

Union of India Vs. Binod Kumar Agarwal.

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Court : Kolkata

Decided On : Mar-22-2011

Judge : Ashoke Kumar Dasadhikari, J.

Acts : Arbitration and Conciliation Act - Sections 34; Sale of goods Act - Section 20

Appeal No. : A.P. NO. 242 OF 2008.

Appellant : Union of India.

Respondent : Binod Kumar Agarwal.

Advocate for Def. : Mr. R.K. Chowdhury, Adv

Advocate for Pet/Ap. : Mr. Mintu Goswami, Adv.

Judgement :

1. The petitioner, Union of India acting through the General Manager, Eastern Railway, under the Ministry of Railways have questioned award dated 27th February, 2008 passed by Mrinal Kanti Dey, sole Arbitrator and Deputy Chief Material Manager/IC, N.F. Railway, Maligaon, Guwahati-11 by filing this application under Section 34 of the Arbitration and Conciliation Act of 1996.
2. The petitioner invited tender for auction sale of 192.673 M/T of scrap Railways under lot No.BESY/1/98/R/UDL/5 lying under PW1/Andal (Yard) to be held on 27th January, 1998, as was specifically mentioned in the concerned auction sales

catalogue. The respondent Binod Kumar Agarwal carrying on business under the name and style of MA TARA TRADING a sole proprietorship concern carrying on business as a dealer, dealing with scrap materials has participated in the auction sale held on 27th January, 1998, by the auction conducted officer/auctioneer namely India Auction Mart, a Government and Railway auctioneer for sale of various scrap materials.

3. The respondent became the highest bidder of the said lot for 192.673 M/T of scrap rails and signed the bid sheet agreement. Thus, the respondent had contracted to purchase the above lot subject to fulfilment of conditions as laid down in the special and general conditions of sale by auction in Eastern Railway. The respondent had deposited earnest money of Rs.1,59,000 on the date of auction and agreed to deposit the balance sale value in two instalments and executed the bid sheet agreement No.22/IAM/BESY/January 1998.

4. The respondent as per agreement did not deposit the balance sale value on the stipulated installment dates and thereby breached the terms of the contract on the plea that the materials of the lot had been handled and the physical status of the material was completely different from the declare status of the materials as per the auction catalogue and alleged that the lot was totally changed from the lot which was earlier shown to him. On 17th February, 1998 the respondent firm issued another letter to the petitioners asking to issue necessary correction so that they can deposit the balance sale value and leave the materials in time. On 7th April, 1998 the respondent issued another letter alleging that they have requested about disturbance of the lot while/after auction and requested for remedial solution so that the complication can be avoided.

5. It was requested by the respondent to refix payment and delivery time without interest and ground rent. The petitioner by a letter dated 29th May, 1998 gave another opportunity to the respondent and extended the payment time and delivery period. Payment time to deposit the balance sale value was extended by ten days without any interest, charges and delivery period was extended by fifty days without any ground rent from the date of receipt of the letter by the respondent. The respondent made no whisper to the balance sale value.

6. In spite of the above extension given by the petitioner. The respondent after a month by its writing dated 29th June, 1998 claimed that no remedial initiatives have been made by the Railways and alleged that they are still waiting for the letter of correction. Thereafter, the respondent by a letter dated 13th July, 1998 replied to the letter dated 29th May, 1998, issued by the petitioners, alleging that they received the petitioners letter on 2nd July, 1998 which the petitioner vehemently denied. Even in spite of granting opportunity to the respondent, the respondent did not pay the balance price and did not take delivery of those materials. The petitioner after waiting for a very long time and finding that the respondent had no intention to the balance sale value, the petitioner by its letter dated 30th September, 1999 terminated/cancelled the sale with forfeiture of earnest money due to non-deposition of balance sale value within the stipulated time by the respondent as per the conditions of sale. The respondent by their advocates letter dated 22nd March, 2005 demanded for appointment of Arbitrator. The petitioner having received the letter from the respondent, called them for settlement of disputes by a letter dated 25th January, 2006.

7/ However, a pre-arbitration committee meeting was held on 1st February, 2006 to settle the dispute raised by the respondent. After hearing the partys contention the pre-arbitration committee was of the view that after refixing payment time and delivery period by petitioners letter dated 29th May, 1998 the respondent claimed for refixation of payment time and delivery period is not acceptable by the committee. As such pre-arbitration committee was of the opinion to refer the matter of arbitration. In the aforesaid circumstances due to the disputes and differences that arose in the matter, the General Manager, Eastern Railway, Calcutta appointed Mr. Mrinal Kanti Dey, then the Deputy Chief Manager/G, Eastern Railway as sole Arbitrator and same was also communicated to the respondent. The sole Arbitrator Mr. Mrinal Kanti Dey entered into the reference and gave direction to the party to file their respective pleadings.

8. The respondent was directed file their statement or claim and the petitioner was directed to file counter statements of claims before the learned sole Arbitrator. Pursuant to such direction of the learned Arbitrator the respondent filed their claim and the petitioners filed counter statement of claim before the learned sole

Arbitrator. The learned Arbitrator after hearing the learned advocates for the parties and considering the submissions made by them and the materials on record passed the final award on 27th February, 2008 to the following effect :-

1. Respondent, i.e., Union of India represented by The Chief Materials Manager/BI, 3, Koilaghat Street, Kolkata-700 001 is directed to issue letter of authority within 30 days from the date of publishing this award to M/s Ma Tara Trading, 121, J.N. Mukherjee Road, Ghusuri, Howrah for making payment of the balance sale value with fixed interest for 30 days @ 20% per annum. Claimant, i.e., M/s Ma Tara Trading, 121, J.N. Mukherjee Road, Ghusuri, Howrah is directed to make payment of the balance sale value with the above interest charges within 20 days of receipt of such letter of Authority. Respondent, i.e., Union of India represented by The Chief Materials Manager/BI, 3, Koilaghat Street, Kolkata-700 001 is further directed to arrange delivery of similar material of equivalent quantity (192.673 MT) without any ground rent within a period of 60 days from the date of such payment from the same location or any other location in Eastern Railway.

9. In case, the claimant, M/s Ma Tara Trading, 121 J.N. Mukherjee Road, Ghusuri, Howrah fails to make payment within the above stipulated period, Respondent will be at liberty to cancel the sale with forfeiture of Earnest Money. The learned Arbitrator have rejected other claims made by the respondent and also rejected the counter claim of the petitioner. Mr. Goswami, learned Counsel for the petitioner have questioned the award on the ground that the learned Arbitrator did not consider that the sale of the materials was held after inspection by the respondents and such sale was as per the general terms and conditions as is where is basis which the learned Arbitrator did not consider. He submitted that, that the Clause 1 of special conditions of sale was not considered by the learned Arbitrator the Clause 1 of the special conditions of sale reads as follows :-

1. The bidders should inspect the materials at site before bidding. If there be discrepancy between the location/description etc. of materials to be auctioned as is appearing in the catalogues and the physical location/actual description the purchasers are required to point out such discrepancy before conclusion of the sale. No complaints regarding the materials/lot will be entertained afterwards.

10. According to Mr. Goswami the respondent being the auction purchases should have raised all complaints before signing of the bid sheet agreement and as no complaint regarding the auctioned lot is maintainable after the completion of auction sale. He submitted that the petitioner was compelled to cancel the auction sale with forfeiture of earnest money by writing letter dated 30th September, 1999, in accordance with the terms of general conditions of sale and further they were compelled to sale the materials in an auction held in 2001 due to non-payment of balance sale value by the respondent thereby violating the terms and conditions of the contract. He also submitted that the claims preferred by the respondent is clearly covered by Excepted matters which is not arbitrable and, therefore, the claims submitted by respondent cannot be referred to arbitration and as such adjudication of the claims of the respondent by the learned sole Arbitrator was wholly illegal, unjustified and could not be entertained and as such the learned Arbitrator has misconducted in entertaining such claim and the award is, therefore, liable to set aside. He refer to Clause 23 of the special conditions which reads as follows :-

The auctioneer, on expiry of the stipulated payment time, shall issue a written notice to defaulting purchaser to pay balance sale value within seven days from the date of receipt of letter with full interest charges, failing which, sale shall be cancelled. The auctioneer shall furnish copies of such notice to sale section and the controlling officer of the depot from the materials was auctioned and bid sheet issued. Such notices shall be valid and binding on the purchaser.

11. He also referred Clause 19 which relates to wagon aid in an auction. He further referred Clause 4(b) of the general conditions which reads as follows :-

If the purchaser fails to pay the said balance of the price in the manner and within the period originally stipulated in Clause 4(a) or as extended by the Depot Officer in terms of provision to Clause 4(a) the earnest money paid by him shall stand forfeited to the Railway Administration. The lot or lots in respect of which forfeiture has been made shall be deemed to have been abandoned by the purchaser and may be reaucted at the discretion of the Rly. Admn. at any subsequent sale without reference to the purchaser concerned and without incurring any liability

whatsoever in relation thereto.

12. By referring this clause he submitted that according to this clause the Railway Administration had the power to forfeit the earnest money in case of failure to pay the balance price the materials could be reauctioned at the discretion of the Railway Administration at any subsequent sale without reference to the purchaser concern. He submitted that this is the clause which, in fact, is an exception and the decision of the Railway Administration could be final and the learned Arbitrator cannot go into the claims of the respondent he further submitted that the learned Arbitrator have gone beyond the contract which is not permissible he cited two decisions in that regard 1999 (9 SCC Page 283 Union of India v. Binod Kumar Agarwal) (Paragraphs 21, 34 and 45, 1999) (8 SCC Page 122 Union of India v. Binod Kumar Agarwal) Paras 16 and 17. He also submitted that this is against public policy and he referred the decision of ONGC Limited v. Saw Pipes Limited reported in AIR 2003 Supreme Court 2629 Paragraphs 14, 74 and 75.

13. Lastly he submits that the award should set aside. Mr. Chowdhury, learned Counsel appearing for the respondent submits that Clause 1 of special conditions is not at all attracted in the instant case. Since the clause is not contemplating any issue subsequent to auction specially when the respondent has raised dispute that the materials of auctioned lot had been handled and the physical status of materials was completely different from the declare status of materials as per catalogue and lot was totally changed from the lot which was actually shown in auction and in that regard the respondent issued several letters, but no reply was given by the petitioner. He submitted that Clause 19 relates to wagon aid and not relevant in the instant case.

14. He further submitted that as per Clause 23 no notice was served upon the respondent and no such copy was disclosed either by the petitioners. He submitted that time is not essence of the contract. As regards Clause 4(b) of general condition of sale he said this is a right conferred upon the petitioners but the right is to be exercised as per the procedure mentioned in Clause 23 but the petitioners have not done that in the instant case. He further submitted that the learned Arbitrator have decided the case on factual finding and under no

circumstances it could be said as perverse and there is no allegation that the relevant materials not taken into consideration. According to him the learned Arbitrator followed the terms of the contract.

15. In the award itself the learned Arbitrator mentioned similar cases like the present one wherein same type of award was passed and he also referred the finding of the learned Arbitrator that the Railway has not submitted any evidence to show that the claimants contentions with regard to disturbance to the lot subsequent to auction was not true or correct or the claimant is not entitled to delivery of materials in a deliverable state on loading point. He further submitted that at least ten hearing took place, but the petitioner could not produce any evidence in that regard. He referred Section 20 of sale of goods Act and submitted postponement of time both for payment and delivery does not render the contract frustrated. Lastly, he submitted that the award passed by the learned Arbitrator is a valid one. I have considered the materials on record and considered the submissions made by the respective counsel of the parties and it appears to me that the learned Arbitrator upon considering all relevant documents and materials and the submissions made by the Counsel of the parties have made and published this award.

16. The learned Arbitrator after considering the entire matter have come to the conclusion that no evidence was ever produced by the petitioners to show that the claimants contention with regard to disturbance to the lot subsequent to auction was not true or correct or the claimant is not entitled to delivery of materials in a deliverable states of a loading point. It was the finding of the learned 17. 17. 17. Arbitrator that Railway had sought to maintain different standard in dealing with the claimant and other party similarly situated. It was a definite finding by the learned Arbitrator that the respondent had extended the time for payment and delivery in the case of other similarly situated party, but in the case of the claimant the respondent never offered materials to the claimant on a loading point in a ready and deliverable state in a manner followed in case of other purchasers.

18. The learned Arbitrator have come to the conclusions and passed the award upon deciding the factual matters as would be evident from the award itself and

this Court is not authorised to interfere with those factual findings. So far the Clause 4(b) of special condition of sale is concerned this is a right conferred upon the petitioners but the procedure for exercise of such right is prescribed under Clause 23 and on repeated enquiry made by this Court the learned Counsel for the petitioner could not show compliance of this requirement of Clause 23 by producing any letter issued by the auctioneer in that regard. However, in my opinion Clause 4(b) is not at all bar upon the learned Arbitrator to decide the reference and pass the award in this regard.

19. In my opinion the learned Arbitrator did not ignore any of the terms of the contract nor he has gone beyond the terms of the contract and, therefore, the award passed by the learned Arbitrator do not call for any interference by this Court. I do not find any illegality on the part of the learned Arbitrator to pass the award dated 27th February, 2008. 12 In view of the aforesaid findings I hold that award passed by learned Arbitrator is lawful and valid and, therefore, the same should not be interfered with. Hence this application is dismissed without any cost.

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