

vai

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.869 OF 2012

Hindustan Petroleum Corporation Limited
a Government of India Company,
registered under the Companies Act, 1956,
having its office at Hindustan Bhavan
Ballard Estate, 8, Shoorji Vallabhdas
Marg, Mumbai – 400 001 and registered
office at Petroleum House, 17, Jamshedji
Tata Road, Mumbai – 400 020

...Petitioner

...Versus...

M/s.Offshore Infrastructure Limited,
having its office at 22, Udyog Khetra
Mulund Link Road, Mulund (West),
Mumbai – 400 090.

...Respondent

Mr.Minoo Siodia with Ms.Raksha Thakur and Mr.Siddharth Shenoy i/b
Rustamji & Ginwala for the Petitioner.

Mr.D. Singh i/b Mr.Sudheer Phadke for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 14TH JULY, 2015
PRONOUNCED ON : 28TH JULY, 2015.

JUDGMENT :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short “the Arbitration Act”), the petitioner has impugned the arbitral award dated 21st February, 2012, thereby allowing claim nos.1 to 4 and interest thereon made by the respondent. Some of the relevant facts for the purpose of deciding

this petition are as under :

2. The respondent herein was the original claimant, whereas the petitioner herein was the original respondent to the arbitral proceedings.

3. The petitioner had undertaken the Mundra Delhi Pipeline Project, at the estimated cost of Rs.1623.00 crores. The petitioner appointed M/s.Engineers India Limited as the project consultant, who invited single public tender for composite works (mechanical, electrical & instrumentation) for terminals and stations at Awa, Ajmer and Jaipur vide bidding document No.654/T-159/05-06/VKG/07 under two bid system. The respondent emerged as the lowest bidder.

4. On 7th July, 2006, the petitioner issued a Fax of Acceptance in favour of the respondent at the total cost of Rs.19,95,30,359.78 with a completion period of 7 months from the date of issuance of the said Fax of Acceptance.

5. On 14th July, 2006, a kick off meeting was held at the headquarters of the said project consultant and most of the construction drawings were handed over to the respondent at the meeting. It was the case of the petitioner that there was delay attributable on the part of the respondent in carrying out the said work. Some of the delay was attributable due to non-arrival of pumps at site and late release of revised cable schedule for which a time extension of seven weeks upto 31st March, 2007 was granted to the respondent on the application made by the respondent. According to the petitioner, several jobs were pending even upon the expiry of the extended date of 31st March, 2007. Some time in the month of June,

2007, HT power job was completed by the respondent. The job was finally certified by the project consultant as completed on 12th November, 2007 after a delay of 33 weeks from the extended date.

6. Dispute arose between the parties. On 11th February, 2011, the Chairman & the Managing Director of the petitioner appointed the learned arbitrator, who entered upon the reference vide letter date 21st February, 2011. Pursuant to the directions issued by the learned arbitrator, the respondent filed its statement of claim along with supporting documents on 31st March, 2011 making 10 claims. On 5th May, 2011, the petitioner filed its reply along with supporting documents. The petitioner and the respondent filed further pleadings by way of rejoinder and sur-rejoinder respectively before the learned arbitrator. None of the parties led any oral evidence before the learned arbitrator. The learned arbitrator held four meetings. On 21st February, 2012, the learned arbitrator allowed claim nos.1 to 4 and rejected claim nos.5 and 6. The learned arbitrator directed the petitioner to pay interest at the rate of 9% p.a. on the claims awarded and rejected the claim for cost of arbitration.

7. The petitioner has impugned those four claims awarded by the learned arbitrator with interest in the present petition filed under section 34 of the Arbitration Act on various grounds.

8. Insofar as claim no.1 is concerned, Mr.Siodia, learned counsel for the petitioner submits that in the original statement of claim filed on 31st March, 2011, the respondent had claimed a sum of Rs.1,91,11,408/-, insofar as this claim is concerned. The said claim was revised by the respondent on 18th November, 2011 to Rs.71,37,666/-. The respondent further revised its claim to

Rs.9,50,590/- when the petitioner showed the bank statement showing payment of Rs.61,87,076/- on 3rd August, 2009. He submits that the respondent did not produce any documentary evidence in support of the final amount claimed under claim no.1 for Rs.9,50,590/-. The petitioner had filed reconciliation statement being Exhibit R 5-A before the learned arbitrator.

9. Learned counsel submits that the petitioner had shown requisite proof of cess refund which was paid by the petitioner to the respondent by cheque dated 31st July, 2008 for Rs.18,94,991/- which was duly reflected in the said reconciliation statement admittedly forming part of the record before the learned arbitrator. My attention is also invited to the bank statement of the petitioner of its account with the State Bank of India showing that the sum of Rs.18,94,991/- was debited to the account of the respondent on 7th August, 2008. The petitioner also produced cess deduction statement of the account of the respondent for different purchase orders and pointed out that the said sum of Rs.18,94,991/- was paid by the petitioner to the respondent against the purchase order No.654/T-159/0047 which was the subject matter of the present dispute.

10. Learned counsel for the petitioner submits that the learned arbitrator however, did not consider the reconciliation statement along with the documentary evidence produced by the petitioner showing payment of Rs.18,94,991/- and erroneously held that the petitioner had not shown any documentary proof in support of the payment of the amount as claimed by the respondent. He submits that on the contrary, the respondent had revised its claim from time to time and finally revised the claim in the written argument and that also without producing any supporting document in support of the final

revised claim at Rs.9,50,590/-. He submits that though the respondent had admittedly not filed any reconciliation statement before the learned arbitrator, the learned arbitrator has erroneously referred to the alleged conciliation statement alleged to have been filed by the respondent. He submits that the award shows patent illegality on the face of the award.

11. Mr.Singh, learned counsel for the respondent on the other hand did not dispute that the respondent had revised its claim from time to time and had finally revised said claim no.1 to Rs.9,50,590/-. He submits that the learned arbitrator has rendered a finding of fact that the petitioner had not produced any documentary evidence to show that the amount as claimed by the respondent was already paid, such finding of fact cannot be interfered with by this Court.

12. A perusal of the record clearly indicates that the respondent had revised its claim more than twice. The last revision was made by the respondent in the written arguments which was filed much after conclusion of the oral hearing. Even in the said written argument, it is not indicated that the respondent had given any break up and supporting documents in respect of the said claim of Rs.9,50,590/-. On the contrary, the petitioner had filed reconciliation statement (Exhibit R 5-A) before the learned arbitrator along with the documentary evidence, including the bank statement to show that the cess refund of Rs.18,94,991/- was already paid by the petitioner to the respondent on 31st July,2008. The said payment is also reflected in the bank statement produced by the petitioner before the learned arbitrator and the said amount was credited to the account of the respondent. Learned counsel for the respondent could not dispute the receipt of the said payment. The respondent has only pleaded

ignorance in respect of the said amount and has alleged that the said payment was not in respect of the payment of the cess refund in respect of the present contract. Learned counsel however, could not dispute the bank statement which was produced by the petitioner and the cess deduction statement by the respondent pointing out that the said sum of Rs.18,94,991/- was towards the purchase order, which was the subject matter of the present contract.

13. A perusal of the award indicates that the learned arbitrator has allowed the said claim on the ground that the petitioner was unable to produce any documentary evidence to show that the cess refund of Rs.18,94,991/- was paid to the respondent in respect of the present contract. It is thus clear that the learned arbitrator has totally overlooked the bank statement produced by the petitioner and also the other related documents, including reconciliation statement, which was not disputed by the respondent before the learned arbitrator. The learned arbitrator has also proceeded on the premise that the reconciliation statement was filed by the respondent and not by the petitioner. The award shows patent illegality on the face of the award and thus is set-aside.

14. Insofar as claim no.2 is concerned, the learned arbitrator has allowed this claim in respect of the payment demanded in respect of various extra items and has awarded a sum of Rs.86,52,728/- to the respondent.

15. Mr.Siodia, learned counsel for the petitioner submits that under clause 5 (j) (4) of the contract, the contractor was under an obligation to inform the Engineer-in-Charge, site in-charge rate at which he intended to charge for any extra or substituted work within

seven days of the date of receipt of the order from the Engineer-in-charge supported by the rate analysis in respect of such claim. He placed reliance on clause 7.4 of the contract, which provides that the final bills shall be submitted by the contractor within one week from the date of completion of the work fully and completely in all respects and if the contractor fails to submit the final bill accordingly, the Engineer-in-charge / site-in-charge may take measurement and determine total amount payable for the work carried out by the contractor and the said certification shall be final and binding on the contractor. The Engineer-in-charge may also take assistance of the outside party for taking measurement.

16. Learned counsel for the petitioner submits that the contract period expired on 31st March, 2007. The job was finally certified by the project consultant on 12th November, 2007. He invited my attention to the letters dated 21st March, 2008 from the project consultant to the petitioner, informing that though the respondent had indicated that it would be submitting the bill along with analysis of rate by its letter dated 1st February, 2008 however, did not submit any rate analysis. The project consultant had already worked out the rates as per the provisions of the contract along with all the details. My attention is also invited to a letter dated 25th October, 2008 from the petitioner to the respondent in which the petitioner placed on record that though the project consultant and the petitioner had requested the respondent to send the rate analysis however, the respondent had not submitted the same till date and thus the project consultant had already worked out the rates for the extra items as per the contract. On 21st February, 2009, the respondent submitted the bill of extra items to the petitioner. The petitioner disputed the amounts claimed by letter dated 29th April, 2009 and other correspondence.

17. Learned counsel for the petitioner submits that though the relevant correspondence referred to aforesaid along with other correspondence were on record before the learned arbitrator which were referred to and relied upon by the petitioner before the learned arbitrator and it was urged that the respondent not having submitted its rate analysis within seven days from the order of the project consultant for extra work and even along with the final bill under clause 5(j)(4) read with 7.4, the Engineer-in-charge has already taken measurement and has worked out the rates as per the provisions of the contract which were binding on the respondent and was not arbitrable. He submits that the learned arbitrator has totally overlooked the provisions of the contract and the correspondence exchanged between the parties and also the project consultant and has awarded such claim contrary to the terms of the contract. Learned counsel for the petitioner invited my attention to various paragraphs of the award in respect of this claim.

18. Learned counsel for the respondent invited my attention to various findings recorded by the learned arbitrator in the impugned award and submits that the learned arbitrator was right in holding that there was no time prescribed for submission of the claim for extra items and has determined the rates which are in accordance with the contract. He submits that there was no dispute between the parties that most of these items were extra items and the respondent was entitled to claim additional amount for such extra work. He submits that this Court cannot interfere with the finding of fact rendered by the learned arbitrator.

19. A perusal of the impugned award indicates that the

learned arbitrator has not considered the provisions of the contract and more particularly clause 5(j)(4) read with 7.4. The respondent had admittedly submitted its bill for extra items only on 21st February, 2009, though the work was finally certified by the project consultant on 12th November, 2007. Since the respondent did not submit the rate analysis as contemplated under clause 5(j)(4) and the final bill within one month as contemplated under clause 7.4, the project consultant worked out the rate analysis in accordance with the provisions of the contract which rate analysis was binding on the contractor. The learned arbitrator even did not consider the relevant correspondence exchanged between the parties, including the correspondence with the project consultant on this issue. The award is rendered on the premise that that was no provision in the contract specifying any particular time period for the submission of the final list of extra items. This observation of the learned arbitrator is patently illegal and contrary to clause 5(j)(4) read with 7.4 of the contract.

20. A perusal of the impugned award indicates that the learned arbitrator has decided the rates analysis for extra item as claimed by the respondent and without looking into the rate analysis prepared by the project consultant, which was binding on the contractor. In my view, the learned arbitrator could not have decided contrary to the terms of the contract and also could not have overlooked the relevant correspondence exchanged between the parties while allowing the claims made by the respondent. This claim awarded thus deserves to be set aside and it is ordered accordingly.

21. Insofar as claim no.3 is concerned, the petitioner had deducted a sum of Rs.99,76,527/- towards the levy of the liquidated charges. Learned counsel for the petitioner invited my attention to

some of the correspondence exchanged between the parties and would submit that though there was sufficient evidence produced by the petitioner on record pointing out a delay of 33 days on the part of the respondent in completing the work which authorized the petitioner to levy the liquidated damages at the rate of 0.5% per week for a maximum of 5% under clause 10 of the General Condition of Contract. He submits that the respondent having committed delay of 33 days in execution of the work, the petitioner was justified in deducting the said amount towards liquidated damages under clause 10 of the General Condition of Contract.

22. Learned counsel for the petitioner submits that the learned arbitrator has not dealt with any of the documentary evidence produced by the petitioner which clearly demonstrates that the delay was solely attributable on the part of the respondent and allowed the said claim by over looking the documentary evidence produced by the petitioner.

23. Learned counsel for the petitioner then submits that since the petitioner had brought it to the notice of the respondent that the petitioner would recover the liquidated damages from the respondent and since the petitioner had proved that the delay was attributable on the part of the respondent, the petitioner was not required to prove any loss before the learned arbitrator.

24. The respondent on the other hand supported the findings rendered by the learned arbitrator and submits that the petitioner has not only failed to prove the delay on the part of the respondent but has also failed to prove the losses, if any, suffered by the petitioner due to the alleged delay on the part of the respondent. In his alternate

submission, learned counsel submits that even if the respondent was responsible for the delay, unless the petitioner would have suffered any loss due to the said alleged delay, the petitioner could not have recovered any such amount as and by way of liquidated damages.

25. A perusal of the award indicates that the learned arbitrator while dealing with this issue has rendered a finding of fact that though the respondent herein might have dealt with the initial mobilization of manpower and equipment after the acceptance of the contract, though such a contention of the respondent is not adequately proved by the respondent with documents, documentary evidence before the learned arbitrator established beyond reasonable doubt that the overall delay in completion of the work beyond 31st March, 2007 was because of several delays attributable on the part of the petitioner before and after the expiry of the extended completion period of the contract which resulted in over all delay, the learned arbitrator has summarized causes of delay in the impugned award and has accepted the case of the respondent herein.

26. The learned arbitrator has rendered a finding that the respondent herein was not responsible for the delay in completion of the work in the contract but the petitioner was responsible of the delay. The learned arbitrator also held that the petitioner did not suffer any loss due to the delay in commissioning and utilizing the benefit of the project since the project was put to use much after actual completion of the work by the respondent, as explained by the petitioner during the oral arguments. It is accordingly held that the levy of the liquidated damages by the petitioner was not justified.

27. A perusal of the award insofar as this claim is concerned

indicates that the learned arbitrator has not dealt with each and every letter addressed by the parties to each other on the issue of delay occurred in completion of the contract, the learned arbitrator however, has considered the record and has rendered various findings of fact. In my view, even if the learned arbitrator would have come to the conclusion that the delay was attributable on the part of the respondent, the petitioner could not have recovered any amount towards the liquidated damages unless the petitioner would have established that the amount mentioned in clause 10 of the General Condition of Contract was a genuine pre-estimate amount of damage or loss and the petitioner would have proved the actual loss suffered. In my view the submission of the learned counsel for the respondent deserves acceptance. Since the petitioner did not prove the loss suffered by the petitioner and also did not even plead before the learned arbitrator that the amount recovered by the petitioner was a genuine pre-estimate of loss or damage agreed by the parties, the petitioner could not have recovered the said amount. In my view, the learned arbitrator has rightly allowed the claim. No inference with this part of the award is thus warranted.

28. This Court in case of **Continental Transport Organisation Pvt. Ltd. vs. Oil & Natural Gas Corporation Ltd., decided on 21st April, 2015 in Arbitration Petition No.372 of 2013** has after adverting to the judgment of the Supreme Court in case of **Kailash Nath Associates vs. Delhi Development Authority, decided on 9th January, 2015 in Civil Appeal No.193 of 2015** has held that unless loss is pleaded and proved, it cannot be recovered. There cannot be any windfall in favour of the respondent to recover liquidated damages even if no loss is suffered or proved.

29. In so far as the claim no.4 is concerned, the learned arbitrator has allowed a substantial part of the said claim made by the respondent towards rebates in respect of various items on which the petitioner had deducted/withheld due payments of the respondent.

30. Learned counsel appearing for the petitioner submits that the learned arbitrator did not consider the documentary proof produced by the petitioner providing the details of the working of each and every deduction/hold applied by the petitioner. He submits that the learned arbitrator had awarded the said claim contrary to the terms of the contract. He submits that the learned arbitrator totally overlooked the fact that the contract provided for both epoxy and non shrink grouting material subject to pump specifications. It is submitted that payment in respect of epoxy was separately made. He submits that non shrink grout produced by the respondent was also deemed to have been paid as full payment which was released for pump erection.

31. Learned counsel submits that in respect of the claim arising out of issue no.4(c), the deduction was applied by the petitioner based on the interpretation of the project consultant of the relevant specifications which was final and binding on the parties under the provision of the said contract.

32. Learned counsel for the petitioner submits that the learned arbitrator has allowed refund of the entire amount of rebate without any justification in so far as issue no.4(g) is concerned. In so far as issue no.4(i) is concerned, he submits that the learned arbitrator totally overlooked the fact that the cable used as per RSEB

specifications was inferior to the specification of the contract and thus the respondent could not be paid as per the SOR rates. It is submitted that the project consultant had worked out the rates which were prevalent market rates and the same were final and binding on the contractor. In so far as issue no.4(r) is concerned, it is submitted that the work was completed in house and thus the respondent had not completed the said work. Learned arbitrator thus could not have awarded the refund of Rs.25,000/- in favour of the respondent.

33. It is submitted that the learned arbitrator had not taken cognizance of the statement of withheld items and the amounts with proper justification given by the project consultant of the petitioner which was exhibited at R-17 and also the statement of release of withheld amount in the final bill which was signed by the respondent, the petitioner and the project consultant. It is submitted that the learned arbitrator did not give any reasons for rejecting the detailed analysis made by the petitioner and the project consultant in the impugned award.

34. Learned counsel for the respondent, on the other hand, tries to justify the reasons rendered by the learned arbitrator for allowing some of the claims made by the respondent and submits that after considering the evidence produced by both the parties, learned arbitrator has rendered various findings of facts and after re-appreciating the evidence has allowed this claim and thus this Court cannot re-appreciate the evidence considered by the learned arbitrator and cannot interfere with the findings of facts rendered by the learned arbitrator.

35. A perusal of the award indicates that the learned

arbitrator, while allowing various claims under claim no.4, has not given any reasons as to why the detailed analysis made by the project consultant and the petitioner has been rejected. Learned arbitrator has also not taken into consideration the statement of withheld items and the amounts with justification given by the project consultant and the petitioner. The statement of release of withheld amount in the final bill is duly signed by the respondent, the petitioner and the project consultant. A perusal of the award indicates that the learned arbitrator has not dealt with any of the submissions made by the petitioner and has allowed various claims made by the respondent without any basis and justification. Some of the claims under claim no.4 are allowed even without giving reasons. In my view, there is substance in the submission made by the learned counsel for the petitioner that the learned arbitrator has not considered any submission made by the petitioner and has totally overlooked the evidence produced by the petitioner. The findings rendered by the learned arbitrator without considering the evidence produced by the petitioner are perverse and thus deserve to be set aside. The award made by the learned arbitrator in respect of the claim no.4 is thus set aside.

36. The next submission of the learned counsel for the petitioner is that though the learned arbitrator was appointed on 11th February 2011, the learned arbitrator has awarded interest on the claim of liquidated damages from 3rd June 2009. In my view, there is no substance in the submission made by the learned counsel for the petitioner. Under Section 31(7)(a) of the Arbitration and Conciliation Act, 1996, the arbitral tribunal is empowered to award interest on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action

arose and the date on which the award is made. In my view, the learned arbitrator is empowered to award interest even on the claim for damages from the date of cause of action till the date of award. This Court in the case of **Haresh Advani Vs. Suraj Jagtiani decided on 24th April 2015 in Arbitration Petition No.846 of 2014** has held that the arbitral tribunal is empowered to award interest on damages from the due date till the date of award and even to award future interest. The said judgment squarely applies to the facts of this case in so far as the interest on damages awarded by the learned arbitrator from the date of cause of action till the date of award is concerned. I am respectfully bound by the said judgment.

37. I therefore pass the following order :-

- a) Arbitral award in respect of claim nos.1, 2 and 4 along with interest thereon is set aside.
- b) The award in respect of claim no.3 along with interest thereon is upheld.
- c) There shall be no order as to costs.

(R.D. DHANUKA, J.)