

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 170/2004

Reserved on: December 2, 2011

Decision on: January 9, 2012

GAIL (INDIA) LIMITED, (Formerly known as
GAS AUTHORITY OF INDIA LTD.) Petitioner

Through: Mr. Rajiv Bansal with
Mr. Rahul Bhandari, Advocates.

versus

HINDUSTAN CONSTRUCTION CORPORATION Respondent

Through: Mr. Anurag Kumar, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

9.01.2012

1. GAIL (India) Ltd. (formerly Gas Authority of India Limited) (hereafter 'GAIL') has, in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenged an Award dated 11th August 2003 passed by the learned Sole Arbitrator in the dispute between GAIL and Hindustan Construction Corporation ('HCC').

2. On 6th July 1994 GAIL awarded HCC a contract for upgradation of the Auraiya Gas Compressor Station for HBJ Pipeline. The contract was to be completed by 27th February 1995. However, the contract was actually completed on 31st October 1996 with a delay of about twenty months. It is claimed by GAIL that HCC was not serious about the execution of the job awarded to it and various notices/letters were issued to HCC by GAIL, and also by Engineers India Ltd. ('EIL') who were the Engineer-in-charge of the project. It is stated that under Clause 27 of the General Conditions of Contract ('GCC'), GAIL was entitled to liquidated damages ('LD') for the

delay in HCC completing the work. GAIL states that after great persuasion HCC completed the work on 31st October 1996 and submitted its final bill. Since HCC had already submitted its 'no claim certificate' ('NCC') while requesting extension of the period of conclusion of contract by the letter dated 7th March 1997, GAIL by its letter dated 14th January 1998 requested HCC to submit a fresh NCC. This was done by the HCC on 16th January 1998. GAIL claims that apart from the above NCC, HCC also issued another letter dated 16th April 1999 nearly fourteen months after the receipt of the final payment confirming that no further amount is due to it under the contract in question.

3. According to the GAIL, under Clause 91 (i) of Volume I of GCC, HCC had to raise any objection as regards payments due to it by giving a written notice within ten days of the final payment. However, HCC for a period of over 1 ½ years, after receipt of final payment, did not raise any claim. On 6th October 1999 HCC filed its claims before the learned Arbitrator. GAIL in its reply raised the question of maintainability of the claim on the ground that HCC had on two occasions, i.e., 7th March 1997 and 16th July 1998 submitted NCCs voluntarily. Further, at the time of acceptance of the final payment, no protest had been raised by HCC. The claim was also resisted on merits.

4. GAIL's objection as to maintainability of HCC's claim was rejected by the learned Arbitrator in the impugned Award dated 11th August 2003. The learned Arbitrator proceeded to allow most of the claims of the Respondent and rejected the counter claim of GAIL.

5. Mr. Rajiv Bansal, learned counsel appearing for GAIL, submitted that the learned Arbitrator erred in rejecting the plea of GAIL that there was full

‘accord and satisfaction’ of the Respondent’s claims and therefore there was no arbitrable dispute remaining to be adjudicated. The plea of the Respondent that it gave the NCC under coercion was an afterthought. At no time did the Respondent raise any such protest. Mr. Bansal referred to a further letter dated 16th April 1999 written to GAIL by HCC which reiterated that they had no further claims against GAIL.

6. Mr. Anurag Kumar, learned counsel for the HCC on the other hand relied on the judgment of this Court in ***GAIL v. Bansal Contractors (India) Ltd., 2010 (120) DRJ 332*** and submitted that the NCC given by HCC was under coercion since otherwise it could not expect to receive any payment from GAIL. It was a practice that the contractor had to submit an NCC along with the final bill itself, and there was no choice with HCC not to do so. He pointed out that the letter dated 16th April 1999 issued by HCC did not pertain to the contract in question. Mr. Anurag Kumar also relied on the judgments in ***Hindustan Tea Co. v. K. Sashikant Co. AIR 1987 SC 81*** and ***State of Rajasthan v. Puri Construction Co. Ltd. v. 1994 (6) SCC 485*** to urge that since the Award was a reasoned one, it did not call for any interference unless there was an error on the face of it.

7. The issue that falls for consideration on the above submissions is whether the learned Arbitrator’s rejection of GAIL’s objection concerning maintainability of HCC’s claim was tenable in law. The question whether submission of no claim certificate by a contractor would constitute ‘accord and satisfaction’ and would preclude such contractor from subsequently raising a claim for reference to arbitration came up for consideration by the Supreme Court in ***P.K.Ramaiah & Co. v. NTPC 1994 Supp (3) SCC 126***. On the facts of that case it was observed (SCC, p.129):

“Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the

claims. The subsequent allegation of coercion is an afterthought and a device to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given. In *Russell on Arbitration*, 19th Edn., p. 396 it is stated that “an accord and satisfaction may be pleaded in an action on award and will constitute a good defence”. Accordingly, we hold that the appellant having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration.”

8. The above decision was followed in ***Union of India v. Onkar Nath Bhalla & Sons (2009) 7 SCC 350*** where it was held that the contractor had after signing on the final bill without any protest or reservation waived its right to raise a further claim and therefore there was no live dispute between the parties that could be referred to arbitration. In ***National Insurance Company Ltd. v. Boghara Polyfab (P) Ltd. (2009) 1 SCC 267***, the Supreme Court set out the possible circumstances in which a claim need not be entertained in arbitration proceedings except “in certain circumstances”. The relevant portion of the said judgment reads as under (SCC @ pp 295-296):

“52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject:

(i) ...

(ii) ...

(iii) A contractor executes the work and claims payment of say Rupees Ten Lakhs as due in terms of the contract. The employer admits the claim only for Rupees six lakhs and informs the contractor either in writing or orally that unless the contractor gives a discharge voucher in the prescribed format acknowledging receipt of Rupees Six Lakhs in full and final satisfaction of the contract, payment of the admitted amount will not be released. The contractor who is hard pressed for funds and keen to get the admitted amount released, signs on the dotted line either in a printed form or otherwise, stating that the

amount is received in full and final settlement. In such a case, the discharge is under economic duress on account of coercion employed by the employer. Obviously, the discharge voucher cannot be considered to be voluntary or as having resulted in discharge of the contract by accord and satisfaction. It will not be a bar to arbitration.

(iv) ...

(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration.”

9. The above decision was further considered and explained by the Supreme Court in ***Union of India v. Master Construction Co. 2011 (5) SCALE 165***. It was held that (SCALE, p.171): “A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate...if such plea is found to be an after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there.” In the said case the Respondent after submitting no claim certificates and release of the final bill amount and its bank guarantee, withdrew the no-claim certificates and lodged certain claims. It was contended that the no-claim certificates were given under financial duress and coercion. However, the Supreme Court found that the ‘no claim certificates’ were given and the contract discharged by the Respondent voluntarily. It held (SCALE, p.172): “Mere allegation that no-claim certificates have been obtained under financial duress and coercion,

without there being anything more to suggest that, does not lead to an arbitrable dispute”

10. Turning to the case on hand, the relevant facts are that after completion of the work on 31st October 1996, HCC submitted its final bill. Going by the first NCC issued on 7th March 1997, it appears that HCC had imposed a condition for issuance of such NCC. The said letter reads as under:

“Date: 7th March 1997.

The Resident Construction Manager,
M/s. Engineers India Limited,
Gas Rehabilitation and Expansion Project,
P.O. Vaghodia, Dist.: BARODA – 391 760

Dear Sir,

Kind Attn.: Shri L.C. Khatwani, R.C.M.
Sub: No Claim Letter.

We shall have no claim whatsoever of any kind towards the Contract No.2986/T-30/93-94/SKD/18/C-23 dtd. 6.7.1994 and the works executed at GAIL Dibiyapur subject to sanction of final extension of time without levy of Liquidated Damages and payment of our final bill.

Thanking you,

Yours faithfully,
For HINDUSTAN CONSTRUCTION CORPORATION”

11. On 14th January 1998, GAIL wrote to HCC as under:

“Dear Sir,

This has reference to the settlement of final bill pertaining to the upgradation of Auraiya Compressor Station. PUF insulation of Control Building roof was carried out by you through a specialized agency viz. M/S LLOYDS INSULATIONS in terms of the Contract Clause no. 60.2-I (d). As per this clause, when the item of work is executed through nominated specialist agency as approved by EIC, then actual amount paid to such nominated agency supported by documentary evidence is required to be submitted by

you. While verifying the records, it is observed that no such documentary evidence has been submitted by you. You are, therefore, requested to submit the documentary evidence of actual payments made to M/s. LLOYD INSULATIONS by you and acknowledgement of the same by them for carrying out the above mentioned PUF insulation job.

You had submitted conditional No Claim Certificate subject to extension of contractual completion period without imposition of LD. Since extension of contractual completion period has been approved without imposition of LD, you are hereby advised to submit the No claim certificate afresh without any condition immediately.

You are also required to submit the copy of your application to Regional Labour Commissioner along with completion certificate for upgradation of Auraiya Compressor Station and Order passed by the R.L.C. for release of Security Deposit.

This is for your kind information that the final bill has almost been processed/checked and the same will be released after getting the above cited clarifications.”

12. It appears from the above exchange of letters that far from being compelled or ‘coerced’ into issuing an NCC, HCC insisted on GAIL extending the period of completion of the contract without imposition of LD as a pre-condition to issuing the NCC. GAIL acceded to the said condition and thereafter HCC issued the NCC in the following terms:

“Sir,

We hereby submit that we have no claim whatever for the work of Auriya Compressor Station upgradation, GAIL, Dibiyapur vide your Order No. 2486/T-30/93-94/SK D/18 e-23 dated 06.07.1994.

This certificate is being issued as desired vide letter no. GAIL/AUR 108M/12/21/95 dated 14.01.1995 of Sr. Manager (O&M).”

13. The copy of the above letter as enclosed with the petition does not bear a date. The learned Arbitrator refers to it as dated 16th January 1998

whereas in the present petition GAIL states that it is dated 16th July 1998. Be that as it may, HCC does not deny having issued an NCC in the above terms. As far as the subsequent letter dated 16th April, 1999 is concerned HCC is right in its contention that it pertained to a different contract. In any event, the said letter does not appear to have been relied upon or exhibited as a document by GAIL in the arbitral proceedings.

14. The above correspondence shows that the two parties were in negotiation as regards the settlement of the final bill and there was no compulsion on HCC, much less any coercion, to issue an NCC. The learned Arbitrator has failed to consider this important aspect while concluding that: “In the present case the NCC was demanded before the bill was finalized and before the amount of final payment intimated to claimants-HCC. Accordingly I do not agree that the NCC constitutes sufficient cause for denying consideration of the claims made by Claimants-HCC before me.” The said conclusion is contrary to the evidence which shows that the NCC was issued after HCC’s condition for issuing it was acceded to by GAIL. Also, in terms of the law as explained in the above decisions, the learned Arbitrator failed to notice that HCC had not issued the NCC under coercion or duress. The NCC issued by HCC to GAIL constituted ‘accord and satisfaction’ of HCC’s claims and there was therefore no arbitrable dispute.

15. For the aforementioned reasons, this Court sets aside the impugned Award dated 11th August 2003. The petition is allowed with costs of Rs. 5,000/- which should be paid by HCC to GAIL within a period of four weeks from today.

S. MURALIDHAR, J.

JANUARY 9, 2012

akg