

(2012) 03 BOM CK 0051

In the Bombay High Court

Case No : Arbitration Petition No. 958 of 2010

Mahanagar Gas Ltd. MGL House, Bandra-Kurla Complex
Bandra (E), Mumbai 400051

APPELLANT

Vs

M/s. Babulal Uttamchand and Co. 108, Shyamkamal A,
Agarwal Market, Tejpal Road, Vile Parle, Mumbai 400057

RESPONDENT

Date of Decision : 09-03-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31, 31(7), 31(8), 34

Contract Act, 1872 — Section 73

Interest Act, 1978 — Section 3

Citation : (2012) 5 BomCR 539 : (2012) 4 MhLj 344

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Rajiv Kumar, assisted with Mr. S.A. Bhalwal with Ms. Komal Patil instructed by Vyas and Bhalwal, for the Appellant; C. Kapil a/w Ms. Shilpa Kapil, for the Respondent

Judgement

Anoop V. Mohta, J.—The Petitioner, who is the original respondent has challenged, by petition u/s 34 of the Arbitration and Conciliation Act, 1996 (The arbitration Act) reasoned award dated 5th March, 2010 passed by the learned sole arbitrator. The Petitioner awarded to the Respondent (the claimant) the work of Project Management and Construction of pipeline network for domestic supply of natural gas in the area of Santa Cruz by work order dated 12th October, 2002. It was for three years from the date of letter of acceptance. The value of the work was Rs.3, 87,07,260.00. The Respondent accordingly mobilized requisite resources and invested huge amount. The Petitioner was responsible to provide gas connection to the individuals of area. The Respondent was required to enter into agreement with the customers. The Petitioner failed and neglected to provide gas to the customers though the pipeline work was completed by the Respondent. The delay in supply of gas was for about 18 months, resulted in non-payment by the customers and consequent non-payment for the work done to the Respondent by the Petitioner. The Respondent, therefore, suffered heavy

financial losses because of breach of the terms of the contract. For various reasons including default on the part of the Petitioner, the full work could not be completed in stipulated period, because of change of specifications from time to time by the Petitioner. Therefore, in view of arbitration clause, the Respondent raised claims. The Petitioner also filed counter claims. The reply and the rejoinders were filed. One witness each was examined. The learned arbitrator heard the matter, accordingly, from time to time and not granted all the respective claims except challenged in the petition.

2. On 7th August, 2008, so far as counter claim No.18 is concerned, both the parties agreed and decided to arrive at agreed figure of the balance amount payable to the claimant on account of work done (Claim No.1) and the amount payable from the claimant to the Respondent on account of Material Reconciliation Recoveries. On 5th January 2009, both the parties, under authorization of the respective clients filed jointly signed statement informing an agreed figure of Rs.35,37,176/- as the amount payable to the Respondent on account of work done but not paid and a figure of Rs.7,17,445/- as the amount due from the respondent to the petitioner on account of recovery against material reconciliation.

3. The learned arbitrator after considering rival contentions, as well as, the material placed on record gave reasoned finding that there was undue delay in supplying the gas and changed the specifications which were most essential requirements for marketing of gas connection by the Respondent and thereby concluded that the Petitioner committed manifest breach of contract.

4. Though there was clause No.44.1 and 59.2 for extension of time for completion of the work and, accordingly, the request was made to the Petitioner, but refused to grant extension. The Petitioner in view of Andheri fire incident pending execution of the contract changed the specifications which resulted in an extra work to be executed by the Respondents. This was also an additional factor for the Respondent to claim for a revised rate for the changed specifications. The Petitioner enhanced safety norms to adopt ISO certificate which required the Respondent to procure new safety tools which also caused delay in day-to-day execution of the work. There was delay in revision of rates also and the same was done in January 2004. There was delay in the third working session as approval from requisite authority (MMRDA) could not be obtained up to January 2005.

5. The Petitioner in view of clause 10.2 and 10.3, though necessary, failed to prepare joint construction programme. The Petitioner committed many breaches that resulted in delay in execution of the work. Therefore, taking overall view and the cumulative effects of defaults the learned arbitrator has held that the Petitioner committed fundamental breach of contract by its failure to supply gas pipes for the first one and a half year and one year thereafter in many other areas. The Andheri fire in Gas pipes, change of specifications, delay in revisions of rates and faulty meters etc. that resulted into delay in achieving the target

and shortfall in the volume of work of the Respondent.

6. The learned arbitrator while granting claim No.1 has observed as under :

This claim pertains to outstanding payments due to the Claimant on account of work done. As stated above, in course of the arbitral hearing, on 7th August, 2008 the learned counsel for the parties agreed that both the Claimant and the Respondent would sit together and try to arrive at agreed figure of the balance amount payable to the Claimant on account of work done. They were allowed to do so. On 5th January, 2009 the learned counsel for the parties filed jointly signed statement along with detailed working informing the Arbitral Tribunal that both of them had arrived at an agreed figure of Rs.35,37,176/-as the amount payable to the claimant from the Respondent on account of work done but not paid (Claim No.1).

7. The arbitrator has not granted the Respondent's claim on account of loss of business opportunity for want of evidence but granted (Claim No.6) loss of profit on account of the breaches committed by the Petitioner. Therefore, it is necessary to consider as submitted by the learned senior counsel for the Petitioner that grant of loss of profit while rejecting loss of business for lack of evidence is rightly granted or not. Once it is held that there is fundamental breach committed by the Petitioner and that result into breach of various terms of the contract, the loss of profit should follow. The arbitrator needs to consider the loss suffered by the Respondent based upon the recognized formulas. He has selected a well known method of granting such claim by taking note of value of work which could not be executed i.e. Rs.2,5238,727.00. Therefore, the calculation of loss of profit at the rate of 10% of Rs.25,23,873.00 cannot be stated to be un based and unreasonable.

8. The learned arbitrator has relied on judgment of the Supreme Court in A.T. Brij Paul Singh and Others Vs. State of Gujarat, by observing that "But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid". The reference was also made to other cases where Supreme Court even granted 15% of the contract price as damages by way of loss of profit in Dwaraka Das Vs. State of Madhya Pradesh and Another, , the Supreme Court here again confirmed grant of 10% of the contract price as loss of profit.

9. The learned counsel appearing for the respondent has relied upon a recent Supreme Court judgment to support the claim of loss of profit, MSK Projects (I) (JV) Ltd. Vs. State of Rajasthan and Another, . It has specifically dealt with the aspect of measurement of contractual damages and/or quantification of damages and loss of expected profits attributable to breaches)of contract by observing that on expected profit is recoverable. The Apex Court after dealing with earlier Supreme Court judgments including that are referred and relied upon has reiterated as under:

39. In A.T. Brij Paul Singh Vs. State of Gujarat, while interpreting the provisions of Section 73 of the Contract Act, 1972, this Court held that damages can be claimed by a contractor where the Government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by understanding the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was further observed that:

10..... What would be the measure of profit would depend upon the facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid.

40. In BSNL V. Reliance Communications Ltd. this Court held as under:

53. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categories as penalties the clauses described as liquidated damages.

10. The submission of the learned counsel for the petitioner that once the contract is settled and signed, binds both the parties, based upon judgment in Nathani Steels Ltd. v. Associated Constructions , need no discussion. This principle is settled. The order on the basis of consent terms, therefore, binds both the parties.

11. The reliance was placed on a Judgment in Union of India (UOI) Vs. Sun Media Services, , to support his submission that even for the loss of profit the supporting evidence is necessary. The facts are totally distinct and distinguishable. The arbitrator and/or the Court needs to consider the terms and conditions of the contract. In that case the Respondent themselves expressed inability to complete the project. The situation in the present case is totally reverse. In this case the learned arbitrator after considering the material on record held that the fundamental breach was committed by the Petitioner that resulted into loss of profit. Once the finding is given that the Petitioner's action/inaction results into breach of contract the grant of loss of profit, based upon the Supreme Court's recognized formula, in the present facts and circumstances, needs to be accepted. The judgments so cited because of its distinct facts and circumstances are of a little assistance to the Petitioner.

12. The learned counsel has also relied on Mazgaon Dock Ltd. Vs. Offshore Hook-up and Construction Services (India) Pvt. Ltd. a judgment delivered by this Court (D.K. Deshmukh, J.) dated 20th August, 2011 to support his submission specifically the finding that the loss of profit was wrongly awarded by the same

arbitrator. The clause and conditions were different.

13. In my view in any arbitration case which has to be decided on the contracts terms between the parties. Therefore, the loss of profit granted and/or rejected in particular case that itself is not sufficient to decide such issue, without referring to the contract and the facts and circumstances of the case, between the parties. In that case there was a clause entitling the parties to delete any part of the contract at any time. The claim was of sub contractor. As per the clause he was not entitled for damages for breach of contract. In the present case, the learned arbitrator has considered the contract terms and conditions and found that there was fundamental breach committed by the Petitioner and, therefore, awarded loss of profit on the basis of settled and recognized formula, even noted by the Supreme Court as quoted above. Therefore, this judgment is also of no assistance to set aside the well reasoned award.

14. I am inclined to observe that the learned arbitrator was right in rejecting the claim No.12 on account of loss of business opportunities by granting loss of profit as recorded above. There was no question of granting claim of the Respondent on both the counts. It is principally one and the same. Therefore, there is no question of accepting the submission by learned counsel appearing for the Petitioner that having once not granted any claim on account of loss of business opportunity for want of any evidence, and the award of the loss of profit on foundation of a reasonable expectation of profit, without evidence and/or material on record. The submission is also unacceptable.

15. The submissions was also made with regard to Claim No.13 i.e. interest at the rate of 12% on the amount awarded on 1.1.2006 till the date of payment. The arbitrator also awarded further interest on the amount awarded by this award at the rate of 18% per annum as per section 31 (7) (a) and (b) of the Arbitration Act till realization. He further contended that having once settled Claim No.1 there was no question of granting any interest again on the awarded amount. After going through the documents which was the basis for settlement, I have also noted that there was nothing mentioned and/or decided or restricted the other claims. The parties have specifically agreed for given figure by keeping rights of other claims open, knowing fully Claim No.13 so far as interest is concerned. One cannot overlook the fact that Claim No.1 was towards recovery of the amount of work done but not paid and the material realization recoveries read with counter claim. There is no force in the contention of the Respondent have waived the interest on the agreed amount and/or that agreed amount includes the interest also. The parties are definitely bound by the agreement and agreed letter which no where restrict the right of the Respondent to claim Claim No.13 i.e. interest on the amount which were not paid for the work done. I am inclined to observe that the learned arbitrator considering facts and circumstances including agreement as referred above, rightly comes to the conclusion and granted interest in view of Claim No.13.

16. Now another issue is grant of interest on the amount awarded under Claim

No.1 from 1st January, 2006 till the date of making of this award. The arbitration was commenced on 30th October, 2005. The arbitrator was appointed on 30th November, 2005 and as the parties have arrived at settlement on 5th January, 2009 the grant of interest need to be considered for the work done but not paid from date of due payment as per the contract but the interest so awarded from 1st January, 2006 as admittedly final bills were never finalized, needs to be considered as reasonable and correct. There is no illegality. The learned counsel appearing for the respondent has also relied on the Supreme Court's Judgment referring to the purpose and object of Section 31 of Arbitration Act. In MSK Projects India (JV) Ltd. (supra) it is observed that in view of Section 3 of the Interest Act, 1978 the Court is empowered to award interest at the rate prevailing in the banking transaction and thereby the Court has a power to vary the rate of interest even agreed by the parties. It is also observed that the arbitrator is competent u/s 31(7) of the Act to award interest commencing from the date of award to the date of decree and/or date of realization. It is clarified that the award of interest prior to arbitrator entering upon reference is matter of substantive law while grant of interest post award period is matter of procedure. The reference was also made to Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, whereby it is observed that the economic reforms in the country, the interest regime has changed and, as the rates of substantially reduced and therefore reduction of interest from 18% to 9% was maintained, in the construction contract matter. Ultimately, it is observed that the rate of interest is to be fixed in the circumstances of each case. It is also observed that it should not be imposed at uniform rate without looking into the circumstances leading to a situation whereby compensation was required to be paid by referring to H.U.D.A. Vs. Raj Singh Rana, . In the present case the learned arbitrator considering the facts and circumstances and in view of undisputed position on record that the parties have arrived at settlement so far as amount not paid for the work done, therefore, has granted interest at 12%, in my view cannot be interfered with. The Apex Court in MSK Project India (JV) Ltd. (supra) has also refused to interfere with the rate of interest awarded by the Court.

17. The learned arbitrator after considering and by giving details granted costs against the Petitioner cannot be stated to be unreasonable and/or exorbitant. It was based upon actual cost/expenses interest incurred by the parties. It is difficult to have judicial control over the award of costs as provided u/s 31(8) of the Arbitration Act. Learned senior counsel appearing has submitted to reconsider this issue and further contended that the parties should have been directed to bear their own costs. In the present case apart from the reasoning given by the learned arbitrator I am also of the view that the fundamental breach which is committed by the Petitioner had resulted into stoppage of the project and the fact that though the parties have settled some claims, but yet loss of profit so recorded in view of reasons that itself is sufficient to maintain the costs so awarded. The arbitration went on for longtime. It definitely involves time,

money and energy of the parties.

18. Normally once the petition u/s 34 gets admitted or unless decided finally the future rate so awarded continues till realization of the award. The admission or pendency of such petition cannot be the reason to punish the respondent with such huge liability of future interest till realization. Some time it takes long time for the petition u/s 34 to be decided and/or attain finality. The learned arbitrator has awarded future interest at the rate of 18% per annum, however, considering the facts and circumstances of the case and as the Court as well as the arbitrator has power to grant and/or consider rate of interest and as this is also case of breach of laying of pipeline for supply of gas / contracts as the arbitrator has awarded the amount on the work done not paid and loss of profit as assessed for the first time I am of the view that rate of interest need to be restricted to 12% from the date of award till realization instead of 18% so awarded.

19. It is to be noted that the arbitrator has awarded counter claim of the Petitioner with 12% interest on the amount. There is no challenge made to the same. This is also an additional factor and to maintain rate of interest at 12% for all the purposes. The Petitioner is, therefore, also entitle for the future interest on the amount awarded from the date of award till realization. The claim and counter claim are also subject to adjustment of the amount so awarded. The Judgment is restricted to the point argued.

20. In view of the above I am inclined to modify award as such modification is permissible in law. The award is well within the frame of law and the record. Resultantly, award dated 5th March, 2010 is modified only to the following extent:

The future rate of interest is reduced to 12% instead of 18% from the date of award till realization on the claim as well as counter claim. The rest of the award is maintained. There shall be no order as to costs.