
(2011) 01 BOM CK 0154

In the Bombay High Court

Case No : Arbitration Petition No. 182 of 2006

Union of India (UOI) and Dy. Chief Engineer (Const.)

APPELLANT

Vs

Sagar Thermit Corp. Ltd.

RESPONDENT

Date of Decision : 14-01-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 21, 85

Citation : (2011) 2 MhLj 845

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : T.J. Pandiyan, for the Appellant; Uday Samudrala, for the Respondent

Judgement

Anoop V. Mohta, J.—Heard finally.

2.The Petitioners have challenged an Award dated 16 December 2005 passed by the Arbitrator appointed in a dispute arising out of Contract Agreement for Works dated 17 December 1999, between the parties with regard to a rail contract work .

3. The basic facts are:

On 21.09.1999, the Respondents were awarded with a contract to work of Cutting and Cropping of Rails and Aluminothermic welding of Rails by SK V process between Kurduwad-Pandhar pur Gauge-Conversion Project at tendered cost of Rs.1,21,07,000/- with a condition of completion period of 5 months from the date of acceptance/award of the contract i.e. 21/09/1999 and accordingly the work was to be completed on or before 21/2/2000.

4. On 31.01.2001 the work was completed by the Respondent after obtaining 5 extensions. The joint measurements were done in the presence of the contractor.

5. On 20.08.2001 and 21.02.2003, the Respondent has ever had raised disputes/claims and pursuant the Order of this Court dated 21.02.2003, the Arbitral Tribunal was constituted. The Respondent submitted various claims, thereafter also.

6. The Petitioners had refuted the claims of the Respondents as the same were "Excepted matters" in view of the specific provisions of the ssm Contract.

7 On 16.12.2005 the Arbitral Tribunal by rejecting the counter claim of the Petitioners, awarded nine out of thirteen claims, in favour of the Respondents (original claimants).

8. The Respondents Original Claimants, called upon the Petitioners/Respondents to compensate financial loss vide letter dated 20th August, 2001, and called upon to appoint an Arbitrator under Clause 64 of General Conditions of Contract (for short, "G.C.C."). The Respondents, did not respond, ultimately filed an Application No. 246 of 2002 in the High Court at Bombay for referring all the claims raised in letter dated 1st August, 2001 and contested a counter claim submitted by the Petitioners. By order dated 21st February, 2003, this Court referred all the claims and counter claims before the Arbitrators, by directing to appoint Arbitral Tribunal. The arbitral tribunal was constituted on 14/08/2003.

9. The Petitioners' counter claim for an amount of Rs. 1,61,50,000/- was rejected totally on the ground of delay in execution of work. Admittedly, by consent of the parties, the time was extended from time to time. The counter claim was made for the first time in the letter dated 14/08/2003. It was not specifically raised though Arbitration Proceedings commenced as per Section 21 and 85 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") on the date of appointment of Arbitrator, dated 20th August, 2001. It was not supported by any evidence and/or material on record except bare averments. The Petitioners did not even lead any evidence to support the counter claims before the Arbitral Tribunal. Therefore, a suit was speculative in nature, it was not considered by the Arbitral Tribunal. The learned Counsel appearing for the Petitioners fairly conceded to the position during the course of hearing in this proceeding also.

10. Admittedly, pursuant to clause 17 of GCC, the Respondents applied for extension from time to time stating reasons for delay. The Petitioner extended the time with clear terms of no claim or compensation based upon the same. In view of this agreed terms, there is force in the contention raised by the Petitioners' counsel that the Respondents' Original Claimants are not entitled for any claim arising out of and/or because of delay in completion of the project though time was extended. The extension was granted with a penalty of Rs. 5000/- per month; was due to abnormal delaying execution of work and partly because of slow and tardy progress of the work. The Petitioner paid to the Respondent as per the statement submitted on regular intervals based upon the jointly signed records and documents. The claimant completed the final work on 20th March, 2001. However, the final bill could not be drawn because of missing items from the contract. It is clear from the award as well as from the submission made by the learned counsel appearing for the Petitioners that as per the joint measurement, as per clause 45 of GCC and as the same fall under "the excepted matters" in terms of Clause 63 of GCC, the total amount payable was only Rs. 3,00,919/-. The claim of work done (Claim No. 1) but not paid till this

date to the extent of above amount which, as recorded, was excluding the mistake as discussed in them eating .There fore,Iam of the view that, the Respondent is entitled fort he amount to Rs.3,00,919/? only and not Rs.8,45,267/?as awarded.

11. So far as the payment of extra items (Claim No. 2), there is no denial to the fact that the Respondents have carried out the said work at site. Thus, extra items were necessary to be executed at site of work, without which the contracted items could not have been completed by the Respondents. The Arbitral Tribunal, therefore, after 6 arbp182.06.sxw considering the fact that though these extra items were not part of the schedule items executed by the Respondents, yet granted the claim.

The payment of extra items were claimed by the claimant during the execution of the work itself and thereafter, carried out the work. The Petitioner had not settled the rate of extra items at the relevant time and therefore, became part of the claim of the Respondents. The Tribunal has discussed the quantity of the work and also each individual extra items, including the rate so demanded. As it was a gauge conversion work and there was no approach by Rail neither by broad-gauge nor by narrow-gauge ,the entire transportation of rails was thus, carried out by road by a separate contractor. Admittedly, the rails were dumped at considerable distances. It is also noted that the work site was not at all approachable by rail. The NG track had been uprooted and BG in any case was not there. The transporter utilized the road vehicles for moving these rails from other divisions and then unloaded/dumped the rails at locations which were convenient and in a fit condition to be approached by the transporter trucks. The site order book also established that the claimants used cranes for the shifting of the rails. The utilization of cranes is also not in dispute. In view of this, the claim as awarded by the Arbitral Tribunal, after giving detailed discussion on the quality of the work and rates payable 7 arbp182.06.sxw for the various extra items by taking note of the schedule of rates of Central Railway1990, item 18202 by providing 4 times rate is reasonable and need no interference, including the rate of shifting of rails by the Respondents @ of Rs. 220.44 per tonne. Total amount so awarded, therefore, of Rs. 8,84,256/on these both counts need no interference. The discretion and expertise so used by the Arbitral Tribunal and awarded claim based upon the material available on record and after taking note of schedule of rates of Central Railway, in my view also is fair and reasonable.

12. The refund of security deposit of Rs. 3,00,000/(

claim No. 3) after completion of the work under the provision of GCC, should follow. There is no dispute about this issue. However, it is made clear that it is to be paid to the Respondents without any interest.

13. So far as sorting of old rails (Claim No. 4), as per Clause 7A of special condition No. 5 and Clause 37 of GCC the rates quoted by the tenderers are all inclusive. This part of the work for which the payment was awarded, already

exists in the basic rate of items. I am of the view that such claim falls under the category of excepted matter in terms of Clause 63. Therefore, the amount so awarded is liable to be 8 arbp182.06.sxw set aside.

14. The underutilization of overheads (Claim No. 5), falls within the provisions of 7A read with Condition No. 22 and Clause 37 of GCC. As per this also the rates quoted by the tenderers are all inclusive till the successful completion of the contract work and as the extension was granted on the undertaking of the Respondents that they shall not claim any compensation on account of such extension, the Respondents are not entitled for this claim also. Even otherwise, the amount so awarded on hypothesis basis without considering the objections raised by the Petitioner that this claim also falls within the ambit of "excepted matters", is liable to be set aside. (General Manager Northern Railways and Another Vs. Sarvesh Chopra,)

15. With regard to the wrongful deduction (Claim No.8), the learned Counsel appearing for the Petitioner did not press this issue as the extension was granted by consent of the parties and on account of respective delay of both the parties, so this claim is maintained.

16. With regard to the payment due to variation in cost of labour 9 arbp182.06.sxw and material (Claim No. 9), as awarded without necessary certificate for variation in cost, apart from the fact that there is a specific clause which debars, the contractor from raising any amount towards price escalation, as in the present case, the time was extended on typical undertaking as referred above, therefore, there is no question of any payment due to variation in cost of labour and material. Even though there is a delay because of the defaults on the part of both the parties, still in view of the specific agreement and extension of time on a condition of no claim/compensation on that ground, the grant of price variation is contrary to the terms and is liable to be set aside. The Arbitral Tribunal, can not go beyond the agreed terms on any count. (Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another,).

17. There is no serious dispute that the same amount was withhold for no submission of certificates, though it was furnished subsequently. This was not seriously contested. The claim No. 11 therefore, as awarded, need no interference.

18. As conceded by both the counsel, as per Clause 16 (3) of GCC, the contractor Respondent is not entitled for any interest on the 10 arbp182.06.sxw awarded amount. The Arbitral Tribunal, therefore, was right in not granting the said amount.

19. In view of above, as the award can be modified and/or some of the claims can be retained/maintained in view of full Bench Judgment (R.S. Jiwani (M/s.), Mumbai v. Ircon International Ltd., Mumbai, 2010 (1), Mh.L.J. 547), I have modified the award as above. The rest of the award is maintained.

20. The Petition is accordingly partly allowed to the above extent.

No order as to costs.