

(2012) 06 BOM CK 0015

In the Bombay High Court

Case No : Arbitration Petition No. 409 of 2008 and Arbitration Petition No. 443 of 2008

Maharashtra State Road Development Corporation Ltd.

APPELLANT

Vs

Jog Engineering Ltd.
 Jog Engineering Ltd. Vs
Maharashtra State Road Development Corporation Ltd.

RESPONDENT

Date of Decision : 26-06-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2012) 06 BOM CK 0015

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : E.P. Bharucha, Mr. Prashant Chavan, Mr. Nooruddin Dhillal instructed by M/s. Amarchand and Mangaldas and Suresh A. Shroff and Co. in Arbitration Petition No. 409 of 2008 and Respondent in Arbitration Petition No. 443 of 2008, for the appearing parties; Rajiv Singh and Mr. V.S. Vengurlekar instructed by y M/ s. Crawford Bayley and Co. in Arbitration Petition No. 409 of 2008 and Petitioner in Arbitration Petition No. 443 of 2008, for the Appearing Parties

Judgement

Anoop V. Mohta, J.—Both these Petitions, u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, "the Arbitration Act"), filed by the original Claimant-Respondent, as well as, the Respondent-Petitioner, separately. Admittedly, the Maharashtra State Road Development Corporation Ltd. (for short, "MSRDC"), the Petitioner issued tender bid for the construction of Mumbai-Pune Expressway, on 10 November 1997. The Respondent original Claimant submitted their bid for "Section D" on 17 December 1997. As per the terms and conditions of the tender, matter proceeded from time to time. A formal contract was executed on 7 February 1998. The work was supposed to be completed on 6 May 2000. On 14 March 1998, the Claimant accordingly submitted a programme for completion of the work by 31 December 1999 in 22 months. The said programme was rejected. The dispute arose between the parties. In view of Clause 67.1 of the Contract, the matter was referred to the Engineer on 24 January 2002. The Engineer gave its decision on 31 August 2002. The matter

was referred, as per the amended clause 67.2 of the Contract, to the Steering Committee. The same was communicated to the Claimant on 5 June 2003, thereby all the claims were rejected.

2. The Claimant, therefore, invoked Arbitration provisions on 17 June 2003. The Former Chief Secretary, Government of Maharashtra was appointed as a sole Arbitrator on 27 August 2003. The matter was proceeded before the Arbitral Tribunal accordingly. The statement of claim, statement of defence and counterclaim read with the rejoinder and reply to the rejoinder were the pleadings. The evidence was lead by the Claimant, in the year 2004. The Petitioner MSRDC filed rejoinder to the counterclaim and ultimately by the impugned order dated 30 April 2008, the Arbitrator has passed the award and thereby, rejected the Counterclaim of the MSRDC in toto.

3. The Arbitrator has awarded part claim of the Petitioner by observing and taking into consideration the material placed on record, evidence and the terms and conditions between the parties. Though the delay attributable to both the parties, yet proceeded further to award the compensation in part, by taking note of delay caused by the MSRDC and even the delay caused by the Claimant. The Arbitrator has awarded the compensation in favour of the Claimant because of delay committed by the MSRDC. At the same stroke, he has deducted certain amount by holding that the Claimant also committed the delay. The concept of awarding compensation for "the net delay" period is nowhere stated to be agreed way of dealing with the Arbitration proceedings. There is nothing on record to show that the parties, at any point of time, agreed to proceed with this concept. There is also nothing on record to show that this concept of grant of compensation is the settled principle and/or recognized principle in such type of construction contract. Both the counsel fairly conceded to this position and submitted for fresh opportunity to deal with their respective grounds again.

4. Admittedly, the contract was awarded for construction of Mumbai-Pune Expressway. The time was the essence. Both the parties agreed and proceeded based upon the terms and conditions. The respective obligations, just cannot be over looked while deciding the claim of either of the parties. The learned Arbitrator, therefore, having once come to the conclusion, based upon the material available on record, that there was delay committed by both the parties, in my view, there is no question, for want of any specific clause, to divide the same delay into two parts and award the compensation, so awarded. If one party is in a position to demonstrate that there is a delay committed by the other party and therefore the entitlement needs to be adjudicated on the basis of material available on record. In the construction contract, a particular part of delay needs to be pleaded, it is always subject to the respective obligations. If there is a delay in either part, the whole project get delayed. The Claimant therefore, having once able to demonstrate that there was the delay on the part of the Respondent MSRDC, the Arbitrator must consider the case accordingly. If the case is made out by the MSRDC that there was unintentional delay and/or delay

committed by the Claimant was deliberate, the Arbitrator needs to consider to grant and/or not to grant the award and/or the compensation or vice-versa.

5. The MSRDC has raised the counterclaim. In such construction contract, so far as the MSRDC and/or such person who awarded the contract and as agreed, is entitled to claim damages/compensation if there is delay in completion of project, and if as noted above the delay was caused also because of latches and/or lacunas on the part of the Claimant, the Arbitral Tribunal ought not to have rejected the counterclaim in such fashion, as if there was no delay committed by the Claimant. Once the finding is given by the Arbitrator that there is admittedly delay on the part of both the parties, then to reject the counterclaim in such fashion itself is unjust and illegal for the reasons already given. The concept of the "net delay", if the Arbitrator wants to use it, in favour of the Claimant, the same ought to have been used by whichever way or in part, in favour of the MSRDC also. If there is delay on the part of the Claimant, the MSRDC definitely entitled to put its case and/or claim compensation, as per the contract terms and conditions itself.

6. In such contract, there is always clauses of claiming of liquidated damages and/or penalty and/or forfeiture and/or extension of time. These terms and conditions, just not even discussed by the Arbitrator basically in view of the concept of liquidated damages and/or the penalty.

7. The observation with regard to the counterclaim that there was no material placed on record by the MSRDC, just cannot be accepted in view of the material and even undisputed facts on record, as recorded.

8. Therefore, taking overall view of the matter, in my view, the award needs interference. As admittedly, both the parties have challenged the same from their respective point of view and after hearing both the parties, it is clear that even otherwise, the Court u/s 34 just cannot decide such issue for the first time without getting clear observations/findings of the Arbitral Tribunal. Admittedly, the concept of grant of compensation on "net delay", as it is quite foreign and as not agreed, just cannot be the foundation for the award. It is necessary for the Arbitrator to consider each and every claim, as claimed and pleaded separately by applying the "net delay" formula, if any. The clear demarcations and details for such claims are required for granting and/or awarding the compensation in either way. This, in the present case, as I have noted above, is missing. The basic concept itself is quite vague and unclear. In my view, it is necessary for the Arbitral Tribunal to reconsider all the issues afresh in accordance with law and as per the terms and conditions and the material available on record after hearing both the parties. However, it is made clear that all the points are kept open.

9. So far as the aspect of the costs is concerned, as the Arbitrator by the impugned award directed both the parties to share the costs equally. Considering the facts and circumstances of the case, I am not inclined to interfere with that order.

10. Resultantly, para 82 of the award including grant of interest, as main claim goes, so also the interest as awarded, is quashed and set aside as observed above. The order is modified accordingly to this extent only.

11. The learned counsel appearing for the Petitioner MSRDC, makes statement that they have already paid the Court fee which is in excess. The office, therefore, be directed to refund the excess Court fees, as prayed in Judges order, if any, in accordance with the law. Other side has no objections for the same. In the result, the following order

ORDER

- (a) The impugned award dated 30 April 2008, is quashed and set aside, except the awarded cost.
- (b) The Arbitral Tribunal to pass a fresh order after hearing both the parties.
- (c) All the contentions are kept open.
- (d) The parties to take steps for appointment of Arbitral Tribunal in accordance with law.
- (e) Both the petitions are accordingly disposed of.
- (f) There shall be no order as to costs.