

(2019) 02 DEL CK 0475

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) 393 Of 2018, Miscellaneous Application No. 12438 Of 2018

Uem India Pvt. Ltd

APPELLANT

Vs

Ongc Ltd

RESPONDENT

Date of Decision : 08-02-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 33(1), 34(4)

Citation : (2019) 02 DEL CK 0475

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Arvind Nayar, Iti Agarwal, Tamanna Goyal, Sandeep Sethi, Abhishek Puri, Surbhi Gupta, V.Siddharth

Judgement

Navin Chawla, J

I.A.No.12441/2018

1. This application has been filed by the petitioner under Section 34 (4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for the following relief:

"(a) Allow the present application and remand the matter to the learned Arbitral Tribunal for rectifying the errors made in the Para 474 and 475 of the Impugned Award; and

(b) Defer the proceedings under Section 34 before this Hon'ble Court until the grounds for setting aside are rectified by the learned Arbitral Tribunal".

2. It is a peculiar case where the party challenging the Arbitral Award itself has filed an application praying for the adjournment of the challenge in order to allow the Arbitral Tribunal an opportunity to resume the arbitral proceedings so as to eliminate the grounds for setting aside the Arbitral Award.

3. The reason for moving this application, however, is that according to the

petitioner the Arbitral Tribunal, while rejecting the Counter Claim No.7 of the respondent, should have allowed the refund of the amount of Rs.11,93,45,835/-, which is the amount of the Performance Bank Guarantee.

4. Learned senior counsel for the petitioner submits that in the final direction passed by the Arbitral Tribunal, due to inadvertence, this relief was not granted in favour of the petitioner. He submits that the petitioner, in fact, moved an application under Section 33 of the Act before the Arbitral Tribunal, however, the Arbitral Tribunal has rejected the same on the ground that it was beyond the period prescribed in Section 33(1) of the Act. He submits that in case this correction is made in the Award, he is not aggrieved with the remaining finding of the Award and therefore, has been forced to challenge the Award merely because of this error that has crept in the Award.

5. On the other hand, learned senior counsel for the respondent submits that the Arbitral Tribunal has partially rejected the Claim No.E(ii) of the petitioner which was a challenge to the invocation of the Bank Guarantee(s). He further submits that the Arbitral Tribunal has allowed the respondent to retain the amount received on encashment of the Performance Bank Guarantee as damages over and above the liquidated damages as prescribed in Clause 6.3.2 of the Agreement, which have been separately allowed in favour of the respondent under Counter Claim No.5. He submits that therefore, no useful purpose would be served by remanding the matter back to the Arbitral Tribunal on this issue.

6. I have considered the submissions made by the learned counsels for the parties. The findings of the Arbitral Tribunal that would bear relevance to the submissions made are reproduced hereinbelow:

"371. The Claimant has failed to bring on record any material to show that the invocation/encashment of the Performance Bank Guarantee was, in any manner, illegal or contrary to the terms thereof.

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424. The Tribunal has opined heretobefore that clause 6.6 read with claim 6.2 of the Contract would apply both to the claims of Claimant as also the Respondent.

425. In that view of the matter, in the opinion of the Tribunal, the Counter Claimant is not entitled to any damages or any consequential loss or damage, loss of use, loss of production or loss of profits or interest costs except Liquidated Damages.

426. Mr. Sharma however, has submitted that having regard to the nature of breaches committed by the Claimant, in the matter of execution of the Contract, it must be held to have committed willful misconduct. The Tribunal has already dealt with this aspect of the matter and as such the aforementioned submissions of Mr.Sharma cannot be accepted.

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Counter Claim no. 2:

Claim of Rs. 15,19,78,222.33 towards production and revenue loss on account of non-performance and various acts of default on the part of the Claimant

439. The purported counter claim towards loss of revenue, in the opinion of the Tribunal, cannot be entertained having regard to the fact that production of oil had not started.

440. In that view of the matter, it is difficult to conceive as to on what basis the alleged loss of revenue to the extent of Rs.4.000/- towards price of crude oil was arrived at, in support whereof, the Counter-Claimant has not adduced any evidence to prove the same.

441. On similar reasoning the purported loss of revenue claimed by the Respondent due to loss of associated gas production @ Rs. 12.50 per standard cubic meter at the average non APM price of gas cannot to have been made on any factual basis. Moreover, even if the Contract had been validly terminated, upon taking over of the Project, the Counter Claimant was obligated to show as to how much costs are required to be incurred for removal of effluents and transportation thereof.

442. The Counter Claimant, therefore, inter alia for the reasons stated heretobefore must be held to have not been able to establish the said counter claim as well which is accordingly rejected.

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444. The Tribunal has held heretobefore that having regard to the provisions contained in clause 6.2 R/w Clause 6.6 is not entitled to any consequential damages.

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452. The Tribunal, furthermore, while determining the question as to whether the termination of the contract was illegal has arrived at a finding of fact that the Counter Claimant was entitled to terminate the contract by reason of breaches on the part of the Claimant herein.

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461. The Tribunal is therefore of the opinion that taking into consideration the peculiar facts and circumstances of the case, interest of justice will be served if the amount of Performance Bank Guarantee furnished by the Claimant is also treated to be the quantum of reasonable damages.

462. Keeping in view the fact that the Claimant has only completed a minuscule fraction of the total work and keeping in view the economic viability of the Project it, for all intent and purport, abandoned the Contract.

463. The parties, even have entered into an Agreement limiting their respective

liabilities by reason of Clauses 6.2 and 6.6 of the Contract as discussed hereto before.

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Counter Claim No. 7:

Claim for Rs.11,93,45,835/- towards performance of Bank Guarantee dated April 21, 2011.

470. In view of the findings arrived at the Tribunal, the Counter Claimant must be held to be not entitled to any amount under the aforementioned head.

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474. For the reasons aforementioned the Claimant is entitled to the following sums:

(i) Claim for Services Rendered; Soil Bearing Capacity= Rs.13,56,376/-

(ii) Return of Advance Bank Guarantee of Rs. 2,95,00,484/-

(iii) Interest @ 12% per annum (on Rs.2,95,00,484) from the date of encashment of Bank Guarantee i.e. 27.01.2014 till the filing of the Statement of Claim i.e 09.02.2015.= Rs. 36,75,840/-.

(iv) Interest for SBC denied.

(v) Pendente lite interest on the aforementioned amount @ 9% per annum on (Rs.13,56,376 + Rs. 2,95,00,484) from the date of filing of Statement of Claim (09.02.2015) till the date of award i.e. 14.12.2017= Rs. 79,12,879/- TOTAL= Rs. 4,24,86,800/-

COUNTER CLAIM:-

(i) Liquidated damages Rs.73,58,264/-

(ii) Interest from the date of termination of the Contract (24.01.2014)@ 12% per annum upto the date of filing of the counter claim (17.04.2015)= Rs.10,86,800/-

(iii) Pendente lite interest on the aforementioned amount @ 9% per annum.= Rs.18,86, 940/-.

TOTAL= 1,03,45,264/-

475. The net amount payable by the Respondent to the Claimant= Rs.,3,21,41,536/-.

476. Respondent is hereby directed to pay the aforementioned awarded amount by 31.01.2018 failing which it shall be liable to pay interest @ 12% per annum from 31. 01.2018 till realization of the full amount including interest."

7. I may also note that while dismissing the application filed by the petitioner under Section 33 of the Act, one of the Arbitrators in his separate opinion has

observed as under:

"When read in its entirety, the award must be given a true and effective meaning. It would not be a reasonable reading of the Award, if the Tribunal permits an unjust enrichment by the Respondent.

It is also trite that the plea of limitation must be reasonably construed.

When a Tribunal exercises its jurisdiction within 30 days its jurisdiction is not limited but a wide one.

I am, therefore, of the view that the Tribunal, while considering grant of relief to the applicant, may decide to do so on the premise that because of another computation error in the award, it is not entitled thereto."

8. The above quoted findings of the Arbitral Tribunal leave a doubt as to whether the Arbitral Tribunal has allowed the amount of Performance Bank Guarantee in favour of the respondent over and above the liquidated damages allowed under Counter Claim No.5. This is more so because in the Award the Arbitral Tribunal has observed that no damages over and above as prescribed in Clause 6.6 of the Agreement can be allowed in favour of the respondent, however, at the same time in paragraph 460 the Arbitral Tribunal has held that amount of the Performance Bank Guarantee furnished by the claimant cannot be said to be wholly unreasonable and in paragraph

461 it has held that the amount of the Performance Bank Guarantee furnished by the claimant is also treated as quantum of reasonable damages. In paragraph 457 the Tribunal has further held that the respondent is entitled to damages in addition to the liquidated damages.

9. In view of the above, the present proceedings deserve to be adjourned, enabling the Arbitral Tribunal to consider the observations made hereinabove and act in terms of Section 34(4) of the Act, if so advised.

The application is allowed in the above terms.

O.M.P. (COMM) 393/2018 & IA No. 12438/2018

List on 30th April, 2019.