
(2019) 06 GAU CK 0063
In the Gauhati High Court
Case No : Arbitration Appeal No. 10 Of 2006

Bongaigaon Refinery

APPELLANT

Vs

Buildworth Pvt. Ltd.

RESPONDENT

Date of Decision : 25-06-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 16(2), 34, 34(2)(a)(iv), 37

Citation : (2019) 06 GAU CK 0063

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : R Deka, S J ` Sarma

Final Decision : Allowed

Judgement

1. Heard Mr. K.N. Choudhury, learned senior counsel appearing for the appellant. I have also heard Mr. D. Das, learned senior counsel representing the respondent.

2. This appeal has been filed under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996), assailing the judgement and order dated 29/05/2006 passed by the learned District Judge, Bongaigaon, in Misc. Arb. Case No.01/2004, refusing to set aside the arbitral award dated 10/12/2003.

3. The facts necessary for disposal of this appeal may be noticed as follows :-

(a) The appellant had floated a Tender inviting bids for execution of the work "Fire Water Piping Works including Integration". Upon processing the tender, the work was awarded in favour of the respondent vide Work Order No. RX-113 dated 31/01/1995. Accordingly, a contract agreement was signed by and between the parties. Time was the essence of the contract. As per the terms of the contract, the date of commencement of the work was 28/11/1994 and the scheduled date of completion was 27/03/1995. However, the respondent could complete the work only on 01/10/1996, i.e. after a delay of 553 days. The respondent had, therefore, applied for extension of time (EoT). M/s Engineers

India Limited i.e. the Engineer-in-charge for the contract had recommended that extension of time be granted to the respondent. As such, the appellant (owner) had granted EoT subject, however, to the condition that Liquidated Damage (LD) @ 10% of the total contract value would be imposed on the final bill of the respondent/contractor. The respondent did not raise any protest against the said decision of the owner and accordingly, the final bill of the respondent was settled by paying the balance amount of Rs. 15,837.48 vide Demand Draft No. 620336 dated 21/01/1990, after deducting a sum of Rs. 8,44,043.40 as LD being 10% of the total contract value.

(b) It appears from the record that the respondent had accepted the demand draft dated 21/01/1990 for an amount of Rs. 15,837.48p as full and final settlement of its claim under the contract but after the defect liability period was over and the security deposit in the form of Bank Guarantee (BG) was released by the appellant, the respondent had requested for waiver of the LD on the ground that the delay was for reasons not attributable to the Contractor. When the appellant did not accede to the request for waiver of LD, the respondent had approached the Hon'ble Chief Justice of the Gauhati High Court by filing an application under Section 11(6) of the Act of 1996, which was numbered and registered as OJ-19/2000, with a request to appoint an arbitrator. By the order dated 20/03/2002 passed in OJ-19/2000, Shri N.C. Baruah, a retired District and Sessions Judge, was appointed as the sole Arbitrator so as to enter into a reference and adjudicate the dispute. The learned sole arbitrator had passed the arbitral award dated 10/12/2003 allowing the claim of the respondent for waiver of the LD amounting to Rs. 8,44,034.40.

(c) Being aggrieved by the arbitral award dated 10/12/2003, the appellant had filed an application under Section 34 of the Act of 1996, registered as Misc. Arbitration Case No. 1/2004 in the Court of District Judge, Bongaigaon, praying for setting aside the arbitral award dated 10/12/2003 inter-alia on the ground that under the contract agreement, the subject matter of dispute was not capable of being settled by means of arbitration. By the impugned judgement and order dated 29/05/2006, the learned District Judge had rejected the said application filed by the appellant. Hence, this appeal.

4. Mr. K.N. Choudhury, learned senior counsel for the appellant submits that the respondent /contractor had accepted the amount of Rs. 15,837.48/- as full and final settlement of its bill without raising any protest, pursuant where to, the security deposit in the form of Bank Guarantee was also released by the appellant and the contract stood fully discharged. Therefore, submits Mr. Choudhury, after the discharge of the contract, it was not open for the respondent to raise a dispute as regards the deduction of the LD amount. By referring to clause 6.6.1.0 of the General Conditions of Contract (GCC), Mr. Choudhury submits that the contractor had never notified his claim as per the requirement of the GCC. Therefore, unless the claim is notified and notice of such claim is given to the Engineer in-charge, no such claim can be referred to

arbitration under the contract agreement. According to Mr. Choudhury, the learned sole arbitrator had acted without jurisdiction by entertaining the claim which was not arbitrable thereby having a vitiating effect on the impugned arbitral award.

5. Mr. Choudhury has also placed heavy reliance on a decision of this Court rendered in the case of Bongaigaon Refinery and Petrochemicals Ltd. Vs. G.R. Engineering Works Ltd. reported in (2016) 1 GLT 796 to contend that in a case involving interpretation of the same clauses of the GCC, the learned Single Judge has held that the claim of the contractor, not filed in accordance with clause 6.6.1.0, would fall within the ambit of "excepted matters" and therefore, would not be arbitrable. Mr. Choudhury submits that the ratio laid down in the decision of G.R. Engineering Works Ltd.(supra) would be squarely applicable to the facts of this case.

6. The learned Senior counsel has also relied upon the decision of the Supreme Court rendered in the case of SBP & Co. Vs. Patel Engineering Ltd. and Another reported in (2005) 8 SCC 618 to contend that merely because the appellant had failed to question the jurisdiction of the Arbitral Tribunal by taking a plea under Section 16(2) of the Act of 1996, the same cannot preclude this Court from examining the question of validity of the arbitral award if the same is found to be in conflict with the express terms and conditions of the contract agreement.

7. Mr. Das, learned senior counsel for the respondent, on the other hand, submits that the claim of the respondent contractor in this case pertains to the arbitrary and illegal deduction of a sum of Rs. 8,44,034.40p from the final bill of the respondent by invoking the LD clause. Therefore, the said claim would not come within the ambit of clause 6.6.1.0 of the GCC and as such, there was no requirement for the Contractor to notify that claim. Mr. Das has further argued that the scope of interference with an arbitral award under Section 34 of the Act of 1996 is very limited and unless the award is found to have been passed in contravention of the terms and conditions of the contract agreement or passed in violation of the substantive law of the country or opposed to public policy, the same cannot be set aside under Section 34 of the Act of 1996. The learned senior counsel submits that the learned District Judge has correctly held that the arbitral award did not suffer from any infirmity and, therefore, rightly refused to interfere with the same.

8. Referring to the decision rendered in the case of M/s. G.R Engineering Works Ltd. (Supra), Mr. Das submits that the said decision is distinguishable on facts and therefore, the ratio of the said decision would not have any bearing in this case. According to Mr. Das, the only dispute in this case being one pertaining to the legality and validity of the deduction of LD from the final bill of the respondent, the arbitral tribunal was competent to adjudicate upon the same and pass an award. The learned senior counsel has, therefore, prayed for dismissal of the appeal.

9. After hearing the arguments advanced by the learned counsel for both the parties, this court is of the view that the core question arising for consideration of this court in the present proceeding is as to whether, the dispute raised by the respondent/ contractor was capable of being settled by means of arbitration ? Since Mr. Choudhury's basic argument is premised on clause 6.6.1.0 of the GCC, therefore, in order to appreciate the contentions advanced by the learned counsel , it would be necessary to reproduced the said clause herein below for ready reference:-

"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 Amount Bills, the CONTRACTOR shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within the 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 of 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 OWNER shall not anywise 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 and all claims and all his rights in respect of any claim not notified to the Engineer-in-charge and the Site Engineer in writing in the manner and within the time aforesaid."

10. Clause 9.0.0.0 and 9.0.1.0 of the GCC contains the arbitration agreement, which is quoted herein below :-

"9.0.0.0 -ARBITRATION

9.0.1.0 - Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.1.1.0 hereof, and any dispute arising out of any Claim(s) of the OWNER against the CONTRACTOR shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 9.0.1.1 hereof. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counter-claim(s) if a Notified Claim of the CONTRACTOR has been referred to arbitration. The CONTRACTOR shall not, however, be entitled to raise as a set-off defence or counter-claim which is not a Notified Claim included in the CONTRACTOR's Final Bill in

accordance with the provisions of Clause 6.6.3.0 hereof."

11. Clause 1.21.0.0. of the GCC defines "notified claims" which reads as follows :-

"1.21.0.0 - 'Notified Claims' shall mean a claim of the CONTRACTOR notified in accordance with the provisions of Clause 6.6.1.0 hereof."

12. From a plain reading of clause 9.0.1.0, it is clear that subject to clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0, it is only a notified claim of the contractor, that is included in the final bill in accordance with clause 6.6.3.0 and where the contractor has not opted for alternative dispute resolution machinery, that can be referred to arbitration under clause 9.0.1.0. What, therefore, follows is that claims arising out of and within the purview of the contractual agreement can give rise to an arbitrable dispute coming within the ambit of the arbitration agreement (clause 9.0.1.0) provided, it is a notified claim included in the final bill.

13. Clause 6.7.1.0 of the GCC deals with discharge of owners liability, which reads as follows :-

"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 under the Final Bill upon condition that the said payment is being made in full and final settlement of all said dues to the CONTRACTOR shall, without prejudice to the notified claims of the CONTRACTOR included in the Final Bill in accordance with the provisions under Clause 6.6.3.0 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 6.8.3.0 hereof on successful completion of the defect liability period".

14. Clause 6.7.2.0 of the GCC provides that acceptance of any amount by the Contractor in respect of notified claims included in the Final Bill in accordance with clause 6.6.3.0 shall be deemed to be full and final settlement of all claims of the Contractor.

15. Clause 9.0.2.0 of the GCC, deals with matters which would stand excluded from the purview of the arbitration agreement. Clause 9.0.2.0 of the GCC is quoted herein below for ready reference.

"9.0.2.0 - Any dispute(s) or difference (s) with respect to or concerning or relating to any of the following matters are hereby specifically excluded from the scope, purview and ambit of this Arbitration Agreement with the intention that

any dispute or difference with respect to any of the said following matters and/or relating to the Arbitrator's or Arbitral Tribunal's jurisdiction with respect thereto shall not and cannot form the subject-matter of any reference or submission to arbitration, and the Arbitrator or the Arbitral Tribunal shall have no jurisdiction to entertain the same or to render any decision with respect thereto, and such matter shall be decided by the General Manager prior to the Arbitrator proceeding with or proceeding further with the reference. The said excluded matters are :

(i) With respect to or concerning the scope or existence or otherwise of the Arbitration Agreement.

(ii) Whether or not a Claim sought to be referred to arbitration by the CONTRACTOR is a Notified Claim.

(iii) Whether or not a Notified Claim is included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

(iv) Whether or not the CONTRACTOR HAS OPTED FOR THE Alternative Dispute Resolution Machinery with respect to any Notified Claim included in the CONTRACTOR's Final Bill."

16. In the case of Executive Engineer, REO v Suresh Chandra Panda reported in (1999) 9 SCC 92, the Supreme Court has held that a dispute specifically excluded from the purview of the arbitration clause would not be referable to arbitration.

17. Likewise, in the decision rendered in Harsha Construction v Union of India reported in (2014) 9 SCC 246, it has been held that even if a non-arbitrable dispute is referred to arbitrator or an issue is framed as to such dispute, it would not be open for the arbitrator to arbitrate since it would be beyond his jurisdiction. It was further held that the arbitrator would not be empowered to arbitrate upon a dispute covered by a clause which specifically excludes the dispute as "excepted matter" from arbitration.

18. While examining the effect and impact of "excepted matters" in a contract agreement, the Supreme Court had observed in the case of Food Corporation of India Vs. Sreekanth Transport reported in (1999) 4 SCC 491 that under "excepted matters" clause, some matters are excluded from the purview of arbitration. The observations made in paragraph 3 of the said decision are extracted herein below for ready reference :-

"`Excepted matters' obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator - concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the courts have found out lacking in its jurisdiction to entertain an application for reference to arbitration as regards the disputes arising therefrom and it has been the consistent view that in the event the claims arising within the ambit of

excepted matters, question of assumption of jurisdiction of any arbitrator either with or without the intervention of the court would not arise; The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters: what are these exceptions however are questions of fact and usually mentioned in the contract documents and forms part of the agreement as such there is no ambiguity in the matter of adjudication of these specialised matters and termed in the agreement as the excepted matters."

19. While dealing with a question of similar nature in G.R. Engineering Works Ltd. (Supra), this court had interfered with the arbitral award passed in favour of the contractor, after accepting the plea raised by the present appellant to the effect that the claim of the contractor was covered as an "expected matter" under the GCC. That was also a case where the appellant had awarded a contract in favour of the Contractor viz. M/s G.R. Engineering Works Ltd. Time was the essence of the contract. However, work was completed after a delay of 379 days. While granting conditional extension of time, the appellant had invoked the LD clause and an amount of Rs 44,66,525/- being 2% of the total contract value, was deducted from the final bill of the Contractor. In that case also the contractor had received the final payment but subsequently, raised a grievance against the deduction with a request to reimburse the deducted amount. The dispute was then referred to a three member arbitral tribunal which, by a majority award, had ruled in favour of the Contractor. The application filed by the appellant under section 34 of the Act of 1996 for setting aside the arbitral award was rejected by the learned District Judge, Bongaigaon. Being aggrieved, the Refinery had preferred Arb. Appeal No 3 of 2005 which was allowed by this court by setting aside the majority award by making the following observations :-

"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 ONGC Ltd. Vs. Saw Pipes Ltd. reported in (2003) 5 SCC 705."

20. As has been noticed above, the appellant in this case had invoked the LD clause and deducted a sum of Rs. 8,44,043.40 from the final bill of the Contractor. As per clause 4.4.2.0 of the GCC, the appellant was entitled to levy penalty on the contractor for the delay in completion of the work and in view of clause 4.4.2.0 (xxi), the appellant had confined the amount of penalty to a maximum of 10% of the total contract value. Whether the deduction was justified or not is a matter that needs to be decided on the basis of the facts and circumstances of the case upon interpretation of the clauses of the GCC. However, it is not in dispute that the claim of the Contractor for waiver of the LD is not a notified claim. Therefore, this court is of the view that the issue raised in this appeal would be squarely covered by the decision rendered in the case of G.R. Engineering Works Ltd. (Supra). Having regard to the language employed in clause 6.6.1.0 read with 9.0.2.0, this court is of the opinion that the dispute raised by the Contractor with regard to imposition of the LD would be covered under the " excepted matter " clause and hence, was not arbitrable under Clause 9.0.1.0.

21. It is to be noted here-in that there is a dispute in this case as to whether the claim of the contractor ought to have been a notified claim or not. However, as per Clause 9.0.2.0, the Arbitral Tribunal shall have no jurisdiction to entertain a dispute on whether or not a claim sought to be referred to arbitration is a notified claim. Therefore, it is evident that the claim of the Contractor was an "excepted matter" and hence, was a non-arbitrable dispute.

22. In the above context, it would be pertinent to note that whether or not a dispute falls within the scope and ambit of the arbitration agreement is a question of law and therefore, is a matter that should be left to be decided by the Arbitrator by interpreting the contract agreement. In case of McDermott International v Burn Standard Co. Ltd reported in (2006) 11 SCC 181 the Hon'ble Supreme Court has held that interpretation of a contract is a matter for the arbitrator to decide even if it gives rise to determination of questions of law. However, it appears that under sub-clause (i) of clause 9.0.2.0 of the GCC, the question as to the arbitrability of a dispute has been taken out of the purview of the arbitral tribunal and has been left to be decided by the General Manager. Clause 9.0.2.0 does not also indicate as to the remedy available to the aggrieved

party in case, the decision of the General Manager goes against the contractor. Therefore, it prima facie, appears to this court that clause 9.0.2.0 of GCC is not in consonance with the law laid down by the Supreme Court. However, since clause 9.0.2.0 is not under challenge and having regard to the express provision contained there-in excluding the jurisdiction of the arbitral tribunal from entertaining a plea pertaining to scope of arbitration of a dispute, it must be held that the learned sole arbitrator did not have the jurisdiction to entertain the dispute in question.

23. A perusal of the arbitral award goes to show that the appellant did not question the jurisdiction of the arbitrator by taking a plea under section 16(2) of the Act of 1996. In the case of S.B.P. & Co. (Supra) relied upon by Mr. Choudhury, the Supreme Court has observed that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to Arbitral Tribunal, thereby clarifying that once the said aspect of the matter is agitated before the Chief Justice at the stage of appointment of an Arbitrator, the issue cannot be re-opened once again before the Arbitral Tribunal. However, there is nothing in the Act of 1996, which would prevent the appellate Court to examine the question of jurisdiction of the arbitral tribunal even at a subsequent stage, if the said aspect of the matter had not arisen for consideration at any earlier stage of the proceeding. Therefore, in a case like this where the question of jurisdiction was neither agitated before the Chief Justice at the stage of appointment of Arbitrator nor before the Arbitral Tribunal under Section 16(2), the matter, in the opinion of this Court, would remain open for determination even at the appellate stage. Arbitrability of a dispute, being a question of law that would go to the root of the matter, the appellate court exercising jurisdiction under section 37 of the Act of 1996, would not be precluded from examining the validity of the award on the touch stone of arbitrability of the dispute and set aside the award if it is found that the Arbitral Tribunal did not have the jurisdiction to entertain the dispute.

24. For the reasons stated herein above, I am of the view that the arbitral award dated 10/05/2003 deals with a dispute not falling within the terms of submission to arbitration and therefore, the award is liable to be set-aside under section 34 (2) (a) (iv) of the Act of 1996.

In the result, this appeal stands allowed.

The arbitral award dated 10/05/2003 is hereby set aside.

Consequently, the impugned judgment and order dated 29/05/2006 passed by the learned District Judge, Bongaigaon also stands interfered with.

Before parting with the record, it is made clear that the arbitral award dated 10/05/2003 has been set aside only the ground of maintainability of the arbitral proceeding, without making any comment on the merit of the claim of the respondent. As such, notwithstanding this order passed by this court, it would be

open for the respondent to pursue appropriate remedy, as may be permissible under the law, if there is any surviving cause of action in the matter.

There would be no order as to costs.

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