

(2019) 07 DEL CK 0270

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 248 Of 2019

Nabinagar Power Generating Company Limited

APPELLANT

Vs

Amr India Limited (Amril, Formerly Amr Construction Ltd)

RESPONDENT

Date of Decision : 05-07-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 18, 28(3), 31(3), 34, 34(2A), 34(2)(a) (ii), 48, 48(2)(b)(ii)

Citation : (2019) 07 DEL CK 0270

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Maninder Acharya, R.Sudhinder, Nimita Kaur, Viplav Acharya, Harshul Choudhary, Brijesh Kumar Goel, Rajeev Kumar

Final Decision : Dismissed

Judgement

Navin Chawla, J

IAs 8840-41/2019

Exemptions allowed, subject to all just exceptions.

OMP(COMM.) 248/2019 & IA 8839/2019

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") has been filed by the

petitioner challenging the Arbitral Award dated 10.12.2018 and the order dated 21.02.2019 passed by the Sole Arbitrator adjudicating the disputes that

had arisen between the parties in relation to the "Site Levelling and Infrastructure package for Nabinagar Super Thermal Power Project (3x660

MW)" Contract No.CS-0370-301-9-CS-LOA-0001 dated 04.07.2011.

2. Disputes between the parties primarily arose out of termination of the

Agreement by the petitioner vide its notice dated 21.10.2013.

3. The Site Levelling Project was to be completed within 30 calendar months from the date of the Letter of Award (LOA) which was 11.05.2011.

This makes the schedule date of completion as 10.11.2013.

4. The Arbitrator, found that the respondent had mobilized necessary resources to commence the work within one month from the date of LOA in

accordance with the Schedule of Work. As recorded in the Site Hindrance Register, the work at the project site could not commence within

11.06.2011 and 20.10.2011 due to non-availability of front (District Administration has not allowed to start the work)(clearance was awaited to

start the work from the district administration).The Arbitrator further found that entry at serial 2 to 9 of the Site Hindrance Register would also

show that the work at the project site was hampered on several occasions (roughly aggregating to 49 days). The Arbitrator further found that the

petitioner had also delayed in handing over the land/fronts as it provided possession of only 510 acres of land out of total of 902 acres of land to the

respondent. The Arbitrator did not find any merit in the submission of the petitioner that the remaining land was not handed over to the respondent as

the respondent delayed the progress of work. Relying upon the cross examination of RW-1 Mr.P.Lakshmi Narsimhulu, witness of the petitioner, the

Arbitrator concluded that there was an inordinate delay in handing over of various fronts to the respondent herein. The Arbitrator further concluded

that the petitioner has not been able to show from the record as to how the respondent had delayed the execution of work when the petitioner herein

itself failed to provide the work fronts in accordance with the terms of the contract. The Arbitrator rejected the argument of the petitioner that in

terms of the Agreement, it was entitled to hand over the land progressively. The Arbitrator held that contractual obligations postulate that such land

had to be handed over within the reasonable time, which in the present case had not been done. The Arbitrator further attributed the delay to the

petitioner on ground of delay in release of Construction Drawings, which in the opinion of the Arbitrator further resulted in slow progress of the work.

5. The learned ASG appearing for the petitioner submits that the Arbitrator has completely ignored the evidence led by the petitioner showing the slow

progress of work by the respondent. She submits that even if certain delay in the

initial period of work is attributable to the petitioner, this could not have absolved the respondent from carrying out the work on the land/fronts after possession thereof had been duly given by the petitioner to the respondent. It was the case of the petitioner that even in the land/fronts of which possession had been given to the respondent, the respondent was not carrying out the work with due diligence forcing the petitioner not only to terminate the agreement but even award certain works to a third party. She further submits that as far as the delay attributable to the petitioner is concerned, the petitioner had duly extended the time for completion of the work by a period of four months by amending the schedule on its own. Therefore, the delay could not have been taken as a ground for setting aside the termination of the agreement. She submits that the Arbitrator has reversed the onus of proof by putting the burden of proof on the petitioner rather than the respondent. It was for the respondent to show that for the period and for the land that it had the possession of, it was carrying out the work with due diligence. The respondent never met the milestones and did not even lead evidence of any hindrance in carrying out the work in the stretch of land which had been handed over to the respondent.

6. I have considered the submissions made by the learned ASG, however, find no merit in the same. As discussed hereinabove, the Arbitrator has found the petitioner in breach of contract by not handing over the complete stretch of land, atleast a major portion thereof, within a reasonable time of the contract. Infact, from the testimony of RW-1, it is clear that a part of land was handed over only as late as 02.05.2013. The Arbitrator has further found delays in the initial commencement of the work and even thereafter for reasons not attributed to the respondent.

7. Clause 13 of the GCC provides for "Time and Extension of Delay". Clause 32 of the GCC further provides for "Compensation for Delay". In the present case and as noted by the Arbitrator, though the petitioner agreed to grant an extension of time to the respondent, the same was infact granted by way of a revision in the L-2 Work Schedule subsequent to serving of the first cancellation notice dated 21.09.2013. The Arbitrator rejected the argument of the petitioner that this revision was carried out to afford an opportunity to the respondent to improve upon the progress of work.

8. The Arbitrator finally concluded on the issue of delay and the cancellation of the agreement as under:

50. On a consideration of the documents and evidence on record, I am unable to accord approval to the conduct of and the procedure adopted by

the Respondent, eventually leading to the cancellation of the Contract. From the facts enumerated herein above, it is amply clear that the delay in

execution of the work cannot be attributed solely to the Claimant. The reference to Site Hindrance Register, the evidence and cross-examination of

the Respondent's Witness and sundry documents on record, do not support the reasoning or case presented by the Respondent. Indeed, the

Respondent is primarily responsible for the delay.

51. It is worthwhile to note that the Respondent has also not disputed that the commencement of the work was delayed due to reasons which could

not have been fastened on the Claimant. The Claimant was executing the project in an 'naxal area' where due to the various acts of violence, the

Claimant was forced to suspend work. Due to the aforesaid reasons, the Claimant had to also suspend the night shifts which resulted in substantially

lowering, output thus severely hampering the progress of the work.

52. I am of the considered opinion that the Cancellation Notice dated 21.09.2013 and Cancellation Letter dated 21.10.2013 are not in consonance with

the provisions of the Contract. Indeed, the circumstances that have unfurled in these proceedings indicate that the Respondent should have granted a

reasonable extension of time. Therefore, the aforesaid Issues are decided in favour of the Claimant and against the Respondent.

9. The above being a finding of fact recorded by the Arbitrator upon appreciation of evidence lead before him, cannot be interfered with by this Court.

In *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)*, 2019 SCC OnLine SC 6, the Supreme Court

has reiterated the limits of the power of this Court under Section 34 of the Act in the following words:

35. What is clear, therefore, is that the expression 'public policy of India', whether contained in Section 34 or in Section 48, would now mean

the 'fundamental policy of Indian law' as explained in paragraphs 18 and 27 of *Associate Builders* (supra), i.e., the fundamental policy of Indian

law would be relegated to the *Renusagar* understanding of this expression.

This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

36. It is important to notice that the ground for interference insofar as it concerns 'interest of India' has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the 'most basic notions of morality or justice'. This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within 'the fundamental policy of Indian law', namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes

to setting aside an award on the ground of patent illegality.

39. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

40. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act that would certainly amount to a patent illegality on the face of the award.

41. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra),

namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner

that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders

outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the

new ground added under Section 34(2A).â??

10. I may also note that the Arbitrator in the Impugned Award has rejected the claim of the respondent for financial compensation on account of non-

payment of idling charges of equipment, machinery and manpower as also for price escalation and loss of profit on the unexecuted contract value. The

respondent, therefore, has not been granted full benefit even after holding that the termination of the Agreement was illegal. Counsel for the

respondent submits that the respondent has accepted the Award and is not challenging the same.

11. In my view, this would also answer the submission of the learned ASG as far as the delay attributable to the respondent is concerned.

12. The learned ASG further submits that the counter claims of the petitioner have been rejected on the ground of being barred by Law of Limitation.

She submits that though the respondent invoked the Arbitration Agreement by a notice dated 29.03.2014, the parties thereafter entered into

negotiations, which culminated into a failure only in December 2016. The Arbitrator was appointed on a petition filed by the respondent only vide order

dated 24.05.2017. The petitioner filed its counter claim on 18.09.2017. She submits that as the parties were in negotiation, the cause of action to make the counter claim continued till the failure of such negotiation proceedings in December, 2016.

13. I do not find any merit in the said submission of the learned ASG. As recorded by the Arbitrator, the cause of action for raising a counter claim arose with the termination of the Agreement on 21.10.2013. The Arbitrator further records that for the first time the petitioner raised a claim against the respondent only with its counter claim on 18.09.2017. To a pointed query, the learned ASG could not show if during the negotiations there was any claim raised by the petitioner against the respondent. The learned ASG could only say that the entire issue was under negotiation including the fact that the petitioner would be making a counter claim against the respondent.

14. In any case, it was for the petitioner to have shown that the counter claim was within the period of limitation and it was entitled to seek such extension of limitation for the period spent in negotiation. In my view, the petitioner has failed to discharge this onus and the Arbitrator has rightly held the counter claims to be barred by limitation.

15. In view of the above, I find no merit in the present petition. The same along with the pending application are dismissed with no order as to costs.