

(2012) 09 BOM CK 0106

In the Bombay High Court

Case No : Appeal No. 121 of 2009 In Arbitration Petition No. 355 of 2004 and
Appeal No. 782 of 2010 In Arbitration Petition No. 355 of 2004

Union of India

APPELLANT

Vs

M/s. Arctic India
 M/s. Arctic India 17 (old 7 A), Alfred
Street, Richmond Town, Bangalore 560 025 Vs Union of India

RESPONDENT

Date of Decision : 04-09-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 28(3), 34, 34(2)(b)
Contract Act, 1872 — Section 70

Citation : (2012) 4 ARBLR 396 : (2012) 5 BomCR 485

Hon'ble Judges : R.D. Dhanuka, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : S.R. Rajguru, in Appeal No. 121 of 2009, Ms. June F. Goveia, instructed by Thakore Jariwala and Associates, in Appeal No. 782 of 2010, for the Appellant; June F. Goveia, instructed by . Thakore Jariwala and Associates, in Appeal No. 121 of 2009, Mr. S.R. Rajguru, in Appeal No. 782 of 2010, for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—Both these Appeals arise out of the same order and were therefore heard together and are being disposed off by a common order. Appeal No. 121 of 2009 is filed by the Union of India (UOI) challenging the order passed by the Learned Single Judge refusing to set aside some of the claims awarded in favour of the Respondent. Appeal No. 782 of 2010 has been filed by the Contractor challenging the Order passed by the Learned Single Judge setting aside one of the claims awarded by the Arbitrator in favour of the Contractor. Since these are cross appeals, we will refer to the parties as "the contractor" and "UOI". On 21 December 1995 UOI invited tenders for replacing of BER A.C Plant at NAD, Karanja. The Contractor submitted its tender on 5 February 1996. UOI issued an acceptance letter on 9 April 1996 in favour of the Contractor. The contract was awarded at Rs.86,13,066/-. The date of commencement as

provided in the Work Order was 24 April 1996 and the stipulated date of completion was 23 July 1997. The period of completion provided was 15 months. Work was actually completed on 29 July 1999.

2. Various running account bills were submitted by the Contractor from time to time. According to the Contractor, UOI was responsible for delay in completion of the work causing loss. According to the UOI, the Contractor was responsible for delay and for causing loss.

3. On 17 July 2002, the Contractor submitted a final bill. UOI returned the final bill on 31 July 2002. On 20 August 2002, the Contractor issued a notice for referring the dispute to arbitration as per Condition 70 of the General Conditions of Contract. UOI did not appoint the arbitrator on the ground that the work was not completed and the notice was premature.

4. By an order dated 31 January 2003 the Engineer-in-Chief, Army Head Quarters was directed to appoint a sole arbitrator to decide the claims and counter claims of the parties arising out of the contract including the issue as to whether the arbitral clause could be invoked considering the contention that the work had not been completed. Pursuant to the said Order, Shri T.K. Saha, C.E. was appointed as the sole arbitrator by the Lieutenant General Engineer-in-Chief. The Contractor filed a Statement of Claim. UOI filed Written Statement and Counter Claim. None of the parties lead oral evidence before the Learned Arbitrator.

5. By an Award dated 29 March 2004, the Arbitrator granted partial relief to both the parties and directed the UOI to pay a sum of Rs.27,55,350/- with interest at the rate of 12% per annum w.e.f. 1 July 2004 till payment. The Arbitrator rejected the claim for arbitration costs claimed by both the parties. The Contractor did not challenge the Award. UOI filed an Arbitration Petition (355 of 2004) for challenging a part of the award. By Judgment dated 25 April 2007, the Learned Single Judge was pleased to set aside part of the award in so far as the claim for compensation in the sum of Rs. 6,23,875/- was awarded by the Arbitrator under claim (Serial A, Item 4 : Simple Interest on Rs.19,93,000/-) (VII RAR). The Contractor has challenged this part of the Judgment in Appeal (782 of 2010). UOI filed an appeal (121 of 2009) challenging the remaining part.

6. Counsel appearing for the UOI submits as under :-

The Learned Arbitrator ought to have allowed the claim of UOI for compensation against the contractor for delay in completion of work beyond period of two years. Findings of the Learned Arbitrator that the Contractor was not responsible for delay and was attributable to the UOI is incorrect. The rejection of various claims made by UOI is not proper.

7. On the other hand, Counsel appearing for the Contractor submits as under :-

(a) The Arbitrator has given findings of fact in so far as delay in execution of work is concerned against the UOI and this Court cannot interfere with the

findings of fact u/s 34 of the Arbitration and Conciliation Act, 1996.

(b) The Arbitrator has not allowed all the claims made by the Contractor but has awarded a reasonable amount allowing part of the claims made by both parties based on documents submitted by both the parties. No ground is made out u/s 34 of the Act for challenging such part of the award.

(c) The Single Judge was not justified in setting aside the claim for compensation awarded by the Arbitrator as the same was towards financial loss suffered by the Contractor in the form of payment of interest made by the Contractor to the Bank on the loans taken from the bank so as to finance progressive work under the contract. The claim was allowed by the Arbitrator in view of the UOI making default in making payment which was contractually due to the Contractor as per the provisions contained in Condition No.64 of the General Conditions of the Contract. It is submitted that this claim was rightly allowed by the Arbitrator and did not warrant any interference by the Single Judge.

8. Clauses 67(a) and (b) of the General Conditions of the Contract reads as under :-

67. Recovery from contractor :- (a) Whenever any claim (s) for payment of sum of money arise(s) out of or under this contract against the contractor, the contractor shall on demand make the payment of the same or agree for effecting adjustment from any amounts due to him by the Government. If, however, he refuses or neglects to make the payment on demand, or does not agree for effecting adjustment from any amount due to him, Govt shall be entitled to withhold an amount not exceeding the amount of the claim(s), from any sum when due or which any time there after may become due the contractor, under this or any other contract with the Govt or from any other sum due to the contractor from the Govt (which may be available with the Govt) or from the contractor's security deposit or security bond amount, and retain the same by way of lien till such claim payment is made by the contractor or till the claim(s) is/are settled or adjudicated upon, or till the contractor, at his expense furnishes fixed deposit receipt(s) duly endorsed as directed by the Accepting Officer, or a guarantee bond from a Scheduled Bank for an amount equal to the amount of the claim(s), in the form as directed by Accepting Officer.

67 (b) :- It is an agreed conditions of this contract that the sum of money so withheld or retained as and by way of lien under this condition by the Govt, will be kept with held are retained as such by the Govt, till the claim(s) arising out of or under this contract is/are settled or adjudicated upon and that the contractor will have no claim for interest or damages whatsoever on any account in respect of such sum so withheld.

9. The award indicates that the Arbitrator has given findings of fact that the UOI was responsible for delay in execution of the work. UOI had taken one year eight and a half months to communicate a firm decision regarding change in scope of work. UOI had not taken a final and binding decision on various issues. Most of

the claims allowed by the Arbitrator in favour of the Contractor, as well as in favour of UOI are based on agreed liability towards each other. The Arbitrator after giving a finding of fact about delay against UOI has rightly rejected the claim of compensation made by the UOI. The other claims awarded in favour of the Contractor and rejection of claim made by UOI is also based on pure findings of fact. It is not for the court to sit as a court of appeal on the findings of the Arbitrator which had been arrived at after going through the material placed on record before him. Once it is held that the issue relating to who had committed breach and who is responsible for delay was referred to the arbitrator, the finding of fact given by the arbitrator that the contractor was not responsible for delay is not open to challenge. We, therefore, do not find any reason to interfere with the finding of fact given by the Arbitrator as canvassed by the Counsel appearing for the UOI.

10. As far as the claim of Rs.6,23,875/- allowed by the Arbitrator in favour of the Contractor is concerned, the record indicates that UOI had deducted a sum of Rs.6,48,504.70 towards compensation on the ground that the work was delayed by the Contractor and an amount of Rs.10,18,707.75 was deducted due to alleged defects in work executed by the Contractor under CA No. CENM-26 of 96-97 with another GE(NW) Kunjali in Mumbai. The UOI deducted these amounts relying upon Clause 67 of General Conditions of Contract. The Arbitrator gave a finding that the claim of UOI for such deduction had not been legally established and thus the Contractor was deprived of Rs.14.30 lacs for 7th RAR for the period starting from 1 September 1999 to 15 July 2002 and thus entitled to get compensation due to financial loss suffered for not getting his legitimately due payments under this contract. The Arbitrator allowed compensation at the rate of 15.5.% per annum relying upon Section 70 of Indian Contract Act by directing UOI to pay a sum of Rs.6,23,875/-.

11. The Learned Single Judge has set aside this claim awarded by the Arbitrator on the ground that the claim was contrary to the contract and the Arbitrator had exceeded jurisdiction by allowing a prohibited claim. Relying upon the Judgments of the Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., and in Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another, the Learned Single Judge set aside this claim.

12. Clauses 67 (a) and (b) show that if any claim for payment arises out of or under the contract against the contractor and if the same is not paid by the contractor or he does not agree for effecting adjustment from any amount due to him by the Government, Government shall be entitled to withhold an amount not exceeding the amount of the claim, from any sum when due or which may at any time thereafter become due to the contractor, under this or any other contract with the Government or from any other sum due to the contractor from the Government and retain the same by way of lien till such payment is made by the contractor or till the claims are settled or adjudicated upon. It is further provided that the sum of money so withheld or retained as and by way of lien under this

condition by Government, will be kept withheld as such by the Government till the claims arising out of or under the contract are settled or adjudicated upon and the contractor will have no claim for interest or damages whatsoever on any account in respect of such sum so withheld.

13. It is thus clear that the UOI had withheld part of the bill amount due and payable to the Contractor on the ground that the UOI had to recover certain amount in the other work or on account of compensation recoverable by the UOI in this work. Clause 67 (a) read with (b) clearly provides that the contractor will have no claim for interest or damage whatsoever in any amount in respect of such sum so withheld.

14. In our view, the Arbitrator by allowing claim for compensation has exceeded his jurisdiction and has decided contrary to the terms of the contract. When such a claim was prohibited under the terms of the contract, the Arbitrator could not grant it even though it was referred to him and therefore this part of the award suffered from jurisdictional error. By allowing such a prohibited claim, the Arbitrator has decided contrary to the terms of the contract and the award is thus in violation of Section 28(3) of the Act and is thus in conflict with public policy u/s 34(2)(b) of the Act.

15. Hence, the Learned Single Judge was right in setting aside this part of the Award. We do not find any infirmity with the order passed by the Learned Single Judge.

16. Both the Appeals are dismissed. There shall be no order as to cost.