

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 104 of 2006

Reserved on: April 10, 2012

Decision on: April 27, 2012

INDIAN OIL CORPORATION LTD Petitioner

Through: Mr. V.N. Koura with
Ms. Mona Aneja and Mr. Sumit
Singh Benipal, Advocates.

Versus

ERA CONSTRUCTION (INDIA) LTD Respondent

Through: Mr. Manoj Singh, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

27.04.2012

1. Indian Oil Corporation Limited ('IOCL') in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') has challenged an Award dated 15th January 2006 of the learned sole Arbitrator in the disputes between it and the Respondent, Era Constructions (India) Limited ('ECIL') arising out of the award of civil and structural works for IOCL's Catalytic Reformer Unit ('CRU'), Utilities and Off-sites at Mathura Refinery, to ECIL by IOCL by a telegram of Acceptance dated 4th January 1995 followed by a Letter of Acceptance ('LOA') dated 22nd February 1995. By the impugned Award, the learned Arbitrator rejected IOCL's claims as being time barred and allowed ECL's counter claims in part.

Background facts

2. In terms of the LOA the work was to be completed within 12 months to be reckoned from the date of issue of the LOA. A formal contract was

entered into between the parties on 3rd May 1995. According to IOCL, ECIL failed to carry out the work in accordance with the contract despite repeated warnings. By December 1995 the Respondent had completed the work of a value of approximately Rs.91 lakhs against the job of the value of Rs. 3.25 crores on the fronts that were made available to it. It was apparent to IOCL, therefore, that ECIL would be unable to complete the work within the stipulated time. According to IOCL, in order to save time it decided to offload the balance part of the contractual scope of work and award it to another contractor in exercise of the rights vested in IOCL under Clause 4.6.4.0 of the General Clauses of Contract ('GCC'). IOCL issued a show cause notice dated 5th December 1995 to ECIL as to why the remaining scope of the work should not be offloaded to the another contractor at the risk and cost of ECIL in terms of Clause 4.6.4.0 GCC.

3. Thereafter, the work was offloaded to two agencies. The work of a value of Rs.5,99,32,605 was awarded to RSB Projects Ltd. ('RPL') and the work of a value of Rs.7,96,250 was awarded to M/s. Ram Sudhisht Singh & Sons ('M/s. RSSS'). IOCL states that both contractors were selected through a re-tendering process which was initiated in December 1995 itself. In terms of the GCC both the contractors would be deemed to be the sub-contractors of ECIL and appointed at the risk and cost of ECIL.

4. IOCL states that RPL completed the work awarded to it on 15th November 1997 whereas M/s. RSSS completed the work awarded to it on 21st September 1997. The final bill in respect of the work performed by RPL was jointly signed in June 1999 for a sum of Rs.5,73,31,218.71. According to IOCL, for this part of the work, it incurred an extra cost of approximately Rs.1,92,67,113.44. As regards M/s. RSSS, the final bill

was signed on 27th July 1999 for a sum of Rs.5,37,377.50. IOCL claims that it incurred an extra cost of Rs.1,97,866.75.

5. IOCL, therefore, under Claim No.1 before the Sole Arbitrator, demanded that ECIL should pay it Rs.1,94,64,980 being the total extra expenditure incurred as a result of offloading of the contract in favour of the other subcontractors to save time and costs. The case of IOCL is that the claim to the above extent could be made by it only after the final bills in respect of the work undertaken by RPL and M/s. RSSS were reconciled upon completion of the respective works performed by them and, therefore, the claim is not barred by limitation.

6. IOCL's second claim was for Liquidated Damages ('LD') on account of delay in ECIL completing the work. According to IOCL, ECIL completed the work remaining with it, upon offloading in the manner explained hereinbefore, after a delay of nine months. IOCL computed the LD as Rs.90,50,159. Again it was contended by IOCL that till such time RPL and M/s. RSSS completed their respective works on 15th November 1997 and 21st September 1997, the total value of the contract could not be computed and correspondingly the percentage thereof i.e. minimum of 1% and maximum of 10% being the permissible LD could not be computed.

7. IOCL's third claim was for a sum of Rs.86,80,290 under Clause 4.6.3.0 of the GCC towards supervision charges being 15% of the contract value as a consequence of the offloading under clause 4.6.4.0 of the GCC. Again, IOCL contended that the contract value could be determined only after the sub-contractors completed their respective works. The fourth claim of IOCL was for a sum of Rs. 1,84,285 towards costs. IOCL's aggregate claim was for a sum of Rs.3,73,79,714.

8. IOCL acknowledged that in terms of the final bill, it owed ECIL Rs.27,00,577 and a sum of Rs.21,81,432 being the cash security deposit which had been deposited and a sum of Rs.16,52,600 being the amount recovered by way of payment made in lieu of the discharged bank guarantee as recorded in the Delhi High Court's order dated 3rd December 1996 in AA No.152 of 1996. Therefore, the amount acknowledged for payment to ECIL was Rs.65,34,609. Consequently, the net amount claimed by IOCL in the arbitration proceedings was Rs.3,08,45,105.

9. ECIL opposed to the above claims and by way of a counter claim contended that it was entitled to interest at 18% per annum on the admitted sum of Rs.65,34,609 by way of an interim award.

Issues framed by the Arbitrator

10. On the basis of the pleadings, the learned Arbitrator framed the following issues for determination:

- “(1) Whether the respondent has committed any breach of their obligations under the contract? If so, to what effect?
- (2) Whether the Indian Oil Corporation is entitled to any amount on account of risk purchase? If so, how much?
- (3) Whether the Indian Oil Corporation is entitled to claim anything by way of liquidated damages? If so, how much?
- (4) Whether the counter claim of the respondent is arbitrable for the reasons that those claims were not notified claims? If so, its effect?
- (5) Whether the Indian Oil Corporation had committed any breach of their obligations under

the contract? If so, what is its effect?

- (6) To what amount, if any, either party is entitled to against the other?

11. Although no issue was framed as regards IOCL's claim being time barred, the learned Arbitrator nevertheless considered it.

12. It was submitted on behalf of IOCL that although the balance work was entrusted to other contractors on 15th December 1995, till those contractors completed their respective works and raised final bills, IOCL was not in a position to ascertain the exact amount. Therefore, its claims were within time. On behalf of ECIL, it was contended that the agreement was terminated on 15th December 1995 and, therefore, the cause of action for IOCL to claim damages and compensation arose on that date. Notwithstanding this, the work awarded to RPL was admittedly completed on 15th November 1997. IOCL did not file its claims even within three years of that date. The reference to arbitration in the present case was made only on 1st May 2001. Reliance is placed on the decisions in *Steel Authority of India v. J.C. Budharaja AIR 1999 SC 3275* and *Juggilal Kamlapat v. N.V. Internationale Crediet-En-Handels Vereeniging 'Rotterdam' AIR 1955 Cal. 65*.

The impugned Award

13. In the impugned Award, the learned Arbitrator accepted the above contention of ECIL and held that IOCL's claims were "hopelessly time barred". Consequently, the learned Arbitrator did not consider it necessary to answer Issues No.2 and 3.

14. Turning to the issue of breach of contract (Issues No.1 and 5), the learned Arbitrator concluded that the work-fronts could not be released to

ECIL by IOCL in time. Further, the delays were on account of IOCL not releasing the drawings in time; not supplying relevant information regarding the soil and underground conditions; change in the security rules/procedure; and non-availability of important materials and equipment which were to be supplied by IOCL. On the other hand, IOCL had condoned the delay in ECIL completing the work by repeatedly extending the time for completion of the work. Consequently, it was concluded that there was no breach of contract committed by the ECIL and wherever it had failed to fulfill its obligations of the work allocated to it, there was good reason for such failure to complete the job. It was held that there was breach of contract by the IOCL.

15. Issue No.4 was whether ECIL's counter claim was arbitrable since it was not notified. According to IOCL, in terms of Clause 6.6.1.0 of the GCC it was only where the claim was partly or wholly rejected and an objection thereto was raised in the manner prescribed under the clause that, the claim could be considered as notified. If it was included in the final bill, it can be treated as arbitrable. ECIL, on the other hand, contended that its claims were part of the formal discussion held between the parties as evidenced by minutes of the meetings. Therefore, there was no need for ECIL to write a formal letter to IOCL raising its claims. Further, IOCL had never formally rejected in writing any of the claims or bills of ECIL.

16. The learned Arbitrator accepted the above contention of ECIL and held that the stages envisaged under the relevant clauses of the GCC "have been followed in spirit" and that IOCL was estopped from disputing the claims of the ECIL on the ground that they were not notified since, in any event, discussions were held between the parties as regards

such claims. Thereafter, the learned Arbitrator proceeded to deal with the ECIL's counter claims. The claim was allowed to the extent of Rs.65,76,950. The claim for dewatering of foundation area was rejected. A sum of Rs.77,446 was allowed under Counter Claim No.3 on account of encountering of artificial obstructions, Rs.47,703 under Counter Claim No. 4 for reimbursement of extra water charges, Rs.1,60,496 under Counter Claim No. 5 for extra multi stage shuttering, Rs.2,91,271 under Counter Claim No. 6 for payment of extra cost for re-fabrication of structural steel columns and Rs.15 lakhs towards reimbursement of loss of profit on account of reduction in the scope of work. ECIL was awarded interest at 8% per annum from 15th December 1995 till the date of the Award.

Submissions of counsel

17. Mr. V.N. Koura and Ms. Mona Aneja, learned counsel appearing on behalf of IOCL submitted, in the first place, that the learned Arbitrator erred in proceeding on the basis that there was a termination of the contract. Referring to Clause 4.6.4.0 of the GCC it was submitted that the IOCL had only offloaded to other contractors the work which was in any event not going to be completed by ECIL before the stipulated date. Therefore, there was, in fact, no termination of the contract with ECIL. Further, under Clause 6.2.4.0 the money would become payable to ECIL only after submission of the final bill prepared in accordance with Clause 6.2.1.0. The sub-contracted work was within the knowledge of ECIL and was at its risk and cost. One of those sub-contractors raised the final bill on 1st August 1998 and the other on 12th/20th March 1999. It was only thereafter that IOCL was in a position to ascertain what was the amount it was going to claim from ECIL being the extra cost incurred by it in getting the work completed through the sub-contractors. Mr. Koura drew

a distinction between Clause 4.6.4.0 and Clause 7.0.9.0 which pertained to termination and which, according to him, was not invoked in the present case at all. Relying on the decision in ***Indian Oil Corporation Limited v. S.P.S. Engineering Ltd. AIR 2011 SC 987*** it was submitted that the decision in ***Steel Authority of India Limited v. J.C. Budharaja*** was distinguishable on facts. As regards the counter claims of ECIL, Mr. Koura referred to Clause 9.0.1.0 and urged that only notified claims of ECIL could have been referred to arbitration. 'Notified claim' was defined in Clause 1.0.24.0 which in turn referred to Clause 6.6.1.0. Inasmuch as admittedly ECIL had not complied with the stages stipulated in the above clauses, its counter claims could not be said to be a notified one and the learned Arbitrator was in error in entertaining such claims. Further, the items of counter claims were not included in the final bill and were, therefore, not arbitrable at all. Mr.Koura relied on the decision in ***M/s. Uttam Singh Duggal & Co. (P) Limited v. Indian Oil Corporation Limited ILR (1985) II Delhi 131.***

18. On behalf of ECIL, it is submitted by Mr. Manoj Singh, learned Advocate, that the decision in ***Delhi Development Authority v. I.S. Rekhi & Sons 1995 (33) DRJ 401*** conclusively decided the issue of limitation against IOCL. It is submitted that once there is a final bill raised by the contractor, the cause of action arises from that date. He referred to the order dated 22nd November 2001 passed by this Court in AA No.411 of 1998 where, with the consent of the parties, the learned Arbitrator was appointed by this Court. It is submitted that with no objection having been taken by IOCL at that stage to the reference of ECIL's counter claims for arbitration, IOCL was estopped from raising such an objection subsequently before the learned Arbitrator. As regards the issue of limitation, it was submitted that the claim was sent by IOCL to the

Respondent on 30th April 1999. A question was raised whether the limitation for IOCL's claims would cease to run merely because the sub-contractor did not raise a final bill. In that event the limitation period might be extended indefinitely. It was submitted that on 15th December 1995 IOCL had engaged the sub-contractor through a telefax and the contract amount also got crystallised on that date. Therefore, IOCL did not have to wait to prefer its claims till RPL or M/s. RSSS raised their final bill. It is submitted that the date of rescinding the contract by IOCL i.e. 15th December 1995 should be the date of commencement of the limitation for IOCL's claims against ECIL. It is submitted that the view taken by the learned Arbitrator that IOCL's claims were barred by limitation was a plausible view to take on the basis of the contractual provisions and did not call for interference. Reliance was placed on the decisions in ***Vishindas Bagchand v. Chairman, Maharashtra State Electricity Board 2002 (1) MhLJ 222***, ***Panchu Gopal Bose v. Board of Trustees for Port of Calcutta AIR 1994 SC 1615*** and ***Steel Authority of India Limited v. J.C. Budharaja***. Reliance was also placed on the decision of this Court in ***Shah Construction Company Limited v. Municipal Corporation of Delhi AIR 1985 Delhi 358*** and ***Satya Prakash Gupta v. Vikas Gupta*** (decision dated 24th November 2011 in RFA(OS) No.23 of 2010). Mr. Manoj Singh pointed out that IOCL was not justified in retaining a sum of Rs.65,34,609 which it admitted as being payable to ECIL. This payment did not require any final bill to be raised by the other sub-contractors. It was submitted that as regards the counter claims of ECIL, these were purely findings of fact on the basis of the evidence produced and did not call for review in exercise of the powers of this Court under Section 34 of the Act. Reference was made to the decisions in ***Himachal Pradesh State Electricity Board v. RJ Shah & Company 1999(4) SCC 214*** and ***Union of India v. Vijay Construction Co. 19***

(1981) DLT 49.

Were IOCL's claims barred by limitation?

19. The first issue to be considered was whether IOCL's claims were barred by limitation. This Court is not examining the plea whether without framing a formal issue in the matter, the learned Arbitrator could have decided the said issue. The fact remains that in the reply to the claims of IOCL, it was pleaded by ECIL that the claims of IOCL were "not tenable, besides being time barred by limitation and are liable to be rejected with heavy cost."

20. The learned Arbitrator appears to have made a fundamental error in proceeding on the basis that on 15th December 1995 there was a termination of the contract by the IOCL. A copy of the letter dated 15th December 1995 written by the IOCL to ECIL has been placed on record. The operative portion of the said letter reads as under:

"You are, therefore, hereby informed that in exercise of powers conferred on Engineer-in-Charge, under Clause 4.6.4.0 of the General Conditions of Contract, another agency/sub-contractor(s) shall and is being appointed to undertake performance of the following works at your risk and cost:

1. Civil and Structural works of utilities and offsite facilities.
2. Civil and Structural works compressor house & related works inside CRU Process Unit.
3. Underground piping inside CRU Process Unit.
4. Pavement of CRU Process Unit.

You will also be liable to pay the Corporation 15% supervision charges as provided in Clause 4.6.3.0 of the General Conditions of Contract and liquidated damages for delay in performance of the works and such other sums as may be payable by you to the Corporation under the Contract."

21. It is clear, therefore, that there was no termination of the contract by the letter dated 15th December 1995. The relevant clauses of the contract may now be referred to. Clause 4.6.4.0 reads as under:

“4.6.4.0 Should the Engineer-in-Charge or the Site Engineer at any stage (notwithstanding that the time for completion of the relative work or item of work as specified in the Progress Schedule has not expired) be of opinion (the opinion of the Engineer-in-Charge/Site Engineer in this behalf being final) that the performance of any work or item of work by the Contractor is unsatisfactory (whether in the rate of progress, the manner, quality or workmanship of the performance, or in the adherence to specifications, or in the omission, neglect or failure to do, perform, complete or finish any work or item, or for any other cause whatsoever), the Engineer-in-Charge/Site Engineer shall be entitled (without prejudice to any other rights of the Owner and/or obligations of the Contractor under the Contract) at his discretion and the risk and cost of the Contractor either to appoint, procure and/or provide such labour/staff/machinery/tools/ materials, etc., as the Engineer-in-Charge/Site Engineer (the decision of either of whom shall be final and binding upon the Contractor) considers necessary to achieve satisfaction in relation to the particular work, operation or item of work, or the work as a whole, as the case may be, or to appoint one or more sub-contractors for the satisfactory performance thereof or any part thereof, or may undertake the performance thereof or any part thereof departmentally, and the provisions of Clause 4.6.3.0 thereof shall *mutatis mutandis* apply to any action taken by the Engineer-in-Charge/Site Engineer pursuant to this clause in the same manner as applicable to an action taken under the said clause.”

22. The above clause has to be read in conjunction with Clause 7.0.9.0 to understand the distinction:

“7.0.9.0 Upon termination of the Contract the Owner shall be entitled at the risk and expense of the Contractor by itself or through any independent Contractor(s) or partly by itself and/or partly through

independent Contractor(s) to complete to its entirety the work as contemplated in the scope of work and to recover from the Contractor in addition to any other amounts. Compensation or damages that the Owner may in terms hereof or otherwise be entitled to (including compensation within the provisions of Clause 4.4.0.0 and Clause 7.0.7.0 hereof) the difference between the amounts as would have been payable to the Contractor in respect of the work (calculated as provided for in Clause 6.2.1.0 hereof read with the associated provisions thereunder and Clause 6.3.1.0 hereof) and the amount actually expended by the Owner for completion of the entire work as aforesaid together with 15% (fifteen per cent) thereof to cover Owner's supervision charges, and in the event of the latter being in the excess former, the Owner shall be entitled (without prejudice to any other mode of recovery available to the Owner) to recover the excess from the security deposit or any monies due to the Contractor. ”

23. It is apparent that there is a separate clause as far as termination of the contract is concerned. As noticed hereinbefore IOCL did not terminate the contract with ECIL as such but only off-loaded the unfinished work to other contractors under Clause 4.6.4.0. Consequently, the cause of action for IOCL's claims against ECIL could not be said to have commenced with effect from 15th December 1995. ECIL itself completed its work and raised the final bill only in November 1999.

24. In ***Indian Oil Corporation Limited v. S.P.S. Engineering Ltd.***, the Supreme Court dealt with the question whether IOCL's claims in that case could have been held by the Designate Court under Section 11 of the Act to be time barred. It was noticed that it was only when the work entrusted to the alternative agency was completed and the bills settled or finalized could the extra cost be determined even for the purpose of Clause 7.0.9.0. The finding of the Designate Judge under Section 11 of the Act was set aside and it was opined that the said question should have been left to be

decided by the Arbitrator after completion of the pleadings. For the purposes of the present case, it is important, therefore, to note that for the purpose of IOCL's claims which were only with regard to the extra cost paid to the sub-contractors, and which was recoverable from ECIL in terms of Clause 6.1.4.2.0, unless the final bills of the sub-contractors after completion of their respective works were submitted and processed, IOCL would not be in a position to determine what amount, if any, was payable to ECIL against its final bill.

25. It is possible that in a given case, a sub-contractor might, despite completing the work, not raise a final bill. That does not mean that IOCL in such an event would be permitted to wait indefinitely. If the sub-contractor does not raise the final bill within three years of the completion of the works then in that case the claim of such sub-contractor itself may become time barred. Therefore, in the present case IOCL would not be permitted to wait beyond three years from the date of completion of the work by the sub-contractor to process the bills of ECIL. However, for the purposes of the present case, that is purely a hypothetical question. As regards M/s. RSSS, a completion certificate was issued by M/s. Engineers India Limited ('EIL') acknowledging the date of completion of the work by the sub-contractor as 21st September 1997. The completion certificate was issued on 27th February 1999. The final bill was finalized on 12th/20th March 1999. Consequently, around this time as far as the work of M/s. RSSS is concerned, IOCL would be in a position to clearly determine what amount had to be claimed extra from the ECIL. As regards RPL, the final bill was raised by it on 1st August 1998 and the date of completion was 14th October 1997. With reference to both these dates, the statement of claims sent by IOCL to ECIL on 30th April 1999 was certainly within time. The actual invocation of the arbitration clause was on 1st May 2001

and, therefore, within three years of that date.

26. The decision in ***Steel Authority of India Limited v. J.C. Budharaja*** is distinguishable on facts. That case did not involve clauses similar to the ones in the present case. Given the nature of IOCL's claims in the present case, it was essential for the recovery of the extra cost incurred by IOCL in getting the work performed by the sub-contractor, the date of final payment by IOCL to the sub-contractor pursuant to the final bills raised by those sub-contractors would be the relevant as far the commencement of the limitation of IOCL's claims against ECIL were concerned.

27. The learned Arbitrator appears to have erred both factually and legally in deciding the issue of limitation. The factual error was in proceeding on the basis that there was a termination of the contract on 15th December 1995 when in fact by a letter of that date IOCL invoked Clause 4.6.1.0 for offloading the remaining portion of the contract, which was to be performed by ECIL, to sub-contractors after notice to, and at the risk and cost of ECIL. The learned Arbitrator failed to appreciate that IOCL's claim was only for additional costs incurred in getting the work performed through the sub-contractors. Such additional costs could not have been possibly known to IOCL till the final bills were raised by such sub-contractors and, therefore, the starting point for limitation was obviously the date on which the sub-contractors raised the final bills.

28. Consequently, this Court sets aside the impugned Award to the extent it holds that IOCL's claims were barred by limitation and fails to decide Issues Nos. 2 and 3. These have to be necessarily remitted to the learned Arbitrator for a fresh decision in accordance with law.

Maintainability of ECL's Counter claims

29. As regards ECIL's counter claims, the issue to be determined is whether they were arbitrable as such. The arbitration clause of the contract is Clause 9.0.1.0 which reads as under:

“9.0.1.0 Subject to the provisions of Clause 6.7.1.0 and 6.7.2.0 hereof, any dispute or difference between the parties hereto arising out of any notified claim of the Contractor included in his Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof and /or arising out of any amount claimed by the Owner (whether or not the amount claimed by the Owner or any amount paid by the Owner to the contractor in respect of the work) shall be referred to arbitration by a Sole Arbitrator selected by the Contractor from a panel of three persons nominated by the General Manager.”

30. It is plain from the reading of the above arbitration clause that the disputes that were arbitrable had to arise out of “any notified claim of the Contractor included in his Final Bill in accordance with the provisions of Clause 6.6.3.0.”

31. Clause 1.0.24.0 defines a notified claim as under:

““1.0.24.0 Notified Claim” shall mean a claim of the Contractor notified in acceptance with the provisions of Clause 6.6.1.0 hereof.”

32. Clauses 6.6.1.0 and Clause 6.6.3.0 read as under:

“6.6.1.0 Should the Contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the Contract as specified in Clause 6.3.1.0 hereof or should the Contractor dispute the validity of any deductions made or threatened by the Owner from any Running Account Bills or any payments due to him in terms of the Contract, the Contractor shall forthwith

give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the Contractor claim such additional payment or compensation, or on the happening of other event upon which the Contractor bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The Contractor shall not be entitled to raise any claim nor shall the Owner anyway be liable in respect of any claim by the Contractor unless notice of such claim shall have been given by the Contractor to the Engineer-in-Charge and the Site Engineer in the manner and within the time aforesaid and the Contractor shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid.”

“6.6.3.0 Any or all claims of the Contractor notified in accordance with the provisions of Clause 6.6.1.0 hereof shall remain at the time of preparation of Final Bill by the Contractor shall be separately included in the Final Bill prepared by the Contractor in the form of a Statement of Claim attached thereto, giving particulars of the Contractor in the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy(ies) of the notice(s) sent in respect thereof by the Engineer-in-Charge and Site Engineer under Clause 6.6.1.0 hereof. In so far as such claim shall in any manner particular be at variance with the claim notified by the Contractor within the provision of Clause 6.6.1.0 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 6.6.1.0 hereof and with consequences in respect of the notified claim as indicated in Clause 6.6.3.1 hereof”

33. This Court is unable to appreciate the approach of the learned Arbitrator in holding that the mere fact that the parties were in correspondence and discussion amounted to a waiver by IOCL of the

requirement of compliance by ECIL with the above clauses. There was no question of the clauses merely being “followed in spirit.” There is a specific procedure envisaged which has to be followed before such a claim could be entertained. The learned Arbitrator was in terms of Section 28 of the Act bound to follow the clauses of the contract in determining whether ECIL’s counterclaims were arbitrable. This was made explicit in the decision in ***M/s. Uttam Singh Duggal & Co. (P) Limited v. Indian Oil Corporation Limited*** where these very clauses were examined and in Para 18 it was observed as under:

“18. Analysing the clause in the case it has first to be seen if there, is a dispute to which the arbitration clause applies. So, the question of existence of dispute is to be seen first. That dispute has to be raised in accordance with the provision of the agreement to attract the applicability of the arbitration clause. If no such dispute exists, the arbitration clause is not applicable and in fact there would be no arbitration agreement. In fact, if reference is made to the arbitration clause in the present case, no time limit as such is prescribed for the appointment of the arbitrator. As I see clause 6.6.1.0 exists independently of clause 9.0.0.0. Under clause 6.6.1.0, the contractor shall forthwith give notice in writing of his claim to the Engineer-in-charge and the Site Engineer within ten days from the date of issue of order of instructions relative to any works for which the contractor claims such additional payment or compensation, or on the happening of other event upon which the contractor bases such claim; (ii) such notice shall give full particulars of the nature of such claims; (iii) grounds on which it is based; and (iv) the amount claimed. The contractor is debarred from raising any claim unless notice of such claim has been given in the manner and within the time prescribed, otherwise the contractor "shall be deemed to have waived any or all claims and all his rights in respect of any claim not notified to the Engineer-in-charge and the Site Engineer in writing in the manner and within the time aforesaid". Under clause 6.6.3.0 if any of the claims which has been notified in accordance with clause 6.6.1.0 still remains/persists at the time of preparation of final bill, the contractor is to specify the same in the form of a statement of claim attached to the

final bill, again giving the particulars of the nature of the claims, grounds on which the claims are based and the amount claimed and this again is to be supported by copy of the notice sent in respect thereof to the Engineer-in-charge and Site Engineer. It is specifically mentioned in clause 6.6.3.0 that if the claim attached with the final bill be at variance with the claim notified under the provisions of clause 6.6.1.0, it shall be deemed to be a claim different from the notified claim with consequence that it shall stand waived as given in clause 6.6.1.0. However, under clause 6.6.3.1 any claim notified under clause 6.6.1.0 which is not calculated in the final bill stands waived. Thus, the parties agreed that before any claim/dispute could be subject matter of arbitration, certain formalities had to be gone into. Clause 9.0.0.0 which deals with arbitration applies only to disputes and differences arising out of a notified claim included in the final bill of the contractor. As noted above, there is no time limit prescribed in clause 9.0.0.0. In these circumstances, it is therefore difficult to see as to how the provisions of S. 37(4) would apply to the requirements of clause 6.6.1.0, assuming that the disputes in the present case are (1) covered under clause 9.0.0.0, and (2) that the contractor did take steps to commence arbitration proceedings within the time fixed by the arbitration agreement. Mr. Watel's argument is that notified claim is nothing but a claim in writing to the Corporation within ten days of the date of occurrence and this claim is to be included separately in the final bill. According to him clauses 6.6.1.0, 6.6.3.0 and 9.0.0.0 are inextricably interlinked and, therefore, the notified claim is merely "some other steps to commence arbitration proceedings" as envisaged in S. 37(4) of the Act."

34. Although the above case arose under the Arbitration Act 1940, the ratio applies on all fours to the case on hand. The inescapable conclusion is that the learned Arbitrator erred in entertaining the counter claims of ECIL despite those claims not being notified claims, not included in the final bill of ECIL and therefore not arbitrable. It is not as if ECIL was without a remedy as regards those counter claims. It could have filed a suit. This was an error of jurisdiction committed by the learned Arbitrator

and, therefore, the impugned Award to that extent cannot be sustained in law. However, it is clarified that the Award to the extent it orders the admitted amount to be paid by IOCL to ECIL with interest at 8% per annum from the date ECIL invoked the arbitration clause up to the date of payment, is upheld.

Conclusions

35. For the above reasons, the impugned Award dated 15th January 2006 is set aside to the extent indicated above. The claims of IOCL are held to be within the limitation and are remitted to the learned Arbitrator for a fresh decision on merits after hearing both sides. For this purpose, the Registry will remit the entire arbitral record to the learned Arbitrator within two weeks. The question of payment of the amount admitted by IOCL as payable by it to ECIL will be decided in the fresh Award by the learned Arbitrator depending on the decision on IOCL's claims. The counter claims of ECIL are held to be not arbitrable and the impugned Award allowing them is set aside.

36. The petition is disposed of in the above terms with no order as to costs.

S. MURALIDHAR, J.

APRIL 27, 2012

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