
(2015) 01 GAU CK 0003
In the Gauhati High Court
Case No : Arb. Appeal No. 3/2005

Bongaigaon Refinery and Petrochemicals Ltd.	APPELLANT
Vs	
G.R. Engineering Works Ltd.	RESPONDENT

Date of Decision : 29-01-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2)(b)

Citation : AIR 2015 Guw 57 : (2015) 3 ARBLR 395 : (2015) 3 BC 156

Hon'ble Judges : Hrishikesh Roy, J.

Bench : Single Bench

Advocate : K.N. Choudhury, Senior Advocate, R. Deka, B.K. Kashyap and M. Mahanta, for the Appellant; R.L. Yadav and K. Yadav, Advocates for the Respondent

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.—Heard K.N. Choudhury, the learned Senior Counsel appearing for the appellant. Also heard Mr. K.L. Yadav, the learned Counsel appearing for the sole respondent.

2. This appeal is directed against the judgment dated 18.8.2005 (Page-13) in Misc.(Arbitration) Case No. 5/2003, whereby the learned District Judge, Bongaigaon has rejected the appellant's application for settling aside the majority Award dated 29.4.2003 (Page-30) by rejecting the Appeal filed under Section 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the Arbitration Act".

Relevant facts.

3.1 The appellant Bongaigaon Refinery and Petrochemicals Ltd. (BRPL) hereinafter referred to as "the Owner" invited tenders for detailed engineering, supply, fabrication, transportation, erection and testing etc. of 3 Nos. of LPG spheres on 21.6.1991. M/s. Engineers India Ltd. (EIL) were appointed as Engineer-in-charge for the contract. The respondent M/s. G.R. Engineering Works

Ltd., hereinafter referred to as "the Contractor", was awarded with the work order by Letter of Intent (LOI) dated 18.4.1992.

3.2 It was agreed between the parties that the work will be completed within a period of 18 months starting from 18.4.1992. Originally the date of completion of the work was fixed as 17.10.1993, however, as per General Conditions of Contract (GCC), extension of time for completion of the work was permitted under certain specified circumstances. The work was completed eventually on 31.10.1994 with the delay of 379 days.

3.3 The respondent pleaded that although action for mobilization, execution and completion of the work was taken, yet the work could not be completed within the scheduled time due to the reasons beyond their control. In this regard the respondent submitted a letter dated 21.2.1995 to the resident engineer thereby requesting not to impose Liquidated Damage (L.D.) for non-completion of the work within the scheduled time.

3.4. After that on 22.2.1995 the respondent submitted a final bill to the Owner and further requested that the extension of contract completion period be accorded. On decision being taken by the Owner and communicated to the Engineer-in-charge, M/s. Engineers India Ltd. (EIL) by letter dated 7.8.1996 informed the contractor that conditional approval to extension of the contractual period was granted by the Owner vide letter dated 5.8.1996 subject to levy of L.D. @2% of the total contract value.

3.5 After deduction of aforesaid 2% L.D, the contractor received a cheque for Rs. 86,16,992/- on 4.12.1996 from the Owner. Subsequently the contractor vide letters dated 2.1.1997 and 28.2.1997 raised grievance against the deduction and requested for reimbursement of the deducted L.D. The Owner vide letter dated 7.4.1997 justified the imposition by stating that L.D. was deducted for delay of 14 days since the contractor failed to take measures to expedite the delivery of fabricated materials at site. Eventually, the dispute regarding recovery of L.D @2% was referred to the 3 member Arbitral Tribunal at the instance of the contractor.

The contention of the Owner before the Arbitral Tribunal

4.1 The levy of L.D. @ 2% and also the counter claim of Rs. 2,43,34,412/- were justified by the Owner mainly on 2 counts i.e. under the GCC the Employer was vested with full power under Clause 4.4.0.0 to levy L.D. upto 10% of the contract value and also because of the delay on the part of the contractor in completing the work, the Owner suffered huge loss.

4.2. The Owner further contended that their decision is final and binding upon the contractor in terms of the Clauses 4.3.6.0 and 4.4.0.0 of the contract terms and in view of this the Owner submitted that this was not an arbitrable dispute.

4.3 Moreover since the payment against the final bill was received without protest by the contractor in full and final settlement on 5.12.1996, it was not

open thereafter to the contractor to make any claim in respect of the final bill.

4.4. The dispute in question is covered by excepted matter and therefore the Arbitral tribunal lacked jurisdiction to decide the claim on L.D.

4.5 Excepted matters are those disputes in respect of which, an adjudicating mechanism is provided in the contract itself. In the instant case according to the Owner, the engineer-in-charge is the adjudicating authority and whose decision is final and binding on the parties.

5. The Tribunal framed 7 issues but the decision on the following issues are relevant.

"iv. Whether in view of Clause 6.7.0.0 of the contract, the contract including the arbitration clause stands discharged and extinguished as pleaded by the appellant/respondent in para A of the preliminary objections?

v. Whether as contended by the appellant/respondent the issues raised by the claimant are "excepted matters and as such, they are outside the purview of arbitration?"

JURISDICTIONAL OBJECTION

6.1 On issue No. (iv) the Owner raised the preliminary objection that since full and final payment was received by the contractor without protest by endorsement dated 4.12.1996 coupled with the provisions of Clause 6.7.0.0 of the GCC, the contract stood discharged and extinguished. Therefore the issue was not arbitrable.

6.2 On issue No. (v) the Owner contended that disputes raised by the respondent were excepted matters and as such those were outside the purview of arbitration.

Arbitrator's (Majority view) Issue No. (iv)

7.1 The Tribunal by a majority view held that the payment received by the contractor on 4.12.1996 was a conditional one and not absolute and therefore the claim of the contractor for the balance amount was within jurisdiction of the arbitral tribunal and the arbitration clause did not get extinguished or discharged.

Issue No. (v)

7.2 By referring to the various clauses and the judgment of the Apex Court in J.G. Engineer's Pvt. Ltd. Vs. Calcutta Improvement Trust and Another, and decision of the Delhi High Court in M/s. International Building and Furnishing Co. (Cal) Pvt. Ltd. Vs. Indian Oil Corporation Ltd., , the Tribunal in its majority view rejected the contention raised by the Owner and further held that the issue of imposition of L.D. of 2% was not an excepted matter and therefore was not outside the purview of arbitration.

Arbitrator's (Minority view).

8.1 While dissenting with the majority view, the Co-arbitrator observed that the interpretation of Clauses 6.6.1.0., 6.7.1.0., 6.7.2.0. and 9.1.0.0. given in the Award had not been correctly appreciated. By referring to the judgment in International Building (supra) the co-arbitrator held as follows -

Issue No. (iv).

8.2 As the final payment has been made under Clause 6.7.1.0. and as there was no notified claim, the contract, including the arbitration clause stands discharged and extinguished.

Issue No. (v).

8.3 In the absence of notified claim of the contractor, the claim is outside the purview of arbitration.

Arbitrator's Direction

9.1 The Arbitral Tribunal by order dated 29.4.2003 through their majority view directed the Owner to comply with the Award within 15 days and if the awarded amount of Rs. 44,66,525/- is not disbursed in time, it would attract future interest at the statutory rate of 18% p.a. from the date of the award till the date of payment.

9.2 However the co-arbitrator while disagreeing with the majority view, had passed a no claim award and further held that contract including the arbitration clause stood discharged and extinguished and that the Arbitral Tribunal had no jurisdiction.

10. At this stage it would be appropriate to note the relevant Clauses of the GCC for better appreciation of the case.

"Arbitration Clause

9.1.0.0 - Subject to provisions of Clause 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 the 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 as hereunder provided in Clause 9.1.1.0 and 9.1.2.0.

Notified Claim

1.0.24.0 - "Notified Claim" shall mean a claim of the contractor notified in accordance with the provisions of Clause 6.6.1.0. hereof.

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 term 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 term of the contract, the contractor shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the contractor claims 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, grounds on which it is based, and the amount claimed. The contractor shall not be entitled to raise any claim, or 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-in-charge and the Site Engineer in the matter and within the time aforesaid.

6.3.1.0 - The remuneration determined as due to the contractor by application of the Schedule of Rates to the Final Measurements as provided for in Clause 6.2.1.0 hereof and associated provisions thereunder shall constitute the entirety of the remuneration and entitlement of the contractor in respect of the work under the contract, and no further or other payment whatsoever shall be or become due or payable to the contractor under the contract.

Excepted matter

4.3.5.0 - Within 7 (seven) days of the occurrence of any act, event or omission which, in the opinion of the contractor, is likely to lead to delay in the commencement or completion of work(s) at job site and its such would entitle the contractor for an extension of the time specified in this behalf in the Progress Schedule(s), the contractor shall inform the Site Engineer and the Engineer-in-charge in writing of the occurrence of the act, event or omission and the date of commencement of such occurrence. Thereafter, if even upon the cessation of such act or event or the fulfillment of the omission the contractor is of opinion that an extension of the time specified in the Progress Schedule(s) at job site is necessary, the contractor shall within 7 (seven) days after the cessation or fulfillment as aforesaid make a written request to the Engineer-in-charge for extension of the time specified in the Progress Schedule and the Engineer-in-charge may at any time Prior to completion of the work extend the time of competition in the Progress Schedule for such period(s) as he considers necessary, if he is of opinion that such act/event/omission constitutes a ground for extension of time in term of the contract and that such act/event/opinion/decision of the Engineer-in-charge in this behalf and as to extension necessary shall, subject to the provisions of Clause 4.3.6.0 hereof, be final and binding upon the contractor.

4.4.0.0 - If there is any delay in the final completion of the work beyond the date for the final completion of the work or works aforesaid at the job site as

stipulated in the Progress Schedule, the Owner shall (without prejudice to any other right of Owner in this behalf) be entitled to liquidated damages for delay at 1% (One percent) of the total contract value for each week or part thereof that the work remains incomplete beyond the Scheduled date of final completion for the work or works, as the case may be, at the job site, subject to a maximum of 10% (Ten percent) of the total contract value.

6.7.1.0 - The acceptance by the contractor of any amount paid by the owner to the contractor in respect of the final dues of the contractor determined in accordance with the provisions of Clause 6.3.1.0 hereof upon condition that the said payment is being made in full and final settlement of all said dues to the contract or shall, without prejudice to the claims of the contractor included in the Final Bill in accordance with the provisions under Clause 6.6.0.0. hereof and associated provisions thereunder be deemed to be in full and final satisfaction of all such dues to the contractor notwithstanding any qualifying remarks, protest or condition imposed or purported to be imposed by the contractor relative to the acceptance of such payment, with the intent that upon acceptance by the contractor of any payment made as aforesaid, the contract (including the arbitration clause) shall subject to the provisions of Clause 6.8.2.0 hereof, stand discharged and extinguished except in respect of the notified claims of the contractor included in the Final Bill and except in respect of the contractor's entitlement to receive the unadjusted portion of the Security Deposit in accordance with the provisions of Clause 6.8.2.0 hereof on successful completion of the defect liability period.

11. The Owner challenged the legality of the Award under Section 34 of the Arbitration Act by contending that the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration and the decision is beyond this scope of the submission to arbitration. The Award was also challenged on the ground that it is in conflict with public policy of India.

12. However through the impugned judgment dated 18.8.2005, the learned District Judge, Bongaigaon held that although there was no notified claim under Clause 6.6.1.0 by the contractor yet there is an arbitrable dispute regarding the deduction of L.D. from the final bill by the Owner. Proceeding on this basis and after noting that decision for the majority award was based on elaborate discussion of the Clauses of the contract, the Court found no scope to disturb the majority award. There was no reference to the minority award rendered by the co-arbitrator, in the impugned judgment.

APPELLANTS SUBMISSION

13.1 Assailing the legality of the Court's decision in the Section 34 application, Mr. K.N. Choudhury, the learned Senior Counsel submits that the terms of the contract provides for finality of the claim and unless the contractor makes a notified claim, as defined under Clause 1.0.24.0 the claim against deduction of the L.D. is an excepted matter.

13.2 The Senior Counsel refers to Clause 6.7.1.0 of the GCC to project that full and final settlement of all dues was accepted by the contractor on 4.12.1996 and therefore in the absence of any notified claim, the dispute on deduction of L.D. is not arbitrable, as it is covered by the exception Clause 6.7.1.0 of the GCC.

13.3 Referring to Arbitration Clause 9.1.0.0 of the GCC, Mr. Choudhury submits that when the contractor have failed to notify its claim, no arbitrable disputes exists and therefore it is argued that the Award was passed without jurisdiction.

13.4 Since levy of L.D. was authorized by Clause 4.4.0.0 of the GCC, the Owner argues that when the parties have expressly agreed for levy of L.D. for breach of contract, the same could not have been reversed by the Arbitrators. The Senior Counsel submits that the impugned Award is opposed to Public Policy of India within the meaning of the explanation to Section 34(2)(b) of the Arbitration Act and therefore the Court below should have quashed the majority award.

13.5 Referring to the minority opinion of the Co-Arbitrator Mr. V.R. Vyas, the Senior Counsel submits that as the contractor never notified any claim to the Engineer-in-Charge within the stipulated period, there is no arbitrable dispute and therefore exercise of jurisdiction by the Arbitrators is unjustified. Projecting further that the Deputy Manager (Accounts) of the Contractor had acknowledged the receipt of the tendered amount (after deduction of the L.D. @2%), as full and final settlement of the contractor's claim, there can be no arbitrable dispute for the deducted L.D.

RESPONDENTS SUBMISSION

14.1 Representing the contractor, Mr. R.L. Yadav, the learned Counsel submits that the award of an Arbitrator should not be lightly disturbed under Section 34 of the Arbitration Act and the Court has no power to re-appreciate the material to reach a different conclusion. He relies on Union of India (UOI) Vs. B.K. Construction, in support of his argument.

14.2 Referring to the letter written by the contractor on 21.2.1995 where request was made for waiving the L.D., Mr. Yadav submits that the contractor made their claim well before the deducted payment was tendered by the Owner on 4.12.1996.

14.3. In this case, the execution was delayed by 379 days and Mr. Yadav refers to the fact that the contractor can't be held solely responsible for the delayed execution as contributory default of co-contractor i.e. Bridge and Rough was also found and therefore the logic for levying L.D. on the contractor is questioned by the respondent.

14.4 The contractor contends that acceptance of payment (with deduction of L.D.), should not debar the contractor from challenging the validity of the deduction and therefore it is argued that the Arbitrators were justified in examining the legality of the deduction and rightly gave their decision on the contractor's claim.

DISCUSSION

15. When the parties have bound themselves by various terms in executing a contract, it is necessary to carefully examine the Clauses of the contract to determine whether an arbitrable dispute could be raised on deduction of L.D. and whether the view taken by the Court in declaring that the Arbitrators acted within jurisdiction was correct and proper.

16. Under Clause 4.4.0.0 of the GCC, if there is any delay in final completion of work, the Owner is entitled to L.D. at 1% for each week, subject to maximum of 10% of the total contract value. Admittedly the execution of the contract was delayed for 379 days but the Owner levied L.D. (Rs. 20,79,872/-) @1% per week for 14 days. The owner's Cheque (with deduction) was received by the Deputy Manager (Accounts) of the contractor on 4.12.1996 with the endorsement -

"The above amount is the full and final payment against our W.O. No. RX/038 dated 28.7.1992 adjustment of payment of R/A Bills and advances etc." Only after accepting the final bill, the contractor raised their grievance on 2.1.1997 against deduction of L.D. by the Owner.

17. Clause 6.6.1.0 of the GCC provides that if the contractor disputes the validity of any deduction made by the Owner, they should forthwith give notice in writing of his claim to the Engineer-in-Charge and unless such demand is made within the stipulated time, the contractor is deemed to have waived his claim.

18. The Owner's liability under Clause 6.7.1.0 is discharged on acceptance by the contractor of the final payment determined as full and final settlement of all dues and only exception envisaged are in respect of notified claims. The notified claims if any can be referred for arbitration under Clause 9.1.0.0 and therefore this clause bears close scrutiny.

19. The Clause 9.1.0.0 interestingly provide for arbitration for all amount claimed by the Owner whereas only notified claims of contractor can give rise to an arbitrable dispute. Thus the contractor and the owner in respect of their respective claims are treated differently under the contract terms. In other words only the notified claim of the contractor can give rise to an arbitrable dispute but no such rider is imposed for claims of the owner.

20. Moreover when the contractor without protest accepts the tendered amount from the Owner in respect of the contractual dues, such payment (with deduction of L.D.), is an excepted matter where the terms of the contract doesn't envisage arbitration. Only for notified claims, arbitration is envisaged under the terms of the contract.

21. The Supreme Court in Harsha Constructions Vs. Union of India (UOI), had held that if a non-arbitrable dispute is referred to an Arbitrator for a subject matter which is covered by the excepted Clause, is not open to the Arbitrator to decide the issue and such decision when rendered for excepted matter can be quashed by the Court under Section 34 of the Arbitration Act.

DECISION

22. In a reported decision arising under the old Arbitration Act, 1940 (hereinafter referred to as "the 1940 Act"), the Supreme Court in *General Manager Northern Railways and Another Vs. Sarvesh Chopra*, explained the concept of excepted matter where the parties agree for adjudication under specified authority and such matters are not arbitrable. In the case in hand, under Clause 4.3.5.0 of the GCC, the contractor was required to inform the Site Engineer and the Engineer-in-charge in writing of events/omission which is likely to delay in completion of work with a request for extension of time and the decision of the Engineer-in-charge is made final and binding upon the contractor. Therefore when we apply the ratio of *Sarvesh Chopra* (supra) to the present facts, it is found that the dispute pertains to levy of L.D. for delayed execution and for this the contractor should have informed the Site Engineer and the Engineer-in-charge in writing. But without such steps by the contractor the issue of deduction L.D. can't be said to be an arbitrable dispute.

23. What is seen here is that the L.D. was levied only for 14 days whereas the execution was delayed by 379 days. Therefore it is apparent that the Owner took into account the factors beyond the control of the contractor and major portion of the delay was thereby condoned. In this context, the observation must be made on the letter dated 22.7.1995 written by the Engineer-in-charge i.e. EIL, who recommended that the entire delayed period be condoned. But M/s. EIL was not empowered to condone the delay. The contract only empowers the Owner to decide on the issue and in this case, the Owner have considered the matter and levied the L.D. for the limited period of 14 days. Therefore when power vests on the Owner to take the decision on L.D., the recommendation made for condoning the delay by the Engineer-in-charge in my view will not benefit the contractor.

24. When arbitration award is rendered through competent jurisdiction, there can be no interference with such award in a proceeding under Section 34 of the Arbitration Act, through re-assessment of the materials by the Court. There can be no quarrel with this submission of the contractor. But when the arbitral award deals with a dispute not coming within the terms of the submission to arbitration, it is a jurisdictional error which is rectifiable in a proceeding under Section 34 of the Arbitration Act. Moreover if the award contains decisions on matters beyond the scope of the submission to arbitration or the decision is in conflict with Public Policy of India, the award can be quashed by the Court by exercising powers under Section 34 of the Arbitration Act.

25. The issue here is whether the contractor's claim on L.D. was a notified claim for it to be arbitrated. The term notified claim is a defined expression under the GCC and it is only such claims which can be referred for arbitration. Here the contractor hadn't notified any claim and therefore I hold that the award was rendered without jurisdiction.

26. Upon application of the relevant clauses to the facts herein, when the

contractor failed to inform the Engineer-in-Charge it amounts to waiver and therefore it is covered under excepted matter where arbitration is not envisaged. Therefore in my view it was not open to the arbitrator to render award on a non arbitrable issue.

27. In contracts where time is of essence and the contractors have bound themselves to levy of liquidated damage our country's public policy do justify deduction of L.D. since a Government undertaking with tax payers funding suffered loss for the delayed execution. Therefore even on this count the majority award can't be sustained and it is held that the Court erred in upholding the award which is against public policy of India. This conclusion is reached by accepting the wider meaning of the expression given by the Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., .

28. While some of the findings recorded in the impugned judgment are found to be based on incorrect facts for which the decision can be said to be perverse, the said aspect doesn't require adjudication because the case is decided on other issues. In this case, there was no notified claim of the contractor and they accepted the final payment on 4.12.1996 without any protest. Therefore even assuming that a dispute existed on deduction of L.D., this wasn't an arbitrable dispute, as it was an excepted matter. Under these facts although the arbitrators based their decision on incorrect foundation those perversities are kept out of this decision since the jurisdictional issue is answered against the contractor who invoked arbitration.

29. In view of above, I quash the majority award of the two Arbitrators. Consequently the impugned judgment dated 18.8.2005 of the learned District Judge, Bongaigaon is declared to be unsustainable and the same is accordingly quashed. It is ordered accordingly.

30. With the above decision, this Appeal stands allowed without any order on cost.