

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 12.11.2013

+ **OMP 1110/2013**

GAIL (INDIA) LTD. Petitioner

Versus

GANGOTRI ENTERPRISES LTD. Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Ajit Pudussery & Mr M. Chandra Sekhar, Advs.

For the Respondent:

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

OMP 1110/2013 & IA No. 18053/2013 (condonation of delay)

1. This is a petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) to assail the award dated 03.07.2013, passed by the sole arbitrator Hon'ble Mr Justice R.C. Lahoti, former Chief Justice of India.

1.1 Both in the petition filed before me as well as in the course of arguments advanced by Mr Ajit Pudussery, the challenge is laid solely to the rejection of the counter claim preferred by the petitioner. The counter claim relates to the imposition of liquidated damages by the petitioner, as compensation for delay in the execution of the contract by the respondent. The petitioner had pegged the counter claim at Rs. 64,47,978/-.

1.2 The petitioner, in the counter claim had sought recovery of a sum of Rs. 54,76,730/-, after adjustment of the accepted value of the final bill, in

the sum of Rs.15,11,651/-. As noted by the learned arbitrator, the balance amount, which ought to have been claimed by the petitioner should have been a sum of Rs. 49,36,327/- and not Rs.54,76,730/-. The petitioner, apparently, was not able to explain the discrepancy based on the record placed before the learned arbitrator. The counsel for the petitioner, apparently, gave a rather vague explanation that the figure of Rs.54,76,730/- may have been arrived at after allowing for certain other claims. However, this need not detain me, as the learned arbitrator for the reasons given in the impugned award has rejected the counter claim of the petitioner, in its entirety.

2. Mr Ajit Pudussery has assailed this decision of the learned arbitrator on various grounds, which I would be adverting to shortly. Before I do that, let me refer to certain broad facts which are relevant for arriving at a decision in the present petition.

2.1 The petitioner, had invited tenders for construction of 175 housing units at UPPC Nagar, Diviyapur, Distt. Auraya, Uttar Pradesh. The respondent being a successful bidder, was awarded the contract. A letter of intent (LOI) dated 14.12.1995, was issued in favour of the respondent. A formal contract was executed between the parties on 03.01.1996.

2.2 The work entrusted under the contract to the respondent was required to be executed in three phases. For each phase, a scheduled date of completion was fixed. Undisputedly, the work, in respect of the each of the three phases was completed, though after the due date of completion. The delay in respect of phase I was 346 days, while the delay in respect of phases II and III was 746 days and 730 days respectively.

2.3 On 15.12.2000, the respondent submitted its final bill. After completion of joint measurements and scrutiny, the bill was certified for a

total value of Rs. 16,11,654/-. Against the certified amount, a sum of Rs. 1 lac was directed to be deducted towards “retention against water proofing and ATT guarantee”. Thus the net amount payable to the respondent was a sum of Rs. 15,11,654/-.

2.4 Admittedly, the net amount towards final bill, as indicated above, was not released to the respondent. Instead, the petitioner sought to recover the liquidated damages from the respondent towards compensation for delay in the execution of the works in issue.

2.5 It may be relevant to note that the respondent had submitted bank guarantees amounting to 10% of the contract value so that a sum equivalent would be released in its favour. The petitioner, having discovered that the amount which was recoverable towards liquidated damages was far in excess of the amount payable under the final bill, it refused to release the payment. This eventuality, perhaps, also occurred on account of the fact that the bank guarantees furnished by the respondent were not available for encashment. The record shows that BG No. 57/99 dated 24.02.1999 and BG No. 59/99 dated 06.03.1999 stood released, while BG No. 8/96 dated 03.02.1996, on which an injunction was obtained by the respondent from a civil court, had become invalid as it had not been renewed. Pertinently, the learned arbitrator discharged this bank guarantee, in view of the decision taken by him, in favour of the respondent.

3. Continuing with the narrative, the respondent vide notice dated 24.07.2001 sought reference of disputes to a sole arbitrator under clause 107.1 of the General Conditions of the Contract (in short GCC). The respondent, agreed to appointment of late Hon’ble Mr Justice R.S. Pathak, former Chief Justice of India, as the arbitrator, out of a panel of three arbitrators furnished by the petitioner. Some part of the proceedings were

conducted by late Mr Justice R.S. Pathak. Upon his demise, parties by mutual consent agreed to the appointment of Mr Justice R.C. Lahoti, as the sole arbitrator. The proceedings before him, continued from the point they were positioned before Mr Justice R.S. Pathak.

4. The record shows that the respondent had preferred 19 claims, while the petitioner had preferred a counter claim towards recovery of liquidated damages, as indicated above. The respondent succeeded only in respect of: claim nos. 1, 7 and 18, whereby it was awarded sums of Rs. 15,11,654/-, Rs. 6.50 lacs and Rs. 1 lac respectively in its favour. Thus, the total amount awarded in favour of the respondent is a sum of Rs. 22,61,654/-. In addition, interest at the rate of 9% per annum is awarded in favour of the respondent from the date of filing of the statement of claims, i.e., 12.11.2001 till the date of the award; with a caveat that in case the awarded amount was not paid by 31.08.2013, it shall bear interest at the rate of 18% per annum from the date of the award till its realization. Costs in the sum of Rs.3 lacs, in addition to the amount expended towards stamp duty in the sum of Rs. 2,270/- by the respondent, was also awarded in its favour.

5. In the background of the aforesaid facts, Mr Pudussery challenged rejection of the counter claim on the following grounds:

- (i) The learned arbitrator had failed to notice that a final decision had been taken by the Engineer-in-charge (EIC) under clause 27 of the GCC to levy liquidated damages.
- (ii) The contract clearly provided that the authority to levy liquidated damages was vested in the EIC, while the decision as to whether or not time for execution of the contract had to be extended was vested in the competent authority; a distinction which the learned arbitrator failed to appreciate.
- (iii) The learned arbitrator had failed to appreciate that the respondent had

not objected to the imposition of liquidated damages, which was levied by the petitioner after expiry of the period stipulated under the contract. The petitioner had consistently deducted a proportionate amount of liquidated damages from the Running Account bills (in short RA bills) submitted by the respondent from time to time. The respondent had accepted payments after deduction of liquidated damages without any “serious protest”.

(iv) The learned arbitrator failed to notice that under clause 107.1 of the GCC the decision taken by the EIC was not arbitrable, since it was an excepted matter. The impugned award, in so far as it rejected the counter claim of the petitioner, was contrary to public policy. The provisions of section 28 and 34 in this regard are adverted to in the petition.

6. Before I proceed further, I must also say that though no arguments were raised before me with regard to the award of the rate of amount of interest post 31.08.2013, or the award of costs, these are grounds of challenge raised in the petition. Notwithstanding the failure of Mr Pudussery to argue the same, I shall be dealing with the same.

REASONS

7. Having perused the record and heard the submissions of the learned counsel for the petitioner, I am of the view that there is no case made out for interference qua the impugned award vis-a-vis the aspects raised by the petitioner. Before I proceed further, it may be relevant to note that the entire case of the petitioner revolves around three clauses of the GCC; these being clauses 26, 27 and 107.1 of the GCC.

8. Clause 26, in particular clause 26.5.1, allows the owner, i.e., the petitioner, to “determine the period by which time is to be extended based on the recommendations of the EIC”. The extension of time, however, would not absolve the contractor (in this case the respondent) qua other

obligations imposed upon it, under the contract.

8.1 The provision of compensation for delay in the execution of the contract is provided in clause 27. The material sub-clauses are 27.1 and 27.2. Clause 27.1 clearly stipulates that time is the essence of the contract, and if, the contractor (i.e., the respondent) fails to execute the work in all respects, within the stipulated period then, unless such failure is due to force majeure conditions, as defined in clause 26 of the GCC, or due to the owner's (i.e., the petitioner's) default, it would have to pay compensation for delay at the rate of 0.5% of the value of the contract for every week of delay or a proportionate sum thereof, subject to a maximum of 10% of the value of the contract. Crucially, this clause provides that the "***decision***" of the EIC in regard to applicability of compensation for delay would be final and binding on the contractor, i.e., the respondent".

8.2 Clause 107.1 of the GCC, which provides for arbitration, excludes matters, in respect of which, the decision of the EIC, is final and binding, from the remit of the arbitrator.

9. The learned arbitrator, in the impugned award, has clearly accepted the contention of the petitioner in this behalf, based on the plain reading of the aforementioned clauses of the GCC, that the authority to levy liquidated damages and the decision in that regard vests in the EIC. The learned arbitrator, has also accepted the contention of the petitioner that the decision as to whether or not extension of time is to be granted to the contractor, i.e., the respondent, vests with the petitioner/ competent authority, as provided in clause 26.5 of the contract, albeit based on the recommendation of the EIC.

9.1 Where the learned arbitrator has found fault with the petitioner's case, is that, he has been unable to discover any written decision placed on record, with regard to recovery of compensation for delay by way of liquidated

damages.

9.2 It is in this background, that on 27.05.2010, the learned arbitrator had, as a matter of fact, directed the petitioner to place on record the relevant decision, if any, taken by the petitioner. The record reveals that at the fag end of the arbitration proceedings, i.e., on 06.09.2010, a photocopy of a note-sheet was produced before him for the period spanning 30.11.2000 till 06.12.2000. Despite the direction issued by the learned arbitrator the original was kept back; it appears the same was not made available to him. As a matter of fact, the learned arbitrator notes in paragraph 8.6 of the award that, the original record, of which, the note-sheet formed a part was not, produced before him.

9.3 On the examination of the note-sheet produced before the learned arbitrator, he came to the conclusion that the EIC had only made recommendations qua the following aspects, for which, approval was sought of the competent authority:

- “....(i) Time extension with 5.5% LD of the contract value of Phase-I.
- (ii) Time extension with 10% LD of the contract value of Phase-II.
- (iii) Time extension with 10% LD of the contract value of Phase-III.

Sd/- (illegible)

06.12.2000

Camp UPPC, Pata”

9.4 The aforesaid extract would show that the signatures at the end of the note were illegible. This aspect has been recorded by the learned arbitrator in the impugned award.

9.5 Since, the petitioner had led evidence of one Mr.A.N. Choudhury (RW-1), who claimed in his deposition that he had taken a decision to levy

liquidated damages, the learned arbitrator gave him the benefit of doubt that the signature on the note-sheet dated 06.12.2000, may be that of Mr A.N. Choudhury. The learned arbitrator, however, notices the fact that in the affidavit filed by Mr A.N. Choudhury, by way of examination-in-chief, he had not referred to the decision taken by him in levying liquidated damages. The learned arbitrator notices that this aspect was alluded to by Mr A.N. Choudhury (RW-1), only in the cross-examination. As indicated above, the learned arbitrator could not find anything in the note-sheet produced before him, which would have him come to the conclusion that a decision had been taken by the EIC with respect to imposition of liquidated damages on the respondent.

9.6 It is in this background that the learned arbitrator came to the conclusion that Mr A.N. Choudhury had only made a recommendation to the competent authority, and that, neither from the pleadings nor from the evidence on record, could he decipher as to who was the competent authority and, what decision had been taken by such an authority. The learned arbitrator's conclusion was that the official who wrote the note dated 06.12.2000 had not taken any decision but had only submitted a proposal for approval by the competent authority. These are findings of facts, which the learned arbitrator has carefully recorded in the impugned award, in particular, in paragraphs 8.14, 8.19 and 8.20 of the award.

9.7 The learned arbitrator, in the background of the above, concluded that in the absence of the decision of the competent authority several questions remained unanswered, which were raised by the respondent. These being: Firstly, with regard to the plea of the respondent that another contractor, who was identically placed, was allowed extension of time without imposition of liquidated damages. Secondly, the competent authority did not

take a conscious decision with respect to imposition of liquidated damages, and hence, it could not be sustained. Lastly, the absence of proof of loss caused to the petitioner on account of the delay in the execution of the contract.

9.8 I find no infirmity in the conclusions arrived at by the learned arbitrator. The conclusions of the learned arbitrator are based on the record made available to him.

9.9 Mr Pudussery, at some stage, had sought to rely upon documents filed in this court, to contend that a decision was taken by the competent authority. I squarely put to him if any of these documents were placed before the learned arbitrator. Mr Pudussery fairly conceded that he was not sure as to whether the lawyer who represented the petitioner in the arbitration proceedings had placed these documents on record.

10. The lack of uncertainty even at the stage of the institution of a petition under Section 34 of the Act speaks volumes for the manner in which the petitioner has dealt with the matter.

10.1 The other argument, that the respondent, had not objected to, adjustments made in RA bills, is untenable for two reasons. First, there is no reference to this aspect in the impugned award. It is quite possible, this argument was never made. Assuming that this argument was made, the fact of the matter is that the contract between the parties requires a decision with respect to liquidated damages by the EIC; which is clearly absent. Lack of protest, as alleged, would not help the petitioner's cause.

10.2 As regards the submission of Mr Pudussery that decision of EIC was an "*excepted*" matter and hence not arbitrable is pivoted on whether or not there was a decision taken, in the first instance, by the EIC. The submission in this behalf, in my view, is completely untenable.

11. This brings me to two other aspects. The first aspect is with regard to the enhancement of the rate of interest in the impugned award to 18%, if the petitioner was to fail in paying the awarded amount by 31.08.2013. It is to be noted that admittedly, as averred in the petition, a signed copy of the impugned award dated 03.07.2013, was made available to the petitioner on 05.07.2013. It had more than one and a half month available to it, to challenge the award. The petitioner, however, waited for the expiry of the three months period granted for impugning an award under Section 34(3) of the Act. The present petition was filed only on 11.10.2013. As a matter of fact, the petitioner has filed an application seeking condonation of delay of eight (8) days beyond the period of three months. In my view, the learned arbitrator has only incentivised alacrity. Pertinently, Section 31(7)(b) of the Act permits recovery of interest, post the date of the award at the rate of 18% per annum, provided the arbitrator has not stated anything to the contrary. [See *State of Haryana & Ors. vs. S. L. Arora and Company (2010) 3 SCC 690*]. The petitioner failed to take advantage of the time frame granted by the arbitrator, and therefore, there is no reason as to why I should interfere with the award on this score.

12. The second aspect relates to costs. The petitioner claims that since the majority of the claims of the respondent were rejected, the learned arbitrator should not have granted costs in the sum of Rs. 3 lacs to the respondent. The learned arbitrator has carefully weighed this aspect, as against the following: the fact that after the re-constitution of the arbitral tribunal, nearly 26 hearings (effective and non-effective) were held before him; the respondent was represented by a senior counsel assisted by a junior counsel; and while, the respondent had succeeded partially, the petitioner's counter claim had been rejected. Having regard to this overall scenario the

arbitrator allowed one-fourth of the total costs incurred by the respondent; which were quantified at Rs. 3 lacs. I find that the learned arbitrator in coming to a conclusion, which he did, has been both fair and equitable. The ground of challenge raised in this behalf is also rejected.

13. For the foregoing reasons, I find no merit in the petition. The same is, accordingly, dismissed.

RAJIV SHAKDHER, J

NOVEMBER 12, 2013

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