

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 333/2004

Reserved on: February 16, 2012

Decision on: March 13, 2012

M/s RAJ KISHAN & COMPANY

..... Petitioner

Through: Mr. Chetan Sharma, Senior Advocate
with Mr. D. Moitra and
Mr. Sanjoy Bhaumik, Advocates.

versus

NATIONAL THERMAL POWER
CORPORATION LTD.

..... Respondent

Through: Mr. S.K. Taneja, Senior Advocate
with Mr. Puneet Taneja and
Mr. Amrit Anand, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

13.03.2012

1. M/s. Raj Kishan and Company, the Petitioner, has in this petition under Section 34 of the Arbitration and Conciliation Act 1996 ('Act') challenged an Award dated 4th June 2004 of the learned sole Arbitrator in the disputes between it and the Respondent, National Thermal Power Corporation Ltd. ('NTPC'), arising out of the award by NTPC in favour of the Petitioner of the contract for civil works of coal handling plant package at NCPS, NTPC, Dadri on 6th February 1989.

2. The value of the contract was Rs.4,69,25,010. The scheduled date of start was 6th February 1989 and the scheduled date of completion was 5th February 1991 i.e. after 24 months. The first extension of time (EOT) for completion

was granted up to 30th June 1993, the second EOT up to 31st December 1995 and the third EOT up to 31st January 1997.

3. According to the NTPC, the Petitioner abandoned the site on 31st December 1997. On 31st January 1998, NTPC issued a notice under Clause 41.1 of the General Condition of Contract ('GCC') stating that NTPC would restart the work and get it done at the risk and cost of the Petitioner. By a further letter dated 17th/20th December 1999, NTPC called upon the Petitioner to take the measurement of the balance works remaining to be executed, at the risk and cost of the Petitioner in terms of Clause 41.2 of the GCC. Thereafter, the balance work was got done through other agencies and was completed on 30th September 2000. The final bill of the Petitioner was prepared on 4th September 2001. NTPC invoked the arbitration on 15th September 2001.

4. The first submission by Mr. Chetan Sharma, learned Senior counsel for the Petitioner, is that the claims of NTPC were barred by limitation. According to the Petitioner, the cause of action for the purposes of limitation arose on 31st December 1997 when the Petitioner is, alleged by NTPC, to have abandoned the work, or at best on 31st January 1998 when the Petitioner was served with notices by NTPC under Clause 41 of the GCC for carrying out the balance works at the risk and cost of the Petitioner. It is pointed out that at one place in the impugned Award the Arbitrator observed that "all these letters relate to the period much after the claimant terminated the contract vide notice dated 31st January 1998 and yet there is no emphatic assertion that the contractor has completed the work contemplated in the contract" thereby accepting that the starting point for limitation was 31st January 1998. Referring to Section 43 of the Act, it is contended that the question of limitation has to be with reference to Section 3 of the Limitation Act, 1963 and that on the face of it, NTPC's claim was barred by limitation. Reliance was placed on the decisions in *S.*

Rajan v. State of Kerala AIR 1992 SC 1918, V.M. Salgaokar & Bros. v. Board of Trustees Marmugao AIR 2005 SC 4138, Oil & Natural Gas Corporation Limited v. Amtek Geographical Private Limited 2004 (3) Raj.581 (Del.), Jammu & Kashmir Bank Limited v. Shree Digvijay Cement 154 (2008), DLT 18 (DB), Smt. Krishna Mittal v. Municipal Corporation of Delhi 2011(1) Raj. 86 (Del.) and Biba Sethi v. Dyna Securities Limited 2009 INDLAW DEL 1017.

5. The plea of the Petitioner that NTPC's claims were barred by limitation was not raised before the learned Arbitrator. A perusal of the present petition under Section 34 of the Act also reveals that no such ground has been raised by the Petitioner even in the petition. This ground has been raised only at the time of the arguments. It is a settled position of law that plea of limitation cannot be decided as an abstract plea of law divorced from the facts. As explained in ***Ramesh B. Desai v. Vipin Vadilal Mehta 2006 (5) SCC 638*** "a plea of limitation is a mixed question of law and fact." Consequently, unless the plea of limitation is raised at the earliest point in time before the learned Arbitrator, it cannot be adjudicated upon as a mixed question of law and fact. In ***Oil and Natural Gas Corporation Limited vs. Mc Chemical Engineers, 1999 (2) Raj. 149 (SC)*** the Supreme Court negated the plea of limitation raised for the first time in the course of challenge to the award before the Court. In ***Tamil Nadu Water Supply v. M. Abdul Karim, 2010 (4) ALR 581 (Madras)*** it was again held that without a proper foundation of facts laid before the learned Arbitrator to demonstrate that the claims were barred by limitation, a plea to that effect cannot be raised for the first time in Court. A Division Bench of Bombay High Court in ***Vimal G. Jain v. Vertex Financial Services Pvt. Ltd., 2007 (4) Arb LR 18 (Bombay)*** held that if the point regarding the bar of limitation is not raised before the Arbitrator, it should be deemed to have been waived. Consequently, "the question of entertaining

such point in proceedings under Section 34 of the Act or in an appeal arising from the order passed therein cannot arise.” This Court has held to the same effect in *M/s. Uppal Engineering Corporation v. C.W.C., 2009 (3) Raj. 666 (Del.)* and *M. Sons Enterprises Pvt. Limited v. Shri Suresh Jagasia and Anr. 2011(123) DRJ 266*. In that view of the matter, the Petitioner cannot be permitted to urge the ground regarding limitation for the first time during arguments. Even otherwise, the plea of NTPC that the actual termination of the contract, as accepted by the Arbitrator, was only on 17th/20th December 1999 and that the limitation should be computed from that date is a plausible view to take. The stray sentence in para 43 of the Award that the said date was 31st January 1998 does not make any difference to the factual position. NTPC having invoked the arbitration on 15th September 2001, its claims could be held to be within time. Consequently this objection of the Petitioner is rejected.

6. Claim No.2 of the NTPC was towards excess consumption/wastage of owner issue materials i.e. cement and steel. As regards the claim in the sum of Rs. 34, 78, 981 towards cement, the learned Arbitrator found that no excess consumption or wastage of cement was established. He accordingly rejected the said claim. With regard to the claim for Rs.72,75,720 towards excess consumption of steel and cement, the learned Arbitrator awarded Rs.17,91,591. In addition to the pleas urged before the Arbitrator it is urged by the Petitioner before this Court that the alleged wastage of steel did not result from the BOQ works but from the extra items jointly prepared by the parties. Reliance is placed by the Petitioner on Annexure ‘C’ in terms of which the allowable wastage was 6.486% whereas the actual measured wastage came to 5.28%. It is contended that the learned Arbitrator ignored Clause 8.3.1(e) which placed a cap of 10% on the security deposit (Rs.9.38

lacs) and, therefore, the reconciliation amount for recovery should not have exceeded Rs.93,800.

7. Mr. S.K. Taneja, learned Senior counsel appearing on behalf of NTPC, referred to Clauses 8.3 and 8.3.1. of the Special Conditions of Contract ('SCC') which deal with accounting and reconciliation at a particular stage. Clause 8.3.1(e) does not provide for any cap on the owner issued materials. The said Clause reads as under:

“8.3.1 (e) At any point of time, the material outstanding as unaccounted for shall be limited to ten percent (10%) by value of the total security given by the Contractor for the materials unless otherwise permitted in writing by Engineer-in-Charge.”

8. The above Clause, in fact, envisages that the total owner issued material cannot exceed 10% of the total security given by the Petitioner unless permitted in writing by the Engineer-in-charge (EIC). Mr.Taneja points out that it is not the Petitioner's case that material in excess of 10% of the security deposit amount was not issued by the owner. The only issue concerned wastage/excess consumption.

9. A perusal of the impugned Award shows that the pleas of the Petitioner in regard to Claim No.2 were set out in para 26 of the Award. The Petitioner had contended that there was in fact no wastage since all the material issues had gone into the work; that the area was enclosed by a security zone and therefore there was no chance of pilferage; that there was no notice of recovery; that such recovery was hit by Section 74 of the Contract Act 1872; that NTPC in fact had not suffered any loss and had already made one recovery from the Petitioner; that the recovery rate was unfounded and finally that the percentage shown for wastage/scrap was without any basis; Clearly therefore no objection was raised by the Petitioner that the Arbitrator ignored clause 8.3.1(e) of the contract. In any event the interpretation sought to be

placed on the said clause has to be in the factual context of the value of the owner issue materials not exceeding 10% of the security deposit. In the present case, it was not factually established that the owner issue materials were not in excess of that cap.

10. The learned Arbitrator has found that there was no clause shown by the Petitioner which required any notice of recovery having to be issued by NTPC. The learned Arbitrator has discussed the issue in great detail. The invocation of Section 74 of the Contract Act was also held by the learned Arbitrator to be without basis as no evidence was led to prove that the rates stipulated in the contract for such excess consumption were unreasonable. The Arbitrator also went into the actual calculation of the excess consumption both in relation to re-enforcement steel and structural steel. Adopting the JPC rates, it was held that the NTPC was entitled to Rs.17,91,579 from the Petitioner. The reasoning and conclusion arrived at by the learned Arbitrator is based on the evidence placed on record and with reference to the contractual provisions. It does not call for interference.

11. The next objection of the Petitioner is in regard to Claim No.3 which was towards the work that was got done by NTPC at the risk and cost of the contractor. The learned Arbitrator in fact rejected this claim but observed in the passing that “if this claim would have succeeded, claimant would have been entitled to Rs.2,01,279.38.” The final Award in fact does not award any amount to NTPC under this claim. Therefore there is no merit in this objection.

12. As regards Claim No.4 towards refund of Rs.7500 for release of the bank guarantee, the learned Arbitrator has allowed this on the basis of the letter dated 24th December 1991 and an admission made by the Petitioner. In fact,

the bank guarantee was released in terms of the Petitioner's offer in the said letter so that the cash would be available to the Petitioner. It is specifically noted that "the learned counsel for the contractor, during course of the arguments, conceded to this claim." Therefore, there is no merit in the objection to this claim as well.

13. Claim No.5 was in the sum of Rs.15,111 towards 5% of the balance work of Rs.3,02,216. The learned Arbitrator, while discussing this claim, noted the contention of counsel for NTPC that compensation had been claimed in respect of the period after December 1997. In fact, the learned Arbitrator gave a finding that both parties were equally liable for delay and, therefore, declined awarding the claim for liquidated damages ('LD') towards 5% of the entire contract value. The learned Arbitrator held that "only damages in relation to the quantity of work left undone would be permissible at a reasonable and fair interpretation" of Clause 10 of the GCC. Consequently, the learned Arbitrator awarded only 5% of the balance work the cost of which was estimated to be Rs.3,02,216.41 and this works out to be Rs.15,111. This decision of the learned Arbitrator cannot be held to be erroneous or contrary to the clauses of the contract.

14. Counter claim No.1 by the Petitioner before the Arbitrator was for a sum of Rs. 1.67 crores towards the market rates for the quantity executed beyond permissible deviation up to 31st December 1997. The learned Arbitrator held that the Petitioner was entitled to only Rs.17,31,666.93 as determined by the EIC in the final bill. The learned Arbitrator discussed the evidence at great length in arriving at the above conclusion. It was held that the rates determined by the EIC were fair and reasonable whereas the demand of the Petitioner was inflated. These are pure questions of fact and, therefore, the

determination by the learned Arbitrator on this score does not call for interference.

15. Counter claim No.2 which was for a sum of Rs.75 lacs towards market rate during the extended period of contract, was not pressed before the learned Arbitrator. Counter claim No.3 was for Rs.50 lacs being the escalation as per contractual provisions for the work executed till 31st January 1998. According to the Petitioner, a separate Annexure-III had been given to show the calculation of the escalation from April 1989 to January 1998 in terms of Clause 53 of the GCC and Clause 7.4.0(iii) of the Work Order (LOA). The total escalation for the whole period from the start date i.e. 1st February 1989 till the date of completion i.e. 31st December 1997 worked out to Rs. 1,83,00,000. After accounting for the sum of Rs. 99.76 lakhs paid by NTPC, the balance claim as per escalation clause worked out to Rs.82,91,597 but was limited to Rs.50 lacs. It is pointed out that this had nothing to do with Counter claim No.2. It is submitted that the learned Arbitrator has confused the issue in para 71 by clubbing Counter Claims Nos.2 and 3.

16. In reply it is submitted by Mr. Taneja, learned counsel for the NTPC that Counter Claim No.2 was for a sum of Rs.75 lacs whereas Counter claim No.3 was for a sum of Rs.50 lacs. Counter claim No.2 was given up and recorded in the order dated 2nd March 2004 by the learned Arbitrator. Annexures- 2 and 3 to the said claim showed that Claims 2 and 3 as clubbed together. Therefore the learned Arbitrator was justified in reducing the said sum of Rs. 75 lakhs from the sum of Rs. 82,91,597. The EIC had certified the escalation as per the middle indices and a sum of Rs.99.76 lacs was paid to the Petitioner through 67 escalation bills in terms of the clause for price adjustment. Rs. 93,15,376 stood paid till the 66th RA bill and therefore a sum of Rs.6,60,956 was found payable in the final 67th bill.

17. While the learned counsel for the Petitioner may have a point that the deduction of the sum of Rs.75 lakhs being the amount claimed under the given up Counter claim No.2 from the Counter claim No.3 in the sum of Rs. 82,91,597 was erroneous in that both were separate counter claims and one did not cancel out the other, the point still remains as to on what basis the Petitioner claims that the total escalation for the entire period of the contract worked out to Rs. 1.83 crores. The Petitioner has shown the calculation for Rs.82,91, 597 (as a combination of the escalation for BOQ items and extra items) and has sought to limit this to Rs.50 lakhs. Yet, the basis for saying that this is the “balance” escalation after accounting for the sum of Rs.99.76 lakhs paid by NTPC has not been established. In the written submissions it is sought to be projected as the difference between Rs. 1.83 crores and Rs.99.76 lakhs which it is not. In the petition it is stated that it is the difference between Rs.1.80 crores and Rs.99.76 lakhs, which again does not work out to Rs. 82,91,597. In any event no evidence is shown to have been placed before the learned Arbitrator as to how the figure of either Rs.1.83 crores or the figure of Rs.1.80 crores was arrived at. Consequently, the rejection of counter claim No.2 by the learned Arbitrator cannot be faulted.

18. As regards the rejection of Counter claim No.4 regarding the amounts spent for extension of bank guarantee, it is seen that the Petitioner is, in fact, asking for the difference in interest allowed by the bank on the margin money deposited by the contractor and the market rate of interest that it would have earned if it would have lent the money. There was no evidence led by the Petitioner before the learned Arbitrator to prove that any expense was incurred by the Petitioner and any loss was suffered by it on account of such extensions of bank guarantee. There is no merit in this objection of the Petitioner.

19. Counter claims Nos. 6 (a) and 7 (a) were towards idling of plant and machinery and idling of labour respectively till 31st January 1998. The learned Arbitrator held that the Petitioner was not entitled to the sums claimed since it had agreed not to claim damages for the owner's defaults and also did not proceed in accordance with Section 55 of the Contract Act. Further the learned Arbitrator found that the Petitioner had filed only paper calculations in support of the claim without any supporting documents. Even the formula suggested at the time of arguments by learned counsel for the Petitioner was found unacceptable. Strangely, however, in para 106 of the Award, the learned Arbitrator appears to have arrived at a figure of compensation on the basis of presumption by applying Clause 10.2.0 and that this would include the damages for alleged loss of profitability "if he was held entitled to any damages on account of the delays attributable to the Owner."

20. The finding of the learned Arbitrator that that three and a half years' delay may be fairly attributable to NTPC and the balance to the Petitioner was a reason for not awarding LD to the NTPC under Claim No. 5 for the entire contract value. The learned Arbitrator has referred to Clause 8.2.9(i) of the SCC in terms of which the Petitioner would not be entitled to any compensation or damages on account of any delay in supply or non-supply of owner issued materials and stores. Clause 27.1.0 provided that in the event of delay in handing over the site, NTPC would only consider suitable extension of time for completion of work. The learned Arbitrator referred to the decision of the Supreme Court in **General Manager Northern Railway v. Sarvesh Chopra 2002 (1) ALR 506 (SC)** wherein discussing Section 55 and 56 of the Contract Act, it was held by the Supreme Court that if the contractor repudiated the contract under Section 55 and the employer had given extension of time either by supplementary agreement or by making it clear that escalation of rates would be permissible and if the contractor put the

employee to notice about claiming escalated rates compensation for delay, then a claim by the contractor would be entertainable. In the present case, in reply to the claims of the NTPC, the Petitioner had stated that time was not the essence of the contract and no penalty could be imposed on account of delay. Discussing the letters issued by the Petitioner to NTPC it was seen that those letters did not exhibit any intention by the Petitioner of revoking the contract if the damages were not paid. Since the Petitioner had not, in fact, exercised its option to terminate the contract under Section 55 of the Contract Act and in the absence of NTPC agreeing to compensate the Petitioner for under-utilization of its resources, the Petitioner was held as not being entitled to the amounts under Counter claim Nos.6 (a) and 7(a). In **Bangalore Development Authority v. Syndicate Bank, (2007) 6 SCC 711**, the Supreme Court has held that where the contractor accepts belated performance, there was no question of any breach or payment of damages. The finding of the learned Arbitrator is indeed consistent with the above law explained by the Supreme Court. The further observation of the learned Arbitrator, in the alternative, that a sum of Rs.23,46,250 calculated at 5% of the total contract value in terms of Clause 10.2.0 would be payable to the Petitioner “if he was held entitled to any damages on account of delays attributable to the owner” was unwarranted and has unnecessarily created confusion.

21. It is submitted by learned counsel for the Petitioner that a clause which prohibits the claim of damages payable under Section 55 and 73 of the Contract Act would be void in terms of Section 23 of the Contract Act. Reference is made to the decision in **Union of India v. M/s. Chenab Construction Joint Venture, 2010(6) RAJ 334 (Del.)**, **M/s Simplex Concrete Piles (India) Ltd. v. Union of India, 2010(5) Raj. 545** and **Asian Techs Limited v. Union of India, (2009) 10 SCC 354**. In the last decision, it was found that the delay in execution of the work was solely due to the fault of the

Department in that case. Here, the finding is that both parties are equally liable for the delay. The other two decisions turned on their peculiar facts. Once the claim of NTPC for LD on the entire value of the contract was rejected on the ground that both parties were responsible for the delays, it was logical for the learned Arbitrator not to entertain only the Petitioner's claims based on the delays attributable to the NTPC.

22. The learned counsel for the Petitioner relied on three letters which formed part of the arbitral record, which, according to him were not discussed by the learned Arbitrator. The first is a letter dated 8th December 1990 (R-116) in which, after complaining of the inordinate delay caused by the NTPC, it was pointed out that the losses suffered by the Petitioner would not be able to be borne "unless NTPC supports us to compensate for the losses." The second is one dated 2nd August 1993 where again it was mentioned that "our rates for the work done after 5.2.91 will be BOQ rates plus escalation plus 90% increase on the BOQ rates." The third is a letter dated 20th December 1994 in which the Petitioner again stated that extra expenses would have to be paid at escalated rates for the work done in the extended period. Even if the learned Arbitrator failed to discuss these letters in particular, they do not by themselves reflect the intention of the Petitioner to terminate the contract and in any event do not satisfy the requirement of Section 55 of the Contract Act as explained in ***General Manager Northern Railway v. Sarvesh Chopra***. In any event this is a matter for appreciation of evidence and the view expressed by the learned Arbitrator is a plausible one to take.

23. Counter Claim No.8 was in regard to loss of profitability/turnover for prolongation of the contract till 31st January 1998. Since Counter claims No. 6 (a) and 7(a) have been rejected, this counter claim had to fail too. Counter claim No. 9(a), 17 and 18 were for claims of interest. Since no interest was

awarded to NTPC, the denial of interest to the Petitioner cannot be held to be illegal.

24. Consequently, the Petitioner's objections to the impugned Award dated 4th June 2004 are rejected. The petition is dismissed with costs of Rs.30,000 which will be paid by the Petitioner to NTPC within four weeks.

S. MURALIDHAR, J.

MARCH 13, 2012
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