
(1998) 03 DEL CK 0028
In the Delhi High Court
Case No : Suit No.1831A/95

A.B.G. Heavy Industries Ltd.

APPELLANT

Vs

Indian Oil Corporation Ltd.

RESPONDENT

Date of Decision : 30-03-1998

Acts Referred:

Citation : (1998) 03 DEL CK 0028

Hon'ble Judges : S.N. Kapoor, J

Bench : Single Bench

Advocate : Ms. Amrita Snaghi, for the Appellant; Mr. Shashi Bahadur, for the Respondent

Judgement

S.N. Kapoor, J.—This judgment shall dispose of a petition u/s 20 of the Arbitration Act, 1940.

2.1. According to the petitioner's case, "Modification and Associated Work of Vacuum Column and Crude Column at Mathura Refinery" was given to the petitioner company on 20th August, 1991. Since the Mathura refinery was required to be shut down the work was to be completed within a short span of 12 days, it included increase in capacity of one of the vessels of the refinery which required specialised skills and machineries. Various unforeseen situations were encountered while executing the contract. Accordingly, the site engineer was informed of the same and configuration of the job was changed. Stainless steel lining was required to be grinded. In the peculiar circumstance of the case and the nature of the job, ten days notice in writing was not possible. The petitioner carried out the task under the instructions from the engineer in charge at site in all their good faith and mutual understanding for extra payment. Hence, the accepted mode of notice between the parties was oral notice. On completion of the work the petitioner had to submit their final bill dated 27th November, 1991 exclusive of the amount for the extra work carried out by the petitioner, for the bill for extra work was rejected vide letter dated 11th May, 1993 vide annexures D and E. Accordingly, dispute and differences arose. Clause 9 of the General

Conditions of the Contract dated 20th August, 1991 provided for settlement of disputes between the parties by means of reference to an arbitrator, namely, the contract itself.

2.2. However, the respondent Corporation gave a panel of three persons, all employees of the respondent Corporation. A copy of the agreement to refer the dispute is annexure F.

2.3. Parties accordingly referred the dispute to the arbitration by Shri J.K. Verma, General Manager, Mathura Refinery.

2.4. According to the petitioner, Shri J.K. Verma, learned arbitrator, misconducted himself and proceedings. He adopted the procedure of special nature which was unheard of. The petitioner did not agree to such a shortcut procedure; raised objections and moved an application before the arbitrator requesting him to desist from going ahead with the arbitration proceeding in view of the expiry of statutory time period.

2.5. The learned arbitrator ultimately in the minutes of meeting dated 9th November, 1994 expressed his unwillingness to continue as an arbitrator and adjourned the arbitration proceeding sine die. On April 6, 1995, he resigned as an arbitrator. Vide annexures O and P.

2.6. The petitioner is seeking appointment of a new arbitrator for adjudicating upon the disputes mentioned in paragraph 28 of the petition.

3. This petition is being contested by the respondent Corporation on the ground that Clause 9.0.0.0. of the General Conditions of Contract (hereinafter called "the GCC" for short) is confined to notified claims of the petitioner in accordance with Clause 6.6.1.0. and including final bill in Clause 6.6.3.0. It is also claimed that numerous claims as mentioned in reply to paragraph 28 are neither notified claims nor included by the petitioner in the final bill and Therefore claim relating thereto is, Therefore, not maintainable and no reference can be made to the arbitration of such claims as the same are not covered by the arbitration agreement, Appointment of arbitrator by the Court is opposed also on the ground that new arbitrator can only be appointed in accordance with the arbitration agreement between the parties for notified claims of the petitioner. No other claim referred to in the petition can be referred to arbitration. Clause 9.0.0.0. of the GCC does not provide for supplying a vacancy by an outside arbitrator or for the appointment of any arbitrator other than those nominated in the Clause.

4. I have heard learned counsel for the parties and gone through the record.

5. Following points need consideration:

(A) Whether the claims which are not notified in writing and not included in the bill can be referred to arbitration?

(B) Whether the Court could supply the vacancy by an outside arbitrator not

contemplated in clause 9?

(C) Relief.

POINT A

6. In so far as the question of reference on non-notified claims is concerned, the matter is amply settled by not one but several judgments of this Court, including a judgment of D.B. However, before referring to those judgments, it would be desirable to refer to various Clauses of the arbitration agreement. Relevant Clauses of the GCC are reproduced as under:-

1.0.24.0. "Notified Claim" shall mean a claim of the Contractor notified in acceptance with the provisions of clause 6.6.1.0.

6.6.0.0. CLAIMS BY THE CONTRACTOR:

6.6.1.0. Should the Contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the Contract as specified in clause 6.3.1.0. hereof or should the Contractor dispute the validity of any deductions made or threatened by the owner from any Running Account Bills or any payments due to him in terms of the Contract, the Contractor shall forthwith give notice in writing of his claim in this behalf to the engineer-in-charges and the Site engineer within 10 (ten) days from the date of issue of orders or instructions relative to any works for which the Contractor claim such additional payment or compensation, or on the happening of other event upon which the Contractor bases such claim and such notice shall give full particulars of the nature of such claim, ground on which it is bases, and the amount claimed. The Contractor shall not be entitled to raise any claim not shall the owner anyway be liable in respect of any claim by the contractor unless notice of such claim shall have been given by the Contractor to the Engineer-in-Charge and the Site Engineer in the Manner and within the time aforesaid, and the Contractor shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-incharge and the Site Engineer in writing in the manner and within the time aforesaid.

6.6.3.0. Any or all claims of the Contractor notified in accordance with the provision of clause 6.6.1.0. hereof as shall remain persist at the time of preparation of Final Bill by the Contractor or shall be separately included in the Final Bill prepared by the contractor in the form of a Statement of Claims attached thereto, giving particulars of the Contractor in the claim, grounds on which it is based, and the amount claimed and shall be supported by a copies of the notice(s) sent in respect thereof the Engineer-in-Charge and Site Engineer under clause 6.6.1.0. hereof in so far as such claim shall in any material particular be at variance with the claim notified by the Contractor within the provision of clause 6.6.1.0. hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in clause 6.6.1.0. hereof, and within consequence in respect of the notified claim as

indicated in clause 6.6.3.1. hereof.

6.6.3.1. Any and all notified claims not specifically reflected and included in the Final Bill in accordance with the provisions of clause 6.6.3.0. hereof shall be deemed to have been waived by the Contractor, and the owner shall have no liability in respect thereof and the Contractor shall not be entitled to raise or include in the Final Bill any claim(s) other than a notified claim conforming in all respects in accordance with the provisions of clause 6.6.3.0. hereof,

9.0.1.0. Subject to the provision of clauses 6.7.2.0. hereof, any dispute or difference between the Parties arising out of any notified claim of the Contractor included in his final Bill in accordance with the provisions of clause 6.6.3.0. hereof and/or arising out of any amount claimed by the owner (whether or not the amount claimed by the owner or any part thereof shall have been deducted from the Final Bill of the Contractor or any amount paid by the owner to the Contractor in respect of the work) shall be referred to arbitrator by a Sole Arbitrator selected by the Contractor from a panel of three persons nominated by the General Manager.

9.1.3.0. No award shall be challenged, nor shall be Contractor refuse to make an appointment within the provisions of clause 9.1.0.0. hereof on the ground that any person nominated by the General Manager or appointment by the Contractor pursuant to the provisions of the said clause, is an employee of the owner is or otherwise howsoever connected with the owner."

7. A similar contract came to be interpreted by this Court in Uttam singh Duggal & Co. (P) Ltd. Vs. Indian Oil Corporation Ltd. & Anr., 1987 (1) Arb. L.R. 281. Analysing the clauses in the said case, it has been held that it has first to be seen if there was a dispute to which the arbitration clause applies; in fact if reference is made to the arbitration clause in the present case, no time limit is prescribed for the appointment of the arbitrator. Ultimately it was held that even time could not be extended in case the conditions in the aforesaid clauses were satisfied.

8. A Division Bench of this court in FAO (OS) 194/94- M/s. International Building and Furnishing Co. (Cal) Pvt. Ltd Vs. Indian Oil Corporation Ltd. made the following observations in regard to similar kind of clause:

"We are in entire agreement with the view taken in the Indian Oil Corporation's case by Wadhwa, J. and the manner in which the learned Judge distinguished the decision of the Full Bench in Ved Prakash Mittal and the decision of the Division Bench in Jai Chand Bhasin Vs. Union of India (UOI) and Another, . We hold that the two latter decisions of Bahri, J. in Kukreja and Saraswati Constriction cases are,- for the same reasons assigned by Wadhwa, J.

The question before us is whether the claim is a "notified claim" so as to be referred to the arbitrator. If the claim is not a notified claim, there is no agreement to refer the claim to arbitration. The words "notified claim" be given a

particular meaning in the agreement of the parties. It is only those claims which can be referred. We are not here concerned with the question whether a claim is time barred and Therefore deemed to be waived by the party as in the Full Bench case. If the matter goes to the civil court because we are declining arbitration, it will be for that court to decide whether the claim is barred or whether there is any waiver of the claim.

For the aforesaid reasons, the appeal fails and is dismissed."

9. In response to the plea that the petitioner could not give notice, a single Judge of this Court in P.N. Shah Vs. Indian Oil Corporation Ltd., (Suit No. 3220-A/89) observed as under:

"Learned counsel for the petitioner submits that in fact the petitioner could not have given notice to the Engineer-in-Charge earlier during the execution of the work in regard to its basic claims pertaining to prolongation of work beyond the stipulated period on completion and the change effected by the respondent in the size of the pipes. If that be so, then the case of the petitioner does not fall within the purview of the clause 6.0.1.0. of the agreement. In this view of the matter, the claim of the petitioner would also not fall within clause 9.0.1.0. of the agreement as that clause is attracted only when the claims of the contractor have been notified in accordance within clause 6.6.1.0.-

10.1 Same view was taken in Bansal Construction Co. Vs. Indian Oil Corporation Ltd. and Another, and M/s Associated Hybids Pvt. Ltd. Vs. India Oil corporation Ltd., Suit No. 2399A/85 decided on 15th October, 1997.

10.2 There cannot be any dispute with the proposition that "the meaning of such a contract must be gathered by adopting a commonsense approach and it must not be allowed to be thwarted by a narrow pedantic and legalistic interpretation" as has been held in The Union of India (UOI) Vs. D.N. Revri and Co. and Others, . Adopting the same commonsense approach, when (i) the intention appears to be nip in the bud to forestall the evil of fake claims raised subsequently, (ii) by laying down detailed procedure and by creating a mechanism to meet the urgent needs by making an Engineer- in charge and site engineer available to lodge the claim; and (iii) by specifically requiring notice in writing within 10 days, it cannot be said that these clauses of the contract could be interpreted otherwise. In case written notice was not required within 10 days from the date of issue of order or instructions relating to any additional work, it might possibly be interpreted as submitted by learned counsel for the petitioner.

10.3 There cannot be any dispute with the proposition that "Notice" does not necessarily mean "communication in writing" as has been held in Nilkantha Shidramappa Ningashetti Vs. Kashinath Somanna Ningashetti and Others, . But "notice in writing" can never be an oral intimation. As such, this submission is of no help to the petitioner.

10.4 Another submission of the learned counsel for the petitioner is that

objection to refer the matter to arbitration cannot be sustained for three reasons. Firstly, the respondent did not raise the objection to the inclusion of claim's notified orally being outside the scope of the scope. Secondly, in M/s International Building and Furnishing Co. Vs. Indian Oil Corporation Ltd., 1995 (1) Arb. L.R. 550 this court has held that such a provision is not mandatory. Thirdly, the question of habitability of dispute must be decided by the arbitrator and not by the court in the light of Tamil Nadu Electricity Board Vs. M/s. Bridge Tunnel Constructions and others, . I find that whole the legal proposition cannot be disputed, in the present context this submission cannot be accepted. Insofar as non-notified claims are concerned in absence of any agreement, reference could not be made. Moreover, this question related to scope of reference and consequently to the jurisdiction of the arbitrator. Secondly, in M/s. International Building and Furnishing Co. Vs. Indian Oil Corporation Ltd. (supra), distinction between "a claim being barred" which is for the arbitrator to decide and "an arbitration reference being barred" in respect of specific disputes which is for the court to decide, was clarified and followed by refusing to refer such disputes. since the objection relates to jurisdiction it can be taken at any stage. As regards nature of clause being mandatory or otherwise, in M/s International Building and Furnishing Co. Vs. Indian Oil corporation Ltd., 1995(1) (supra), the Division Bench of this court has not approved the view taken in earlier judgments and refused to express any opinion whether such clause would not be treated as mandatory. Submission of the learned counsel for the respondent that seeing the purpose, the context and requirements, it is mandatory, cannot be rejected out of hand. As such this objection cannot be ignored by this Court. Consequently, it is not possible to hold any view different from the views expressed by this Court in M/s International Building & Furnishing Co. (supra) & Uttam singh Duggal & Co. (P) Ltd. (supra).

11. Accordingly, if any dispute does not relate to a notified claim covered by clauses 1.0.24.0. 6.6.1.0 or 6.6.3.1, it cannot be referred to arbitration. This point is decided accordingly.

POINT B

12.1 Before this court considers the questions of supplying the vacancy, the court in the peculiar facts and circumstances, has to consider first whether there is any notified claim which could be referred for arbitration. In this regard, it may be mentioned that in respect of following claims, there is no dispute that they are notified claims and reference is permissible under the clauses referred to above.

- i) Out of the numerous claims referred to in para 28(b) of the petition and concerning bills dated 19th October 1992, the claims mentioned SI.No. 5,7,9, 14,15,16,23,24 and 26 at p. 112 to 117 of Annexure R to the petition;
- ii) Claim raised in bill dated 20th November 1992 for Rs. 19,576.85P;
- iii) Claims mentioned in para 28(i) and (j) are notified claims.

12.2 About other claims mentioned in various paras, of para 28 of the petition, the petitioner does not claim that any notice in writing was given within 10 days, as required under clause 6.6.1.0, 6.6.3.0 and 6.6.3.1 and obviously in view of the decision on point A, they cannot be referred for arbitration. However, this court need not go into the question of limitation and waiver etc., in respect of non-notified claims and leave the matter to be decided by civil court for this court is bound to decline arbitration in view of the judgment of Division Bench of this court in M/s. International Building and Furnishing Co. (Cal) Pvt. Ltd. Vs. Indian Oil Corporation Ltd. (supra). It will be for the civil court to decide whether the claim is barred or there is waiver of the claim or not.

13. Insofar as notified claims are concerned, the matter could possibly be referred to for arbitration.

14. However, in this connection, the submission of the learned counsel for the respondent is that the arbitrator should be a neutral arbitrator and not one from the panel to be chosen from the respondent's General Manager. On the other hand, it is contended by learned counsel for the petitioner that in any event, clause 9 of GCC does not provide for supply of vacancy by an outside arbitrator or for the appointment of any arbitrator than those nominated in clause 9.0.1.0 and 9.1.3.0 read as under:

9.0.1.0 Subject to the provisions of clauses 6.7.1.0 and 6.7.2.0 hereof, any dispute or difference between the parties hereto arising out of any notified claim of the Contractor included in his final bill in accordance with the provisions of clause 6.6.3.0 hereof and/or arising out of any amount claimed by the owner (whether or not the amount claimed by the owner or any part thereof shall have been deducted from the Final Bill of the Contractor or any amount paid by the owner to the Contractor in respect of the work) shall be referred to arbitration by a Sole Arbitrator selected by the Contractor from a panel of three persons nominated by the General Manager.

9.1.3.0 No award shall be challenged, nor shall be Contractor refuse to make an appointment within the provisions of clause 9.1.0.0. hereof on the ground that any person nominated by the General Manager or appointed by the Contractor pursuant to the provisions of the said clause, is an employee of the owner is or otherwise howsoever connected with the owner.

15. If both the clauses are read together, (i) arbitrator has to be a sole arbitrator; (ii) it has to be selected by the contractor from the panel of three persons nominated by the General Manager; and (iii) the contractor shall not refuse to make an appointment within the provisions of clause 9.1.0.0. on the ground that any person nominated by the General Manager or appointed by the contractor pursuant to the proviso of said clause is an employee of the owner is or otherwise howsoever connected with the owner. It gives an indication that arbitrator could only by a person from a panel of three persons nominated by the General Manager.

16.1 Learned counsel for the petitioner referred to Arvind Construction Co. (P) Ltd. Vs. Engineering Projects India Ltd., in support of his contention that in that case vacancy could be supplied by the Court for there is no provision in the arbitration agreement between the parties regarding filling up the vacancy of the arbitrator by the respondent itself. Accordingly, in view of Section 20(4) the vacancy may be supplied. However, the observations of Hon'ble Mr. Justice B.N. Kirpal do not support the contention of learned counsel for the petitioner in its entirety for the court observed:

"In terms of the clause, the Chairman and Managing Director himself can act as the sole Arbitrator but I think the Court, while exercising powers u/s 20(4) of the Arbitration Act, can direct that if the Chairman and Managing Director does not himself act as the sole arbitrator and decides to appoint another person as the sole arbitrator then the person to be so appointed should belong to a profession or a category suggested by the Court. Such a direction by the Court would not, to my mind, be contrary to the provision of the arbitration clause because the arbitration clause postulates the selection of the arbitrator by the Chairman & Managing Director and as long as this discretion remains with the appointing authority merely suggesting or directing the appointment of a particular type of arbitrator would not be contrary to the arbitration clause."

16.2 These observations make it clear that this court was just directing the Managing Director to supply the vacancy and for supplying the vacancy certain suggestions were also made.

16.3 However, in a *pari materia* case, in *M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others*, , Supreme Court in response to similar submissions made following observations in para 16:

"..He prays that any retired High Court Judge may be appointed as an arbitrator by us. We have not felt inclined to accept this submission, because arbitration clause states categorically that the difference dispute shall be referred "to an arbitrator appointed by the Chairman and Managing Director of IPDL" (Indian Drugs and Pharmaceutical Limited) who is the appellant. This provision in the arbitration clause cannot be given a go-bye merely at the askance of the respondent unless he challenged its binding nature in appropriate proceedings which he did not do."

16.4 Accordingly, since arbitration clause states categorically that "any dispute or differences...shall be referred to arbitration by a sole arbitrator selected by the contractor from the panel of three persons nominated by General Manager", in the light of the observations in *M/s Indian Drugs & Pharmaceuticals Ltd. Vs. M/s Indo Swiss Synthetics Gem Manufacturing Co. Ltd. & Ors.* Case (*supra*), this provision in arbitration clause cannot be given a go-bye merely at the instance of the petitioner. In *Govt. of Andhra* the arbitration agreement provided for arbitration of 3 persons holding specific post. Civil Court ordered appointment of

sole arbitrator. Supreme Court set aside the order and directed the trial Court to refer the dispute for decision to "the present Chief Engineer, Srisailam Project, Deputy Secretary to Govt., Finance Department and Director of Accounts, Sriramsagar Project with a direction to the parties to cooperate in concluding the proceedings expeditiously". Objections that the petitioner participated before the sole arbitrator (under protest) and the sole arbitrator has given award were overruled and the award was also set aside. This also indicates that the agreement of arbitration by specified persons cannot be ignored and if vacancy is to be supplied; it has to be supplied out of the specified class of person(s), as the case may be.

16.5 For the above said reasons, it is held that while vacancy can be supplied in absence of any provision to the contract in the arbitration clause, it has to be supplied in terms of the agreement. Accordingly, the notified disputes cannot be referred the arbitration to any person not contemplated in clause 9.

POINT C: RELIEF

17. Now an altogether different facet of the same point is required to be seen. In *Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc.,* . The Supreme Court observed in para 4 of the judgment as under:

4. Section 20 is merely a machinery provision. The substantive rights of the parties are found in Section 8(1)(b). Before S.8(1)(b) can come into operation it must be shown that (1) there is an agreement between the parties to refer the dispute to arbitration; (2) that they must have appointment an arbitrator or arbitrators or umpire to resolve their dispute; (3) anyone or more of those arbitrators or umpire must have neglected or refused to act or is incapable of acting or has died; (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled and (5) the parties or the arbitrators as the case may be had not supplied the vacancy.

18. Apart from this, it may further be added that in view of proviso to Section 8(1), the party may serve the other parties or the arbitrator as the case may be with a written notice to concur in the appointment or in supplying the vacancy. The right would arise only "if the appointment is not made within 15 clear days after service of the said notice, and thereafter the court may appoint on the application of the party who gave the notice". It means that the petition u/s 8 of the Arbitration Act read with Section 20 could not be filed without service of 15 clear days notice. In the petition, it is nowhere alleged that any such notice was given. As such, it would appear that the petition itself may not be competent as it is. But this would just amount to taking too technical a view which is likely to thwart substantial justice. Filing of the petition itself is sufficient notice for Section 8(2) does not provide for written notice though service of notice may be interpreted to be written notice also.

19. For the foregoing reasons and, in order to do substantial justice in between the parties, it is desirable that for referring the disputes relating to notified

claims mentioned in para 28 of the petition the General Manager may nominate a panel of three persons within three weeks from today and the contractor may select one of them out of the panel of three persons so nominated by the General Manager for reference of disputes to the person so selected within two weeks thereafter.

20. The petition is disposed of accordingly.

21. Parties are left to bear their own costs.