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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : March 26, 2012*
Judgment Pronounced on: April 11, 2012

+ FAO(OS) 357/2007

GAIL (INDIA) LTD. Appellant
Represented by: Mr. Jagjit Singh, Advocate.

versus

SURYA ROSHINI LTD. Respondent
Represented by: Mr. Samrat Nigam, Advocate and
Ms. Ankita Mahajan, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. This is an appellate challenge to the award dated April 19, 2007 passed by the learned Sole Arbitrator insofar claim in sum of ₹61,72,728/- on account of the stated price difference between the costs of the pipe line actually laid and what was required to be laid has been declined.

2. The appellant, Gas Authority of India Ltd. (GAIL) had an agreement with National Thermal Power Corporation (NTPC) to supply natural gas at its power plant in village Mujheri, district Faridabad, Haryana, and for which, from the main pipeline already laid by GAIL from Bijapur to Dadri, a tap had to be provided at the said main line by GAIL at village Chainsa wherefrom the respondent/contractor, Surya Roshni Ltd. had to lay down a 14 KM spur pipe-line of 14 inch diameter connecting the point of tap with the plant of NTPC in village Mujheri. This was as per a contract entered into between GAIL

and Surya Roshni Ltd. The tender documents, gave in detail the chemical composition of the steel pipes, the tensile strength etc., and suffice would it be to highlight that the steel pipes were required to withstand a design pressure of 92 kg. per square centimeter and a hydrostatic pressure of 129 kg. per square centimeter. The thickness of the steel sheets of which pipes were to be fabricated was to be 6.4 mm. Surya Roshni Ltd. laid down the pipe-line and when subjected to field hydrostatic test, by removing three pipe segments and subjecting them to field hydrostatic test, all three pipes failed the test inasmuch as much before the stipulated pressure was reached the pipes burst at the seam. As informed to us during arguments of the appeal, the pipes burst due to poor quality of welding when steel sheets were rolled to form a cylinder and the edges welded. It was a case of loose welding, as informed to us, and this explaining the pipes notwithstanding the requisite pressure and bursting at the seam.

3. Since time was running out for GAIL to comply with its contractual obligations with NTPC, the long drawn out process of replacing the entire 14 KM pipe-line was opined to be a counter-productive rectification procedure and a viable alternative found out was to de-rate the entire spur line to design pressure of 58.27 kg. per square centimeter and this required works to be executed at the tap of terminal at village Chainsa for safe operation of the pipe-lines at low pressure. Of course, the three pipes which had burst while conducting the field tests had to be replaced.

4. GAIL took resort to the latter and claimed six amounts under six different heads from Surya Roshni Ltd. which disputed liability. Proceeding to encash the performance guarantee in sum of ₹15,84,357/-, GAIL filed a

civil suit against Surya Roshni Ltd. and since the contract between the parties had an arbitration clause, being Article 30.4.1 of the General Conditions of Contract, the dispute was referred to the sole arbitration of Justice Anil Dev Singh (Retd.), before whom GAIL submitted a statement of claim having an element of principal sums claimed and pre-claim interest. The principal sums claimed were as under:-

S.No.	Particulars	Amount (in ₹)
1.	Cost of replacement of three burst pipe(s). Cost of one quoted price of M/s Krupp Hoesch Stahlen Port, GmbH used for replacing one burst pipe.	40,222.59
2.	Costs of 2 quoted price of Respondent used for replacing two burst pipes.	60,876.82
3.	Costs incurred for modification carried out at Chainsa and NTPC Terminal Faridabad to de-rate the entire pipe lines. Said job was carried out/work performed by M/s Punj Lloyd Ltd.	23,44,207.85
4.	Costs towards repairs for changing and installing the three burst pipes. Work/contract performed by M/s Jaihind Pvt. Ltd.	3,00,000.00
5.	Price difference between costs of line pipes of specified qualities and strength and to the one actually supplied by Respondent which is of lower specification. Lower quality, lower strength, lower grade. Reasons for claiming for difference and arriving at figure following basis have been taken into consideration: i) Thickness of pipe ordered for design pressure of 92	61,72,728.00

	KG/CM2 with corrosion allowance of 1 MM is 6.4 mm. ii) Thickness of pipe required for design pressure of 58.27 KG/CM2 considering corrosion allowance of 1 mm is 4.44 mm. iii) Extra amount paid by claimant is $6.4 - 4.44/6.4$ US\$ 38,75=US\$ 11,75,62 which is equivalent to Indian ₹61,72,728 (considering one US\$=₹44)	
6.	Amount spent in analysis of samples of burst pipes from welding Research Institute Tiruchirappalli.	1,50,000.00

5. The stand taken by Surya Roshni Ltd. before the learned Arbitrator was that in view of Article 20.3.2 of General Conditions of Contract it is only liable to reimburse GAIL for the cost incurred by it for replacing the pipes which had burst during field hydraulic test to the extent of 10% of the value of contract but is not liable to pay any damages to GAIL on account of failure of pipes during field hydraulic test.

6. As evident from the aforesaid, the controversy involved in the present case necessitated the interpretation of Article 20.3.2 of the General Conditions of Contract, which reads as under:-

“20.3.2 Owner shall be reimbursed by seller for any pipe furnished on this order that fails under field hydrostatic test, if such failure is caused by a defect in this pipe, which is outside the acceptance limits of this specification. The reimbursement cost shall include pipe, labour, equipment rental for finding, excavating, cutting

out and installation of replaced pipe etc. in position. The overall limit for reimbursement by seller for failure of pipe during field hydrostatic test shall be maximum 10% of contract price. The hydrostatic test pressure will not exceed that value which will cause a calculated hoop stress equivalent to a 90% of specified minimum yield strength. In case seller so desires, he will be advised at least two weeks in advance so that his representative may witness the hydrostatic test in field, however, the testing and leak (if any), finding and repair portion shall not be postponed because of absence of manufacturers' representative.

The reimbursement including consequential damages due to failure will be subject to minimum of US\$ 20,000 and maximum of US\$50,000 per failure."

7. The learned Arbitrator interpreted Article 20.3.2 as per reasoning in paragraph 34 to 37 of the award dated April 19, 2007, which paragraphs read as under:-

"34. As is clear from the said Article, it deals with the subject of reimbursement. Why, for what reason and to what extent the seller is to reimburse the buyer is provided in this Article.

35. The first sentence of the article open with a mandatory direction that owner shall be reimbursed by the seller in the event of failure of any pipe supplied by the latter that fails under field hydrostatic test provided such failure is caused by defect in the pipe, which is outside the acceptable limits of the specifications. It furnishes justification or cause for reimbursement. The next sentence (which is the second sentence of the article) specifies/lists the things/works for which reimbursement cost is admissible. It lays down that reimbursement cost shall include pipe, labour and equipment rental for finding, excavating, cutting out and installation of replaced pipe etc. in position. For all this work the third sentence of the aforesaid

articles fixes overall limit for reimbursement to the extent of 10% of the contract price. Obviously this overall limit upto which the purchaser/owner is to be paid for, is connected with reimbursement for replacement of pipes, which includes pipe, labour and equipment rental, for finding, excavating, cutting out and installation of replaced pipe etc. in position, does not include consequential damages suffered by the owner due to the defect in the pipe. The subject of consequential damage is dealt with in the last paragraph of the article. It is noteworthy that the cost for replacement of pipe which is dealt with in the first paragraph of the article, does not include consequential damages, as otherwise there was no reason to separately provide for reimbursement on account of consequential damages for failure of pipe. The last para of the article specifically and directly deal with the subject of consequential damages for failure of the pipe, whereas in the second sentence the cost of replacement of pipe is comprehended.

36. The last paragraph of the article, which stands alone, signifies that the reimbursement including consequential damages shall be subject to minimum of US\$ 20,000 and maximum of US\$ 50,000 per failure. The consequential damages have not been envisaged in the earlier part of article 20.3.2. It has been specifically provided in the last para of the clause. In case, 10% of the contract price for failure of pipes during the field hydrostatic test is to be considered as the final cap or the maximum limit for all types of damages, it does not stand to reason why a separate paragraph dealing with consequential damages upto maximum US\$ 50,000 per failure was included in article 20.3.2, when it was known to the parties that 10% of the contract price which works out to be US\$ 33,383 (the Claimant in its letter dated March 1, 2000 has mentioned 10% of contract price as US\$ 38,387) was less than maximum damage of US\$50,000 per burst. A construction which render the last paragraph of Article 20.3.2

as a surplusage, nugatory and ineffective must be avoided.

37. It appears to me that there are two caps or limits which have been imposed by article 20.3.2. The first cap is for purpose of limiting reimbursement in respect of the failed pipe on account of cost of the pipe, labour, and equipment rental for finding, excavating, cutting out and installation of replaced pipes. This cap fixed an overall limit of 10% of the contract price for reimbursement to the owner for the cost of replacement and installation of pipe. It does not deal with reimbursement relating to consequential damages. The other cap is perceived in the last paragraph of the article 20.3.2 which deals with reimbursement for the consequential damages. It is perfectly legitimate in a contract between the parties to provide for reimbursement on account of replacement of defective goods and at the same time to provide for consequential damages resulting from defective supply of goods. There is no contradiction between the two concepts. The purpose of awarding damages for breach of contract is to put the injured party in a position as though the contract has been performed. Both the concepts, therefore, serve the purpose of awarding damages. It is well settled that efforts should be made to give effect to every clause in the agreement and not to reject any clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement. I have examined the last clause of Article 20.3.2 with reference to the other clauses of the Agreement but I do not find it to be inconsistent with or repugnant to the rest of the agreement. The clause fixing cap of 10% of the contract price as the reimbursement cost on account of replacement of pipe is totally reconcilable with the clause fixing the second cap of US\$ 50,000 as consequential damages for failure of a pipe. Therefore, it appears to me that the last clause of article 20.3.2 which is incorporated as a separate paragraph cannot be rejected or reduced to a surplusage. The last paragraph of

article 20.3.2 is operative and must be given effect to.”

8. Based on the aforesaid interpretation of Article 20.3.2 of General Conditions of Contract and holding that the seller is bound to provide equipment, fittings and accessories necessary for a satisfactory functioning of the pipe-line, the learned Arbitrator allowed all claims raised by GAIL save and except claim No.5 and reduced claim No.4 to ₹1,50,000/- since evidence led was that said amount was spent towards repair and changing three pipes which had burst and not ₹3,00,000/- which was claimed. Total amount held payable under said heads was ₹28,69,563.41, which was rounded off to ₹28,69,563/- and since GAIL had invoked bank guarantees in sum of ₹15,84,357/- award passed was in sum of ₹12,85,206/- and pre suit interest was awarded 12% per annum, which was also made the pendente lite rate of interest till award was made and future interest awarded was @ 18% per annum.

9. The learned Arbitrator rejected claim No.5 in sum of ₹61,72,728/- raised by GAIL as per reasoning contained in paragraphs 58 and 59 of the award dated April 19, 2007, which paragraphs read as under:-

“58. The Ld Counsel for the Claimant contended that Claimant is also entitled to Rs.61,72,728/- on account of pipe difference between cost of line pipes of specified quality and strength and the one actually supplied by the Respondent, which according to Claimant was lower specification, lower quality and lower strength and lower grade. The claim of the Claimant is based upon following facts:

- a) The Claimant had ordered electric welded line pipes conforming to American Petroleum Institute (API) 5-L GR x 60, as per specification No.2986-

90-QA-SP-0005, and of size 355.6 mm OD X 6.4mm Wall Thickness.

- b) Pipes were ordered to withstand design pressure of 92 KG/CM² with corrosion allowance of 1mm and field hydrostatic pressure of 129 KG/CM².
- c) Three pipes bursted during the Field Hydrostatic Test at a much lower pressure than the specified pressure.
- d) The pipes were de-rated to withstand the design pressure of 58.27 kg/CM² considering corrosion allowance of 1mm.
- e) Pipes of 4.4 mm are good enough to withstand the design pressure of 58.27 kg/CM².

According to the Claimant since the pipes of 6.4 mm supplied by the Respondent failed during the Field Hydrostatic Test before reaching the design pressure of 92 KG/CM², they did not fulfill the purpose for which the pipes of 6.4 mm were ordered. Pipes of 4.4 mm could have been used for withstanding the lower pressure of 58.27 Kg/CM². The Claimant claims the difference between the cost of pipes of 6.4 mm, wall thickness and pipes of 4.4 mm wall thickness. As per the claimant, the difference between the cost of pipes of 6.4 mm wall thickness and pipes of 4.4 mm wall thickness is US\$ 44 per pipe. On this basis a sum of Rs.61,72,728/- has been claimed by the Claimant from the Respondent. It is not in dispute that the Respondent had supplied pipes of 6.4 mm wall thickness. It is not denied that as per the contract between the NTPC and the claimant, the gas was to be supplied at a design pressure of 25-30 kg/CM² g (see page 201 D) and not at a design pressure of 92 kg/CM² g and field hydrostatic pressure of 129 kg/cm². Therefore, even after de-rating the

pipe line, the gas can be supplied to the NTPC at the design pressure of 25-30 kg/cm² g. The claimant has not alleged or asserted in the pleadings that because of de-rating of the pipe line, the purpose of laying the pipeline for supply of gas to the NTPC was not achieved or its profitability has been affected. On March 16, 2007, the parties were heard on the question of impact of de-rating. They were also asked to furnish any other clarification which they wished to make in respect of the submissions, which were advanced by them before that date. The learned counsel for the claimant submitted that the pipeline was not meant only for supplying gas to the NTPC but it was also meant to supply gas to other parties in future. This is not the case set up by the claimant in the pleadings. In fact, it is the case of claimant that the claimant and NTPC entered into a contract whereby the claimant agreed to supply gas to the NTPC for its power plan at village Mujheri, tehsil Ballabgarh, District Faridabad, in its main gas pipe line running from Bijapur to Dadri. Besides, 14 km long SPUR pipeline of 64 inches diameter from Tap off point at village Chainsa to the power plant of the NTPC at Faridabad was required to be laid and accordingly for acquiring the pipes of 6.4 mm, diameter for laying 14 km long spur pipeline tenders were floated.

59. Thus, from the pleadings of the claimant it is clearly established that the 14 Km pipeline was meant to connect tap off point at village Chainsa with the power plant of the NTPC at Ballabgarh. It is not stated in the pleadings that from this pipeline any other customer of the claimant – GAIL was to be served. It appears to me that this pipeline was specially laid for power plant of the NTPC at Village Chainsa. In the circumstances, therefore, there is no force in the argument of the learned counsel for the claimant that the pipeline was to serve other customers in future and, therefore, the pipeline was required to withstand pressure of 92 kg/CM² and

hydrostatic pressure 129 kg/CM². Thus when the pipes of 6.4 mm are being retained and used by the claimant and de-rating of the pipes has not affected its profitability, I do not find any reason to accept the submission of the learned counsel for the claimant."

(Emphasis Supplied)

10. The contractor accepted the award and made payments. GAIL filed objections raising a grievance that as a result of the award, the effect was that GAIL paid a price for pipes having thickness of 6.4 mm and got an end product where gas could be transmitted at a much lower pressure which could be served by a pipe having thickness of 4.44 mm. To put it in plain language, GAIL urged that what was finally achieved was achievable using pipes of a lesser thickness which would have cost less and thus GAIL should be entitled to a refund of ₹61,72,728/-.

11. Vide impugned judgment dated 24.07.2007 the learned Single Judge held that the award dated 19.04.2007 passed by the Arbitrator does not warrant any interference for the reasons that in view of the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 as interpreted by the decision of the Supreme Court reported as ONGC v Saw Pipes (2003) 5 SCC 705 an award can be set aside only on the grounds that it is contrary to the fundamental policy of Indian law, interest of India, justice or morality or is patently illegal or so unfair or reasonable that it shocks the conscience of the Court, which is not the position in the present case. It would be relevant to note the following portion of the reasoning of the learned Single Judge:-

"16. If the contentions of learned counsel for the petitioner are tested on the aforesaid parameters, I am of the considered view that the aspect sought to

be raised does not fall within the aforesaid ambit. The dispute pertains to the claim for damages. Part of the claims has been allowed while part of the claims in dispute has not been awarded. It is not as if the Arbitrator was not conscious of the nature of claims and defence in this behalf. The Arbitrator came to the conclusion that the damages already awarded in terms of the Award would suffice as no damage could be said to have occurred on the basis of the claim of the petitioner. The contentions of the counsel for the parties are clearly noted by the Arbitrator and it is not possible to accept the plea of learned counsel for the petitioner that he argued something different than what was being examined by the Arbitrator. The matter in dispute pertains to the overall appraisal of evidence including the adequate material to come to the conclusion."

(Emphasis Supplied)

12. Aggrieved by the impugned judgment dated 19.04.2007 passed by the learned Single Judge dismissing the objections filed by it, GAIL has filed the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ventilating the same grievance as was raised by it before the learned Single Judge.

13. What is the scope of interference by the Courts with an award under Section 34 of the Arbitration and Conciliation Act, 1996?

14. After examining the case-law contained in the decisions reported as ONGC v Saw Pipes (2003) 5 SCC 705, Grid Corporation of Orissa v Balasore Technical School (2000) 9 SCC 552, Northern Railway v Sarvesh Chopra (2002) 4 SCC 45, State of Rajasthan v Navbharat Contractors (2006) 1 SCC 86 and Hindustan Zinc v Friends Coal Carbonisation (2006) 4 SCC 45, in the decision reported as DDA v R.S. Sharma (2008) 13 SCC 80 the Supreme Court made following pertinent observations regarding scope of interference by the courts

with an award under Section 34 of the Arbitration and Conciliation Act, 1996:-

“From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.”

15. In view of the aforesaid dictum of law, we proceed to determine whether the learned Single Judge was correct in holding that the award dated 19.04.2007 passed by the

Arbitrator does not warrant any interference under Section 34 of the Arbitration and Conciliation Act, 1996.

16. As per contract between the parties, Surya Roshni Ltd. had to lay down a 14 km spur pipe line of 14 inch diameter connecting the point of tap in the main pipe line provided by GAIL at village Chainsa with the plant of NTPC in village Mujheri. The pipes were required to withstand the design pressure of 92 kg per square centimeter and hydrostatic pressure of 129 kg per square centimeter. However 3 pipes which were subjected to hydraulic test burst at the seam much before the stipulated test pressure had reached. In view of said failure of the pipes, GAIL de-rated the entire spur line to design pressure of 58.27 kg per square centimeter, carried out modification at tap off terminal at village Chainsa and replaced the burst pipes with the new ones.

17. As already noted hereinabove, the learned Arbitrator has allowed the claims raised by GAIL in respect of the expenses incurred by it for de-rating the entire spur line to design pressure of 58.27 kg per square centimeter, carrying out modification at tap off terminal at village Chainsa and replacing the burst pipes with the new ones. However the learned Arbitrator has rejected claim No.5 raised by GAIL, under which claim GAIL has essentially claimed loss incurred by it on account of pipes withstanding lower design pressure than stipulated pressure on account of de-rating of pipes. In rejecting the said claim, the learned Arbitrator has taken the view that GAIL cannot claim any amount on said account when Surya Roshni Ltd. has been directed to pay the expenses incurred by GAIL for de-rating the spur pipe line leading to pipes withstanding lower design pressure than the stipulated

pressure, particularly when no loss of profit is caused to GAIL due to such de-rating.

18. To put it simply, the pipe line installed by Surya Roshni Ltd. failed the field hydraulic test. GAIL could have replaced said pipe line at that stage. However due to paucity of time GAIL chose to de-rate the said pipe line to make it workable. The expenses incurred by GAIL for de-rating the pipe line has been held to be payable to GAIL by Surya Roshni Ltd. It has been held by the learned Arbitrator that having taken expenses from Surya Roshni Ltd. for making the pipe line workable GAIL cannot claim any further loss.

19. The aforesaid view taken by the learned Arbitrator is plausible. It is settled legal position that when the view taken by the Arbitrator is plausible the same should be interfered by the Courts. (See the decision of the Supreme Court reported as Indu Engineering & Textiles Ltd v DDA (2001) 5 SCC 691 and State of UP v Allied Constructions (2003) 7 SCC 396).

20. In view of the above discussion, the present appeal is dismissed. As a necessary corollary thereof, the impugned judgment dated 24.07.2007 passed by the learned Single Judge dismissing the objections filed by GAIL is affirmed.

21. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

APRIL 11, 2012
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