

SUPREME COURT OF INDIA

Kamrup Industrial Gases Ltd.

Vs.

Union of India

C.A.No.4249 of 2007

(Jagdish Singh Khehar,CJI., Dr. D.Y.Chandrachud and Sanjay Kishan Kaul,JJ.,)

11.04.2017

JUDGMENT

Jagdish Singh Khehar, CJI.,

1. An agreement dated 21.04.1965 was executed between the appellant-Kamrup Industrial Gases Ltd., and the respondent-Diesel Locomotive Works, Varanasi, for setting up a plant for manufacture of Oxygen gas and Acetylene gas, at the site of the Diesel Locomotive Works, at Varanasi. It is not a matter of dispute, that the aforesaid contract required the Diesel Locomotive Works, to lift a minimum of 18,000 cubic meters of Oxygen gas, and 2,500 cubic meters of Acetylene gas, per month. The obligation being, that even if the minimum quantity of the gases was not lifted, payment for the minimum postulated quantity, would have to be made, by Diesel Locomotive Works. The contractual agreement also envisaged, that in case Diesel Locomotive Works could not lift the aforesaid minimum postulated quantity, Kamrup Industrial Gases Ltd., would assist it for the disposal of the balance, which could not be lifted. However, if the appellant remained unsuccessful in the sale of the deficit amount of gas, Kamrup Industrial Gases Ltd., would have the liberty to empty their cylinders on buyer's account, namely, the appellant- Kamrup Industrial Gases Ltd., would blow off the unutilized balance, and recover the proceeds thereof, from Diesel Locomotive Works.

2. The appellant before this Court, raised an arbitral dispute, claiming payment/ consideration, on account of non-lifting of the minimum quantum of gases, by Diesel Locomotive Works. By an order dated 13.08.1976, the Calcutta High Court appointed an arbitrator, in the matter. Various orders were passed by the Calcutta High Court thereafter, appointing different arbitrators. Eventually Shri D.P. Mukherji, was appointed (by the High Court, vide its order dated 22.09.1988) as the sole arbitrator, to adjudicate upon the dispute raised by the appellant-Kamrup Industrial Gases Ltd. The arbitral proceedings continued from 1982 to 2004. The arbitral award was finally rendered on 18.04.2004. The operative part of the arbitral award is extracted hereunder :

“Having regard to my findings on the issues settled in these proceedings as recorded in the preceding paragraphs hereof; I now give my award on the claims raised by the claimant.

(1) As regards Claim No.1, I award Rs.8,72,235.16P (Rupees Eight Lakhs Seventy Two Thousand Two Hundred Thirty Five and paise sixteen) to the claimant;

(2) With regard to claim No.2, the claim of Rs.1,50,000/- is rejected;

(3) With regard to Claim No.3, the claim of Rs.1,50,000/ - is rejected;

(4) As regards Claim No.4, the claimant is entitled to a sum of Rs.3,23,581.59P (Rupees Three Lakhs Twenty Three Thousand Five Hundred Eighty One and paise fifty nine) on account of interest on the unpaid bills of the claimant upto 15th November, 1976;

(5) As regards Claim No.5, the claimant is entitled to interest at the rate of 3% (Three Percent) per annum on the unpaid bills, being sum of Rs.8,72,235.16P as pendente lite interest from March 6, 1989 till the deed of this Award.

The claimant shall also be entitled to further interest at the rate of 6% (Six Percent) per annum on the said sum of Rs.8,72,235.16P from the date of the Award till the date of decree or realization whichever is earlier;

(6) As regards Claim No.6, the claimant will be entitled to Rs.4,00,000/- (Rupees Four Lakhs) as costs of and incidental to these proceedings.”

3. The Diesel Locomotive Works being dissatisfied with the award, approached the Calcutta High Court (hereinafter referred to as the High Court), under Sections 30 and 33 of the Arbitration Act, 1940. By an order, dated 19.04.2005, a learned Single Judge of the High Court, upheld the award, dated 18.04.2004.

4. Dissatisfied with the impugned award, dated 18.04.2004, as well as, the order passed by the learned Single Judge, dated 19.04.2005, the Diesel Locomotive Works preferred a further appeal under Section 39 of the Arbitration Act, 1940. A Division Bench of the High Court, by an order dated 27.04.2007, accepted the appeal (preferred by Diesel Locomotive Works). Aggrieved by the same, the appellant has approached this Court, through the instant civil appeal.

5. During the course of hearing it emerged, that the main reason for the Division Bench of the High Court in accepting the appeal was, that the appellant did not produce vital documents called for by the Diesel Locomotive Works, before the Arbitrator. The aforesaid documents, were in the exclusive custody of the appellant herein - Kamrup Industrial Gases Ltd., and since the same were not produced before the arbitrator, an adverse inference was drawn by the High Court. The details of the documents sought from the appellant, have been described in the impugned order (dated 27.04.2007), which are as under :

“i) Statement of daily production of Oxygen and D.A. Gas at their DLW Township Factory.

ii) Statement showing the purchase of Carbide month wise during the period in question.

iii) Actual Sale documents/Books for all sales to parties as well as to DLW during the period in question.

iv) Profit and Loss Account and balance sheet for the period in question for their DLW Plant.

v) Excise Inspector’s reports for duty on such excisable commodities for the period in question.”

6. With reference to the aforesaid documents, the High Court recorded its findings as under :

“It is not in dispute that the aforesaid documents called for by the Buyer by its counter-statement were never produced before the learned Arbitrator. There is nothing in the award to show that any attempt whatsoever was made by the learned Arbitrator to have these documents produced before him.”

(emphasis is ours)

A perusal of the reasons recorded by the High Court, leads to the inference, as if, the position recorded by the High Court was acknowledged even by the Kamrup Industrial Gases Ltd.

7. The aforesaid findings recorded by the High Court, constitute the first challenge raised by the appellant, before this Court. It was the vehement contention of the, learned counsel for the appellant, that as a matter of fact, it emerges from the proceedings conducted before the Arbitrator, that all the aforesaid documents were actually produced by the appellant before the Arbitrator, during the course of its sitting held on 16.08.1989. In order to demonstrate the factual position, our attention has been drawn to the above proceedings, wherein it is inter alia recorded as under :

“Mr. Deba! Banerjee, Counsel appearing for the Claimant, submits that the following set of documents have been formally disclosed on behalf of the Claimant and filed before the Learned Arbitrator on 10.8.89 :-

1) Statement for Production and Sale of Oxygen and DA Gas at IGL, Varanasi Branch during 1973, 1974, 1975.

2) -Do- Certified by Auditors

3) Certificate from Inspector of Central Excise for Oxygen Gas cleared to IGL, Varanasi Branch on payment of Excise Duty for the Year 1973, 1974, 1975.

- 4) Annual Report & Profit & Loss A/c of IGL the years 1973, 1974, 1975.
- 5) Plant Reports showing daily production, Sale and Blow off of Oxygen and DA gas in IGL, Varanasi during July and August, 1973.
- 6) Letter written by IGL to DLW for upliftment of oxygen and DA gas and blow off of balance quantities of gases during the years 1973, 1974 and 1975.
- 7) Statement of Procurement, invoices, Performa invoices, store receipts etc. for purchase of Calcium Carbide by IGL, Varanasi Branch during 1973, 1974 and 1975. Mr. Banerjee further submits that the Xerox copies of the same set of documents have been served on Mr. L.K. Chatterjee Central Government Advocate, which was received by his office on 11.8.89.”

Based on the above record, of the proceedings, it was the submission of learned counsel for the appellant, that not only were the required documents produced before the arbitrator, they were also handed over and served upon the Central Government Advocate, representing the Diesel Locomotive Works, before the Arbitrator.

8. We find substance in the contention advanced at the hands of the learned counsel for the appellant, more particularly because learned counsel for the respondent, could not dispute the factual position recorded in the proceedings conducted before the Arbitrator, on 16.08.1989. We therefore, hereby set aside the finding recorded by the High Court, to the effect, that the documents sought for by the buyer - Diesel Locomotive Works, were neither produced before the Arbitrator, nor provided to the respondent.

9. The next question, that arises for consideration is, whether the appellant was entitled to payment on account of short lifting of gases by the Diesel Locomotive Works. In this behalf, it has already been noticed hereinabove, that the Diesel Locomotive Works, would lift a minimum of 12,900 cubic meters of Oxygen gas, and a minimum of 2,500 cubic meters of Acetylene gas, per month. And whether or not they lifted the minimum quantity, the appellant herein - Kamrup Industrial Gases Ltd., would be entitled to payment for the same. Be that as it may, it is imperative to determine, before the appellant can be held to be entitled to claim the right of such payment, that the appellant - Kamrup Industrial Gases Ltd., had actually produced the gases in terms of the stated minimum quantum, and further, the appellant was not able to sell the shortfall, in the open market. The question of payment to the appellant would arise only if, there was a subsisting shortfall, after the steps referred to above were followed. This could be done by adding the amount of gases lifted by the Diesel Locomotive Works, and the amount of gases sold by the appellant in the open market. Payment for the shortfall would emerge, “only” if the shortfall of gases thus established, were shown to have been blown off, as has been claimed by the appellant before the Arbitrator, and before the High Court.

10. During the course of hearing, learned counsel for the appellant invited this Court's attention to the following observations, recorded in the impugned order, wherein, the High Court observed as under:

“The learned Arbitrator in the 190 th Sitting appears to have framed the following amongst other issues. “Did the claimant blow off the gases on DLW's account as alleged in their statement of facts? Surprisingly there is no such case made out by the Supplier in its Statement of Facts. Mr. Dasgupta, learned Advocate appearing for the Supplier was given time to find out the necessary pleading. He candidly confessed that no such pleading is there in the Statement of Facts.”

11. The above factual finding of the High Court, has also been assailed by the appellant. We may notice, that it was also the submission of learned counsel for the Diesel Locomotive Works, that based on the agreement executed between the parties, the appellant had to inform the Diesel Locomotive Works, before Kamrup Industrial Gases Ltd., exercised the choice of emptying its cylinders (by blowing off the gases). In this behalf, it was the submission of learned counsel for the respondent- Diesel Locomotive Works, that no such intimation was ever extended to the Diesel Locomotive Works, and as such, no remuneration could be claimed by the appellant, for the gases allegedly blown off (to empty its cylinders).

12. Insofar as the instant aspect of the matter (referred to in the preceding paragraph), is concerned, learned counsel for the appellant pointedly invited our attention to the following observations recorded by the Arbitrator (in the award dated 18.4.2004), wherein the evidence produced by the appellant was dealt with, as under:

“The evidence adduced by the claimant on this topic is the evidence of their witness, A.N. Jha (Qs.195 to 225) wherein the said A.N. Jha has proved that the claimant had given intimation to the respondent about the balance quantity of gases that remained with the claimant unrealized and called upon the respondent to take supply of the same, otherwise, the claimant would blow off the said gases. The said statements are tendered herein as Exts.LLLLLLL, MMMMMMM and NNNNNNN. The said A.N. Jha was cross-examined by the respondent's Counsel, but his evidence on this topic has remained unshaken. Reference is made to Qs. 1044 to 1047 and Qs. 1370 to 1411 in cross-examination, put to the said A.N. Jha. The said A.N. Jha has proved that the said Blown off statements had been delivered by him personally to the respondent's employees at the General Manager's Office. The said A.N.Jha has also deposed that the people at the General Manager's Office of the respondent refused to acknowledge receipt of the said statements on the copies of the Statements produced by the claimant and the copies of the said Statements were kept in the office of the claimant which they have produced in this Reference and which have been exhibited herein as mentioned before. The claimant has also produced in this Reference their Plant Reports and proved the same through their witness, A.N. Jha (Qs. 244 to 265 in examination-in-chief). The Plant Reports were exhibited in these proceedings as Exhibit PPPPPP series. The said A.N. Jha has deposed that the said Plant Reports were prepared by the Foreman on duty of the respondent on the basis of the

production and sale of Oxygen and D.A. Gases during the relevant periods. The said Plant Reports were prepared under his supervision. The Plant Reports have entries regarding production, available gases lifted by DLW, Sales to other customers, Blown Off Statement and Closing Stock of the Claimant-Company. The Plant Reports are internal documents of the claimant, produced and proved by A.N. Jha in these proceedings. The other documents on which the claimant relies with regard to their case of blowing off of the gases are various bills submitted by the claimant in respect of the gases, both lifted and unlifted quantities, made on the respondent. The claimant's Counsel has contended that though these bills were duly served on the respondent in accordance with Clause 7 of the Agreement, no objections were raised regarding the accuracy and/or contents of the said bills."

(emphasis is ours)

13. Having perused the documents furnished by the appellant, at the asking of the Diesel Locomotive Works, and having perused the findings recorded with reference to the statement made by Shri A.N. Jha, before the Arbitrator (extracted above), we are satisfied, that on each occasion, before the shortfall of the gases were blown off, the appellant duly informed the Diesel Locomotive Works, and in that view of the matter, it is not possible for us to concur with the findings recorded by the High Court, that due intimation was not furnished by the appellant - Kamrup Industrial Gases Ltd., to the respondent - Diesel Locomotive Works, before carrying on the exercise of emptying their cylinders, by blowing off the unlifted gases. It is also relevant in this behalf to make a reference to the determination recorded by the Arbitrator, again based on the statement of the aforesaid Shri A.N. Jha, that on different occasion, relevant bills were raised by the appellant - Kamrup Industrial Gases Ltd., indicating payments claimable by the appellant. The bills raised also denoted the amounts deducted on account of the sale proceeds of the gases which the appellant could sell in the open market. According to Shri A.N. Jha, all the bills were duly furnished to the Diesel Locomotive Works. Details in this behalf are extracted below:

"The claimant had called one A.N. Jha (full name Amar Nath Jha) as witness. Jha was the Office Superintendent of the Claimant-Company in 1971 and was appointed as the Assistant Manager in 1972 and was posted at the claimant's factory at Varanasi during the relevant time. Jha had deposed that all the relevant bills with covering letters from the claimant were served on the respondent at the F.A. & C.O. Department of DLW at Varanasi by him personally and the receipt of the said bills were acknowledged by various officers of the said F.A. & C.O. Department of the respondent on the copy of the said bills (vide Qs. 32 to 75 in Examination-in-chief). The evidence of Jha in this respect had not been shaken in cross-examination by the learned Counsel for the respondent. With respect to bills for unlifted quantity of gas, the respondent's case is that they made part payments for the gas supplies at the contract rate but withheld payment of escalation charges relating to rise in the price of Carbide mentioned in the said bills. Receipt of the said bills was not denied by the respondent. In respect of bills for the price of unlifted quantities of gas, the respondent's Counsel put Qs.1470 to 1497 to the said Jha in cross-examination. Jha

maintained that he personally served the said bills at the Office of the F.A. & C.O. of the respondent and obtained acknowledgements by the people working at F.A. & C.O. Department of the respondent of the receipt of the said bills on the copies of the said bills, which are tendered in evidence in these proceedings. The respondents on their part called one M. Singh as their only witness. The said M. Singh was the Senior Clerk working in the Stores Department of the respondent at the relevant time. He did not belong to the F.A. & C.O. Department of the respondent and had no knowledge of affairs of the said F.A. & C.O. Department. No one from the said F.A. & C.O. Department or the General Manager's Office has been called by the respondent to contradict the deposition of Jha. Further, the respondent did not produce Receipt Register from the F.A. & C.O. Department to controvert the evidence of Jha although the respondent's witness, the said M. Singh, deposed that the respondent maintained Receipt Registers at the relevant time. The respondent has adduced no evidence to rebut the testimony of Jha that the bills had been served on the respondent. I accept the evidence of Jha on this point.”

(emphasis is ours)

Interestingly, there was no rebuttal to the assertions made by Shri A.N. Jha, before the learned Arbitrator.

14. For the reasons recorded above, we are satisfied, that the impugned order passed by the High Court deserves to be set aside. The same is accordingly set aside. We hereby affirm the determination recorded by the Arbitrator in his award, dated 18.4.2004. The civil appeal is allowed, in the above terms.

15. The list of dates reveals, that on 1.9.2006 the Calcutta High Court decreed the award dated 18.4.2004 (in Award Case No. 12/2004). The said factual position is not disputed in the counter affidavit filed on behalf of the respondent. We therefore accept that the arbitral award on 1.9.2006 was decreed. In consonance with Section 29 of the Arbitration Act, 1940, we hereby award to the appellant post decretal interest at the rate of 9%, on the awarded amount, with effect from 1.9.2006.

16. Allowed, in the above terms.