(2012) 10 BOM CK 0231

In the Bombay High Court

Case No : Arbitration Petition No. 215 of 2003

The Union of India APPELLANT

Vs

M/s. C.M. Gandhi and Co. RESPONDENT

Date of Decision : 20-10-2012

Acts Referred:

Arbitration Act, 1940 — Section 34
Arbitration and Conciliation Act, 1996 — Section 11
Contract Act, 1872 — Section 34, 74

Citation : (2012) 10 BOM CK 0231

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : S.V. Bharucha with Ms. Nisha Valani, for the Appellant; Simil Purohit with Mr. Rohan Cama, Gauraj Shah and Mr. Namish Joshi instructed by y Vimadalal and Co., for the Respondent

Judgement

Anoop V. Mohta, J.—The Petitioner-Director General, Naval Project (MB), through the Union of India has challenged award dated 24 December 2002, passed by the sole Arbitrator appointed under the Arbitration agreement between the parties. There is no counter Petition/challenge to the award by the Respondent (Original Claimant). The basic dates and events are as under.

On 9 June 1996, the Petitioner issued a Tender under contract No. DGNP (MB)/04 of 97-98 for provision of Mast Testing Facility at Naval Dockyard, Mumbai. On 23 September 1996, the Respondent submitted their tender for the said work. On 6 May 1997, after obtaining some clarifications and due negotiations, the Petitioner issued the work order for an amount of Rs. 1,04,56,327/- in favour of the Respondent. The date of commencement of Phase-I as per work order No. 1, 9 August 1997, was extended to 15 November 1997.

2. The date of commencement of Phase-II as per work order No. 1 was 9 August 1997, and the completion date was 8 August 1998 i.e. 12 months. This date was extended to 15 February 1999. On 18 December 1997, the Petitioner''s by a

letter issued a Completion Certificate for Phase-I for having completed the same on 15 November 1997. On 15 February 1999, complied the phase II. On 5 March 1999, the Petitioner by their letter issued a Certificate of Completion stating therein that the work has been completed satisfactorily. On 8 March 1999, pre-final Bill and final bill submitted by the Respondent.

3. On 30 October 1999, a letter addressed by the Respondent to the Petitioner raising claims on account of delays, obstructions, hindrances and breach of contract committed by the Petitioner. On 9 December 1999, letter addressed by the Petitioner to the Respondent denying the aforesaid claims of the Respondent. On 2 March 2000, notice addressed by Respondent to the Petitioner invoking the Arbitration proceedings and calling upon them to appoint a Sole Arbitrator as per condition No. 70 of IAFW-2249 to settle the disputes/differences.

4. On 31 October 2001, Arbitration Application No. 197 of 2001 for an appointment of Arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act), preferred by the Respondent before this Court. On 15 February 2002, by a reasoned order and after considering the objections of the Petitioner, appointed an Arbitrator. On 8 May 2002, Government of India, Ministry of Defence appointed Brigadier R.B. Singh, from the Union of India Panel of Learned Arbitrator, as the sole Arbitrator.

5. On 9 July 2002, the statement of facts and claims filed by the Respondent before the Sole Arbitrator. On 12 August 2002, pleadings in defence of the Petitioner. On 17 August 2002, Respondent statement of defence. On 29 August 2002, the Petitioner''s rejoinder in reply to the Respondent pleading in defence. On 17 September 2002, the Respondent surrejoinder in reply to counter claim raised by the Petitioner in its rejoinder. On 24 December 2002, the learned Arbitrator passed the detailed Arbitration Award for Rs. 22,21,476/-.

6. On 30 December 2002, the Respondent demanded the claim amount from the Petitioner as per the Arbitration Award. On 6 May 2003, the Execution Application No. 298 of 2003 filed by the Respondent to implement Award dated 24 December 2002. On 28 March 2003, the present Petition was filed by the Petitioner. On 16 June 2003, it was dismissed for default. On 12 August 2003, the Petition restored subject to cost of Rs. 1000/-. On 25 September 2003, the Amendment Application filed by the Petitioner was allowed. On 18 November 2003, the Petition was admitted. The Petition listed for final hearing. Heard accordingly.

7. The contract was for design and provision of Mast Testing Facility at Naval Dockyard at Mumbai executed on 6 May 1997. The period of completion of the contract was for 15 months which was extended by consent. The Claimant-Respondent submitted final bill on 8 March, 1999 as the Phase-I was completed on 15 November 1997 and Phase-II was on 15 February 1999. There is no dispute that the contract governed by the general conditions of contract. The relevant clauses are conditions 11,65 and 70. As per condition 11 which deals with time, delay and extension, it is specifically provided that "no claim in

respect of compensation or otherwise, howsoever arising, as a result of extensions granted under condition (A) and (B) shall be admitted." There is nothing on record to show that time was extended under the condition (A) and (B). There is no dispute that time was the essence of contract. As per clause 65, "no further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. The Arbitrator was under obligation to pass award within 6 months and/or within the extended time.

8. The Petitioner, therefore, challenged the grant of claim Nos. 7(A) and (B) and 8. The full charges were also claimed of Claim Nos. 1, 2, 4 and 5, as the same were partly allowed. No evidence was led by the parties except the documents on record. The final bill was submitted of 8 March 1999, the cheque was sent on 1 February 2002, which was not accepted nor encashed. The payment was admittedly not made within reasonable time, though the demand was raised with supporting material.

9. The learned Arbitrator has awarded payment of final bill, (Claim No. 1), as the Petitioner agreed to pay final bill for amount of Rs. 3,26,213.52/-. For non payment of Star Rate No. 12., (Claim No. 2-A), the amount is awarded at Rs. 13,538.42/-. The Arbitrator has awarded Rs. 2250/- for nonpayment of overhead, establishment (Claim No. 2-B). The Arbitrator referring to the conditions that "the quantities of various items as given in Schedule ''A'' Part II are provisional and may vary according to approved design and site conditions" and therefore, has awarded Rs. 66,058.31 in view of admitted increase cost of piling of depth beyond 16 meters. (Claim No. 2-C). The Arbitrator has granted compensation for additional bank guarantee, as the final bill could not paid by the Petitioner in time. Therefore, claimed renewal charges of bank guarantee from 5 November 1998 (Claim No. 4). The learned Arbitrator ultimately has granted bank charges from 9 September 1999 and partially granted Rs. 42,000/-. The Contractor-Respondent claimed compensation for delay in payment of Running Account Receipts. (Claim No. 5). The learned Arbitrator after holding that there was delay of more than 37 months and therefore, has granted only Rs. 6,000/- though claim was of Rs. 1,35,649.57/-. The learned Arbitrator, not granted any compensation for revision of rates for the work executed beyond the original period of contract and also not granted for Deviation Order (Claim Nos. 6 and 3).

10. The basic challenge raised by the Petitioner with regard to the compensation for loss of idle staff and machinery and idle labours and workers (Claim No. 7-A and 7-B) and compensation towards loss of profits and overheads due to prolongation of contract period (Claim No. 8). The supporting reasons are as under:-

33.9.5. The Union of India admitted that there was delay in clearing site, giving decision for diversion of sewer and water supply lines etc. They however argued that at all points of time, contractor had some work in hand and he could continue with other items of work. It was their contention that contract carried a clause for payment of escalation which compensated him for variation in prices of materials, fuel and wages of labours. U.O.I. argued that contract provided for grant of extension of time, which had been duly approved by the DGNP.

33.9.6 All the above mentioned reasons have had a contribution to make in causing this prolongation of 6 months 7 days. As the reasons unfold themselves, it is clearly evident that majority of these were such that lied at the door-steps of DGNP. The U.O.I. reference to certain letters, mentioned in paras above, also revealed delays on the part of DGNP. These letters, in no way, come to the rescue of their arguments. For whatever be the compulsions with them, they could have eschewed the delays and mitigated their consequential effects. Perusal of the documentary evidence reveals that DGNP did not expedite on many issues which did cause hindrance and delay in progressing of activities connected with execution of this contract. The next question to be decided is if all the reasons, as stated in para above, fall under condition 11(A) and (B) of IAFW-2249 for which consequential risks are that of the contractor under its condition 11(C). My answer is clearly "No" as majority of these reasons do not even remotely correspond to what is agreed under the said Conditions 11(A) and (B). Therefore, the immunity available to government would have to be limited to that portion of 6 months and 7 days delay the reasons for which actually fell within the purview of conditions 11(A) and (B). For this purpose, I have analysed the reasons and their time effect on completion of contract. On doing so, I find that a period of not more than three months (out of 6 months 7 days) could be made to fall under condition 11(A) of IAFW-2249. Balance 3 months delay is for reasons other than those listed in condition 11(A) and therefore condition 11(C) of IAFW-2249 is not attracted for this period of 3 months. The U.O.I. shall therefore have to accept the liability for consequential effects of this delay of 3 months caused at DGNP''s hands. DGNP cannot first be the cause for the delays and then argue to bail themselves out proclaiming shelter under condition 11(C). They cannot be the judge of their own actions. The facts have to be unearthed and for this, one can only rely on material evidence that emerges from the correspondence/letters between the parties during the relevant period. I have done so. Having decided on the proportion of responsibility for DGNP/U.O.I., the next aspect is to decide on the measure of damage caused and compensation therefore.

33.9.7. For the hire charges claimed by contractor he had furnished proof by way of paid vouchers and argued that this was evidence of his machinery T & P and staff remained idle for 3 months. This part of his claim is therefore sustained to the extent mentioned above and expenses for it works out to Rs. 1,70,700.00 for the effective period of 3 months.

33.9.8. Second part of contractor''s claim is for idle labour and workers. Contractor has claimed labour component as 25% of work done and amounting to Rs. 28,15,901.20. He then argued that this meant monthly labour cost as Rs.

1,87,726.75 (i.e. Rs. 28,15,901.00 divided by 15). contractor''s case is that he had deployed labour worth Rs. 11,70,100.83 for additional period of 6 months 7 days as a loss. U.O.I. denied the claim arguing that there was no idle labour and that the labour deployed by contractor was just sufficient for the work. I have already concluded above that prolongation of contract was for effective period of 3 months and was at the hands of DGNP. Contractor''s claim for idle labour and workers for this much period is justified and accordingly it is sustained for Rs. 5,63,180.00. I therefore award an amount of Rs. 1,70,700.00 for Claim No. 7(A) and Rs. 5,63,180.00 for Claim No. 7(B), totalling to Rs. 7,33,880.00.

And thereby awarded total sum of Rs. 7,33,880/- for Claim Nos. 7-A and 7-B.

11. So far as claim No. 8 is concerned, the following reasons are given -

33.10.1. I concluded period of prolongation as 3 months in para 33.9.6 above. Contractor has claimed 17.5% as loss of profit and overheads of his turnover. Contract value is Rs. 1,04,56,327.00 to be completed in 15 months. Monthly turnover works out to Rs. 6,97,088.46. Contractor''s claim towards loss of profit and overheads per month works out to Rs. 1,04,563.26 (Rs. 6,97,088.46x15%). Considering delay period of prolongation as stated above for 3 months, I award Rs. 3,13,689.80 for Claim No. 8.

The learned Arbitrator, thereby awarded a sum of Rs. 313689.80. The reasons are well within the frame work of law and the record for the following reasons and so also the award.

12. The basic submission raised that the Arbitrator was appointed on the application filed by the Respondent on 15 February 2002 and thereby directed the Arbitrator to proceed expeditiously to resolve the dispute. The liberty was also granted to the Respondent-claimant to raise the claims before the Arbitrator and to the Petitioner to file counter-claim. The parties accordingly filed their claims and the counter-claims. Therefore, having once the parties filed the claim and counterclaim, pursuant to the order passed by the Court to settle the disputes, therefore, in the present facts and circumstances, the claim so raised by the Respondent cannot be faulted with. The Arbitrator, therefore, in view of the order, bound to adjudicate the claims so raised by the parties.

13. The Apex Court in Ravindra Kumar Gupta and Company Vs. Union of India (UOI), maintained the award as in that case also there was delay attributable to the employer Union of India. The similar clause was read and referred in the matter and also the similar submissions referring to the grant of compensation towards loss of profit, escalation overhead charges, on the ground of employers delay, if any.

14. I have already in Union of India Vs. M/s. Suraj Infrastructures Pvt. Ltd., Arbitration Petition No. 324 of 2009, dated 17 September 2012 maintaining similar types of award of compensation on the ground of delay on the part of employer and observed as under:-

26. The Apex Court in J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, , referring to Section 34 read with the provisions of Contract Act observed as under:-

Once it is held that the issues relating to who committed breach and who was responsible for delay were arbitrable, the findings of the arbitrator that the contractor was not responsible for the delay and that the termination of contract is illegal are not open to challenge.

In the result, the escalation price so awarded on the basis of delay and consequential termination of contract by the employer upheld.

15. The Arbitrator has power to award the interest unless specifically agreed otherwise. There is no such clause pointed out in the present case. The grant of interest, therefore, covered by the provisions of Arbitration Act and the judgments.

16. The strong reliance is placed by the Learned Counsel appearing for the Petitioner on Oil and Natural Gas Commission, Mumbai Vs. Macqreqor-Navire Port Equipment, Mumbai, referring to Section 74 of the Contract Act, 1872 read with the provisions thereof and also the Interest Act, 1978.

17. So far as the counter-claim is concerned, there is no material supplied and/or reasons given by the Petitioner to claim the cost of reference. The cost of recovery for defects in work was rejected for want of details and supporting material and ultimately awarded Rs. 9,902/- towards claim of defects in the work. I am inclined to grant 9% p.a. simple interest as not awarded by the Arbitrator on the amount towards the counter claim No. 2, from the date of the award. The claim and counter claim with interest, need to be adjusted accordingly.

18. So far as interest is concerned as mentioned in para 33.11.8, I am inclined to reduce the rate of simple interest from 12 % per annum to 9% per annum, in view of Krishna Bhagya J ala Nigam Ltd. Vs. G. Harischandra Reddy & Anr. 2007 AIR SCW 527.

19. So far as the future interest is concerned, I am restricting the same also to 9% per annum simple interest, instead of 15 % per annum as awarded. The aspect of pendency of present Arbitration Petition for various reasons, is also relevant factor in reducing the rate of interest. The future rate of interest, as the award is of dated 24 December 2002 and the Petition was heard for the facts referred above in the year 2012, the Petitioner should not only be asked to suffer rate of interest because of pendency of the litigation.

20. The Respondent is entitled for the interest on the ground of compensation/ damages so awarded on the ground of delay from the date of award only. So far as delay in payment is concerned, the interest so awarded needs no interference. The Arbitrator has awarded the compensation on the ground of delay, loss of idle staff, machinery, labours and workers and loss of profit and overhead due to

prolongation of contract period. Therefore, I am inclined to observe that the Respondent claimant is entitled for the interest on the said amount from the date of the award and not prior to that. There is no question of interest on the assessed damage or compensation retrospectively. It should only from the date of award.

21. Considering the scope and purpose of Section 34 of the Arbitration Act, as there is no perversity and no illegality in the reasons and the compensation so awarded is also reasonable and just and fair based upon the record, the award needs no interference, except the rate and date of the interest on all stages as recorded above. In the result, the following order:-

ORDER

a) The award is maintained, except the rate and date of interest. The award is modified accordingly.

b) The Petition is accordingly disposed of in the above terms.

c) There shall be no order as to costs.