
(2016) 04 BOM CK 0060

In the Bombay High Court

Case No : Arbitration Petition No. 606 of 2016

Oil & Natural Gas Corporation Limited

APPELLANT

Vs

International Certification Services Private Limited

RESPONDENT

Date of Decision : 28-04-2016

Acts Referred:

Citation : (2016) 4 MhLJ 727 : (2017) 1 RAJ 381

Hon'ble Judges : R.D. Dhanuka, J.

Bench : Single Bench

Advocate : Mr. Kevic Setalvad, Senior Counsel with Ms. Daisy Dubhash, Mr. J.P. Kapadia, Mr. O. Mohandas and Mr. A. Khare i/b Little & Co, for the Appellant; Mr. Vishal Kanade with Ms. Bhakti Nadkarni i/b Lex Firum, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.(Oral)—By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 the petitioner has impugned the arbitral award dated 26th October, 2015, recommending immediate withdrawal and cancellation of ONGC letter dated 22nd April, 2014 regarding dealing with the respondent and to permit the respondent herein to participate in all ongoing and future tenders, wherever they are qualified and to restore their business credibility. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner herein was the original respondent, whereas the respondent was the original claimant in the arbitral proceedings.

3. The petitioner had invited bids for maintenance, painting of its process platforms at Mumbai in the year 2008. M/s. J.K. Surface Coating Pvt. Ltd. had submitted its bids. The bid of the said M/s. J.K. Surface Coating Pvt. Ltd. was accepted by the petitioner on 8th May, 2009. The petitioner had also invited bids for hiring the services of a third party for supervision, quality control and

measurement of work of maintenance, painting of the said offshore platforms of Mumbai Offshore. The petitioner had accepted the bid of the respondent in respect of the said work on 8th June, 2009. The petitioner entered into a contract with the respondent on 7th July, 2009. It is not in dispute that when the tender was opened, the tender amount was more than Rs. 1.00 crore. It is also not in dispute that in the year 2012, the work for supervision and maintenance entered into between the parties was completed by the respondent.

4. It is the case of the petitioner that the respondent received a vigilance complaint with regard to the work carried out by the painting contractor i.e. M/s. J.K. Surface Coating Pvt. Ltd. The petitioner accordingly initiated action against the said M/s. J.K. Surface Coating Pvt. Ltd. based on such vigilance complaint. On 13th June, 2012, the petitioner addressed a letter to the respondent for seeking explanation in respect of the alleged discrepancies in the certification process undertaken by it. It was the case of the petitioner that in view of the wrong certification of the invoices of the painting contract by the respondent, the petitioner had made excess payment of Rs. 57,41,582/- to the painting contractor.

5. It is the case of the petitioner that on 10th July, 2013, the Vigilance Department submitted its recommendation that the petitioner may consider action against the respondent and the painting contractor for recoveries of excess payment.

6. The petitioner thereafter started enquiry by nominating an enquiry officer on 18th October, 2013 to enquire and investigate the case against the respondent.. The enquiry officer thereafter issued a show cause notice to the respondent. The respondent replied to the said show cause notice and denied the allegations made therein. The enquiry officer thereafter conducted an enquiry on 31st December, 2013 and recommended banning of all further business dealings with the respondent and putting the respondent on a holiday for a period of three years for the alleged gross violation of the provisions of the scope of the work.

7. Based on such enquiry report, the competent authority of the petitioner issued an order on 22nd April, 2014 against the respondent stopping further business dealings with the respondent for participation in future tenders of the petitioner for the period of three years from the date of the issue of the said order.

8. On 18th December, 2014, the respondent invoked arbitration as per clause 27 of the contract. The petitioner appointed Dr. I.M. Chatterjee as a sole arbitrator on 10th April, 2014. The respondent filed statement of claim before the learned arbitrator and applied for refund of the amount recovered by the petitioner by encashing the performance bank guarantee and also impugned the letter dated 27th April, 2014 issued by the petitioner thereby blacklisting the respondent from future contract for a period of three years. The petitioner resisted the said claim by filing the written statement. The learned arbitrator made an award on 26th October, 2015 and rejected the monetary claim made by the respondent.

The learned arbitrator however, recommended the impugned withdrawal and cancellation of the letter dated 27th April, 2014 issued by the petitioner thereby dealing with all the business with the respondent for a period of three years. This part of the impugned award is impugned by the petitioner in this petition filed under section 34 of the Arbitration & Conciliation Act, 1996.

9. Mr. Setalvad, learned senior counsel appearing for the petitioner invited my attention to the various provisions of the contract entered into between the parties and more particularly clauses 9, 10, 18.1 to 18.6 and 27.1. It is submitted by learned senior counsel that admittedly the contract had expired by efflux of time. He submits that the contract was not terminated on account of force majeure and also on account of unsatisfactory performance. He submits that clauses 18.1 and 18.2 of the contract were thus not attracted in the facts and circumstances of the present case. Reliance is placed on second part of clause 18.6 which provides for consequence of termination. He submits that since the contract was not terminated under clauses 18.1 and 18.2 which provided for termination of contract on expiry of the contract and termination on account of force majeure, the contractor could be put on holiday under clause 18.6. He submits that there is no dispute that clause 34 which provided for "integrity pact" was deleted.

10. Learned senior counsel for the petitioner also invited my attention to four circulars issued by the petitioner which provided for procedure required to be followed for black listing a contractor and action permitted under those circulars against such a contractor. He submits that the action was initiated by the petitioner against the respondent under those circulars and also under "integrity pact" which provided for black listing such contractor for a period of three years.

11. It is submitted that since the petitioner had taken action against the respondent for black listing under the "integrity pact" and based on such circulars, the cause of action, if any, arisen in favour of the respondent was outside the scope of the contract and thus the said prayer for impugning the action of black listing was not arbitrable under the arbitration clauses recorded under clause 27.1 of the contract.

12. The next submission of the learned senior counsel for the petitioner is that clause 27.2 which provided for number of arbitrators required to be appointed by the appointing authority would also indicate that the arbitrator could be appointed only if the amount of the claim was as prescribed under clause 2 of the said clause.

13. It is submitted by the learned senior counsel that the learned arbitrator thus acted beyond the scope of his jurisdiction and has decided the issue of blacklisting on the respondent which was not permissible under clause 27.1 of the contract.

14. The next submission of learned senior counsel is that the fact that the learned arbitrator has rejected the claim for refund of performance bank

guarantee amount by rendering a finding against the respondent that the work was not satisfactory, the learned arbitrator could not have consequently passed an order for setting aside the order of blacklisting against the respondent. The conclusion drawn by the learned arbitrator is contrary to the findings recorded by the learned arbitrator. He submits that the petitioner has no dispute that the respondent could avail of any other remedy in law other than invoking the arbitration agreement.

15. Mr. Kanade, learned counsel appearing for the respondent on the other hand invited my attention to clauses 18.1 to 18.6, 27.1 and 34 of the arbitration agreement. It is submitted by the learned counsel that admittedly the "integrity pact" clause recorded in clause 34 was deleted. He submits that admittedly the petitioner had taken action of blacklisting against the respondent under "integrity pact". In support of this submission, learned counsel for the respondent invited my attention to some of the paragraphs of the impugned award in which the submissions of both the parties were recorded by the learned arbitrator. He submits that the contention of the petitioner before the learned arbitrator was that clause 34 of the contract which provided for "integrity pact" clause was deleted by mistake by the petitioner. He submits that the petitioner had applied for rectification of the contract before the learned arbitrator based on the premise that the said clause 34 was deleted by mistake.

16. It is submitted that since the action taken by the petitioner was under clause 34, which was not part of the contract, the respondent was entitled to invoke arbitration under clause 27.1 of the contract. He submits that the question as to whether the petitioner could take any action of blacklisting the respondent was the question which would fall within the parameters of clause 27.1 as the same was in connection with construction, meaning, operation, effect, interpretation of the contract or breach thereof. He submits that the disputes and differences arose between the parties as to whether the petitioner could have banned the respondent under the provisions of the said contract and thus the learned arbitrator had jurisdiction to deal with such claims made by the respondent.

17. The next submission of learned counsel for the respondent is that the petitioner had not raised an issue of jurisdiction before the learned arbitrator that the claim made by the respondent was outside the scope of contract or was outside the purview of arbitration agreement recorded in clause 27.1 of the contract. He submits that since the issue of jurisdiction was not raised before the learned arbitrator, the said issue of jurisdiction cannot be allowed to be raised for the first time in this petition filed under section 34 of the Arbitration & Conciliation Act, 1996.

18. Learned counsel for the respondent invited my attention to the findings and observations made by the learned arbitrator while granting the relief of setting aside the order of blacklisting the respondent. He submits that the learned arbitrator has after considering the pleadings and documents has rendered findings of fact which findings being not perverse cannot be interfered by this

Court. He submits that the learned arbitrator has interpreted the terms of the contract and has come to the conclusion that under the provisions of the contract, the petitioner could not ban the respondent in view of the deletion of clause 34 of the contract. He submits that since the action on the part of the petitioner was beyond the scope of contract, the said claim was arbitrable. It is submitted that the interpretation of the learned arbitrator of the provisions of the contract being a possible interpretation, this Court cannot substitute the possible interpretation of the learned arbitrator with another interpretation.

19. Mr. Setalvad, learned senior counsel for the petitioner in rejoinder submits that the learned arbitrator could not have entertained such claim. In support of this submission, he placed reliance on the judgment of the Calcutta High Court in case of *Vijay Singh Nahata v. Union of India & Ors.*, AIR 1998 Calcutta, 153 and in particular paragraphs 48 to 54. He submits that the challenge to an order banning a contractor could be challenged only by way of writ petition and not by filing arbitration proceedings.

20. A perusal of the contract entered into between the parties indicates that clause 34 of the contract which provided for "integrity pact" had been deleted admittedly when the contract was signed. The said contract also provided that any modification to the contract had to be in writing. Admittedly, there was no such amendment to clause 34 of the contract.

21. The question that arises for consideration of this Court is whether the action of blacklisting taken by the petitioner against the respondent by applying a non-existing provision was outside the contract which action was based on the performance of the contractor under the same contract awarded to the respondent and if so whether such cause of action could be adjudicated upon by invoking the arbitration agreement recorded in clause 27.1 of the contract.

22. It is not in dispute that the contract was terminated by efflux of time. No action had been taken by the petitioner on account of force majeure. It is not the case of the petitioner that the respondent was banned by invoking clause 18.6 of the contract. A perusal of the letter dated 22nd April, 2014 issued by the petitioner thereby banning the business dealings with the respondent for a period of three years clearly indicates that the said order was based on irregularity alleged to have been observed in the works in the same contract which was subject matter of arbitration.

23. In my view, even if the validity period of contract had expired upon completion of work between the parties, the dispute, if any, having arisen out of the said contract in view of the banning order issued by the petitioner based on the alleged unsatisfactory performance of the respondent of the same contract, the arbitration agreement will not come to an end and would continue to subsist for adjudication of the dispute between the parties under the said agreement. In my view, there is thus no substance in the submission of the learned senior counsel for the petitioner that the claim impugning banning order issued by the

petitioner was outside the scope of contract or outside the scope of arbitration agreement recorded under clause 27.1 of the contract or that the arbitration agreement did not survive after expiry of the contract.

24. In my view, since clause 34 of the contract was admittedly deleted by the parties when the contract was awarded to the respondent, the petitioner could not have taken any action against the respondent under the said non-existent clause. The submission of the petitioner made before the learned arbitrator for rectification of the contract based on the alleged mistake in deleting the said clause was in my view, totally untenable and is rightly rejected by the learned arbitrator.

25. A perusal of the record clearly indicates that the petitioner did not raise any issue of jurisdiction before the learned arbitrator, which is raised by the petitioner for the first time in this petition. It was not the case of the petitioner that though the issue of jurisdiction was raised by the petitioner before the learned arbitrator, the same is not considered by the learned arbitrator. In my view, the issue of jurisdiction thus not having been raised before the learned arbitrator, the same cannot be allowed to be raised for the first time in the present proceedings filed under section 34 of the Arbitration & Conciliation Act, 1996.

26. Be that as it may, in my view, the challenge to the order of banning issued by the petitioner was within the purview of jurisdiction of the learned arbitrator under arbitration agreement recorded in clause 27.1 of the contract. A perusal of the said clause clearly indicates that the same is very wide and would include the disputes or question arising out of its agreement which arose between the parties. In my view, the claim of the respondent that the action of banning was in breach of the contract would thus clearly fall within the ambit of arbitration agreement. In my view, the learned arbitrator has thus acted within the jurisdiction by exercising his power under clause 27.1 of the contract. There is thus no substance in this submission made by the learned senior counsel for the petitioner.

27. Insofar as the submission of learned senior counsel for the petitioner that mechanism of the arbitration could not be invoked also under clause 27.2 is concerned, there is no substance in this submission of the learned senior counsel. A claim upto Rs. 5.00 crores could be adjudicated upon by a sole arbitrator to be appointed by the petitioner.

28. A perusal of the judgment of the Calcutta High Court, relied upon the learned senior counsel for the petitioner in case of Vijay Singh Nahata (supra) indicates that the Calcutta High Court had considered the issue of black listing in the writ petition. In my view, the said judgment would not apply to the facts of this case and would not assist the case of the petitioner.

29. A perusal of the award clearly indicates that the learned arbitrator has dealt with the provisions of the contract and has dealt with the submissions and pleadings of both the parties and has rendered a finding of fact. In my view, the

said finding of fact rendered by the learned arbitrator is not perverse and thus cannot be interfered with by this Court under section 34 of the Arbitration & Conciliation Act, 1996.

30. The learned arbitrator has interpreted the terms of the contract and has held that in view of deletion of clause 34 of the contract, the petitioner could not have taken any action of banning the respondent in absence of such contract. The interpretation of the learned arbitrator is not only possible interpretation but is correct interpretation.

31. Insofar the submission of learned senior counsel for the petitioner that since the learned arbitrator had rejected the claim for refund of performance bank guarantee amount and thus the conclusion drawn by the learned arbitrator is inconsistent with the findings recorded by the learned arbitrator is concerned, it is not in dispute that the respondent has not impugned the said finding. In my view the action banning the contractor by the petitioner was an independent action. The learned arbitrator on interpretation of the terms of the contract having found that the said action was outside the scope of contract, has rightly allowed the said claim.

32. In my view, the petition is devoid of merits and is accordingly dismissed. No order as to costs.