
(2016) 12 DEL CK 0088

In the Delhi High Court

Case No : O.M.P. (COMM) 57 of 2016 & IA No. 3146 of 2016

United India Insurance Co. Ltd.

APPELLANT

Vs

THDC India Limited

RESPONDENT

Date of Decision : 05-12-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2017) 236 DLT 183

Hon'ble Judges : Mr. Vibhu Bakhru, J.

Bench : Single Bench

**Advocate : Mr. Puneet Taneja and Ms. Shaheen, Advocates, for the Respondent;
Mr. A.K. De, Advocate, for the Petitioner**

Final Decision : Dismissed

Judgement

Mr. Vibhu Bakhru, J. - United India Insurance Co. Ltd (hereafter "UIIC") has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") inter alia praying that the arbitral award dated 07.11.2015 (hereafter "the impugned award") passed by the Sole Arbitrator, Justice P.K. Bahri (Retd.) be set aside. By the impugned award, the arbitrator has allowed the claims made by THDC India Limited (hereafter "THDC") in relation to the agreement dated 02.03.2001 executed by the parties herein.

2. The principal controversy urged on behalf of UIIC in this petition, concerns the arbitrator's finding that the insurance policy (hereafter "the policy") stated to have been issued by UIIC and annexed to the Statement of Defence was not binding on THDC. Mr. De, the learned counsel for UIIC contended that the defences raised by the UIIC were in terms of the policy and the arbitrator had grossly erred in rejecting the same by holding that the same was not binding. It was urged that since the arbitrator had disregarded the terms of the policy, the impugned award is contrary to the terms of the contract between the parties and is thus, liable to be set aside.

3. Briefly stated, the relevant facts to address the controversy between the parties are as under:

3.1 THDC - a public sector enterprise - invited a tender (Tender No. THDC/RKSH/MCE/99-2000) for "All Risks Comprehensive Marine-cum-Erection (MCE) Insurance Policy for Electrical and Mechanical Equipment, Computerised Control System, Hydro Mechanical Equipment and all other Associated/Auxiliary Equipment/connected systems for Tehri: HPP (Stage- 1)" on 22.05.2000. UIIC's bid, which was submitted in response to the said invitation to tender, was accepted by THDC. The parties thereafter entered into an agreement dated 02.03.2001 (hereafter "the Agreement") wherein total premium for the policy was fixed at Rs. 3,70,45,004/-. The same covered all imported and indigenous machinery and equipment, tools and any other material to be erected/installed in the project including spares thereof.

3.2 The total sum insured was Rs. 1,550.11 crores, which consisted of the following parts:

"I) Marine Overseas Supply Rs. 1090.88Cr.

II) Marine Indigenous Supply Rs. 160.75Cr

III) Storage & Erection Rs. 298.48Cr"

3.3 Although the insurance coverage of the policy was fixed from 29.09.2000 to 28.09.2003, however it could be extended and the premium was to be calculated on pro rata basis. The policy stood extended till 28.09.2007; that is, the date when above mentioned last two stages of the project were completed and the last unit was commissioned. It is stated that on 29.03.2007, while the trial of unit no.1 of the project was going on, Lightning Arrestor and Voltage Transformer(LAVT),Neutral Grounding Cubical and other accessories got damaged and therefore, UIIC appointed M/s Insurance Technical Services (hereafter "the surveyor") to inspect the damaged components.

3.4 THDC, by a letter dated 11.07.2007, informed UIIC that all the units of the Project had been commissioned and requested to adjust the excess premium paid by THDC. On 31.08.2009, THDC raised a claim of Rs. 45,27,895/- towards the damaged components.

3.5 The surveyor submitted its final report on 04.06.2012 by holding that there was under insurance. The surveyor calculated the total cost of completion at Rs. 2,938.79 Crores on account of inflation as per the RBI Index and consequently assessed loss on account of damaged components at Rs. 19,67,412/-.

3.6 THDC issued a letter dated 29.06.2013 and called upon the UIIC to settle the claim of unlawful deduction of Rs. 18,51,853/- on account of under insurance and further refund the excess premium paid by THDC within 21 days of receipt of the said letter.

3.7 Thereafter, by a notice dated 25/26.10.2013, THDC invoked the arbitration

clause - Clause 9.0 of the General Terms and Conditions governing the Offer - and appointed Justice P.K. Bahri (Retd.) as the Sole Arbitrator.

3.8 THDC raised 5 claims before the arbitrator, which are as follows:

Claim No. 1 - Rs. 4527895/- as the loss incurred due to damage to LABT, NG Cubical and accessory of Unit No. 1.

Claim No. 2 - Rs. 1 ,79,77,395/- on account of Excess premium paid to the respondent.

Claim No. 3 - Rs. 2.50 lakhs towards the damages on account of unfruitful expenditure incurred by claimant.

Claim No. 4 - Interest @ 18% per annum on the amounts claimed from the due date till the date of payment.

Claim No. 5 - Costs of the present arbitration Proceedings.

3.9 UIIC, in its Statement of Defence, asserted that the parties were bound by the policy attached with the Statement of Defence and in terms of the policy, the surveyor's assessment was binding; consequently, THDC's claims ought to be rejected.

3.10 The Surveyor had proceeded on the basis that the cost of project was to be adjusted on account of inflation on the basis of the Index published by RBI and had, accordingly, computed the cost of the project at Rs. 2,938.79 crores. On the aforesaid basis, the surveyor had concluded that THDC had under-insured the project since it had paid the premium on the basis that the cost of the project to be Rs. 1,550.11 crores. Accordingly, the surveyor had assessed the loss at Rs. 19,67,412/-. The arbitrator rejected the aforesaid conclusion and accepted THDC's claim towards the damage of LAVT, NG Cubical and other accessories. The arbitrator held that the deduction of Rs. 18,51,853/- on account of under insurance, was unsustainable. According to the arbitrator, the cost of the project was to be ascertained on the basis of cost incurred. The arbitrator also noted that the cost of the project had been duly approved by the Central Electricity Authority and the total cost of the project was finally determined at Rs. 1,187.71 crores.

3.11 UIIC sought to support the report of the surveyor on the basis of the policy annexed with the Statement of Defence. The arbitrator considered the same and held that there was nothing on record to indicate that the policy was ever communicated to THDC or formed a part of the contract between the parties.

3.12 The arbitrator also allowed THDC's claim for excess premium paid. Admittedly, in terms of clause 6.1 of the Special Conditions of Contract forming a part of the Agreement, the premium payable was to be adjusted on the basis of the "actual values to be declared by the insured" and UIIC was liable to refund the excess premium paid within three months of the demand. The premium had been calculated on the projected cost of Rs. 1,550.11 crores but the cost finally

determined was Rs. 1,187.71 crores; therefore, the arbitrator accepted that THDC was entitled to a refund of excess premium paid. Submissions

4. Mr A.K. De, the learned counsel appearing for the UIIC submitted that the impugned award insofar as it held that the insurance policy was not binding on THDC was perverse. He earnestly contended that the arbitrator was appointed in terms of the arbitration clause contained in the policy and therefore his conclusion that the policy was not binding, was unsustainable. He further submitted that in terms of the policy, the decision of the surveyor was binding and therefore, the arbitrator had no jurisdiction to reject the assessment made by the surveyor.

5. Next, Mr. De contended that the arbitrator grossly erred in holding that excess insurance premium was paid by THDC. He submitted that UIIC had to re-insure the project since the same was valued at above Rs. 1,500 crores. He submitted that in case the value of the project was lower, UIIC would have no obligation to seek re-insurance and pay re-insurance premium. He submitted that since the arbitrator had completely overlooked this contention, the impugned award was liable to be set aside.

Reasons and conclusion

6. The contention that the arbitrator was appointed pursuant to the arbitration clause in the policy is palpably erroneous. In view of the disputes that had arisen between the parties, THDC had appointed the arbitrator by a letter dated 25/26.10.2013. A Plain reading of the aforesaid letter indicates that THDC had made the appointment in terms of clause 9 of the Agreement between the parties. No objection to such appointment was raised by UIIC. Clause 9 of the General Terms and Conditions governing the Offer is set out below:

"9.0 Arbitration

9.1 All disputes between the parties to the contract arising out of or in relation to the contract other than those for which the decision of the Engineer or any other person is by the contract expressed to be final and conclusive, shall after written notice by either party to the contract to the other party be referred to Sole Arbitrator appointed by THDC. The arbitration shall be conducted in accordance with it the provisions of the Arbitration and Reconciliation Act, 1996 as amended from time to time. The parties to the contract understand and agree that it will be no objection that the Sole Arbitrator has earlier in his official capacity to deal directly or indirectly with the matters to which the contract relates or that in the course of his official capacity to deal directly or indirectly with the matters to which the contract relates or that in the course of his official outlet had expressed on all or any of the matters in dispute or difference. The award of the Arbitrator shall be final and binding on the parties to the contract."

7. The aforesaid clause is materially different from clause 7 of the policy relied upon by UIIC, which reads as under:-

"7. If any dispute or difference shall arise as to the quantum to be paid under this Policy (liability being otherwise admitted) such difference shall independently of all other questions be referred to the decision of a sole arbitrator to be appointed in writing by the parties to or, if they cannot agree upon a single arbitrator within 30 days of any party invoking Arbitration, the same shall be referred to a panel of three Arbitrators comprising of two Arbitrators - one to be appointed by each of the parties to the dispute/difference and the third Arbitrator to be appointed by such two Arbitrators and arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this Policy.

It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this Policy that the award by such Arbitrator/Arbitrators of the amount of the loss or damage shall be first obtained."

8. It is also relevant to note that in terms of the arbitration clause contained in the policy relied upon by UIIC, an arbitrator was to be appointed by a mutual consent. However, as per clause 9 of the General Terms and Conditions governing the Offer, the arbitrator was to be appointed by THDC. In the present case, there can be no dispute that the arbitrator was appointed by THDC in terms of clause 9 of General Terms and Conditions governing the Offer; first of all for the reason that the letter dated 25/26.10.2013 invoking the arbitration clause expressly referred to clause 9 and secondly, the arbitrator was appointed by THDC. This was accepted by UIIC as admittedly, no objection to the said appointment was raised by UIIC.

9. In view of the above, the contention that the arbitrator's finding that the policy did not bind the parties is perverse since his appointment was also in terms of the said policy, is bereft of any merit.

10. The Agreement between the parties was arrived at in terms of a tender floated by THDC. UIIC had responded to the invitation to tender and had submitted its offer which was accepted and an agreement dated 02.03.2001 was entered into between the parties. Clause 2 of the said agreement, expressly provided as follows:

"The Following document shall be deemed to form and be read and construed as part of the agreement. viz.

a) This Agreement

b) The accepted copy of the "Letter of Award" dated 20.09.2000.

c) Tender document/offer of the Insurer and all the subsequent correspondence as mentioned in the LOA."

11. The arbitrator had also examined the material produced by the parties and concluded that there was no evidence to prove that the policy relied upon by UIIC was issued to THDC at the material time. The learned counsel for UIIC has been unable to dispute the aforesaid finding. Even before this Court, he has not been able to point out any evidence which would even remotely indicate that the said policy had been communicated to and accepted by THDC at the relevant time. Thus, I am unable to find any infirmity with the arbitrator's conclusion in this regard.

12. The contention that the arbitrator had failed to consider that UIIC was required to re-insure the project, is also unpersuasive. Admittedly, no such plea was taken by UIIC in its Statement of Defence, thus clearly, the arbitrator cannot be faulted for not considering the same.

13. Clause 6.1 and 6.2 of the Special Conditions of Contract, which formed a part of the Agreement, expressly provided for adjustment of insurance premium. The said clauses are set out below:

"6. Adjustment of sum Insured.

6.1 The "sum to be got insured" under the policy is inclusive of the estimated value of the various factors considered for working out the sum to be got insured and the same is to be adjusted on the basis of actual values to be declared by the "insured" in respect of Sea/Inland freight, Custom duty, port charges, handling charges, storage charges and cost of erection and other variable cost. The insurer is to refund excess premium paid to the insured within three months of demand.

6.2 The sum to be insured under the policy is inclusive of the contract value whose orders are placed and the estimated value of some of the packages where P.O./S.O. are yet to be placed by the Insured. The sum Insured shall be adjusted in accordance with the values of the packages to be declared by the Insured after making the payments. The actual values as intimated by the Insured shall be taken in to account and the amount of premium payable shall be reworked out for necessary adjustment against the amount payable/paid by the Insured towards premium."

14. In view of the above, even if UIIC had to re-insure the project and pay insurance premium, it cannot escape its obligation as expressly agreed and was bound to adjust the premium paid by THDC. The arbitrator's conclusion in this regard cannot be faulted. However, even if it is assumed that the arbitrator had erred in interpreting the terms of the Agreement, still no interference with the impugned award would be warranted in these proceedings.

15. It is well settled that the question as to interpretation of an agreement between the parties is clearly within the jurisdiction of the arbitrator. In *Mcdermott International Inc. v. Burn Standard Co. Ltd and Others.*: (2006) 11 SCC 181, the Supreme Court held as under:-

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*: AIR 2003 SC 4519 and *D.D. Sharma v. Union of India* : (2004) 5 SCC 325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

16. In *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India*: (2010) 11 SCC 296, the Supreme Court held as under:

".....The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

17. Although the view expressed by the Supreme Court in above mentioned judgment was in the context of the Arbitration Act, 1940, the view expressed therein is still good law as the scope of interference under the Act has not been widened but considerably narrowed.

18. The scope of Judicial Review under Section 34 of the Act is limited and does not entail re-appreciation of the evidence or re-adjudication of disputes. Unless it is established that the findings of the arbitrators are perverse and his conclusions are contrary to established principles of law, no interference with the arbitral award would be warranted. In the present case, I am unable to accept that the impugned award is contrary to public policy of India or that any grounds as specified under section 34 of the Act exist for setting aside the impugned award.

19. The petition is, accordingly, dismissed. The pending application also stands

disposed of.