

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 490/2010

Reserved on: April 12, 2012

Decision on: May 2, 2012

INDIAN OIL CORPORATION LTD. Petitioner
Through: Mr. M.M. Kalra with
Mr. Kunal Kalra, Advocates.

Versus

HONEYWELL AUTOMATION INDIA LTD. Respondent
Through: Mr. Dhruv Mehta, Senior Advocate
with Mr. Ashish Wad, Ms. Kanika
Bhutani, Mr. Sameer Abhyanikar and
Mr. Sriram Krishna, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

02.05.2012

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by the Petitioner Indian Oil Corporation Ltd. ('IOCL') is to an Award dated 19th April 2010 of the sole Arbitrator in the disputes between it and the Respondent Honeywell Automation India Ltd. [earlier known as Tata Honeywell Ltd. ('THL')] arising out of a Work Order dated 26th July 1999 in terms of which THL had to undertake the work of design, manufacturing, testing, supply, installation, commissioning and maintenance of Terminal Automation System works at the Jalandhar Terminal of IOCL.

2. The stipulated date of commencement of the work was 10th August 1999. The stipulated date of mechanical completion was 9th May 2000 and the stipulated date for system commissioning was 9th August 2000. Thus the total period of completion of the work was 12 months.

3. According to the Respondent, the execution and mechanical completion of the work got delayed till 20th December 2000 i.e. by 7 months and 11 days, as the work of other contractors engaged by the Petitioner was not complete and due to non-availability of the site fronts and specific works left incomplete by ICOL's other contractors. The other contractors, upon the completion of whose activities the Respondent's progress of work was dependent, could not complete their work earlier than December 2000.

4. The Respondent's grievance was that while those contractors were given extension of time ('EOT') by IOCL, the Respondent was not. Further, even for the extra work awarded to it, including re-working of 42 MOVs out of the 100 MOVs in the pump house manifold area as late as on 4th December 2000, the Respondent was not given EOT for completion, although payment for the additional/extra work was released. According to the Respondent even after the stipulated period of mechanical completion expired on 9th May 2000 IOCL directed it to execute extra work with variation and extra

items. It executed work worth Rs.479 lakhs up to May 2000 which was 92% of the total value of the work. However, the balance 8% work could not be completed for reasons beyond the control of the Respondent.

5. The Respondent contended that IOCL had delayed payment for supplies and services rendered by the Respondent. Mechanical completion was achieved by the Respondent on 23rd December 2000. However, IOCL failed to provide the clean product for carrying out calibration and stamping of the meters. The Respondent further submitted that IOCL failed to provide the requisite number of tank trucks for the trial runs and also failed to provide the working conditions for proper operation of instruments/systems. According to the Respondent, the system was handed over by it to IOCL on 7th December 2001 after fulfilling all obligations. However, IOCL withheld from the 7th Revised Running Bill a sum of Rs.65,49,325 as provisional liquidated damages ('LD'). The Respondent claims to have got watch and ward and other establishment at the site during the extended period thereby suffering a loss of Rs.23,33,900. It claimed Rs.62.50 lakhs being the loss suffered on account of its resources remaining idle during the extended period of contract. It also claimed interest and costs.

6. IOCL in its response denied the allegations. It was contended that it was

the Respondent who was responsible for the delay in the completion of the work. The Respondent had admitted to this fact when it sought EOT till 30th October 2000. IOCL contended that the Respondent was negligent in executing the work. Barring the fronts for erection/installation of only FCU for MOV, rest of the fronts were available for carrying out the work. The non-completion of 8% of the work was due to the Respondent's own lapse and negligence. Provisional LD was recovered "keeping in view the fact first the complete case should be studied before levying the final LD".

7. On the basis of the pleadings of the parties the learned Arbitrator framed the following issues:-

“(1) Whether the claimant are estopped from claiming the claims as claimed in the claim petition in view of its accepting the payment of bills in full and final settlement of claims?

(2) Whether the claimant is entitled to refund of liquidated damages of Rs.65,49,325 as claimed by it as Claim No.1 in the statement of claim. If yes, to what extent?

(3) Whether the claimant is entitled of sum of Rs.23,33,900/- as claimed by it as extra cost incurred by it as claimed in Claim No.2 in the claim petition. If yes, to what extent?

(4) Whether the claimant is entitled to claim and receive amount of

Rs.62,50,000 on account of idling charges as claimed by the claimant in Claim No.3 in the claim petition. If yes, to what extent?

(5) Whether the claimant is entitled to claim and get interest @ 18% p.a. as claimed by it?

(6) Whether the claimant is entitled to sum of Rs.2,50,000 towards cost of arbitration and litigation, as claimed by it?”

8. The conclusions of the learned Arbitrator in the impugned Award on each of the issues were as under:-

(i) It could not be said that on account of the endorsements on the 7th Revised RA Bill or final bill the Respondent had accepted the withholding of the LD amount.

(ii) Since the Respondent was not entirely responsible for the delay”, the contributing factors were lack of actions on the part of IOCL and/or its contractors.

(iii) The levy of LD on the Respondent could not be sustained. Holding the issue in favour of the Respondent it was opined that the Respondent was entitled to a refund of Rs.65,49,325 which had been deducted from his 7th Revised RA Bill as provisional LD.

(iv) In the absence of any documentary proof provided by the Respondent issues No. 3 and 4 were decided against the Respondent.

(v) Under Issue No.5, the learned Arbitrator awarded interest at 9% per annum on the awarded amount from the date the amount was withheld till realization.

9. Mr. M.M. Kalra, learned counsel for the Petitioner first submitted that the learned Arbitrator brushed aside the documentary proof which showed a clear admission on the part of the Respondent that it was responsible for the delay in completion of the work. The material which was required to be fixed and fitted at the site did not reach the site in time. Reference was made to the minutes of the meeting held on 21st August 2000 (RW1/6) in which it was recorded that in spite of repeated requests by the Petitioner by letters dated 31st May 2000, 2nd June 2000, 23rd June 2000 and 3rd August 2000 the Respondent had not adhered to the dates agreed by its representatives for the completion of the balance jobs. It is next contended that the learned Arbitrator mis-conducted the proceedings by ordering refund of LD without examining the letter dated 13th September 2000 (Exhibit RW1/7) in which the Respondent had admitted that they had started manufacturing of additional chassis console for TFMS. It was stated that 85% of I&C activity was completed. The Respondent had sought EOT till December 2000. This was the clear admission of its inability to complete the work and of not having sufficient material and manpower at

the site. No engineer had been sent for software testing despite various requests by IOCL. There was therefore a violation of Sections 21, 28 and 31(3) of the Act by the learned Arbitrator. It is pointed out that the Respondent had accepted the payment against the 7th Revised RA Bill, from which LD was deducted, without any protest. Reliance is placed on ***Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Private Limited (2010) 13 SCC 377*** to justify the imposition of the LD on the Respondent in terms of the contract. The award of interest was also assailed.

10. Mr. Dhruv Mehta, learned senior counsel for the Respondent contended that the scope of interference with the impugned award under Section 34 of the Act was limited. None of the grounds under Section 34 were attracted. The Award could not be said to be suffering from any patent illegality. He pointed out that there was no plea raised by the Petitioner under Section 34 of the Act that the finding of the learned Arbitrator that there was no mention of any deduction of the LD in the final bill was erroneous. What was withheld in the 7th Revised RA Bill was LD on provisional basis. Even according to IOCL the case had to be studied further before the final bill was prepared. However, that was never done. The plea that there was complete satisfaction that the Respondent having accepted full and final

payment and therefore being estopped from protesting against the withholding of the LD was not raised by IOCL before learned Arbitrator. He pointed out that against the withholding of the LD the Respondent had in fact written four letters dated 23rd June 2001, 16th August 2001, 26th September 2001 and 1st October 2001. On the issue of delay Mr. Mehta pointed out that if the delay was in fact caused by IOCL it was not justified in withholding any sum from the bills. The fact that the EOT could be granted in terms of the contract showed that time was not the essence of contract. The passing observation that the Respondent could have also contributed the delay did not take away from the main finding that IOCL was responsible for delay in completing the work.

11. This Court has perused the “9th and Final” bill, a photocopy of which as appended to the petition is illegible. If anything was written in the right hand column of the payment certificate it is not visible at all. In any event there is no clear indication of reduction of LD in the said bill. The copy of the 7th Revised RA Bill, however, is more legible. It was dated 24th March 2001 and shows deduction of a provisional LD of Rs.66,94,325. The remarks appended thereto by the Respondent reads: “I further certify the amount of payment I shall be receiving on this bill will be full and final of our claims, in respect of this work (except the refund of security deposit)

and we have no claim against the Corporation with regard to this work order (applicable only in case of final bill)". As correctly observed by the learned Arbitrator the above certification indicates the acceptance of the amount but not of acceptance of any reduction of the provisional LD.

12. In the written statement of IOCL before the learned Arbitrator in para 1.9 it was stated as under:-

"That this paragraph of the claim petition is wrong and is denied. Provisional LD was recovered keeping in view the fact that first the complete case should be studied before providing the final LD."

13. There is nothing to indicate that IOCL first completely studied the case before withholding the LD against the final bill. Therefore, by accepting the payment of the final bill the Respondent did not waive its right to challenge the withholding of the LD amount from the 7th Revised RA Bill.

14. The learned Arbitrator has in para 41 of the Award held that "in the final bill no LD is indicated". This finding has not been challenged by IOCL. It has not produced any document to dispel of the above finding of the fact. This Court is unable to find any error having been committed by the learned Arbitrator in holding that the Respondent was not estopped from maintaining its claims only because it had accepted payment of bills in full and final settlement of the claims.

15. At this stage this Court would like to refer to the recent decision of the Supreme Court in *National Insurance Company Limited v. Boghara Polyfab Private Limited (2009) 1 SCC 267* where the law was explained as under:

“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 are:

(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.

.....

(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.”

16. The above legal position was also noted by this Court in ***Gail (India) Limited v. Hindustan Construction Corporation 2012 II AD (DELHI) 48.***

17. In light of the above decisions it is not possible to agree with the contention of IOCL that in the facts of the present case there was accord and satisfaction of the claims of the Respondent and that its claims were not arbitrable. The letters dated 23rd June 2001, 16th August 2001, 26th September 2001 and 1st October 2001 and 6th November 2001 do indicate the protest by the Respondent about deduction of the provisional LD. In the circumstances, the decision of the learned Arbitrator as regards Issue No.1 calls for no interference.

18. As regards Issue No.2 the learned Arbitrator has discussed the evidence at great length and has also noticed the legal position. If one reads the Award as a whole then it is apparent that the finding of the learned Arbitrator is that the Respondent cannot be held responsible for the delay. Although in Paras 62 and 63 of the impugned Award there are observations to the effect that there may have been “some contributory factors”, for the delay, the Award in fact answers Issue No.2 in favour of the Respondent

and holds it entitled to refund of the LD deducted. The attempt by learned counsel for IOCL to urge that both parties were equally responsible for the delay is not borne about by the above observations. As explained in Para 4 of the decision in *Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Private Limited (2010) 13 SCC 377* this Court is not expected to re-appreciate the evidence on record as an appellate Court.

19. The decision to grant the Respondent interest at 9% p.a. on the awarded amount from the date of the withholding of the amounts till date of realization does not suffer from any illegality and does not call for interference by this Court.

20. For the above reasons it is held that no grounds have been made out for interference with the impugned Award of the learned Sole Arbitrator.

21. The petition is dismissed with costs of Rs.25,000 to be paid by the Petitioner to the Respondent within four weeks.

S. MURALIDHAR, J.

MAY 2, 2012
mm