(2013) 04 BOM CK 0080

In the Bombay High Court

Case No : Arbitration Petition No. 106 of 2011

M/s. R.M. Cylinders Private Limited — APPELLANT

Vs

Hindustan Petroleum Corporation Limited — RESPONDENT

Date of Decision : 09-04-2013

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 34, 73, 74
Limitation Act, 1963 — Section 3

Citation : (2013) 4 ABR 22 : (2013) 5 ALLMR 762 : (2013) 3 ARBLR 203 : (2013) 4 BomCR 71 : (2013) 4 MhLj 67

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Rita Yadav instructed by Mr. Raval Shah, for the Appellant; M.D. Siodia a/w Mr. Kaushik Naresh Singh instructed by y Rustamji and Ginwala, for the Respondent

Judgement

Anoop V. Mohta, J.—The Petitioner (Claimant) has challenged award dated 30 August 2010, passed by the sole Arbitrator u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act). The operative part of the award is as under:-

1 The imposition of Liquidated Damages Charges of Rs. 24,06,885/- towards undelivered quantity of LPG Cylinders and Rs. 1,25,361/- towards delayed supply of LPG Cylinders totaling to Rs. 25,32,246/- on the Claimant by the Respondent Corporation is in accordance with clauses 8, 9 & 10 in the Attachment-I to Purchase Order M-2633/LPG/SB dated 07/06/2004 and Clauses 8, 9 & 10 in Annexure-V of Tender HPCL/LPG-MKTG/E-030/SB/03-04 dated 25.04.2003 and the same is legal and valid.

2. The action of the Respondent Corporation in recovering Liquidated Damages Charges of Rs. 1,25,361/- towards delayed supply of LPG Cylinders and Rs. 23,81,861/- towards Liquidated Damages Charges for undelivered quantity of LPG Cylinders from the pending bills of the Claimant is in accordance with Clause

11 in Annexure-V of the Tender HPCL/LPG-MKTG/E-030/SB/03-04 dated 25.04.2003 and Clause 12 in Attachment-I to the Purchase Order M-2633 dated 07.06.2004. The action of the Respondent Corporation in recovering the above amounts from the pending bills of the Claimant is legal and valid.

3. The Claimant shall Deposit with the Respondent Corporation an amount of Rs. 24,995/- being the balance Liquidated Damages Charges payable to the Respondent Corporation within 60 days of this Award.

4. The Respondent Corporation shall refund the Deposit of Rs. 5 Lakhs to the Claimant, if the same has not been refunded so far.

5. The Counter Claim of the Respondent for interest @ 12% on the balance LD Charges of Rs. 24,995/- from the date of dispute to the date of payment is rejected as the matter has been under reference to Arbitral Adjudication and as such sub-judiced. However, in the event the Claimant fails to deposit the above amount with the Respondent Corporation within 60 days of this Award, the Claimant will be liable to pay interest on the amount @ of applicable Bank interest from the date of this Award to the date of payment.

6. The Counter Claim of the Respondent to Award Rs. 2,00,000/- towards cost of litigation is rejected. The parties shall bear their own expenses.

2. The relevant clauses 8, 9 and 10 of the purchase order in Attachment-I are as under:-

8. DELIVERY SCHEDULE/REVISION BEFORE EXPIRY OF DELIVERY SCHEDULE:-

(a) Based on the requirement the HPCL will be planing PO/allocation from time to time giving minimum 15 days notice from the date of receipt of allocation letter. The Seller shall supply LPG cylinders within the delivery schedule. The Seller shall note that the date of receipt of LPG cylinders at the destinations shall be considered as the date of completion of supply as per the order/allocation. In short, the actual delivery shall mean the date of receipt of LPG cylinders at the locations.

(b) In the event of the Seller anticipating difficulty to meet the delivery schedule for the reasons not attributable to him, the Seller should submit a written request for extension, in case he desires the extension explaining the reasons for the delay. It will be the Corporation''s sole discretion to accept or reject the request. In case the Corporation satisfied with the explanation given by the Seller then the Corporation may grant suitable time extension and advise the revised delivery schedule. The decision of the Corporation in this regard will be final and binding on the seller.

9. FAILURE AGAINST THE DELIVERY SCHEDULE:

(a) HPC shall review the supply position after completion of the Delivery Schedule. If the Seller fails to adhere to the said Delivery Schedule as per para 8 above.

(b) (i) HPC may prune and re-allocate the quantities short supplied by the Sellers who could not meet the original delivery schedule.

(ii) Alternatively, HPC may consider giving a time extension as deemed appropriate based on request by such Seller who could not meet the original schedule given.

(iii) HPC''s decision in regard to Prunning & Reallocation on case to case basis and the methodology followed shall be final.

10. LIQUIDATED DAMAGES FOR SUPPLY IN CASE OF TIME EXTENSION:

(a) Corporation shall review the supply position every month and may prune and re-allocate the quantities short supplied by the parties who are not able to meet the schedule indicated. Irrespective of Re-allocation of the short supplied quantities as per 9(b) (I) above, or grant of time extension as per 9(b) (ii) above, Liquidated Damages @ 5% of the GDP shall be levied on undelivered quantity as per slated Delivery Schedule given under (8) above.

(b) In the event of extension granted by Corporation beyond the slated Delivery schedule, Liquidated Damages @ 1/2% per week of extended period or part thereof subject to a maximum of 5% of GDP of the value of the undelivered quantity shall be levied. In case of any revision in Excise Duty, lower of the current and previous rates of Excise Duty shall be applicable to the quantities delivered during extended period.

(c) In case of failure to supply even after grant of extension, both LD as per (a) and (b) above, subject to a maximum of 5%, shall be payable and the Corporation shall have the discretion to prune all such undelivered quantities, re-allocate to other suppliers as decided by the Corporation and recover the extra cost from the defaulting vendor, if any borne by the Corporation while procuring such shortfall quantity from other suppliers. Corporation''s decision in regard to Prunning and Reallocation on case to case basis and the methodology followed shall be final. The limitation on order quantity will not be applicable for re-allocation of pruned quantity.

3. The basic events shows that, on 25 April 2003, a public tender No. LPG MKTG/ E-030/SB/03-04 was floated by the Respondent for procurement of 32 lakhs 14.2 KG of LPG cylinders for supply to various LPG plants. On 7 June 2003, by purchase order No. M-2441/LPG/SB dated 7 June 2003, the Petitioner was given the order to supply 2, 06, 419/- cylinders per year. The Petitioner supplied 1, 67, 306/- LPG cylinders from the period 7 June 2003 to 6 June 2004. As the Petitioner could not supply the complete order within the prescribed time limit. The short supply quantity was adjusted with the excess quantity supplied by M/s. Hyderabad Cylinders Private Limited.

4. On 7 June 2004, a purchase order was placed on the Petitioner for supply of 177306 cylinders as per Clause 26 of the Purchase order dated 7 June 2003. For the difficulty explained, the Petitioner could not supply the due number of

cylinders. Ultimately, the Petitioner supplied 98573 cylinders to the Respondent based upon the tender dated 10 December 2004. The Respondent, however, failed to make the balance payment of the cylinders, so supplied. The Petitioner requested from time to time to extend the validity of order by letter dated 27 June 2005, 1 August 2005, 25 August 2005, 19 September 2005, 3 October 2005 and many more. The Respondents also by letter dated 6 April 2005, 4 April 2005 and others, warned the Petitioner regarding non supply of cylinders in time and also the delay and its consequences.

5. The Petitioner raised/claimed total amount of Rs. 30,07,222/-. (Rs. 25,07,222/- towards unpaid amount and Rs. 5,00,000/- towards security deposit). In view of Arbitration clause, the Petitioner submitted the claims before the learned Arbitrator, firstly on 14 February 2007 and later on by filing a statement of claim on 16 May 2009. The Respondent also resisted the claims and filed a counter claim on 8 June 2009, for the liquidated damages of Rs. 24,06,885/- and also sought declaration that the amount withholding/adjusted by them towards the liquidated damages is legal and valid. The Respondent also prayed to reject the claim in toto. Both the parties have filed their written arguments; and supported their respective case by citing various Judgments.

6. Admittedly, no evidence was led by the Respondent to support their action of deduction of liquidated damages from the payable amount to the Petitioner and the loss they suffered. They deducted the amount based upon the clauses so referred above unilaterally and refused to release the balance amount. The Petitioner, when claimed for balance amount as recorded above, the Respondent for the first time before the learned Arbitrator, on 8 June 2009 raised counter-claim for the liquidated damages with further prayer to declare their action legal, valid and binding. The learned Arbitrator based upon the terms and conditions held that no evidence is necessary to laid by the Respondent to support the case of loss, if any caused. Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., The learned Arbitrator on the contrary, held that the burden lies upon the claimant/Petitioner to prove the loss suffered by the Respondent.

7. It is relevant to note the following observations of the judgment in Vishal Engineers and Builders Vs. Indian Oil Corporation Limited,

20 ...

41....That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of ''legal injury'' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74...When the section says that an aggrieved party is entitled to compensation, whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of ''actual loss or damage''. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach. ...

If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to ''unjust enrichment'', which cannot be countenanced and has to be eschewed.

42. It is too preposterous on the part of the petitioner to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered.

8. A Division Bench of Delhi High Court in above judgment by following the principles, set aside the amount granted as liquidated damages and ordered to refund the same on the foundation that the recovery of liquidated damages by the Respondent in absence of any loss whatsoever cannot be held to be permissible.

9. I have considered the aspect of proof of loss of damages after considering the Saw Pipes (supra) and other Supreme Court Judgments and held that "the Arbitrator is bound to follow the basic principles of law while granting damages which is always the subject to prove of loss and profits". M/s. Shah Jagshi Jethabhai, 549, Meru Towers-A, Jame Jamshed Road, Matunga (C.R.), Mumbai - 400019 Vs. J.N. Construction, 701, Horizon View, 1/A, Raheja Complex, Seven Bungalows, Versova, Mumbai - 400061, . and further observed as under:-

20 I have also observed in Indian Oil Corporation Ltd. Vs. Kadbrotee Engineering Industries, by considering the Apex Court Judgment, that the award granting damages merely on the basis of the claim statement without any supporting material and evidence on record is invalid."...

21 I have also observed in Oil and Natural Gas Corporation Limited (Supra) that in case of contract containing Liquidated Damages Clause, evidence of actual loss/damage is necessary. The burden to prove he same actually lies upon the Claimant. The quantum of damages cannot be awarded only on the basis of presumption and assumption and/or expectations. The doctrine of mitigation of loss, burden of proof, onus of proof and shift of burden, just cannot be overlooked by the Arbitrator while awarding the damages. In my view, all these basic elements are missing in the present case, while awarding the contract in favour of the Respondent. The finding given by the Arbitrator, therefore, is contrary to the pleadings by overlooking the material issues and the relevant facts.

and the award was set aside in that matter for these reasons. This is not a case of a fundamental breach of the terms or admitted breach of the contract.

10. A Single Bench of this Court in M/s. Nandi Cylinders Pvt. Ltd. Vs. Hindustan Petroleum Corporation Ltd., Arbitration Petition No. 105 of 2011, dated 30 June 2011 (D.K. Deshmukh, J.) held that the liquidated damages, even if any, ought to have been claimed within the period of limitation. The counter-claim of liquidated damages so raised by the Respondent, therefore, needs to be tested on the anvil of law as it was raised first time in the counterclaim in the year 2009, though the deduction was made prior in time.

11. The parties are bound by the terms and conditions of the contract. But it is relevant to note that as per the terms, the discretion was provided to extend the time of delivery. The said discretion therefore, means in a given case the Respondent accept or reject the request subject to satisfaction with the explanation given by the person/seller. The discretion therefore, was provided that the Respondent to grant suitable time and advise to revise the delivery schedule. The decision of the Respondent in such circumstances, was final and binding on all. The correspondences on record show that the request were made from time to time to extend the delivery period. The correspondences show that both the parties were aware of rising steel prices of the same and resulted the consequences on the supply of cylinders. No conditional extension clause was pointed out or referred.

12. The scheme of terms and contract and specifically clause 8, 9 and 10 of Attachment-I of the Purchase orders proceeded on a foundation, apart from discretion so discussed and the extension so granted, if the seller fails to adhere to the delivery schedule, the Respondent may prune and reallocate the quantities short supplied by the sellers and in spite of non-supply even after the extension of time, liquidated damages clause get invoked. The percentage is fixed for the liquidated damages. It also provides that to re-allocate to other suppliers and recover the extra cost from defaulting vendor, if any, borne by the Corporation while procuring such shortfall quantity from the supplier. The decision of the Respondent in this regard is also held to be final. This scheme, in my view, goes to the root of the matter in the present facts and circumstances of the case, as it is necessary for the Respondent to take the steps to avoid and/or mitigate the losses, if any. There is nothing on record to show that any steps were taken by the Respondent at any point of time to avoid further losses and/or contract was re-allocated and/or third party invited to supply the goods/ balance cylinders.

13. The another aspect is the basis of deduction of the unilateral amount/ withholding of the amount. There is nothing to show what is the basis for arriving at the conclusion and so the rates taken into consideration while taking such unilateral action. The Respondent''s action was admittedly unilateral without due and proper notice at the appropriate time, apart from no supporting material to justify their claim.

14. Admittedly, the counter claim of liquidated damages was raised in the year 2009. There was no such claim and/or notice given to the Petitioner before taking such action of deduction of the amount. The Petitioner''s claim based upon three invoices of the year 2005 for the period 2004-2005, totalling amount of Rs. 25,07,222/-. The Petitioner''s claim was submitted on 14 July 2007. The Respondent lodged their counter claim for the first time on 8 June 2009. The dispute was also raised about the pricing of the cylinders in view of the fluctuations in the price of steel market. The Petitioner when asked for their due amount in view of the supply of the cylinders though late, the Respondent before the Arbitrator raised the counterclaim of liquidated damages. The aspect of

limitation also just cannot be overlooked in the present facts and circumstances of the case. In view of Section 3 of the Limitation Act, 1963 and as the ground was specifically raised in this petition, it is necessary for the Court to consider the issue of limitation as it goes to the root of the matter and the jurisdiction itself. The learned Arbitrator, however, has not considered these aspects in accordance with law.

15. I have already recorded and as the Arbitration Act itself provides that the basic principle of laws of the land need to be followed by the Arbitrator while dealing with such type of disputes. The assessment and adjudication of any claim or counter claim specially compensation or damages based upon the terms of the contract, which itself requires the evidence and the material to assess the actual loss or damages. The Supreme Court in Saw Pipes (Supra), nowhere declared that no evidence is necessary to be laid by the parties, one who rely upon such clause of liquidated damages. Such clause cannot be read in isolation. In the present case, though there was obligation upon Respondent to take necessary steps to mitigate the losses, yet no steps whatsoever taken except deducting/ withholding the due amount of the Petitioner, unilaterally. In the present case, therefore, I am inclined to observe that the basic principle of assessing the liquidated damages and/or compensation, though based upon such clauses, have been overlooked by the learned Arbitrator by wrongly applying the principle of Saw Pipes (Supra) as referred above.

16. However, in the interest of justice as the Court u/s 34 has power to remand the matter and as all these issues are inter-linked and inter-connected, the award needs to be set aside with direction to re-consider all the issues based upon the material, after giving opportunity to both the parties. The fresh initiation will cause great injustice and hardship to both the parties. Therefore, this order with direction to expedite the arbitration proceedings, by the same Arbitral Tribunal or other. The parties to take steps accordingly. All points are kept open. Resultantly, the following order:-

a) The award dated 30 August 2010 is quashed and set aside.

b) The matter is remanded back for fresh consideration, on all points.

c) The learned Arbitrator to dispose of the matter as expeditiously as possible after giving opportunity to both the parties.

d) There shall be no order as to costs.

