
(2013) 02 DEL CK 0172
In the Delhi High Court
Case No : OMP No. 780 of 2011

Tal Manufacturing Solutions Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 04-02-2013

Acts Referred:

Citation : (2013) 3 AD 528 : (2013) 135 DRJ 107

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Akhil Sibal, with Mr. Shashwat Pattanaik, Ms. Simran R. Gurnani and Mr. Ashutosh Kumar, for the Appellant; Anshuman Sinha, with Mr. Ajay Vikram Singh, for the Respondent

Judgement

Manmohan Singh, J.—The petitioner has filed the abovementioned petition u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for setting-aside a portion of the impugned award dated 26th May, 2011 to the extent that it does not grant the petitioner reliefs in terms of prayer clause (b) of the Statement of Claim. The petitioner is engaged, inter-alia, in the business of supplying, erecting and commissioning industrial plants. The respondent through its Controller of Stores invited tenders vide Tender No. G-180 for procurement of a Minerallic Abrasive (Sand) Blasting Plant for Stainless Steel Passenger Coach/Car Shells. On 17th April, 2000, the respondent issued an amendment being Amendment No. 1 to the above said Tender No. G-180. On 27th June, 2000, the respondent issued a second corrigendum to the said Tender vide which Clause No. 3.4.1.4 was amended. By a letter dated 12th July, 2000, the Assistant Commissioner of Stores certified that the external blasting of the coach would be mechanized as per corrigendum No. 2 dated 27th June, 2000 that the internal blasting and the blasting of the underside of the coach would be carried out by manual blasting. On 3rd November, 2000, by an amendment further modifications/clarifications in the said tender were issued by the respondent. The said amendment made it a requirement that the blasting process in the proposed plant should be such that the said surface area of 560

sq.mts. should be fully blasted in 6 hours or less.

2. On 4th December, 2000, the petitioner submitted its offer/bid bearing No. TAL/MKTG/MDP/SAL/05/COV/2002. The said offer was made pursuant to the modification/clarification in the above said tender by way of the aforesaid amendment dated 3rd November, 2000. On 23rd May, 2003, this offer was accepted by the respondent vide its Purchase Order No. COFMOW/IR/S3417/2K/G180. On receipt of the said Purchase Order, the petitioner supplied the necessary machinery and commissioned the plant in accordance with the specifications provided in the tender documents and the amendments, clarifications and modifications thereto.

3. The petitioner further submitted that on 2nd April, 2005, the Deputy Chief Mechanical Engineer (M&P), RCF, Kapurthala (hereinafter referred to as the "RCF") issued a Proving Test Certificate (in short, called as "PTC") certifying the receipt, successful installation and commissioning of the Minerallic Abrasive (Sand) Blasting Plant and the technical acceptability and functioning thereof. The said PTC also certified that the training of RCF personnel had been completed by the petitioner.

4. After the joint trials conducted in the month of October, 2006 it was first contended by the respondent and RCF that the productivity of the Plant was lower than that specified in the Accepted Tender (in short, called as "AT"). A tripartite meeting was held between the petitioner, the respondent and RCF on 4th January, 2007. The said issue of productivity of the Plant being lower than that specified in the AT was raised by the respondent and RCF. At the said meeting, the respondent and RCF alleged that the amount of time taken for blasting one LHB Chair Car was more than 18 hours and 15 minutes as compared to the maximum of 8 hours provided in the AT. The minutes of the tripartite meeting of 1st February, 2007 accordingly record as follows, "The solution therefore lies in correctly calculating the clear area and shaded area of LHB Chair Car. Once the area is agreed to clearly by M/s. TAL & RCF, element of productivity clause in AT and then joint measurement of timing would be recorded on the coach."

5. On 23rd February, 2007, the joint measurement and calculation of surface area of the coaches was undertaken by the petitioner and RCF. In the said measurement, the approx. surface area of the LHB Chair Car coach which was actually supplied was calculated to be about 840 sq.mts. On 5th March, 2007, the petitioner by its letter forwarded the extended Bank Guarantees as requested by the respondent. Another tripartite meeting was held between the petitioner, the respondent and RCF on 10th April, 2007 where the surface area of the LHB Chair Car coaches which were actually supplied was calculated to be about 840 sq.mts. Thereafter, on 17th April, 2007 and 18th April, 2007, actual field trials were jointly conducted, as agreed, for establishing productivity/capacity of the plant. The joint note dated 21st April, 2007 records that for robot blasting the time taken was 385 minutes as compared to 420 minutes as per the proportional

calculation of time on the basis of the AT, and for manual blasting actual time taken was 240 minutes as compared to 105 minutes as per the proportional calculation of time on the basis of the AT. On 22nd June, 2007, the respondent invoked Bank Guarantee No. IGL03305 and on 10th July, 2007, the respondent invoked another Bank Guarantee No. IGL03025.

6. It is further submitted in the petition that the petitioner by its letter dated 3rd July, 2007 sent to the respondent requested for a coach to conduct joint measurement and trial blasting in order to understand how even though the Plant was performing at full capacity due to change in the input condition of the total surface area of the coach, the time taken to complete blasting would be higher. The petitioner by its another letter dated 5th July, 2007 referring therein the letter dated 3rd July, 2007 requested the respondent to arrange a tripartite meeting at RCF, Kapurthala for sorting out cycle time issue for garnet blasting plant in the coming week. By its letter dated 20th July, 2007, the petitioner disputed the correctness and validity of the respondent's actions in invoking the said warranty bank guarantees and referred the matter to arbitration.

7. On March 24, 2008, the petitioner filed its Statement of Claim. In reply thereto, the respondent filed its written statement and counter-claim dated May, 2008 for a sum of Rs. 3,23,00,000/- being the alleged loss of revenue sustained by the respondent on account of non-performance and breach of the agreement by the petitioner. Thereafter, the petitioner filed its rejoinder/reply to the aforesaid written statement/counter-claim of the respondent. During the arbitral proceedings, additional documents were also filed by the petitioner. Evidence of the parties was led, and thereafter oral arguments were made. The petitioner filed its written submissions.

8. The petitioner states that prayer(b) of the Statement of Claim filed by it before the Arbitrator reads as under:-

(b) That the learned Arbitrator be pleased to order and direct the Respondent to pay to the Claimant an amount of Rs. 1,42,82,785.86/- being the aggregate amount of the said Warranty Bank Guarantee No. IGL 03305 and Warranty Bank Guarantee No. IGL 03025, both dated April 17, 2006, together with interest thereon at 18% p.a. from the date on which money was paid to the respondent by the Bank pursuant to the invocation and encashment of the said bank guarantees, till payment and/or realization thereof.

9. The Arbitral Tribunal after considering the rival submissions of the parties and the evidence, passed the impugned Award dated 26th May, 2011 and, inter-alia, held that the invocation of the Bank Guarantees was not justified. Apart from the above, the Arbitrator has also dealt with the case of the respondent as well as counter-claims with regard to the alleged loss suffered by the respondent. Three heads referred by the respondent during the course of the hearing before the Arbitrator are: (i) Loss due less productivity of coaches as per AT, (ii) Loss due to frequent breakage of pine wood slats (expensive item) of long screw conveyor,

and (iii) Expenditure incurred by Rail Coach Factory to make plant run even at sub-optimal level (which otherwise should have been covered free of cost by M/s. Tal during warranty period). The details of discussion in the award read as under:-

I. LOSS DUE TO LESS PRODUCTIVITY OF COACHES AS PER AT

Calculation of Productivity lost:

That the actual loss of productivity of coaches due to more time taken by the plant. It is vital to say that in production of the coach the plant was taking 35.18% more time.

i) The required productivity is 75 coach/month i.e. 9000 coaches yearly. With increase in area productivity calculated is 748.7 coaches yearly.

ii) Observed productivity due to increased blasting time = $480/780 \times 75 \times 12 = 553.84$ coaches/year.

Loss in productivity (i-ii) = 194.86 coaches/year.

Loss of productivity @ 194.86 coaches per year due to increased blasting time in 15 years codal life of machine in terms of coaches = $194.86 \times 15 = 2922.90$ i.e. 2923 coaches.

Outsourced cost of blasting of one coach approximately = Rs. 25,000/-.

Hence the total loss suffered by the respondent is Rs. 7,30,75,000/-.

II. LOSS DUE TO FREQUENT BREAKAGE OF PINE WOOD SLATS (EXPENSIVE ITEM) OF LONG SCREW CONVEYOR.

a) Due to broken pine wood slates of long screw conveyor, even though, there were replaced, due to design problem, pine wood slates are frequently breaking.

b) Hence, due to above reasons approximately 200 nos. of pine wood slats were breaking per year, therefore, 3000 nos. of pine wood slates are to be replaced within the codal life. The cost of pine wood slats as per firm's quotation is Rs. 1,200/- per slat. Hence loss of amount Rs. $3000 \times 1200 =$ Rs. 36,00,000/-.

III. EXPENDITURE INCURRED BY RAIL COACH FACTORY TO MAKE PLANT RUN EVEN AT SUB-OPTIMAL LEVEL (WHICH OTHERWISE SHOULD HAVE BEEN COVERED FREE OF COST BY M/s. TAL DURING WARRANTY PERIOD):

a) Expenditure incurred on Compressor ducting and control panel cabin done by Rail Coach Factory = Rs. 1,00,000/-

b) Expenditure incurred on water logging problem started and sorted out by Civil Department/Rail Coach Factory = Rs. 22,034/-

c) Expenditure incurred on electrical items in running the plant during the warranty period = Rs. 36,500/-

d) Expenditure incurred on electronic items in running the plant during the

warranty period = Rs. 40,060/-

e) Expenditure incurred for change of flexible Hose pipe for vacuum cleaner during the warranty period = Rs. 60,000/- Total expenditure incurred Rs. 2,58,594/-.

Total losses suffered by the respondent is I+II+III = Rs. 7,69,33,594/- plus 18% interest on this amount till the realization of the claim.

Legally Recovered amount from the claimant from the Bank guarantee is Rs. 4,46,33,594/-.

Hence, the balance Counter claim of the respondent is Rs. 32,30,00,000/- plus 18% interest on this amount till the realization of the claim.

The respondent has basically submitted account a claim which constitute the following three factors:

- i. Due to loss of productivity calculated over 15 years codal life of the plant.
- ii. Loss due to request breakage of pine wood slats expensive item of long screw conveyor.
- iii. Plant run even AT sub-optimal level (Which otherwise should have been covered free of cost by M/s. TAL during warranty period).

Simple interest on the total loss @ 18% has also claimed.

The claimants argument that the surface area given in the respondents letter dated 03.11.2000 as 560 sq.mtr. is accepted. This area was reflected in the GAD also submitted by the claimant and was duly approved by the respondent. The argument given by the respondent that the PTC was procured by the claimant unilaterally after blasting only 6 coaches as against 15 coaches is not tenable. If 15 coaches had not been blasted on the plant the PTC should have not been issued.

The argument of the claimant that the area of coach was much more than the area given in the AT and was approximately 840 sq.mtr. which was measured jointly by RCF and M/s. TAL was never objected to by even COFMOW and RCF is acceptable.

The counter claim due the loss of productivity is therefore, not tenable for two reasons:

- i) The PTC has been issued by RCF.
- ii) The actual area of the coach was much more than given in the AT.

It indicates that the plant was giving productivity in proportion to increased surface area.

The counter claim of the respondent that the money has been spent in carrying

out the repairing to the damaged parts of the plant when it was under break down and under warranty is acceptable. Apparently the plant was certainly under break down on account of which the respondent had spent some money to rectify.

10. With regard to 18% interest claimant by the petitioner on amount of Warranty Bank Guarantee (WBG) invoked by the respondent, the Arbitrator says that the said claim is not tenable as there has a certainly been loss of production during the period the plant has been giving frequent trouble and was under break down. The other reason given by the Arbitrator is that there was no mention of any interest to be levied on the amount invoked in the contract agreement and there was no provision of the interest to be paid on the amount spent by RCF, Kapurthala for rectification of the plant in the AT.

11. After the said finding, the sole Arbitrator has, in the operative portion of the award, passed the following Award which reads as under:-

1. Based on the in the above discussion I feel that since, the PTC has been issued to M/s. TAL which takes care of the require productivity given by the plant, the invocation of WBG is not justified.

2. The counter claim submitted by the respondent to the extent of spending money for rectification of the plant while giving frequent trouble and was under break down during warranty should be realized from the claimant which amounts to Rs. 2,58,594/-.

3. No interest should be applicable on any amount spent by the respondent or the amount of WBG invoked.

12. Though, in the impugned award dated 26th May, 2011, the Arbitrator has specifically held that the invocation of the WBG was not justified, however, he did not direct the respondent to return/repay the said amount of Rs. 1,42,82,785.86/- and further awarded the cost of Rs. 2,85,000/- in favour of the respondent. Since, it appeared to the petitioner that the Arbitrator due to a clerical or typographical error had not included the relief of repayment of the monies received by the respondent under the WBG, the petitioner made an application before the Arbitrator by addressing a letter dated 9th June, 2011 to the respondent, requesting the Arbitrator to act u/s 33(1)(a) or Section 33(4) as the case may be. However, no response was received from the Arbitrator. The petitioner's Advocates addressed further letters dated 27th June, 2011, 28th July, 2011 and 16th August, 2011 to the Arbitrator, copies of which are filed along with the petition and marked as Exhs. V, W and X. However, the learned Arbitrator failed to response to the said letters within the prescribed time despite of several reminders.

13. The petitioner under these circumstances, left with no option but to file the application/objections before this Court on 29th September, 2011.

14. The impugned award dated 26th May, 2011 passed by the learned Arbitrator was received by the petitioner on 2nd June, 2011. The application for correction

of the award u/s 33 was filed by the petitioner on 9th June, 2011 within the prescribed period of 30 days. In view of this, learned counsel for the petitioner submits that the objections u/s 34 of the Act are filed within the prescribed time.

15. Mr. Sibal submits that even if the duration of pendency of the application is not counted and no benefit is taken by the petitioner qua the period of pending application for correction of Award, still the objections are filed within three months and extended period of thirty days, although his client is legally entitled for the said benefit of limitation.

16. Learned counsel for the petitioner has also argued that the Arbitrator incorrectly did not grant the interest on amount of Warranty Bank Guarantees invoked by the respondent, inter-alia, for the reason as there was no mention of any interest to be levied on the amount invoked in the Contract Agreement and there was no provision of interest to be paid on the amount spent by RCF, Kapurthala for rectification of the plant in the AT.

17. There is a force in the submission of the counsel for the petitioner in view of the settled law on this aspect in the case of Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, , the relevant para of which reads as under:-

43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, CPC and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative form for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the Court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award

in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena's case almost all the Courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.

18. After having gone through the objections and the grounds made in para 34 of the petition, I am of the considered view that the relief para of the award has to be corrected/modified due to peculiar facts and circumstances of the present case for the following reasons:-

(i) The Arbitrator has ex facie committed an error on the face of the award passed by him by not directing the respondent to return/repay to the petitioner Rs. 1,42,82,785.86/- being the sum total of the Warranty Bank Guarantees, despite of specific claim made by the petitioner in the Statement of Claim and even despite of holding that the invocation of the WBG was unjustified.

(ii) The Arbitrator was obliged in law to respond to the application of the petitioner which was in the form of the petitioner's letter dated 9th June, 2011 followed by reminders dated 27th June, 2011, 28th July, 2011 and 16th August, 2011. There was a complete silence on the part of the Arbitrator who failed to exercise his powers/duties conferred upon him under the Arbitration and Conciliation Act, 1996 and in particular, Section 33(1)(a) and Section 33(4) of the Act.

(iii) It is the admitted position that after having held that the invocation of the WBG was unjustified, the Arbitrator ought to have directed the respondent to return/repay to the petitioner the sum of Rs. 1,42,82,785.86/- received by the respondent. By not passing the said order, it is clear that the Arbitrator has committed a gross error which is apparent on the face of the award.

(iv) There is no force in the submission of the learned counsel for the respondent that the objections u/s 34 of the Act are time barred, as admittedly, the impugned award was passed by the learned Arbitrator on 26th May, 2011. Copy of the same was received by the petitioner on 2nd June, 2011. The application for correction of the award u/s 33 was filed by the petitioner on 9th June, 2011

within the prescribed period of 30 days. Admittedly, in the present case, no response was received by the petitioner from the Arbitrator. The objections were filed on 29th September, 2011. The same are within the time prescribed u/s 34 of the Act.

19. The respondent's counsel has restricted his arguments only to his submission that respondent has not received the copy of the application filed by the petitioner for correction of the award, when it was inquired from the counsel for the respondent as to whether any such objection or averment is made by the respondent in its reply to the objections u/s 34 of the Act, he was unable to point out any averment made in the reply in this regard, rather he says that due to the oversight, the same objection was not taken. His other objection was that the petitioner has not filed all the documents which are necessary to be produced along with the objections. The said submission of the learned counsel appearing on behalf of the respondent is without any force, as on mere reading of the Award, it appears that there is an error committed by the Arbitrator.

20. It is pertinent to mention that the respondent also challenged the impugned award before this Court by filing of the objections u/s 34 of the Act, being OMP No. 710/2011 wherein the respondent has alleged that the arbitrator has incorrectly accepted the claim of the petitioner. The said objections were dismissed by this Court by order dated 21st September, 2011 with the following observations:

.....I do not find any merit in this submission because, as a matter of fact, the petitioner itself issued the PTC. The finding of the Tribunal that the area each coach actually treated was 840 sq.mts., as opposed to 560 sq.mts. mentioned in the AT, is not assailable. It is clear that on account of the larger area, the time required for sand blasting of each coach went up. The petitioner's claim for loss of productivity has been rejected by the learned Arbitrator for good reasons. It is not for this Court to sit in appeal over the award of the Arbitral Tribunal.

I do not find any merit in the submissions of the petitioner, or any illegality, much less a patent illegality, in the award. The petition is, accordingly, dismissed.

21. The said order has not been set-aside by the Division Bench, as alleged by the learned counsel appearing on behalf of the respondent.

22. In the present case, no doubt, the learned Arbitrator has accepted the claim of the petitioner, but has committed an error in the final para of the award while granting the relief in favour of the petitioner. The said para is not happily worded by the learned Arbitrator, as no direction was issued to the respondent, while accepting the claim of the petitioner, to pay the amount against the Warranty Bank Guarantees encashed by them, though the finding of the learned Arbitrator is that the invocation of the Warranty Bank Guarantees is not justified. Similarly, the learned Arbitrator did not grant the relief of interest applicable on the amount spent by the respondent after the amount of Warranty Bank Guarantees invoked by the respondent.

23. This Court is conscious about the fact that under the Scheme of Section 34 of the Act, the said provision allows for supervisory role of the Courts for the review of the arbitral award for the purpose of any interference. It is correct that the role of the Court is of minimum level and one of the grounds to set aside the same is that if there is any violation of natural justice. However, in case the Court finds that the relief is not properly worded, the Court is empowered to clarify/ modify the same if it is so desired.

24. By exercising power under sub-section (4) of Section 34 of the Act, the award is accordingly modified to the extent of last para of relief of the award, i.e. items No. 1 & 3 which would be read as under:-

a) With regard to items No. 1 and 3, the respondent is directed to pay to the petitioner the amount of Rs. 1,42,82,785.86/- being the aggregate amount of the Warranty Bank Guarantee No. IGL 03305 and Warranty Bank Guarantee No. IGL 03025, both dated 17th April, 2006, together with interest thereon @ 9% per annum from the date on which money was paid to the respondent by the Bank pursuant to the invocation and encashment of the said bank guarantees, till the payment or realization thereof.

The objections are accordingly disposed of.