OD-8

APO No.92 of 2018
GA No.980 of 2018
In
EC No.70 of 2017

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

DELONG STEEL LIMITED
Versus
LORDS BLUETECH CO. PVT. LTD.

BEFORE:

The Hon'ble JUSTICE SANJIB BANERJEE
And
The Hon'ble JUSTICE ABHIJIT GANGOPADHYAY

Date : 14th May, 2018.

Appearance:
Mr. K. R. Thakker, Adv.

Mr. Moinak Bose, Adv.

The Court : The appellant complains of a foreign arbitral award being needlessly interfered with on the perception of the Court of the first instance that the award was based on a matter that was not submitted for adjudication to the arbitral tribunal.

The agreement provided for the respondent supplying iron ore fines of specified grade and content to the appellant. It is not in dispute that the original contract required the iron (Fe) content to be in excess of 56%. There were other

parameters relating to the sulphur and water contents, but they may not be relevant in the immediate context.

The payment was to be received by the respondent through irrevocable letters of credit. Upon the respondent supplier submitting the documents evidencing despatch of the goods, the payment has been received by the supplier.

The appellant herein claims that when the goods reached the destination, they were discovered to be of lower Fe content than what the appellant had bargained for. At the discharge port, it was discovered that the Fe content of the consignment was about 54.06%. According to the appellant, the appellant was entitled to reject the entire shipment. However, the appellant claims that the parties negotiated so that a lower price would be paid than the US $ 111 per tonne agreed to in the contract. According to the appellant, the reduced price was about US $ 108 per tonne. In such regard, the parties apparently prepared a document referred to in the arbitral reference as Addendum 3. It is also the undisputed position that Addendum 3 was never signed by the respondent.

In terms of Clause 21 of the original contract between the parties, any modification or amendment to the agreement had to be only in writing and by documents signed by the parties. Despite the appellant's assertion in course of the arbitral reference that the parties had agreed to Addendum 3 as would be evident from the other correspondence exchanged between them, the arbitral tribunal refused to look into the contemporaneous correspondence and went by the strict letter of Clause 21 of the agreement that required any addendum or modification to be in a writing signed by the parties.

The appellant had lodged a claim in excess of US $ 156,000 in the reference. Upon the arbitral tribunal finding that Addendum 3 could not be relied upon,

the arbitral tribunal embarked on an exercise of assessing the damages on the basis of the terms of the contract de hors Addendum 3. The respondent asserted before the Single Bench that the entire claim of the appellant was founded on Addendum 3 and once Addendum 3 went out on the ground that it had not been signed by one of the parties, the entire claim was liable to fail.

By the judgment and order impugned dated February 7, 2018, the Court of the first instance accepted such contention and held that in view of Section 48(1)(c) of the Arbitration and Conciliation Act, 1996 pertaining to enforcement of foreign awards, the award could not be implemented in India.

According to the appellant, the larger claim of the appellant was disregarded by the arbitrator on the basis of the reduced price apparently agreed to by the parties, but this did not preclude the arbitral tribunal from assessing the damages suffered by the appellant herein on the basis of the terms of the original contract and the permissible addenda thereto without taking Addendum 3 into consideration. In such regard, the appellant refers to the reliefs sought in the statement of claim before the arbitral tribunal. The first claim before the arbitral tribunal read as follows:

"(1) US$ 156,198.39, alternatively damages;"

It is also evident from paragraph 8 of the statement of claim that when the consignment arrived at the port of Tianjin in China on March 2, 2013, the quality certificate issued at the discharge port showed that the consignment contained iron of 54.04% which was below the permissible level of 56% as envisaged by Clause 3 pertaining to the specifications of the goods in the original contract.

It is thus evident that the claim in accordance with the original agreement was contained in the statement of claim itself, but the quantum of claim had been

enhanced by virtue of the appellant herein relying on Addendum 3. The basis of the claim cannot be said not to have been carried to the arbitral reference.

It is also elementary that when a higher quantum is claimed, the adjudicating authority has also the power to assess whether a lesser amount may be awarded to the claimant. The circumstances or the basis for the claim was clearly made out in the statement of claim, but the quantification thereof was on the basis of Addendum 3 and not on the basis of the price as agreed to and recorded by the parties in the original agreement.

Section 48(1)(c) of the Act of 1996 applies to New York Convention awards and provides that to the extent an award deals with a difference not contemplated by or not falling within the terms of submission to arbitration, the same may not be enforced. The proviso to the Clause requires an effort to be made to sift what is permissible to be implemented from what may not be permissible in view of such provision.

In the present case, the basis of the claim was adequately indicated in the statement of claim and the same is reflected in the detailed award passed by the arbitral tribunal. The arbitral tribunal disregarded the higher quantification of the damages in view of Addendum 3 being thrown out, so to say. The arbitral tribunal assessed the quantum of damages on the basis of the price of the goods as contained in the original contract. There was no legal scope for interference with the foreign arbitral award on such count, particularly, on the ground that the matter was not submitted to the arbitral reference.

For the reasons aforesaid, the judgment and order impugned dated February 7, 2018 cannot be sustained and the same is set aside. The appellant herein is left free to implement the foreign arbitral award dated June 8, 2015 in accordance with law.

All formalities are dispensed with. The appellant will also be entitled to costs assessed at Rs.25,000/-.

It will be open to the appellant herein to seek immediate orders in execution before the Court of the first instance.

APO No.92 of 2018 and GA No.980 of 2018 are disposed of.

Urgent certified website copies of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(SANJIB BANERJEE, J.)

(ABHIJIT GANGOPADHYAY, J.)

bp.