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In the Bombay High Court

Case No : Arbitration Petition No. 325 of 2008

Oil and Natural Gas Corpn. Ltd. APPELLANT

Vs

DOLPHIN Offshore Enterprises (I) Ltd. RESPONDENT

Date of Decision : 18-10-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 28(1), 28(3), 31(7), 31(8), 34
Civil Procedure Code, 1908 (CPC) — Section 34
Contract Act, 1872 — Section 70
Interest Act, 1978 — Section 3

Citation : (2011) 7 ALLMR 611 : (2011) 2 ARBLR 273 : (2011) 3 BomCR 370 : (2011) 1 MhLj 377 : (2011) 6 RCR(Civil) 2488

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Pradeep Sancheti, instructed by and Vyas and Bhalwal, for the Appellant; V.K. Rambhadran, for the Respondent

Judgement

Anoop V. Mohta, J.—Rule, returnable forthwith. By consent of the parties, heard finally.

2. The petitioner has challenged the Award dated 2nd April, 2008 ("the Award") u/s 34 of the Arbitration and Conciliation Act, 1996 ("the Act") passed by the Arbitral Tribunal.

3. The basic facts as per the petitioner are as under:

(a) The petitioner is the owner of the Vessel named "Sindhu 14" (hereinafter referred to as "the vessel").

(b) In response to the Tender Notice No. MRBC/MM/TECH/O and M/10(18) 99 (''Tender'') dated February 19, 1999 issued by the petitioner, the Respondent submitted its bid for rendering the services of manning, running, operation, victualising and maintenance for the aforesaid vessel. The bid of the Respondent was accepted by the petitioner which was communicated to the Respondent by the Letter of Intent (LOI) dated August 11, 1999 which was then eventually culminated in Contract dated November 29, 1999 between the parties (the contract).

(c) The vessel was handed over to the Respondent on August 22, 1999 by the outgoing operator M/s. Seaspan Shipping Ltd. The Contract was valid for two and half years with effect from August 22, 1999 till February 21, 2002.

(d) The Contract envisaged maintenance to seaworthiness by the Respondent along with the other necessary incidental repairs and maintenance needed for effective functioning of the vessel. The process of delivery of the said vessel by the outgoing operator and taking over thereof by Respondent technically known as "Handing over - Taking over" - (HOTO'') was done under Clause 3 of the contract. The HOTO process and formalities thereto consisted of a Protocol signed by both the parties. An independent survey Agency appointed by the petitioner to evaluate the condition and to prepare a condition report. The Protocol provided for preparation of a list of defects in the hull, machinery and equipment of the said vessel. The defects were noticed in the presence of the representatives of both the parties and a list ("HOTO list") was prepared by the independent surveyors Messrs Metcalf Hodkingon Pvt. Ltd., containing 221 defects on August 22, 1999.

(e) After the HOTO list was prepared, petitioner desired to know the estimated costs of rectification of the listed defects and vide contract No. MRBC/LOG/MP/HOTO/ESTM/2000 dated March 23, 2000, the petitioner appointed J. Basheer and Associates Surveyors Pvt. Ltd. for the purpose of estimation of cost for rectification of HOTO defects of the vessel as detailed in the tender. The report of the said J. Basheer and Associates is of January 25, 2001.

(f) However the petitioner processed the invoice submitted by Respondent as agreed in the contract which resulted in deduction of payment which was outside the scope of the work contract.

(g) In the said arbitral proceedings, respondent sought for an award interalia praying that the petitioner herein be directed to pay the Respondent a sum of Rs. 24,77,121 along with interest at the rate of 18% per annum from October 12, 2002 and also prayed for costs thereto.

4. There were eight claims raised by the respondent supported by the documents. The petitioner resisted the same by placing on record documents as well as relevant clauses of the Agreement between the parties. The learned Tribunal, considering the details of respective claims and the defence so raised and after giving opportunity to both the parties, gave the findings on individual claim and concluded in the following words:

(A) The Oil and Natural Gas Corporation, the Respondents herein are ordered and directed to pay to Dolphin Offshore Enterprises (I) Ltd., the claimants herein, the sum of Rs. 22,29,226.00 (Rupees twenty-two lacs twenty-nine thousand two

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hundred twenty-six only) with interest thereon at the rate of 12% per annum from 12.10.2002 till payment or realisation whichever is earlier.

(B) Oil and Natural Gas Corporation Ltd., the Respondents herein are ordered and directed to pay to Dolphin Offshore Enterprises (I) Ltd., the Claimants herein the sum of Rs. 5,00,000.00 (Rupees: Five lacs only) towards costs of these proceedings.

By consent, the sum amount is corrected as Rs. 21,60,606/ -

5. The petitioner''s submission with regard to the grant of interest inspite of specific clauses of the Agreement has some force as the Supreme Court judgment cited by the learned Counsel appearing for the respondent is not applicable on facts as well as the agreed clauses between the parties. In Sayeed Ahmed and Co. Vs. State of U.P. and Others, the Supreme Court has dealt with Sections 31(7)(a) and (b) and 34 of the Act. The relevant portion of Sections 28(3) and 31(7) are as under:

28. Rules applicable to substance of dispute.-

(1)....

(2)....

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

31. Form and contents of arbitral award. -

(1) ....

(2) ....

(3) ....

(4) ....

(5) ....

(6) ....

(7)(a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

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6. The relevant clauses of the Agreement are as under:

22.0 Arbitration:

22.1 Except as otherwise provided elsewhere in the contract, if any dispute, difference, question or disagreement or matter whatsoever shall, before or after completion or abandonment of work or during extended period, hereafter arises between the parties hereto or respective representative or assignees concerning with the construction, meaning, operation or effect of the contract or out of or relating to the contract or breach thereof shall be referred to arbitration.

22.2 The reference to arbitration shall be to a arbitral tribunal consisting of three arbitrators. Each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator, who shall act as the presiding arbitrator.

22.3 ....

22.4 ....

22.5 It is a term of the contract that the cost of arbitration will be borne by the parties in equal shares.

22.6 It is also a term of the Contract that neither party to this agreement shall be entitled to the interest on the amount of award.

22.7 ....

22.8 Subject as aforesaid, the provisions of Arbitration and Conciliation Act, 1996 and any statutory modifications or re- enactments thereof and rules made thereunder for the time being in force shall apply to the arbitration proceedings under this clause.

7. The above agreed clauses are clear to the effect that the parties agreed that "Neither party to this agreement shall be entitled to the interest on the amount of award". It is also agreed that subject to aforesaid, the provisions of the Act shall apply to the arbitration proceeding between the parties. It is also agreed that any dispute and difference or question or disagreement, before or after completion and/or during extended period, between the parties, with the construction, meaning, operation or effect of the contract or out of or relating to the contract or breach thereof, shall be referred to arbitration. Therefore, it is agreed that the arbitral Tribunal is empowered to decide the dispute, difference or disagreement concerning construction, meaning, operation and effect of contract or out of or relating to the contract and/or breach thereof. In view of above specific agreed clauses, in my view, the arbitral Tribunal ought not to have awarded the interest on the sum of Rs. 22,29,226/ - at the rate of 12% per annum from 12.10.2002 till payment or realisation whichever is earlier as awarded, as it was specifically agreed by both the parties that they shall not be entitled for any interest on the amount of award.

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8. It is necessary to consider basic notwithstanding/ non-obstante clause i.e. "unless otherwise agreed by the parties" of Section 31(7)(a) of the Act. The parties can agree to waive or restrict the interest and/or rate of interest on the whole or any part of the money or for the whole or any part of the period between the date on which the cause of action arose and the date on which the award was made or intent on the award amount. There is no bar for such agreement. Therefore, if the parties in the present facts and circumstances of the case, agreed as recorded above, they are not entitled for any interest on the amount of award. There is no question of granting even 12% p.a. interest as awarded on the awarded amount.

9. The arbitrator, in view of Clause (b) of Sub-Section (7) of Section 31 of the Act, in absence of otherwise agreed clause and if there is no bar, can award interest up to the rate of 18% p.a.. The words in Section 31(7)(b) "unless the award otherwise directs" are supports the agreed clause and in view of Section 28(3) of the Act also, therefore, the arbitrator has no power to award any future interest, from the date of the award. It is specifically permitted and/or permissible under the Act itself, specially in view of rider of Section 31(7) so reproduced above. Therefore, if such contract/ agreement permits the parties not to claim interest on the awarded amount, in my view, such debar clause ought not have been overlooked by the arbitrator. The submission that the other part of Section 31(7)(a) and (b) if read in isolation then the power of arbitrator to award such interest is permissible as per the judgment of the Apex Court as referred above, Sayyed Ahmed and Company (Supra), is unacceptable. Sections 31(7)(a) and (b) and 28(3) need to read together. There is no question of reading the same in isolation.

10. In Sayyed Ahmed and Company (Supra), there was no such clause for consideration. The question is the power and jurisdiction of the arbitrator to award interest for the three periods viz. pre-reference period, pendent lite and future period from the date of the award, but it is only when there is no express bar in the contract regarding the award of interest. It is observed by the Apex Court, in Sayyed Ahmed and Company (Supra).

10. Ultimately, this Court made it clear that the arbitrator had the jurisdiction and authority to award interest for the three periods, namely, pre-reference period, pendente lite and future period (from the date of award) if there was no express bar in the contract regarding award of interest - vide Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj (2001) 2 SCC 721 as also the decision in Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd. (2005) 6 SCC 462.

(Emphasis added)

11. The points relating to interest have been further summarized in State of Rajasthan and Another Vs. Ferro Concrete Construction Pvt. Ltd., in the following

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words.:

(a) Where a provision for interest is made on any debt or damages, in any agreement, interest shall be paid in accordance with such agreement.

(b) Where payment of interest on any debt or damages is barred by express provision in the contract, no interest shall be awarded.

(c) Where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of Section 3 of the Interest Act will apply and consequently interest will be payable;

(i) where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings;

(ii) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed.

(d) Payment of interest pendente lite and future interest shall not be governed by the provisions of the Interest Act, 1978, but by the provisions of Section 34 of the Code of Civil Procedure, 1908 or the provisions of law governing arbitration as the case may be.

(Emphasis added)

12. In the present case, the clause is comprehensive and bars interest on the awarded amount. Clause G 1.09 in [Sayyed Ahmed (Supra)] bars interest under any head in clear and categorical terms on the money or balance lying with the Government or due and payable owing to any dispute or delay on the part of Engineer in making payment and in other respect whatsoever. Those facts and circumstance based upon the agreed terms in question, therefore, are distinct and distinguishable, as the clauses in question are significantly different. Even otherwise, the Act provides discretionary powers to the arbitrator to award such interest. There is no question of exercising discretionary power in view of agreed clause. The arbitrator, is bound by the agreed clause and he cannot go beyond the same, in the present facts and circumstances, therefore, there is no question in awarding any interest on the awarded amount.

13. The importance has already been given to the specific clauses/ agreed clauses of the agreement between the parties. Therefore, in view of the peculiar clauses in question, I am of the view that the interest so awarded by the arbitrator is unsustainable and without jurisdiction. The award needs to be set aside to that extent as the part of the award can be modified and rest of the award can be maintained, in view of the Full Bench Judgment. R.S. Jiwani Vs. Ircon International Ltd., A Government of India, .

14. Section 31(7)(a) of the Act begins with a non-obstante clause i.e. "unless

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otherwise agreed by the parties". This clause prevails overall other provisions of interest in all the stages, by the Arbitrator. I am dealing with a specific agreement clause and therefore, also the power of the Arbitrator to award interest in all the stages. The obstante clause read with agreed clause govern and regulate the power of the Arbitrator to grant interest. This non-obstante clause prevails over the entire scheme of power of the arbitrator to grant interest at all stages.

15. It is made clear that the power of arbitrator to grant interest is regulated by the agreement between the parties. This is no way control or regulate the power of the Court to award interest once the award is made final in accordance with law. This obstante clause and the agreed clause nowhere control the power of the Court to award future interest or modify the interest rate or period or stage. But, in view of the Scheme of the Act and specially of Section 28(1) and 31(7), the Court needs to consider the agreed clause between the parties while making the award final and binding.

16. Such non-obstante clause needs to be interpreted widely to cover Section 31(7)(a) and (b) together. The provisions and the power to award interest is not mandatory, but it is discretionary. The Arbitral Tribunal needs to exercise that discretion judicially. The Tribunal should normally exercise its power to award interest, but subject to overriding contractual right to interest, if any. The right to interest, therefore, is subject to contract/agreement between the parties, which they are permitted and free to execute or agree under the Act itself. Such agreement shall have precedence over the default provision of Section 31(7)(a) and (b) of the Act. There is no conflict between the power of Arbitrator to award interest and a contractual right to claim particular rate of interest and/or from the particular period and/or to waive or debar from claiming any interest on any amount even at all stages to the rate of interest under the Act.

17. As noted, Section 31(7)(a) begins with a non-obstante clause as referred above. This clause, in my view, govern Section 31(7)(a) and (b) both. As the parties are free to agree on the power of the Tribunal in respect of the award of interest, such power cannot be restricted only to Section 31(7)(a), the provision permit, in my view, the parties to agree on the powers of the Tribunal in regard to the award of interest for Section 31(7)(b) also. In the present case, as noted above, the parties agreed accordingly covering Section 31(7)(a) and (b) both. This contractual agreement restricting the interest is well within the frame work of law and there is no conflict of such contractual right with Section 31(7)(a) and (b). The freedom to enter into such type of agreement with regard to the interest is well within the Uncitral Model Law and Rules, scheme and recognised power even u/s 49(1) of the English Arbitration Act, 1996.

18. The object of awarding post/future-interest is always to get the awarded amount as early as possible and/or to avoid delay in making payment towards the awarded amount specially when the Award attains finality. The respondents and/or a party against whom Award is passed may delay the proceeding and/or

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payment. Once the Award is final and/or attains finality as per the provisions of the Act, the Court in a given facts and circumstances, in spite of above clauses may pass or award and/or grant future or post-award interest for early recovery of the amount so awarded and/or protect the interest of the party in whose favour award is passed or the future loss as he may not be in a position to utilise awarded amount from the date of confirmation and/or final award till the execution and/or realization of the same.

19. Another challenge was raised with regard to the claim at Serial No. 7 towards the operation and maintenance charges while the vessel was waiting for instructions from ONGC. Item No. VI, Clause 12 of the agreement provides open ended time for revamping 60% compensation for the same. The Petitioner deducted 40% operation and maintenance charges though the vessel was waiting for revamping and was non-operational during 104 days, but 60% of the daily rate was paid. The claim, therefore, was raised for unpaid balance. There is a material on record, as observed by the learned Arbitral Tribunal that during 104 days, the said vessel with complete crew on board was waiting for finalization of the tender and the award of the contract for revamping. The Respondent themselves on their own could not have kept the fully ready and manned vessel for such period. For want of instructions, the Respondent could not have even moved the vessel to the revamping yard. The learned Tribunal, in my view, rightly considered the word "revamping" to include waiting for instructions of revamping. Clause 12 of the agreement (down time) provides that the master and crew of the vessel as well as the base staff are to be fully involved in the revamping of the vessel. Having once entered into the contract in question and compel other parties to keep everything ready and involved, subject to instructions and as they could not proceed with, the submission that it no way covers waiting for revamping, as rightly rejected by the Tribunal. The Petitioner denied the claims of the Respondent only because of their own inaction as they unable to give instructions and/or finalize the contract within the reasonable time and kept the fully manned vessel waiting. The Petitioner cannot claim benefit of their own wrong. It is not the case that the Respondent were not ready and fully and/or failed to complete their steps within the time prescribed. In such type of contract, it is expected that both the parties will complete and perform their part within reasonable time. When time period is prescribed, it is always with the clear understanding that both the parties will act within the framework of it. Therefore, on the basis of undisputed position on record, and as the Petitioner caused waiting, they cannot deny the right of the payment so claimed by the Respondent for keeping the vessel ready and the crew involved. In my view also, the reasoning so given is well within the purview of law and cannot be stated to be absurd or beyond the overall scope of the contract. The interpretation so given by the Tribunal to the clause, in the facts and circumstances, is possible and reasonable and therefore, needs no interference.

20. The Tribunal has further rightly observed referring to Clause 5.1 of the agreement that the vessel was not expected to operate offshore but waited for to

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be moved to the revamping yard. Therefore, submission with regard to the class certificate in no way sufficient to discard the claims so raised by the Respondent. There was no question of operation with all certificates and clearances as rightly observed. There is a clear finding given that the vessel was operational for the purpose of carrying itself for revamping and participating for revamping. Therefore, costs so incurred during this waiting period, need to be compensated and has rightly awarded by the Arbitral Tribunal. In all, considering the facts and circumstances and the agreement clauses between the parties, the view so taken, cannot be stated to be unjust, perverse or contrary to law.

21. Another submission was raised that no proper and previous approval was taken for various repairs and replacements which were not listed in HOTO and/or without giving list and estimation of the same for approval. The learned Tribunal after considering Section 70 of the Contract Act and considering the nature of contract between the parties and as it was for to carry out repairs and replacements of the vessel and as the fact of repairs or replacements and the materials so used were not denied, the Petitioner cannot deny the claims of the Respondent so raised; and as it was done without any objections and as it was necessary to repair and replace the same under the contract. The learned Tribunal has rightly granted claims on the principle "where the person for whom the act was done accepted and enjoyed the benefits although there was no request for the act on his part" which in the present case, is not in dispute. The submission that the work was not in the list of HOTO and therefore, was not under the contract, in the facts and circumstances, therefore, not acceptable, in view of the claim Nos. 1,4,5,6 and 8 specially, when other claim Nos. 2, 3 and 7 were duly proved.

22. There are various facets of costs of the proceedings, which may include "cost of the reference", "cost of the arbitration proceeding", "cost of the parties". The parties in the present case agreed to share the cost of the arbitration. The Arbitral Tribunal, in the present case, considering the facts and circumstances of the case, awarded the cost of Rs. 5,00,000/ - (Rupees five lacs) in favour of the winning party and against the losing party. Such grant of award is well within the frame work of law even as per Section 31(8) of the Act. Such after event award of cost cannot be equated with the arbitration costs which the parties have agreed to share equally; they must have incurred and shared already till the date of the award. The lump sum amount so awarded towards the costs, therefore, needs no interference. To award the costs, is entirely in the discretion of the Court, so also the tribunal. It cannot be claimed as a matter of right. The cost awarded by the Court while awarding the claim in favour of winning party cannot be shared equally with the loosing party based upon the agreement in question. The share of costs of Arbitration as per Clause 22.5 has nothing to do with the present costs so awarded. This was in addition to the expenses and/or costs of the Arbitration which party agreed to share equally. No other challenge raised.

23. I have observed in Jigar Vikamsey, An Indian National Vs. Bombay Stock

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Exchange Limited, , considering the various judgments of the Supreme Court revolving around Section 34 of the Act as under:

11 The Petition is u/s 34 of the Act. The Apex Court recently in G. Ramachandra Reddy and Co. Vs. Union of India (UOI) and Another, and in M.P. Housing Board Vs. Progressive Writers and Publishers, , while dealing with both the Arbitration Acts and considering the principles to challenge the Arbitral Award has re-iterated the following points:

(a) The re-appraisal of the evidence by the Court is not permissible (M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro,). An Award of an Arbitrator need to be read as a whole to find out the implication and meaning thereof of the reasons. The Court, however, does not sit in Appeal over the Award.

(b) The interference, where reasons are given would still be less, unless there exists a total perversity and/or the Award is based on a wrong proposition of law.

(c) Even if two views are possible on an interpretation of central clause, that would not be justification in interfering with the Award specially when the view so taken is possible/plausible one (State of U.P. Vs. Allied Constructions,). [G. Ramchandran (Supra)] But the interpretation of the clause which is wholly contrary to law should not be upheld by the Court. [Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd.,]

(d) The jurisdiction of the Court to interfere with an Award made by an Arbitrator is limited, unless there is an error apparent on the face of the Award and/or jurisdictional error and/or legal misconduct. [Numaligarh Refinery Ltd. (supra).

(e) The wrong point of law and apparent, improper and incorrect findings of facts which are demonstratable on the face of the material on record, may be treated as grave error and/or legal misconduct. (g) "From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996;

or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court u/s 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

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(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India." [Delhi Development Authority Vs. R.S. Sharma and Co., New Delhi,].

In view of above settled principles of law, the judgments cited by the parties in support of their respective submission on law need no further discussion. The facts are totally distinct and distinguishable.

24. In view of above itself, I am interfering and modifying so far as the order of interest on the awarded amount till realization by the arbitral tribunal in following words:

The petitioner to pay 18% interest from the date, the award has attained finality, till the realization of same, if the Petitioner fails to make the payment from the date of final order under the Act.

25. The rest of the award is maintained.

26. The arbitration petition is partly allowed and disposed of accordingly. No costs.

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