

(2023) 03 DEL CK 0061

In the Delhi High Court

Case No : Review Petition No. 89 Of 2022 In Original Miscellaneous Petition
(COMM) No. 12 Of 2021

Oil India Limited

APPELLANT

Vs

Techno Canada Inc.

RESPONDENT

Date of Decision : 10-03-2023

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2A), 34(2)(b), 34(2)(b)(ii),
37(1)(c)
Indian Contract Act, 1872 — Section 73, 74

Citation : (2023) 03 DEL CK 0061

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Ritin Rai, Ashutosh Kumar, Ritika Sinha, A Singh, Vikram Nandrajog

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner (hereafter 'OIL') has filed the present petition seeking review of the order dated 08.09.2021, whereby the petitioner's application [O.M.P.(OS) (COMM) 12/2021] under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning an arbitral award dated 01.09.2020 (hereafter 'the impugned award') was partly allowed.

2. The respondent (hereafter 'TCI') had commenced the arbitral proceedings for adjudication of its various claims. The Arbitral Tribunal had allowed most of the claims as raised by TCI. The operative/dispositive part of the impugned award is set out below:

"OPERATIVE/DISPOSITIVE SECTION:

A) Claimant is entitled to receive USD 26,19,700/- as part of Claim No.1.

B) Claimant is entitled to payment of USD 3,73,707/- from Respondent as part of

Claim No.2.

C) Claimant is entitled to a payment of USD 21,000/- from Respondent as part of Claim No.3.

D) Claimant is entitled to a payment of USD 173,348/- from Respondent as part of Claim No.3A, after adjusting the amount already paid to Claimant, if any.

E) Claimant is entitled to payment of USD 1,00,000/- from Respondent as part of Claim No.4.

F) Claimant's Claim Nos.5 is rejected and dismissed.

G) Claimant is entitled to interest @12% as past, pendente lite and future interest on all the amounts awarded to it under the present arbitration proceedings as under Claim No.6.

H) Claimant is entitled to receive Rs.54,90,000/- from Respondent as costs incurred during the arbitration proceedings as under Claim No.7.

I) All payments in USD to be made under the prevailing rate of exchange on the date of payment and to be made by Respondent within 30 days from the date of receipt of this Award."

3. OIL had assailed the said award by filing the above-captioned application under Section 34 of the A&C Act. The learned senior counsel, who had appeared for OIL in the said application, had confined the challenge to the impugned award on the following grounds that its claims were barred by limitation; that TCI had waived its right to claim any compensation by unconditionally accepting the deferment of deadlines; that the interest awarded was beyond the claims raised by TCI; that the Arbitral Tribunal had erred in awarding pre-award interest on claims other than Claim no.2; and that the Arbitral Tribunal had erred in awarding costs.

4. This Court considered the said contentions and set aside the impugned award to the extent that it had awarded establishment cost of USD 100,000 (Claim no.4) and to the extent that the Arbitral Tribunal had awarded interest (past, pendente lite and future) in excess of 10% per annum.

5. This Court did not accept the contention that the claims raised by TCI were barred by limitation and the impugned award was liable to be set aside under Section 34(2)(b)(ii) of the A&C Act, on that ground.

6. OIL appealed the order dated 08.09.2021 before the Division Bench of this Court [FAO(OS)(COMM) 176/2021 captioned 'Oil India Ltd. v. Techno Canada Inc.'] under Section 37(1)(c) of the A&C Act. One of the grounds urged by OIL in the said appeal, was that this Court had not considered the objection regarding the applicability of Standby Day Rates (SDR) and Monthly Rental Charges (MRC) for quantifying the amount payable under Claim No.1. By an order dated 20.12.2021, the Division Bench of this Court dismissed the appeal. However, in

view of the submission that OIL's challenge to the quantification of damages – which OIL claimed was argued at length was not considered, the Division Bench granted OIL the liberty to file a review petition notwithstanding that the same would be barred by limitation. Paragraph no.34 of the order dated 20.12.2021 passed by the Division Bench in FAO(OS)(COMM) 176/2021 is set out below:

"34. The next contention of the Ld. Senior counsel for appellant is that the issue of applicability of Standby Date Rate and the Monthly Rental Charges, while quantifying claim no.1, had not been adverted to by Ld single judge in the order under challenge, even though the Appellant had taken a categorical objection to the same at Para 32 (from Ground C-F) in the Petition filed under Section 34, before the Ld Single Judge. It has been stated at the Bar by the learned Senior Counsel appearing for the appellant, that the said objections were duly argued before the learned Single Judge. However, he has also been fair in conceding that he was not the counsel before the learned Single Judge and hence, on instructions, states that the said point was argued. But since, he was not the counsel appearing for the appellant before the learned Single Judge, he cannot state with certainty. He seeks liberty to file a review petition before the learned Single Judge as far as the quantification of SDR from 28.01.2015 to 08.06.2015 is concerned. In view of this matter, liberty as prayed for, is granted. The Appellant should prefer the review within four weeks of this order being uploaded. If so preferred, the learned Single Judge may deal with the same on merits, and the same would not be rejected on the grounds of limitation."

7. OIL has filed the present review petition pursuant to the liberty granted by the learned Division Bench of this Court.

8. At the outset, it is relevant to state that, Mr. Gulati, learned senior counsel, had advanced submissions on behalf of OIL during the proceedings under Section 34 of the A&C Act. He had, during the course of arguments, confined the challenge to the contentions as noted in Paragraph nos. 29 to 38 of the order dated 08.09.2021. The statement that arguments were advanced on the question of quantification of damages as awarded by the Arbitral Tribunal against Claim no.1 is incorrect. Mr. Gulati was requested to appear in court for clarification. He had appeared before this Court on 08.07.2022 and stated that, in fact, he had given up certain grounds after obtaining express instructions from OIL. However, there was some communication error insofar as the ground relating to the challenge to the quantification of Claim no.1 is concerned. He submitted that he apparently had no instructions to give up the same and there was some communication error. It is not necessary to dilate on the question as to why the counsel had not pressed the challenge to the quantification of damages after filing of the submissions. Suffice it to state that no oral submissions were advanced to assail the impugned award on the ground of quantification of damages. Notwithstanding the above, this Court considers it apposite to consider the said objection as well.

9. At the outset, it is material to note that the impugned award is an award

rendered in an international arbitration and therefore, the challenge on the ground of patent illegality under Section 34(2A) of the A&C Act, is not available to OIL. According to OIL, the impugned award, to the extent of quantification of damages under Claim no.1, falls foul of the fundamental policy of Indian law and therefore, the award is liable to be set aside in terms of Section 34(2)(b)(ii) of the A&C Act.

10. At this stage, it would be relevant to note the factual context of the disputes. The disputes between the parties arise in connection with the Contract No.: 6205782 for "Hiring of Production Testing Services for Exploratory Wells in NELP-VI Block (mz-onn-2004/1) in Mizoram". The notice inviting tenders for hiring of the production testing services in question was issued by OIL in the month of May 2014. TCI had, pursuant to the said notice, submitted its offer, which was accepted by a Letter of Award (LOA) dated 13.10.2014. Thereafter, the parties had entered into a formal agreement dated 26.02.2015 (hereafter 'the Agreement'). The Agreement was for a term of one year, which was extendable for an additional period of one year at the option of OIL. The total contract price was agreed at USD 4,952,800.

11. OIL issued a notice dated 21.10.2014 (Mobilisation Notice) calling upon TCI to mobilise its resources at the specified site (Well Aibawk-1 at Location MZ-3). In terms of the Mobilisation Notice, TCI was required to mobilise its resources at the site by 28.01.2015. However, thereafter, OIL issued an email dated 06.01.2015 requesting TCI to defer the mobilisation of equipment till 15.03.2015. On 10.02.2015, OIL sent another email requesting that the mobilisation be further deferred to 15.04.2015, instead of 15.03.2015 as requested earlier.

12. It is TCI's case that OIL failed to provide sufficient area at the site and facilities for storage and installation of the equipment even after 15.04.2015. Therefore, the mobilisation was completed a little later, that is, on 08.06.2015.

13. OIL issued a notice for final de-mobilisation from the Well (Aibawk-1 at Location MZ-3) on 20.08.2016 effective 12:00 noon on the said date. It called upon TCI to clear the site within a period of ten days thereafter. In the period between 08.06.2015 and 20.06.2016, OIL had also issued an interim demobilisation notice dated 22.10.2015 and an interim re-mobilisation notice dated 31.03.2016, calling upon TCI to re-mobilise between 15.05.2016 to 29.05.2016. TCI, requested for payment of Monthly Rental Charges (MRC) in respect of certain items for the period after the interim de-mobilisation notice but OIL had denied the same. TCI had also raised invoices for MRC but the same were not accepted.

14. The disputes were also referred to an 'Outside Expert Committee', which recommended that a sum of USD 233,570 plus service tax be paid to OIL in full and final settlement of its claim but the said recommendation was rejected by OIL.

15. The disputes raised between the parties were referred to arbitration.

16. Before the Arbitral Tribunal, OIL raised various claims. The controversy in the present petition is confined to quantification of award in respect of Claim no.1. Claim no.1, as set out in the statement of claims, is reproduced as under:

“(A). Claim No.1: US Dollar 21,34,384/- towards Respondent’s contractual liability/ compensation for loss on account of deferment of mobilisation and delay in mobilisation completion (even after bringing the equipment/tools to site):

Sl.

Particulars

US Dollar

a.

SDR for SOR item A5/AA in the form of Respondent’s contractual liability/ compensation from January 28, 2015 (original mobilisation date as per mobilisation notice of October 21, 2014) to June 8, 2015 (actual mobilization date i.e. date of issuance of Work Order) = 132 days @ USD 4,375 per day;

5,77,500

b.

SDR for SOR item B5/BB in the form of Respondent’s contractual liability/ compensation from January 28, 2015 (original mobilisation date as per mobilisation notice of October 21, 2014) to June 8, 2015 (actual mobilization date i.e. date of issuance of Work Order) - 132 days @ USD 13,500 per day.

17,82,000

c.

MRC for SOR items SOR items C3/CC and D10/DD, D11/DD,

D12/DD and D13/DD in the form of Respondent’s contractual liability/ compensation from January 28, 2015 (original mobilisation date as per

mobilisation notice of October 21, 2014) to June 8, 2015 (actual mobilization date i.e. date of issuance of Work Order) = 132 days @ USD 12,500 + 33,000 per month;

2,00,200

d.

Cost of loading and transportation of equipment to en-route location up to January 6, 2015 (date on which deferment notice of January 6, 2015 was issued 77 days after the mobilisation notice of October 21, 2014), Transportation back to storage yard (Base) and unloading at Base in the form of compensation;

60,000

Total

18,45,700

GST @ 12%

2,21,484

Total of Claim No.1

20,67,184

17. It is apparent from the above that Claim no.1 comprised of four sub-claims. TCI had made a sub-claim no.1a for SDR in respect of Item A5/AA – Surface Production Testing Service Package for the period 28.01.2015 to 08.06.2015. In terms of the contract between the parties, SDR was payable for tools and equipment in respect of the said items from the date and time of completion of mobilisation and during the period the tools and equipment are not in operation. In this regard, TCI claimed that it was in an advanced stage of mobilisation on 06.01.2015, when it received the request for deferring mobilisation. In terms of the contract, TCI was required to mobilise within a period of 100 days of the Mobilization Notice. As on 06.01.2015, 77 days out of the total number of 100 days after issuance of the Mobilisation Notice dated 21.10.2014 had elapsed. TCI claimed that, but for OIL's request for deferring mobilisation, it would have fully mobilised within the stipulated period, that is, by 28.01.2015. It did not do so only on account of OIL's convenience. Therefore, 28.01.2015 was required to be treated as the mobilisation date and TCI was entitled to the payment of SDR (standby rates) as it had practically committed its resources. TCI's claim was founded on the assertion that it could not utilise its equipment on account of deferment of mobilisation. At the material time, the equipment was en route and was, therefore, required to be stored and managed. Since TCI was deprived of utilising the equipment gainfully – which it would have done by mobilisation on 28.01.2015 – it was entitled to the SDR for those items. SDR for item A5/AA [which was subject matter of Sub-claim 1(a)] was agreed at USD 4,375 per day under the contract in question.

18. TCI's sub-claim 1(b) was in respect of item B5/BB. This claim was also founded on the basis that TCI could not employ the said equipment gainfully during the period 28.01.2015 to 08.06.2015. Since the mobilisation was deferred at the instance of OIL, it was required to pay the SDR for the said equipment. Under the contract, the SDR for the said item (B5/BB) was fixed at USD 13,500 per day.

19. Sub-claim 1(c) was in regard to MRC for certain items for which there was no agreed SDR and the contract provided for payment of MRC. MRC in the items in question (Item C3/CC, D10/DD, D11/DD, D12/DD and D13/DD) was quantified at USD 200,200.

20. Sub-claim 1(d) was regarding loading and unloading charges, which TCI claimed that it had incurred in transportation and loading and unloading of equipment which were en route as on 06.01.2015 being transportation to storage yard base/other storage locations and the cost of loading and unloading from base storage/other storage facilities to the site. TCI claimed that some of the equipment (Item A5/AA) was stored at its facility at Barmer, Rajasthan and Item No.B5/BB was imported from M/s Tacrom Services SRL, Romania. Other items C3/CC (TCP Service Package) was sourced from M/s HLS Asia and in terms of DD items, the following items were sourced from Barmer, Rajasthan: "Slickline unit" (DD10/DD), "BHP/BHT measurement tool (Electronics Memory Gauges)" (D11/DD), "Single Phase 10-13 – Barmer Rajasthan Base Bottomhole PVT Sampler" (D12/DD) and "Sample bottles with transfer kits" (D13/DD).

21. TCI also provided details of the expenditure incurred. OIL contends that the impugned award accepting the quantification of Claim no.1 is in conflict with the public policy of India. It is contended that TCI could not be awarded SDR and MRC as claimed because the said charges were payable only after mobilisation and there was no dispute that the mobilisation was completed on 08.06.2015.

22. Mr. Rai, learned senior counsel appearing for OIL, submitted that applying SDR and MRC for quantification of the loss was contrary to the terms of the Agreement and also in violation of the principles for quantifying damages under Section 73 and 74 of the Indian Contract Act, 1872, which permits only reasonable compensation. He also submitted that TCI was required to support its claim by evidence but it had not produced any evidence as to the actual cost or loss incurred. He also referred to the decision of the Supreme Court in *Kailash Nath Associates v. Delhi Development Authority & Anr.*: (2015) 4 SCC 136.

23. This Court is unable to accept that the impugned award, inasmuch as it accepts the quantification of Claim no.1, is in conflict with the public policy of India.

24. The Arbitral Tribunal had considered OIL's defence that SDRs and MRCs were payable after mobilisation. It is apparent from a plain reading of the impugned award that the Arbitral Tribunal had accepted that TCI had taken all steps for mobilisation and had committed its resources. The resources were not mobilised at site on account of OIL deferring the mobilisation dates; not adhering to the mobilisation schedule; and not providing works site to the claimant. The Arbitral Tribunal found that OIL was in default on the aforesaid counts and, therefore, could not insist on a strict interpretation that SDR and MRC was payable on actual mobilisation. In other words, the Arbitral Tribunal accepted that the date when TCI was ready for deployment at site was relevant for the purposes of payment of SDR and MRC as TCI had withheld bringing the equipment at site on account of OIL deferring the deployment of the equipment.

25. It is material to note that the Claim nos.1(a), 1(b) and 1(c) were not founded on actual costs incurred by TCI. The said claims were founded on the basis that

TCI was entitled to the charges as agreed as it had committed its resources and was in a position to deploy the same on 28.01.2015 but was prevented from doing so by OIL. Therefore, OIL was liable to pay the charges as would be payable by it on such deployment.

26. This Court is unable to accept that the quantification of Claim no.1 on the aforesaid basis falls foul of the fundamental policy of Indian law.

27. The expression “fundamental policy of Indian law” cannot be interpreted in wide terms to include violation of any Act or Statute. A clear distinction must be drawn between challenge to an award on account of patent illegality under Section 34(2A) of the A&C Act and the challenge to an award on the ground that it is in contravention of the fundamental policy of Indian law. In *Oil and Natural Gas Corporation Ltd. v. Western Geco International Limited*: (2014) 9 SCC 263, the Supreme Court had explained the concept of fundamental policy of Indian law to encompass three juristic principles. First, the judicial approach; second, the principles of natural justice; and third, reasonableness as understood in the sense of the *Wednesbury* principle, that is, no reasonable person could possibly arrive at the said conclusion (see: *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*: [1948] 1 K.B. 223).

28. The question whether an arbitral award is in contravention of the public policy is not required to be determined by review on the merits of the disputes. This is expressly clear by Explanation 2 to Section 34(2)(b) of the A&C Act.

29. In view of the above, the present application seeking review of the judgment is unmerited and is, accordingly, dismissed.