to a court under Section 34 of the Act of 1996.

Classically, the mechanism for challenging an arbitral award is seen as a safety-net to stop only the blatantly wrong and gross awards on the ground of such awards either shocking the conscience of the court or being opposed to public polity or the like. Despite the various expressions used in the provision and the various hues of such expressions colourfully portrayed in erudite judgments, the ultimate test is whether the award is so unreasonable that no

prudent person when presented with the facts and the applicable law could have rendered such an award. In course of the exercise undertaken by the court under Section 34 of the Act of 1996, it does not look for the undotted i's or the uncrossed t's. It is also elementary that an arbitrator is the master of assessing the sufficiency of the evidence to arrive at a finding on facts. It is only the perverse awards that even the meanest mind could not have rendered that get stuck in the wide gaps of the safety-net of the challenge mechanism.

It is possible, as the railways suggest, that field tests may have been conducted prior to the issuance of the purchase order of July 17, 2006 where certain parameters may have been agreed upon. But upon the relevant specifications being identified by referring to RDSO Specification No.C-9810 (Rev.1) in the purchase order, the pre-contract correspondence or understanding or agreements were no longer of any relevance. Further, when the payment terms in the purchase order provided for 95 per cent of the payment to be received upon the inspection certificate being issued and the balance 5 per cent upon the receipt note being obtained after effecting supply, the post-supply inspection of the goods or the post-supply allegation that the goods did not adhere to the specifications was, in a sense, precluded by the purchase order. And, finally, it is not the railways' case that the appellant procured the inspection certificates fraudulently or in connivance with RITES in derogation of the specifications stipulated in the purchase order.

For the reasons aforesaid, the judgment and order impugned dated August 17, 2018 cannot be sustained and the same is set aside. The award of November

14, 2017 is restored and left undisturbed. The railways will pay costs assessed at Rs. 1 lakh to the appellant in addition to whatever is due in terms of the award.

APO No. 20 of 2019 and GA No. 186 of 2019 are disposed of as above.

(SANJIB BANERJEE, J.)

(SUVRA GHOSH, J.)

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