

(2017) 05 DEL CK 0074

In the Delhi High Court

Case No : 29 of 2016

CONTAINER CORPORATION OF INDIA LTD.

APPELLANT

Vs

B GHOSE AND COMPANY

RESPONDENT

Date of Decision : 12-05-2017

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 11](#), [Section 34](#) - Appointment of arbitrators - Application for setting aside arbitral award

Citation : (2017) 05 DEL CK 0074

Hon'ble Judges : Vibhu Bakhru

Bench : SINGLE BENCH

Advocate : Rishi Awasthi, Vishesh Issar, Varun Sharma

Final Decision : Disposed off

Judgement

IA No. 1413/2016

1. Exemption is allowed, subject to all just exceptions.

2. The application is disposed of.

O.M.P. (COMM) 29/2016 and IA No. 1412/2016

3. Container Corporation of India Ltd. (hereafter "CONCOR") has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") to set aside the arbitral award dated 07.10.2015 (hereafter "the impugned award") made by the arbitral tribunal constituted by the sole arbitrator, Justice C. K. Mahajan (Retd.). By the impugned award, the arbitral tribunal has adjudicated the disputes in respect of an Agreement dated 10.11.2003 entered into between the parties,

whereby the respondent agreed to provide cargo handling services at Inland Container Depot (hereafter "ICD"), Tughlakabad, New Delhi.

4. CONCOR is a public sector undertaking, primarily engaged in providing

services and facilities of transport from ICDs to ports by Rail, within the country. CONCOR manages and operates container terminals including ICDs, container freight stations and domestic container terminals, in several parts of the country. The respondent was awarded the contract for "Acting as Contractor for Cargo Handling Operations at Inland Container Depot Tughlakabad for Container Corporation of India Ltd." dated 10.11.2003 (hereafter "the Agreement") pursuant to a tender floated by CONCOR. The initial term of the Agreement was for a period of two years with effect from 10.09.2003, however, the Agreement was extended several times, before it finally expired on 17.08.2011.

5. On 11.04.2007, the Delhi Government issued a notification, prohibiting the employment of contract labour in the work of stuffing and de-stuffing of containers at the premises with effect from 16.04.2007. As a consequence, the aforesaid activity was deleted from the scope of the Agreement.

6. Certain disputes arose between the parties as CONCOR had withheld certain amounts from the payments due to the respondent. The respondent also alleged that CONCOR indulged in discriminatory pricing, failed to revise rates for additional services, etc.

7. This led the respondent to invoke the arbitration clause on 22.02.2012. Thereafter, the respondent filed a petition (Arb. P.139/2012) under Section 11 of the Act in this Court. And, this Court, by an order

dated 16.08.2012, appointed Justice J. M. Malik (Retd.), as the sole arbitrator to adjudicate the disputes between the parties. However, later, by an order dated 29.11.2012, this Court substituted Justice C. K. Mahajan (Retd.) in his place.

8. The respondent filed its statement of claims raising the following claims: Claim no.1 - recovery of Rs.1,32,46,000/- levied as penalty for non- availability of forklifts; Claim no.2 - recovery of Rs.45,38,006/- for deductions made under the Agreement in question for claim in respect of another contract at Rewari (hereafter "the Rewari contract") along with return of bank guarantee and release of security deposit of Rs.15,00,000/- each; Claim no.3 - recovery of Rs.6,84,000/- deducted as legal fee; and Claim no.4 - recovery of Rs.34,65,000/- deducted from the monthly invoices from November 2008 to August 2011.

9. Before the arbitral tribunal, respondent asserted that penalties imposed and the deductions made were illegal and contrary to the terms of the Agreement. Further, there was no provision in the Agreement allowing any deductions to be made if the minimum number of equipment was not procured within the stipulated date for commencing the work. It was further argued that no material was placed that showed that the respondent had violated any labour laws resulting in CONCOR suffering any additional costs or expenses. Similarly, it was contended that the retention of bank guarantee and security deposit as also withholding of amounts on account of claims under the Rewari contract, was also unjustified as no loss had been suffered by CONCOR and its claims relating to the

Rewari contract remained unadjudicated.

10. On the other hand, CONCOR asseverated that it was justified in making deductions as the respondent failed to procure and deploy the minimum equipment, as specified in the Agreement. It further argued that pending clarification on labour law compliance by the respondent, the deduction of Rs.35,70,000/- from the monthly bills was justified. Similarly, in view of pending labour disputes, the security deposit and the bank guarantee were retained. Further, CONCOR contended that it was justified under Clause 10.6 of the Agreement to adjust the amount payable under the Agreement against claims arising under the Rewari contract.

11. Insofar as Claim no.1 - for recovery of Rs.1,32,46,000/- levied as penalty for non-availability of forklifts - was concerned, the arbitral tribunal considered Clause 12 and Clause 21 of the Agreement and noted that the Agreement provided for levy of penalty for "delay in deployment" of minimum equipment beyond 21 days of signing of the Agreement and on not providing the requisite equipment requisitioned by the warehouse in-charge within an hour. It observed that warehouse in-charge can requisition equipment only after the period of 21 days is over. The arbitral tribunal reasoned that the requirement of equipment is not constant and depends upon the volume of containers; therefore, it is only when equipment as determined from time to time by the warehouse in-charge, is not made available on requisition that CONCOR would be entitled to levy penalty.

12. After examining the various letters sent by CONCOR, it was held that as and when there was shortfall in equipment on requisition, penalty was imposed and deducted from the monthly bills; however there was no material to show the loss suffered by CONCOR on account of such non-

availability. There was also no material to show that from 2003 to 2011, minimum equipment was not available for the entire period. Further, no loss was suffered under Clause 12; that is, at the stage for procurement of equipment. As no breach of contract was established and no loss was suffered by CONCOR for non-availability of minimum equipment, the levy of penalty was held as unjustified. Consequently, Claim no.1 was allowed.

13. With regard to Claim no.2, - for recovery of Rs.45,38,006/- on account of deductions made under the Agreement for amount due under the Rewari contract - the arbitral tribunal noted that under the Rewari contract, the respondent did not have the obligation to provide "Reach Stacker"; however, on 18.01.2005, it was directed to provide such equipment by the next day. On failure of the respondent to provide such equipment, CONCOR hired the equipment from a third party. On 08.01.2008, the respondent was informed that Rs. 55,98,006/- would be recovered on account of CONCOR hiring "Reach Stacker" from a third party under the Rewari contract. The arbitral tribunal examined Clause 10.6 of the Agreement, as relied upon by CONCOR, and held that deductions can be made only for damages or expenses paid/incurred by CONCOR. And, since the

issue of damages under the Rewari contract was pending adjudication, the deduction for hiring "Reach Stacker" was held to be not permissible.

14. The retention of security deposit also did not find favour with the arbitral tribunal as it was held that the "amount of security deposit cannot be recovered towards any other claims against which other amounts have been specifically purported to have been recovered" by CONCOR.

Similarly, the bank guarantee was also directed to be returned. In light of the above, Claim no.2 was also allowed.

15. Likewise, Claim no.3 - for recovery of Rs.6,84,000/- deducted as legal fee for litigation commenced by the workers against CONCOR - was also accepted as CONCOR failed to establish that such expenses were incurred for non-compliance of labour laws by the respondent. The workmen had approached the labour court in view of termination of their services pursuant to the notification dated 11.04.2007 issued by the Delhi Government. The arbitral tribunal held that moving the court for redressal of grievances cannot be a basis for making deductions.

16. For similar reasons as above, Claim no.4 - for recovery of Rs.34,65,000/- deducted from the monthly invoices from November 2008 to August 2011 - was also accepted as CONCOR failed to establish that it incurred expenses on behalf of the respondent for the non-compliance of labour laws by the respondent. Further, it was held that mere delay in payment of salary in a particular month would not justify withholding of a substantial amount due and payable to the respondent.

17. In addition to the above, the respondent was also awarded interest at the rate of 12% on the aforesaid amounts from the date of withholding till payment along with costs of Rs.5,00,000/-.

Submissions

18. Mr Rishi Awasthi, learned counsel appearing for CONCOR advanced submissions on three fronts. First, he submitted that the arbitral tribunal had grossly erred in holding that the penalties as envisaged under Clauses 12 and 21 of the Agreement were not separate. He drew the

attention of this Court to the aforementioned clauses of the Agreement and submitted that both Clauses 12 and 21 were independent and penalties chargeable under both the clauses could be imposed concurrently.

19. Next, Mr Awasthi contended that the arbitral tribunal had grossly erred in holding that CONCOR could not deduct any sum from the amounts due to the respondent in respect of another contract (the Rewari contract). He submitted that in terms of Clause 10.6 of the Agreement, CONCOR was entitled to withhold and recover amounts due under any other contract from any amount payable under the Agreement in question.

20. Lastly, Mr Awasthi contended that CONCOR was also entitled to withhold and recover money for any expense incurred in relation to the workmen employed by the respondent. He stated that the workmen of the respondent had instituted cases and CONCOR, being the principal employer, was also arrayed as a party to the proceedings instituted by the workmen. He stated that CONCOR had incurred a sum of Rs.6,84,000/- on account of legal fees and was thus, entitled to recover the same.

21. Mr Vishesh Issar, learned counsel appearing for the respondent countered the aforesaid submissions and submitted that CONCOR had failed to establish that it had incurred any loss and, therefore, was not entitled to recover any amount as damages under Clause 12 or Clause 21 of the Agreement. He relied on the decision of the Supreme Court in *Kailash Nath Associates v. Delhi Development Authority and Anr* : (2015) 4 SCC 136 and the decision of the Division Bench of this Court in *Engineers India Ltd. v. Tema India Ltd* .: 2016 (1) ArbLR 282 (Delhi) in support of his contention that liquidated damages were not payable in cases where no loss was suffered by the party claiming such damages.

22. Insofar as the recovery of amounts due under the Rewari contract is concerned, he submitted that there were serious disputes as to whether the said amounts were payable and the said controversy was pending adjudication in another arbitral proceeding and therefore, no recovery could be made by CONCOR from the amounts admittedly due to the respondent.

Reasoning and Conclusion

23. The first and foremost issue to be addressed is whether the arbitral tribunal had erred in allowing the respondent's claim for the amount of Rs.1,32,46,000/- which was recovered by CONCOR on account of non-availability of equipment. At this stage, it is relevant to refer to the relevant extracts of Clause 12 and Clause 21 of the Agreement, which read as under:-

"12. MINIMUM REQUIREMENT OF PEOPLE AND HANDLING EQUIPMENT. * * * *

12.1.10 The items listed above are the minimum requirements and shall have to be increased suitable by CHO as decided by CONCOR from time to time. CHO should be able to provide at all times, as and when required, additional sufficient number of equipment, trained supervisors, tally clerks and able bodied adult male labourers as demanded by warehouse in-charge of ICD to perform all the works under this contract. 12.2 All equipment should be in good fettle and capable of handling cargo in accordance with relevant standards stipulated for cargo handling. In case of equipments to be owned by the tenderer, the proof of ownership may be enclosed. Alternatively, an undertaking may be given to

procure the requisite number equipments within the period stipulated for starting the work i.e. within 21 days of signing the contract. The tenderer will, however, indicate the sources of finance for procuring the equipment within this time frame. In case of delay in deployment of machinery beyond 21 days a

penalty of Rs.1000/- per equipment per day or part thereof shall be levied. In case of equipment(s) not owned by the tenderer, a letter /Agreement from the owners for the use of such equipment(s) by the tenderer for the duration of this contract shall be enclosed.

* * * *

21. AVAILABILITY OF EQUIPMENTS: Since the business of CONCOR is time sensitive, CONCOR would expect prompt positioning of equipment by the CHO, without any delays. The specified number of equipments should be made available at the terminal at all times as per the instructions of warehouse-in-charge. In case the CHO does not provide the requisite equipment within one hour or requisition by the warehouse-in-charge, the same shall be treated as unsatisfactory performance and the CHO, shall be liable to the fined upto Rs.1000/- on each occasion at the discretion of Chief Manager, ICD."

24. It is apparent from a plain reading of Clause 12 that penalty / damages envisaged therein, amounting to Rs.1,000/- per day, were chargeable in the event the respondent had failed to deploy the machinery required, beyond 21 days of signing of the Agreement. In terms of the Agreement, the respondent was required to procure the minimum machinery and equipment as specified in the Agreement within a period of 21 days and failure to do so would invite penalty as contemplated under Clause 12 of the Agreement. The respondent's obligation to procure and deploy machinery - failure of which is to be visited with penalty under Clause 12 of the Agreement - is materially different from the breach of

obligation as contemplated under Clause 21 of the Agreement. Clause 21 of the Agreement concerns the non-availability of equipment at the time when it is required. Thus, in the event, the respondent was unable to position the equipment within one hour of the same being requisitioned by the warehouse in-charge, the same was to be visited with fine of Rs.1,000/- for each such occasion.

25. It is apparent that Clause 21 would operate only in respect of the equipment that had been procured by the respondent and yet was not available when requisitioned. It is a matter of some controversy whether any penalty under Clause 21 could be imposed in respect of equipment that was not procured within a period of 21 days of signing of the Agreement as in that case, the question of the machinery being available within one hour of the same being requisitioned would not arise. In that case, prima facie, the penalty would be leviable under Clause 12 of the Agreement and not under Clause 21. There may be a situation where an operator fails to procure the minimum number of machines / equipment within the period of 21 days as envisaged under Clause 12 and in addition, also fails to make available the equipment that he has procured and deployed, within one hour of the warehouse in-charge requisitioning the same. In such circumstances, it may be possible to contend that the operator would be liable for penalty both under Clause 12 as well as under Clause 21 of the

Agreement; under Clause 12 for not procuring the requisite number of equipment and under Clause 21 for not promptly positioning the equipment procured by it. In this view, there may be some merit in the contention that penalties under Clauses 12 and 21 of the Agreement could be imposed concurrently. However, this is not the case set up by CONCOR.

26. In the facts of this case, CONCOR had imposed penalty on the respondent under Clause 21 for not promptly positioning the equipment as and when required and had recovered the same. This could obviously be done only if the equipment had been procured by the respondent. Prima facie, the respondent could not be visited with penalty for not procuring the equipment and not positioning the same when required.

27. The arbitral tribunal found that CONCOR was not making any distinction between the procurement and deployment of machinery as considered under Clause 12 of the Agreement and not promptly making available the equipment under Clause 21 of the Agreement. Admittedly, CONCOR had not imposed penalty under Clause 12 of the Agreement at the commencement of the Agreement but had sought to impose such penalty subsequently for the period 2003-2011. The arbitral tribunal also noted that in various letters sent by CONCOR, it had imposed penalty for non-availability of equipment under Clause 21 of the Agreement and had deducted the same from the monthly bills.

28. The arbitral tribunal found that there was no material on record to show that from 2003 to 2011, minimum equipment was not available for the entire period although there were some instances of inspection reports to show non-availability of equipment under Clause 12. In addition, the arbitral tribunal also found that CONCOR was unable to establish that it had suffered any loss in case of non-deployment of the minimum number of equipment specified.

29. The aforesaid conclusions arrived at by the arbitral tribunal do not warrant any interference in these proceedings. It is not disputed that CONCOR had not placed any material on record to establish that it had

suffered any loss on account of any alleged failure on the part of the respondent to procure the minimum number of machinery/equipment. More importantly, there is also no pleading on record to the effect that (a) it was not possible for CONCOR to quantify such damages and/or (b) that such damages are a reasonable estimation of the damages suffered by CONCOR. In the circumstances, this Court is not persuaded to accept that the impugned award inasmuch as it allows Claim no.1 is perverse or patently illegal.

30. The next issue to be addressed is whether the arbitral tribunal had erred in awarding a sum of Rs.45,38,006/- recovered by CONCOR on account of amount due under the Rewari contract. There is much merit in the contention of the learned counsel for CONCOR that the arbitral tribunal had proceeded to return findings in relation to disputes that have arisen in the Rewari contract, which is a subject matter of another arbitration. The arbitral tribunal has come to an

affirmative finding that the respondent did not have any obligation to provide "Reach Stacker" under the Rewari contract. If the said finding is sustained, CONCOR's case in the arbitration proceedings relating to the Rewari contract would fail. In this view, it would be essential to clarify that the impugned award would not preclude any of the parties from agitating their respective claims/contentions in the arbitration proceedings relating to the Rewari contract.

31. Having stated the above, this Court does not find that any interference is warranted with the conclusion of the arbitral tribunal that CONCOR was not entitled to recover any sum from the amounts due to the respondent on account of the claim in relation to the Rewari contract.

Clause 10.6 of the Agreement, which is relied upon by CONCOR, reads as under:-

" 10.6 All costs, damages or expenses which CONCOR may have paid/incurred for which, under the contract, the CHO is liable, may be deducted by CONCOR from any money due or becoming due to him. CONCOR reserves the right and is at liberty to retain the security or any payment due to CHO under the contract or any other contract to set off against any such claims whether arising out of this contract or part of any other transaction/claim against the CHO."

32. The arbitral tribunal had considered the import of the aforesaid clause and concluded as under:-

"According to clause 10.6 the claim in relation to a different contract can only be made to the extent of costs, damages or expenses "paid/incurred" by the respondent. Thus deduction can only be made towards actual amounts recoverable under such other contract. The issue of damages is pending adjudication before an Arbitrator in Rewari."

33. The aforesaid view is a plausible interpretation of Clause 10.6 of the Agreement. Given the limited scope of judicial review under Section 34 of the Act, this Court finds no cause to interfere with the aforesaid conclusion.

34. The contention that CONCOR is entitled to recover legal expenses from the amounts due to the respondent is plainly unsustainable. In terms of Clause 11.2 of the Agreement, the respondent had agreed to indemnify CONCOR against all payments, claims and liabilities arising out of or for compliances with or enforcement of the provisions of any labour laws. Plainly this does not imply to include legal expenditure incurred by CONCOR for defending any proceedings initiated against it merely on the ground that such proceedings had been initiated by respondent's workmen.

The arbitral tribunal had noted that CONCOR had failed to establish that there was any non-compliance of labour laws by the respondent, therefore, no amount on account of legal expenses was recoverable from the respondent. There is yet another reason why CONCOR cannot be permitted to agitate this issue in this Court; the counsel for CONCOR had conceded before the arbitral tribunal that there was no material to justify the deduction. In absence of any material or

evidence on record to justify the deduction, no such amount would be withheld. Thus, this Court finds no infirmity with the decision of the arbitral tribunal to award the claim in favour of the respondent.

35. In view of the above, the present petition is dismissed with the clarification that any observation made by the arbitral tribunal in the impugned award will not preclude any of the parties from pursuing their respective claims/ counter claims and from urging such contentions as may be advised in the arbitral proceedings pending between the parties in relation to the Rewari contract.

36. All pending applications stand disposed of. The parties are left to bear their own costs.