
(2014) 06 MAD CK 0140
In the Madras High Court
Case No : O.P. No. 348 of 2013

Ennore Port Limited

APPELLANT

Vs

Haskoning B.V.

RESPONDENT

Date of Decision : 02-06-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 21, 33, 34
Contract Act, 1872 — Section 70

Citation : (2015) 2 ARBLR 196 : (2014) 5 MLJ 518

Hon'ble Judges : R. Sudhakar, J

Bench : Single Bench

Judgement

R. Sudhakar, J.—This Original Petition is filed u/s 34 of the Arbitration and Conciliation Act, 1996 (for brevity, the Act) to set aside the award dated 11.3.2009 passed by respondents 2 to 4 (Arbitrators).

2.1. The brief facts of the case are as under: The Government of India proposed to establish a Port for transportation of coal to the North Chennai Thermal Power Plant. The fifth respondent herein, namely, Chennai Port Trust, which was appointed by the Government of India as the Executing Agency for construction of Ennore Port, entered into Consultancy Agreement with the first respondent on 17.8.1994 and the agreement period is 54 months, namely, up to May, 1999.

2.2. The first respondent did not complete the project within the agreed time. Even prior to the expiry of the agreement period, the first respondent sought for extension of the agreement. Notes on Discussion (NOD) was entered on 09.7.1999. The Chennai Port Trust, after obtaining approval of the Government of India for the terms of NOD, forwarded Addendum 1 to the first respondent. But, the first respondent did not accept the same and initiated recovery proceedings against the Chennai Port Trust, for the alleged due towards the services rendered, namely, NLG 35,83,600.20; US\$ 1,61,429.56 and Rs. 11,90,67,590.16 together with interest.

2.3. By virtue of a Memorandum of Understanding dated 30.3.2002, all the

assets and liabilities, including contracts entered into by the Chennai Port Trust in respect of Ennore Port Project, stood transferred in favour of the petitioner, namely, Ennore Port Limited, which is a company in which the Government of India and Chennai Port Trust are the shareholders.

2.4. The petitioner made a counter claim in the arbitral proceedings for recovery of a sum of Rs. 50,39,79,779.49/- and US\$ 25,445 on account of loss and damages suffered due to the gross negligence and deficiency in the services rendered by the first respondent. Later, the counter claim was revised to Rs. 31,97,49,490.70 and US\$ 25,445 together with interest at 18% per annum.

2.5. The Arbitral Tribunal passed an award on 11.3.2009 directing the petitioner to pay a sum of Rs. 34,47,736.33, US\$ 1,61,429.56 and Rs. 7,52,20,489.56 together with interest at 12% per annum from 20.5.2002, while rejecting the counter claim of the petitioner. Thereafter, the Tribunal passed an order u/s 33 of the Act on 27.4.2009, correcting the award of Rs. 7,52,20,489.56 to Rs. 7,85,76,167.12.

2.6. Aggrieved by the said award, the petitioner has come up with this original petition for the relief stated supra.

3. I have heard Mr. K. Manoj Menon, learned counsel for the petitioner, Mr. R. Senthil Kumar, learned counsel for the first respondent and Mr. Krishna Ravindran, learned counsel for the fifth respondent.

4. The learned counsel for the fifth respondent has filed a Memo dated 2.6.2014 to the following effect:

MEMO FILED ON BEHALF OF THE 5th RESPONDENT

The 5th Respondent submits as follows:-

The 5th Respondent states that as per the Memorandum of Understanding dated 30.3.2002 entered into between M/s. Ennore Port Limited, the Petitioner herein and M/s. Chennai Port Trust, the 5th Respondent herein, all the assets and liabilities of the 5th Respondent was transferred to the Petitioner in respect of the Petitioner Port. From that date onwards, the Petitioner becomes the independent entity and the successor of the 5th Respondent in respect of Petitioner Port.

In view of the same, the 5th Respondent is only a formal party and it may be relieved from the above proceedings and thus render justice.

Dated at Chennai this the 2nd day of June 2014.

And pleaded that the fifth respondent is not a necessary party to this proceedings.

5. The learned counsel for the petitioner as well as the first respondent are not disputing the fact that by dint of the Memorandum of Understanding dated 30.3.2002, all the assets and liabilities, including contracts entered into by the Chennai Port Trust in respect of Ennore Port Project, stood transferred in favour

of the petitioner herein.

6. In view of the above, the fifth respondent is not a necessary party to the present proceedings and the memo dated 2.6.2014 filed by the fifth respondent is recorded.

7. The issues that arise for consideration in this original petition are dealt with on the trot as under.

LIMITATION

8.1. The first issue raised by the petitioner is that the claim of the first respondent under invoices dated 27.1.1998 (Ex. A30) and 9.2.1998 (Ex. A31) is barred by limitation and there is no acknowledgment of liability with regard to the said invoices.

8.2. The said claim was made by the first respondent based on invoices dated 27.1.1998 (Ex. A30) and 9.2.1998 (Ex. A31). It is the case of the petitioner that notice u/s 21 of the Act invoking arbitration clause was issued by the first respondent on 12.2.2002 (Ex. A27), which is beyond the period of three years and, therefore, the award insofar as Paragraphs 80 to 83 dealing with claim under Exs. A30 and A31 has to be set aside.

8.3. Apparently, on the face of the records, there is a clear indication that the notice u/s 21 of the Act was issued on 12.2.2002 (Ex. A27), which is far beyond the period of three years from the invoices dated 27.1.1998 (Ex. A30) and 9.2.1998 (Ex. A31). The learned counsel for the first respondent also does not dispute the fact that the said claim was barred by limitation.

8.4. In view of the above, that portion of the award relating to Basin Tranquility Studies and Fast Time Simulation, covered by Exs. A30 and A31, which is referable to paragraphs 80 to 83 of the award, stands set aside.

AIR TRAVEL REIMBURSEMENT

9.1. The second issue that arises for consideration is the claim of the first respondent with regard to air travel reimbursement based on invoices marked as Ex. A75 and Ex. A77.

9.2. The Arbitral Tribunal after considering the invoices marked by the first respondent allowed the claim made by the first respondent based on the said invoices.

9.3. The learned counsel for the petitioner submits that travel made by the first respondent was with regard to work unconnected with the services to be rendered under the agreement and, therefore, the Arbitral Tribunal erred in allowing the claim under the invoices marked as Exs. A75 and A77. In this regard, the learned counsel also placed reliance on Clause 3.03(c)(3)(i) & (ii) of the agreement (Ex. A1).

9.4. A plain reading of the Clause 3.03(c)(3) of the agreement reveals that it is

with regard to reimbursement of actual cost of transportation to consultants, who are not residents of India, and are visiting India for the purpose of executing the contract and it is not relating to domestic air travel. Therefore, the first respondent is not entitled to claim air travel reimbursement based on Exs. A75 and A77.

9.5. In view of the above, that portion of the award relating to air travel reimbursement, covered by Exs. A75 and A77, which is referable to paragraphs 139, 140 and 144 to 146 of the award, is set aside.

ESCALATION COSTS

10.1. The third issue pertains to the claim of the first respondent for escalation costs under invoices marked as Exs. A135 and A136, which was allowed by the Arbitral Tribunal.

10.2. In the case on hand, the period of agreement was from 17.8.1994 to May, 1999. However, for certain reasons agreeable to both parties, the consultancy work was extended beyond the agreement period of May, 1999 and it went on up to March, 2001. It is beyond any cavil that the petitioner in this case utilized the services of the first respondent for completion of the project, for which a claim was made before the Arbitral Tribunal in terms of Section 70 of the Indian Contract Act, 1872.

10.3. In respect of this claim, the Tribunal, by applying the principle of quantum meruit (as much as is deserved), granted escalation as claimed by the first respondent under invoices marked as Ex. A135 and A136.

10.4. The learned counsel for the petitioner objects the said portion of the award granting escalation costs by stating that escalation of costs can be granted only for the agreement period and not beyond.

10.5. Section 70 of the Indian Contract Act, 1872, which reads as under:

Section 70: Obligation of person enjoying benefit of non-gratuitous act:

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Provides for compensation for the services rendered. It does not speak about escalation. Nevertheless, the escalation clause is contained in the agreement (Ex. A1) and the agreement period expires in May, 1999. Therefore, escalation costs cannot be granted for the period post the contract.

10.6. On this plea, the learned counsel for the first respondent has no serious dispute in setting aside the award insofar as escalation costs is concerned granted based on the principle of quantum meruit.

10.7. In view of the above, the portion of the award relating to escalation costs,

covered by Exs. A135 and A136, which is referable to paragraphs 195 to 202 of the award, is set aside.

INTEREST

11.1. The next issue pertains to the awarding of interest at the rate of 12% per annum on the entire amount due and payable in terms of the award.

11.2. The Tribunal has granted interest at the rate of 12% per annum from the date of filing of the claim statement till realization and the same is objected to by the petitioner by stating that the rate of interest awarded is on the higher side.

11.3. On the contrary, the learned counsel for the first respondent is agreeable to modification of the rate of interest to 6% per annum for foreign currencies, namely, Dutch Guilders (NLG) and US Dollars (US\$), and at 9% per annum for Indian Rupees.

11.4. It was also brought to the notice of this Court that after the award was passed by the Arbitral Tribunal, a negotiation meeting was convened between the petitioner and the first respondent and the relevant portion of the minutes of the negotiation meeting reads as under:

At the outset, Director (O) explained to members of M/s. Haskoning recalling the discussion made on 04.06.2009 in which EPL was in disagreement with the following invoices and with respect to rate of interest as given in the Arbitral Award.

Exhibit No.

Amount

(i)A-30 & A-31

NLG 77903.85

(ii)A 75

INR 77662.00

(iii)A 77

INR 154038.40

(iv)A 135

INR 38566109.40

(v) A 136

INR 12129383.00

After, carefully examining the views of EPL, M/s. Haskoning decided to give a discount by equivalent value of to the above invoices.

After detailed deliberations, the following further decisions are mutually agreed to:

1. Payments will be made in relevant currencies as per the award.
2. Simple interest for the Forex component will be paid from 20.05.2002 to till the date of payment @ 6 % per annum.
3. Simple interest for the INR component will be paid from 20.05.2002 to till the date of payment @ 9% per annum.
4. Deductions of Rs. 5.82 lakhs from INR amount payable towards Award of Haskoning I.
5. Finally agreed amount payable against the award is given in Annexure A.
6. Payment will be effected by EPL within 2 months from today (i.e., 03.07.2009) subject to approval of the Board.
7. Statutory deductions shall be in line with what has been agreed in the main contract.
8. EPL shall arrange for all statutory approvals from Indian authorities for payment of the amounts including foreign currency remittances.
- 11.5. In view of the Minutes of the Negotiation Meeting dated 3.7.2009 and the stand taken by the learned counsel for the first respondent, the rate of interest awarded by the Arbitral Tribunal is modified to the effect that for foreign currencies, namely, Dutch Guilders (NLG) and US Dollars (US\$), the rate of interest applicable will be 6% per annum and for Indian Rupees (INR) the rate of interest applicable will be 9% per annum.
12. All other grounds raised in the original petition are not seriously pressed by the learned counsel for the petitioner and accordingly, they are rejected.
13. This Original Petition is ordered in the above terms. In all other respects, the award passed by the Arbitral Tribunal shall hold good. No costs.