
(2014) 12 SHI CK 0151
In the High Court Of Himachal Pradesh
Case No : Arb. Case No. 50 of 2007

Himachal Pradesh State Electricity Board	APPELLANT
Vs	
Madan Lal Gulati	RESPONDENT

Date of Decision : 19-12-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31, 34, 34(2)
Limitation Act, 1963 — Section 11, 21, 3(2)(b), 5

Citation : (2014) 12 SHI CK 0151

Hon'ble Judges : Dharam Chand Chaudhary, J

Bench : Single Bench

Advocate : J.S. Bhogal, Senior Advocate and Suneet Goel, Advocate for the Appellant; Y.P.S. Dhaulta, Advocate for the Respondent

Judgement

Dharam Chand Chaudhary, J.

1. Petitioner is a Board constituted under the Electricity (Supply) Act 1948. The petitioner-Board had taken in hand the construction work of Thiroth Hydel Project. The construction of underground work comprising of Head Race Tunnel and Desilting Chambers was awarded to the respondent-Contractor for a sum of Rs. 1.15 crores by the Executive Engineer, Thiroth, Division No. 1 vide letter dated 21.11.1989. An agreement was entered upon between the petitioner and the respondent-Contractor. The agreed date for completion of the work was 31.08.1991. The respondent-Contractor, however, failed to complete the work well within the time as agreed upon. The contract, therefore, was rescinded on 23.03.1992 with the stipulation to get the same completed by the petitioner-Board at the risk and cost of the respondent. The work could only be completed in the month of June, 1996.

2. The respondent-Contractor served the petitioner-Board with a legal notice dated 16.10.1998 calling upon thereby to appoint an Arbitrator for adjudication of the dispute having arisen in relation to the agreement. The Arbitrator came to be appointed on 09.09.1999.

3. The petitioner-Board preferred the claims against the respondent-Contractor well within the period of limitation in the month of June, 1999 i.e. well within three years of the date of completion of work i.e. June, 1996. The respondent, however, filed reply to the claims of the petitioner-Board and also the counter-claims on 26.08.2002 allegedly beyond the period of limitation. The Arbitrator announced the award on 07.09.2007 and thereby while awarding a sum of Rs. 12,00,000/- along with interest @ 15% in favour of the petitioner-Board at the same time awarded a sum of Rs. 21,63,850/- along with interest @ 15% in favour of the respondent-Contractor.

4. The petitioner-Board aggrieved by the award has questioned the legality and validity thereof on the grounds inter-alia that the same being non-speaking award having no reasons, as required under Section 31 of the Arbitration and Conciliation Act, 1996 recorded by the Arbitrator is against the public policy of India. Also that, the counter-claims being time barred have been erroneously entertained and the aspect of limitation has not been considered. The amount under the counter-claims has been awarded without there being any evidence available on record and rather the Arbitrator travelled beyond the terms of the agreement, while making the award in favour of the respondent-Contractor. On the other hand, claim to the tune of Rs. 39,12,870/- of the petitioner-Board has not been considered in the light of the evidence available on record and only a paltry amount i.e. Rs. 12,00,000/- has been awarded out of the same.

5. The respondent-Contractor in preliminary submissions has urged that no ground in terms of Section 34(2) of the Act is made out for setting aside the impugned award and also that the objection not filed by the authorized person, the same is not maintainable. The petition is also claimed to be time barred. On merits, while supporting the award, it has been submitted that he preferred the counter-claims well within the period of limitation. It is specifically pointed out that the petitioner-Board raised objections qua the counter-claims time barred only after 17 hearings having taken place in the matter before the learned Arbitrator. It is also denied that he failed to complete the work within the stipulated period. It is rather the petitioner-Board stated to have erroneously rescinded the contract.

6. In rejoinder, the petitioner-Board has denied the contents of the preliminary submissions being wrong. On merits, while reiterating the contents of the petition denied the contentions to the contrary in the reply being wrong.

7. On the pleadings of the parties, following issues were framed on 28.07.2008:

i) Whether the award dated 7.9.2007 is against the Public Policy of India ? If so, its effect? OPO

ii) Relief."

8. The parties though initially opted for producing evidence by way of affidavits, however, on 29.09.2008 intended to argue the matter on the basis of record of

the Arbitrator, as find recorded in the order passed on that day.

9. It is seen that a Co-ordinate Bench of this Court dismissed the petition and also the counter-claims vide judgment dated 6th May, 2009. The matter on being taken to a Division Bench by way of Arbitration Appeal No. 7/09 was remanded to learned Single Judge for fresh disposal after taking on record reply to the petition on behalf of respondent-Contractor, as it was not filed earlier, though rejoinder thereto was on record. Now, reply stands taken on record as discussed supra.

10. Mr. J.S. Bhogal, learned Senior Advocate has mainly emphasized on the point of limitation and has canvassed that counter-claims, the respondent-Contractor preferred being hopelessly time barred have erroneously been entertained and the amount so claimed by the respondent-Contractor by way of counter-claim awarded wrongly. On merits also, it has been urged that award without there being any reason, is non-speaking hence perverse and not legally sustainable. According to Mr. Bhogal, claims to the tune of Rs. 39,12,870/- having been preferred by the petitioner-Board well within the period of limitation should have been awarded as a whole. The Arbitrator without recording any cogent and plausible reason has erroneously reduced the same and awarded only a sum of Rs. 12,00,000/- against the claim of the petitioner-Board.

11. On the other hand, Mr. Y.P.S. Dhaulta, learned counsel representing the respondent-Contractor has urged that the impugned award to the extent of allowing counterclaims is absolutely legal and valid, hence calls for no interference by this Court under Section 34 of the Act. The claims preferred by the petitioner-Board allegedly being time barred should have not been entertained nor any amount awarded. The award to the extent of allowing the claims preferred by the petitioner-Board partly has been sought to be quashed.

12. It is seen from the record that the Arbitrator on the basis of the claims and counter-claims preferred by the parties on both sides before him has framed the following issues:

"1. Issue No. 1-Whether the claim filed by the claimant is within time limit.

2. Issue No. 2-Whether the counter claim filed by the Respondent is within time limit.

3. Issue No. 3-Whether there has been a breach of contract by the Respondent.

4. Issue No. 4-Whether the Claim of the Claimant is justified.

5. Issue No. 5-Whether the counter claim of the Respondent is justified."

13. Issue Nos. 1 and 3 have been answered in favour of the petitioner-Board. Issue No. 4 has also been answered in favour of the Board, however, partly as only Rs. 12,00,000/- has been awarded against the claim of the Board to the tune of Rs. 39,12,870/-. Issue No. 2 has been answered in favour of the respondent-Contractor. Issue No. 5 has also been answered in favour of the

respondent-Contractor, however, partly because against the claim of Rs. 1,99,41,497/-, he claimed by way of counter-claims, only a sum of Rs. 21,63,850/- has been awarded to him.

14. Now the question arise that the claim/counterclaim constitutes disputes within the meaning of Clause 25 of the contract agreement, which reads as follows:

"Clause 25-SETTLEMENT OF DISPUTES BY ARBITRATION"

"Except where otherwise provided in the contract, all questions and disputes relating to the meaning and interpretation of the terms of contract, specifications, design, drawings and instructions herein before mentioned and as the quality of workmanship or material used in the work or as to any other question, claim, right matter, or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion of abandonment thereof of the contract, shall be referred to a Sole Arbitrator who will be appointed by HPSEB.

It will be no objection to any such appointment that the Arbitrator, so appointed, is Govt./Board servant, that he had to deal with matters to which the contract relates to and that in the course of his duties as Govt./Board servant, he had expressed views on all or any of the matters in dispute or difference. In case the Arbitrator to whom dispute/difference so referred is unable to function as such for any reason whatsoever or his Award being set aside by the Court for any other reasons, another Arbitrator shall be appointed in the same manner as indicated above. Such person shall be appointed to proceed with the references from the stage at which it had been left by his predecessor or to conduct the proceedings afresh as he may deem fit or as the case may be. It is also a terms of the contract that the party invoking Arbitration shall specify the dispute(s) to be referred to the arbitration under this Clause together with the amount(s) claimed in respect to each dispute. If work under the contract has not been completed when a dispute on any matter whatsoever is referred to arbitration, the contractor shall not be entitled to suspend such work to which the dispute relates and payment to the contractor shall be continued to be made in terms of the contract.

It is also a terms of the contract that if the contractor(s) does not prefer any claim, in writing within 90 (ninety) days of the date on which the dispute first arises or date of limitation of the preparation of the bill, thereof, whichever is earlier, the claim(s) of the contractor will be deemed to have been waived and absolutely barred and the HPSEB shall be discharged and released of all the liabilities under the contract in respect of such claim(s). Likewise all dispute(s) referred to above shall be preferred as provided above within 90(90) days of the final bill otherwise all claim(s) shall stand extinguished. Provided, in the event of

rejection of contractor's claim(s), the contractor within 80 days after receiving limitation in writing of such decision shall give notice in writing to the Chief Engineer, requesting him that the matter be referred to the arbitration.

In all cases referred for arbitration, the Arbitrator/Umpire shall assign reasons under all circumstances on which his decision is based. The Arbitrator/Umpire from time to time, with the consent of the parties enlarge time for making/publishing the Award. The decision of the Arbitration/Umpire as the case may be, shall be conclusive, final and binding on the parties.

Subject to the provisions of the contract on the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force, shall apply to all arbitration proceedings under this Clause. All disputes regarding the contract shall be subject to the jurisdiction of Shimla Courts alone irrespective of place, execution and performance of contract and delivery & payment whatsoever etc. etc."

15. The present is a case where on account of non completion of work within the stipulated period, the petitioner-Board has rescinded the contract on 23.03.1992 and resorted to the course of action provided under Clause 3 of the contract agreement and arranged to execute the remaining work at the risk and cost of the respondent-Contractor. Clause 3 of the agreement, reads as follows:

"Clause 3-DETERMINATION OF CONTRACT"

Chief Engineer, may without prejudice to Board's right in respect of any delay or inferior workmanship or otherwise or to any claim for damage in respect of any right or remedies under this contract or otherwise and irrespective of the fact whether the date of completion has or has not elapsed by notice in writing, absolutely determine the contract in any of the following cases:

1(i). If the contractor, having been given by the Engineer-in-Charge a notice in writing to rectify, reconstruct or replace any defective work or that the work/or part of work is being performed in an inefficient manner or otherwise improper or unworkman like manner, fails to comply with the requirement of such notice within a period of seven days thereafter or if the contractor shall delay or suspend the execution of the work or part of the work so that either in the judgment of the Chief Engineer(which shall be final and binding) the contractor will be unable to secure completion of the work by the date for completion or the contract has already failed to complete the work by that date.

2(ii). If the contractor being company shall pass a resolution or the court shall make an order that the company shall be wound up or if a receiver or a manager on behalf of creditor shall be appointed or if circumstances shall arise which entitle the court or creditor to appoint a receiver or a manager or which entitle the court to make a winding up order.

3(iii). If the contractor commits breach of any of the terms and conditions of this

contract.

4(iv). If the contractor commits any acts mentioned in Clause-21 hereof.

When the contractor has made himself liable for action under any of the cases aforesaid, the Chief Engineer, on behalf of the Board shall have powers:

a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contractor under the hand of the Chief Engineer, shall be conclusive evidence). Upon such determination or rescission, the security deposit of the contractor shall be liable to be forfeited and shall be absolutely at the disposal of HPSEB.

b) To execute the work departmentally and debit the cost (cost as certified by the Engineer-in-Charge shall be final and conclusive against the contractor) of such execution to the contractor and credit him with the value of the work done in all respects in the same manner and at the same rates as if it had been carried out by the contractor under the terms of his contract. The certificate of the Engineer-in-charge as to the value of the work done shall be final and conclusive against the contractor, provided always that action under the sub-clause shall only be taken after giving notice in writing to the contractor, provided also that if the expense incurred by the department are less than the amount payable to the contractor at contracted rates, the difference should not be paid to the contractor and if the expenses incurred by the department are more than the amount payable to the contractor at contracted rates, the difference shall be paid by the contractor.

c) After giving notice to the contractor to measure up the work executed by him and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to original contractor, if the whole work had been executed by him (of the amount of which excess the certificate in writing of the Engineer-in-charge shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by the Board under this contract or any other amount whatsoever or from his security deposit or the proceeds of Sales thereof or sufficient part thereof as the case may be.

d) To take any part of the work out of contractor's hands which in the opinion of Engineer-in-charge is not being carried out by the contractor with required diligence and efficiency and to execute it departmentally or through other agency at the risk and cost of the contractor.

In the event of any one or more of the above courses being adopted by the Engineer-in-charge, the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered upon into any engagements or made any advances on account or with a view to the execution of the work or the performance of

contract. And in case, action is taken under any of the provisions aforesaid, the contractor shall not be entitled to recover or be paid any sum for any work thereto or actually performed under this contract unless and until the Engineer-in-charge has certified in writing the performance of such work and the value payable in respect thereof and he shall be only be entitled to be paid the value so certified."

16. It is seen that the delay in execution of the work or completion of the work within the stipulated period extends a right in favour of the Board to rescind the contract under intimation in writing to the Contractor. The Board was also competent to execute the remaining work at the cost of the contractor by crediting him with the value of the work so executed in such a manner and at the rate, as if such work has been executed by the Contractor himself under the terms of the contract. Such course of action can only be resorted to after giving notice in writing to the Contractor.

17. Clause 3 of the agreement is self-speaking and provides for the determination of the contract on account of breach of any terms and conditions including qua completion of the work within the stipulated period. This Clause further provides for procedure to be followed to execute the remaining work at the cost of the Contractor to his notice and knowledge and the costs of the work so executed as it is the liability of the Contractor to bear the costs of the work so executed as per the bill(s) to be prepared by the Engineer Incharge.

18. Therefore, rescission of the contract and execution of the remaining work by the petitioner-Board at the risk and costs of the Contractor being not a dispute within the meaning of Clause 25, the petitioner-Board should have neither sought the appointment of an Arbitrator nor Arbitrator so appointed had any jurisdiction to entertain or adjudicate the same. As a matter of fact, Clause 3 of the contract agreement is non arbitral. The amount of Rs. 39,12,870/- has been determined by the Board under Clause 3 of the contract, as discussed supra. There was no need for the Board to have invoked arbitration Clause i.e. Clause No. 25 of the contract agreement. The Arbitrator had also no jurisdiction to arbitrate and adjudicate the same. The claim petition itself was misconceived and the costs of the remaining work, the Board executed should have been adjusted against the security deposits made by the Contractor or against his outstanding bill(s), if any, or by resorting to any other and further remedy available to it to recover the same. As a matter of fact, the petitioner-Board has already resorted to such remedy by filing Civil Suit No. 77 of 2009 in this Court, after the judgment dated 6th May, 2009 in this petition initially, as stated by Mr. Suneet Goel, Advocate, learned counsel for the petitioner-Board. Any how, in my considered view, the Arbitrator has exceeded the jurisdiction and erred in entertaining as well as adjudicating the claims preferred by the petitioner-Board.

19. If coming to the counter-claims, the respondent-Contractor preferred though, the same could have been entertained and adjudicated by the Arbitrator under Clause 25 of the contract agreement, however, if preferred within 90 days from

the date of dispute having arisen. Admittedly, the contract was rescinded on 23.03.1992 by the petitioner-Board on the ground of non-completion of work within the stipulated period. The respondent-Contractor, however, claims that he is not responsible for non-completion of the work within the stipulated period and rather it is the petitioner-Board responsible for the same and to the contrary the contract has been rescinded in an arbitrary manner. The Contractor should have raised all such questions in accordance with the agreed terms and conditions i.e. by issuance of notice for appointment of Arbitrator and preferring his claims well within the period of limitation. He, however, never served the Board with any notice for appointment of Arbitrator nor ever preferred his claims, if any. It is rather the petitioner-Board sought the appointment of Arbitrator in June, 1999 after the completion of the left out work in the month of June, 1996. The determination of the contract agreement on account of breach of contract and the payment of the cost of the left out work is a matter not covered under Clause 25 of the contract agreement. It is rather entitlement of the petitioner-Board to recover the costs of such work, of course, subject to compliance of the procedure prescribed under Clause 3 supra. The limitation for filing a suit for recovery of money is three years. The petitioner-Board, therefore, could have recovered the amount, if any, left out after adjustment of the security deposits or against the pending bill(s), if any, of the Contractor by way of resorting to the remedy available to it in accordance with law. The respondent-Contractor did not approach the competent authority for appointment of the Arbitrator nor ever lodged his claims within 90 days as prescribed under Clause 25 of the contract agreement. He, rather preferred counter-claims on 28.06.2002 viz. even much after the appointment of Arbitrator and his having entered upon the reference, because first hearing before the Arbitrator did take place on 22.10.2001.

20. Surprisingly enough, the respondent-Contractor even not sought the condonation of delay as occurred in filing the counter-claims within the meaning of Section 5 of the Limitation Act. It is significant to note that in terms of Clause 25 of the contract agreement, any disputes having arisen in relation to the terms of contract, specifications, design, drawings and instructions of the work to be executed under the agreement, the aggrieved party has to seek the appointment of an Arbitrator to refer such dispute(s) for adjudication within a period of 90 days from the day such dispute(s) having arisen.

21. In the case in hand, the contract was rescinded on 23.03.1992. Therefore, had there been any dispute or claims of the respondent-Contractor against the petitioner-Board, he should have approached the competent authority for appointment of the Arbitrator within the period of 90 days from the date thereof and also preferred his claims. He has neither sought the appointment of Arbitrator nor preferred his claims till 28.06.2002. The counter-claims, he preferred, therefore, are definitely beyond the period of limitation. The apex Court in *Voltas Limited Vs. Rolta India Limited*, has supplied emphasis on the law laid down in *State of Goa Vs. Praveen Enterprises*, , which reads as follows:

"23. Thereafter, addressing the issue pertaining to counterclaims, the Court observed as follows: (Praveen Enterprises case, SCC pp. 590-91, para 20)

"20. As far as counterclaims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of the Limitation Act, 1963 provides that in regard to a counterclaim in suits, the date on which the counterclaim is made in court shall be deemed to be the date of institution of the counterclaim. As the Limitation Act, 1963 is made application to arbitrations, in the case of a counterclaim by a respondent in an arbitral proceeding, the date on which the counterclaim is made before the arbitrator will be the date of "institution" insofar as counterclaim is concerned. There is, therefore, no need to provide a date of "commencement" as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counterclaims. There is however an exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counterclaim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the Act, the limitation for such counterclaim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counterclaim."

(Emphasis supplied)

22. Applying the principle settled in Parveen Enterprises's case supra and applying the same to the given facts and circumstances in the case before it the apex Court has observed that in a case of counter-claims by a respondent in arbitral proceedings, the date on which the counter-claim is made before the Arbitrator will be the date of institution of the counter-claims and the respondent can wriggle out from the rigor of the limitation, only if he had also made a claim against the claimant and sought arbitration by serving a notice to the claimant. In the case before the apex Court, the appellant (respondent in the Court below) had also raised the counterclaims and sought arbitration by expressing its intention on number of occasions. It is in that backdrop the counterclaims in that case were held to be within the period of limitation. In the case in hand, however, as noticed supra, the respondent-Contractor never preferred the claims nor made any request for appointment of Arbitrator and rather preferred the counterclaims much after the arbitration proceedings commenced on the request made by the petitioner-Board. The counterclaims, therefore, without there being any reasons for condonation of delay should have not been entertained, what to speak of adjudication thereof. The Arbitrator while deciding issue No. 2 has held as follows:

"Issue No. 2: Counterclaim of the Respondent is admissible in view of the permission granted by the Arbitrator Er.S.R. Khitta. In case the claimant had any objection to grant of permission by the Arbitrator to the Respondent, it should have been filed before the Arbitrator at that time itself. This was not done. This issue has not been contested even during the proceedings. This counter claim

has been objected to only in the written arguments. As such I allow the counter claim of the Respondent."

23. As a matter of fact, the Arbitrator had no authority or jurisdiction to condone the limitation at his own and without any case thereto made out.

24. In view of what has been said hereinabove, the Arbitrator has erred himself and also mis-conducted while adjudicating the dispute inter-se the parties being barred not only under the terms of the contract but also the law of limitation. The award, as such, is set aside. The petition stands accordingly disposed of.