

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 21.06.2017

PRONOUNCED ON:13.12.2017

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

Original Petition No.441 of 2014

Chennai Petroleum Corporation Ltd.,

represented by its Deputy General Manager (Admin.),

Mr.M.Sankaranarayanan .. Petitioner

Vs

1.M/s.Ion Exchange (India) Ltd.,

Chennai-600 017.

2.Mr.Justice K.Govindarajan (Retd.), .. Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the impugned arbitral award dated 20.03.2014 insofar as it directs payment of the sum of Rs.1,04,36,120/- to the first respondent with interest thereon and allow this petition with costs.

For petitioner :Mr.R.Senthil Kumar

For respondents :Mr.Ramakrishna
Viraraghavan,
Senior Counsel for
Mr.G.Shiva Shankaran

ORDER

This Original Petition, filed at the instance of the Chennai Petroleum Corporation Limited (in short and henceforth 'CPCL'), challenges an award of the learned Sole Arbitrator dated 20.03.2014.

2.The first respondent in this Original Petition, Ion Exchange India Ltd (in short and henceforth 'IEL') was the claimant before the Arbitrator and a company with considerable expertise in water treatment technologies. The petitioner in the Original Petition/the first respondent in the arbitration proceedings is a state owned oil and gas corporation, engaged in the business of refining of crude oil.

3.The brief facts of the case are as follows:

(i) A tender was floated by CPCL on 18.07.2003 for the purpose of installation of a zero discharge water treatment plant for the treatment of water discharged from a 3.0 million metric tons per annum (MMTPA) crude oil refining plant at Manali.

(ii) The plant was installed for treating the water generated by Effluent Treatment Plant III, that was under construction, and in accordance with MINAS standards.

(iii) The first respondent was awarded the tender and accepted the same by Letter of Acceptance dated 29.01.2004.

(iv) In terms of the contract, the work was to be completed within a period of 12 months from the date of acceptance. Extension of time, as requested by IEL was granted by CPCL and the project was ultimately completed on 19.12.2005.

(v) On the basis of the aforesaid delay, an amount of Rs.1,04,36,120/- was withheld as liquidated damages (LD) by CPCL, in terms of clause 58 of the Special Conditions of Contract and clause 34 of the General Conditions of Contract.

(vi) Repeated requests for settlement of the claims for refund of the amount withheld were made by IEL, which did not find favour of response from CPCL. As a result, the clause for arbitration stood triggered.

(vii) Proceedings for arbitration were commenced before the second respondent, Mr. Justice K. Govindarajan. Various claims, including the refund of 10% of the amount withheld by CPCL on the ground of delay and interest thereupon from December, 2005 till the filing of the claim petition on 14.02.2013, were advanced by IEL.

(viii) After a detailed hearing, an award dated 20.03.2014 was passed by the learned Arbitrator who, in considering nine items of claim, rejected eight as being barred by limitation and allowed the claim relating to the refund of liquidated damages withheld by CPCL.

(ix) The learned Arbitrator concluded that the initiation of proceedings for arbitration vide letters dated 05.06.2012 and 05.11.2012 was within the period of three years from the conclusion of contract on 19.03.2011. The claim was thus quantified and CPCL directed to refund the said amount.

(x) IEL has accepted the decision of the learned Arbitrator on the rejection of eight issues and CPCL has challenged the award in so far as it allows the one claim in relation to the claim of liquidated damages.

4. Mr.Senthil Kumar reiterates the arguments advanced before the learned Arbitrator to the effect that the claim of IEL towards liquidated damages was barred by limitation. The claim, according to the petitioner is to be seen in the light of the dates and events as follows:

<i>Date</i>	<i>Description</i>
18.07.2003	Notice inviting tender
29.01.2004	Fax of acceptance
25.02.2004	Letter of acceptance
27.07.2004	Execution of Agreement
29.12.2004	Scheduled job completion date
19.12.2005	Actual job completion date based on extensions given
03.01.2007	No Claims Certificate
19.03.2007	Date of performance guarantee test run (PGTR)
01.10.2007	Job completion report
19.03.2009	Expiry of contractual guarantee period for RO membranes
19.03.2011	Expiry of contractual guarantee period for UF membranes
05.06.2012	Invocation of arbitration clause by first respondent

5. As per the job completion report dated 01.10.07, the factum of levy of liquidated damages was informed in writing by the Engineer-in-Charge to IEL as and when the deduction was made and also specifically when the job completion report was issued. Thus, according to CPCL, if at all a dispute was to be raised and the clause for arbitration liable to be invoked in that regard, it ought to have been within three years from either of the aforesaid dates only.

6. Mr. Senthil Kumar would submit that Article 113 of the Limitation Act, which is applicable to proceedings under the Arbitration and Conciliation Act, provides for a limitation of three years from the date when the 'right to sue' accrues to make a claim. According to him, the 'right to sue' in this case was triggered when the amount of Rs.1,04,36,120/- was, in fact, deducted by way of liquidated damages.

7. The deduction was made in the 18th Running Account bill as acknowledged by IEL in its no-claim certificate dated 03.01.2007. Thus the right to sue would be triggered either on 03.01.2007 or, at the highest, on 01.10.2007 when the job completion report was issued specifically referring to the deduction towards liquidated damages and communicating the same to IEL. Any claim beyond 03.01.2010 or 01.10.2010 would thus, according to CPCL, be barred by limitation.

8. The flaw in the award, according to CPCL, was also in the framing of issues by the Learned Arbitrator quite apart from the conclusion arrived at by him. The proper issue for determination ought to have been the question of when the contract came to an end instead of which the issue framed was the determination of when the 'right to sue' accrued.

9. Reliance was placed on various judgments, specifically the paragraphs extracted as under:

(i) *State of Punjab and others vs. Gurdev Singh* 1991 (4) SCC 1

'The court has to find out when the "right to sue" accrued to the plaintiff. If a suit is not covered by any of the specific articles prescribing a period of limitation, it must fall within the residuary article. The purpose of the residuary article is to provide for cases which could not be covered by any other provision in the Limitation Act. The residuary article is applicable to every variety of suits not otherwise provided for. Article 113 is a residuary article for cases not covered by any other provisions in the Act. It prescribes a period of three years when the right to sue accrues. Under Article 120 it was six years which has been reduced to three years under Article 113. According to the third column in Article 113, time commences to run when the right to sue accrues. The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.'

(ii) *Rupchand Rajaram Shah vs. Maharashtra State Road Transport Corporation, Bombay and another* 1991 (3) Bombay CR 668:

'28. In the facts of the present case, we are inclined to take the view that the appellant's suit would be governed by the provisions of Article 113 of the Limitation Act 1963. If this is the true position, the right to sue had accrued to the plaintiff/appellant as and when the first respondents imposed the penalty commencing from 9th March 1973 and ending with 28th January 1975, excluding the last item of Rs.12,000/-, which was the penalty imposed while settling the final bid on 13th January 1976. As stated earlier, since the suit has been filed on 02.01.1979, on the above reasoning, only the claim of Rs.12,000/- would be within limitation.'

10. Mr.Senthil would draw attention to the claim statement pointing out that there was no reference to any activity pursuant to December 2005 when the transaction had been completed in all respects. Thus, all activity, even according to IEL had come to an end in December 2005 and the invocation of the arbitration clause in 2012 was thus, according to Mr.Senthil, clearly barred by limitation. The conclusion in the award to the contrary was thus perverse in law and fact.

11. Submissions were also made on the merits of the matter stating that the delay in completion of the project was wholly attributable to IEL as was the quantification of

the liquidated damages as well as the direction to refund the amount withheld to IEL along with interest.

12. Mr.Senthil refers to the no-claims certificate issued by IEL dated 03.01.2007 and extracted hereunder:

NO CLAIM CERTIFICATE

*Name of work : New Zero Discharge Plant for 3
MMTPA Expansion*

Name of Contractor : Ion Exchange (India) Ltd. - Mumbai

W.O./L.O.I. No. : WO No.2003-14/W/003 dated 25.02.2004

Schedule Completion Date : 30 December 2004

Actual Completion Date : 19 December 2005

This is to certify that other than the amount not paid equivalent to LD (Rs.One Crore and Four Lacs only) and the bill amount mentioned below, no other claim is pending from this contract.

13. Thus, according to him, IEL was fully aware of the withholding of the amount of LD as early as on 03.01.2007 and ought to have raised a demand immediately and within limitation.

14.Mr.Ramakrishna Viraraghavan, learned senior counsel appearing for Mr.G.Shiva Shankaran, learned counsel for IEL, the first respondent would, at the outset, lay considerable stress upon the limited scope of interference possible by this Court in a challenge of this nature. According to him, the Court need not dwell on whether the claim made by it was, in fact barred by limitation, but only had to restrict itself

to examining whether the conclusions of the Arbitrator on this account were perverse, calling for interference. If the impugned conclusion as in the award were not established to be perverse, such conclusions were not liable to be substituted by an alternate view held by the Court assuming that the Court did, in fact, have an alternate view on the aspect of limitation.

15. He would, in this regard, rely upon the judgments of the Supreme Court in *Associated Builders vs. Delhi Development Authority* ((2015) 3 SCC 49), *Swan Gold Mining Ltd. vs. Hindustan Copper Ltd.* ((2015) 5 SCC 44) and *National Highways Authority of India vs. ITD Cementation India Ltd.* (2015) 14 SCC 21.

16. The contract inter se the parties was, according to him, a single, lump sum turnkey contract for the construction of a new zero discharge plant and the guarantees thereupon. The scope of the contract would include all services to be rendered thereunder which would cover the guarantees as well. While he would agree that it was Article 113 that would be applicable to determine the elapse of limitation, the 'right to sue' set out as a test under Article 13 will, in the present case, only be triggered from the date of complete performance of the contract which was 19.03.2011.

17.To appreciate the argument advanced, the relevant clauses relied upon by learned senior counsel are extracted below:

'19. 'Completion Certificates' shall mean the certificate to be issued by the Engineer-in-Charge when the works have been completed to his satisfaction.

.....

20.The 'Period of Liability' in relation to a work means the specified period from the date of issue of completion certification upto the date of issue of Final Certificate during which the Contractor stands responsible for rectifying all defects that may appear in the works.

.....

81.Period of Liability from the date of issue of Completion Certificate

81.1.The Contractor shall guarantee the installation work for a period of 12 months from the date of issue of completion certificate. Any damage or defect that may arise to lie undiscovered at the time of issue of completion certificate, connected in any way with the equipment or materials supplied by him or in workmanship, shall be rectified or replaced by the contractor at his own expense as deemed necessary by the Engineer-in-Charge or in default, the Engineer-in-Charge may cause the same to be made good by other workmen and deducted expenses (of which the certificate of Engineer-in-Charge shall be final) from any sums that may be then or at any time thereafter, become due to the contractor or from his security deposit or the proceeds of sale thereof, or of a sufficient portion thereof.

81.2.....

81.3.The work will not be considered as complete and taken over by the Owner until the fill in place at site has been tested and approved by the Engineer-in-Charge. All tests shall be carried out

by the Contractor at his own cost and as directed by the Engineer-in-Charge.

.....

93.Final Decision and Final Certificate

Upon expiry of the period of liability and subject to the Engineer-in-Charge being satisfied that the works have been duly maintained by the contractor during monsoon of such period as herein before provided in clause 81 and that the contractor has in all respect duly made up any subsidence and performed all his obligations under the contract, the Engineer-in-Charge shall (without prejudice to the rights of the Owner to retain the provisions of relevant clause hereof) otherwise give a certificate herein referred to as the final certificate to that effect and the contractor shall not be considered to have fulfilled the whole of his obligations under the contract until Final Certificate shall have been given by the Engineer-in-Charge notwithstanding any previous entry upon the work and taking possession, working, or using of the same or any part thereof by the Owner.

94.Certificate and payments no Evidence of Completion

Except the final certificate, no other certificates or payment against a certificate or on general account shall be taken to be an admission by the Owner of the due performance of the contract or any part thereof or of occupancy or validity of any claim by the Contractor.'

18.It is an admitted position that the final completion certificate has, in fact, not been issued by the Engineer-in-charge. Technically and as per clause 93 of the contract, there is no completion till such certificate is issued.

19. Be that as it may, Mr. Ramakrishnan would next draw attention to the scope and responsibilities under the contract at Article 2.1, extracted below:

SCOPE AND RESPONSIBILITIES

2.1 General

The scope comprises basic Engineering, Detailed Engineering, total procurement of all the items including construction materials, Construction and Installation, Testing, Painting, wrapping coating, Insulation, acid/alkali proof lining/coating, Pre-commissioning, Commissioning, Trial runs, guaranteeing the chemical and utility consumption and Guaranteeing the entire Zero Discharge Plant on LSTK basis to meet the required quality of outlet water.

While testing the plant for performance guarantee runs, services and facilities as required shall be provided by the Contractor.

The scope also includes all related civil and structural works, architectural works, mechanical works, piping, electrical and instrument works.

The basic scope of job shall be based on the Design Basis, Process Description, Technical specifications, Addendum, Corrigendum, Standards, Data sheets, Drawings etc. furnished elsewhere in the document.

Unit sizes and Equipment sizes wherever given are minimum requirements. However, the bidder can add any unit/equipment or increase the size of unit/equipment in order to furnish the process guarantee of Zero Discharge Plant.

Unless otherwise specified, all works required for completeness of Zero Discharge Plant including civil structural,

architectural, mechanical, piping, electrical, instrumentation, painting etc. shall also form a part of the scope of work and supply.

20.The scope of the contract was, according to IEL, comprehensive and the contract continued till such time all requirements under the scope were met and completed in full.

21.The price was also a lumpsum price that included 'Basic and Detailed Engineering, Design, Procurement, Supply, Transportation, Fabrication, Construction, Erection, Installation, Painting, Testing and commissioning including Equipment, Machinery, Piping, Mechanical, Electrical, Instrumentation, Civil and structural, Installation, Painting Works and also hookup with incoming and outgoing lines, facilities at battery limits including providing isolation valves at battery limits as specified for this job, performance testing and Guaranteeing of entire New Zero Discharge Plant for 3 MMTPA Expansion Project including supply of spares for start up and commissioning, supply all labor, mandatory spares and materials, equipments, machinery, tools and tackles including supply of chemicals complete as per design base drawings, technical specifications, data sheets, specific requirements scope of work etc. as per contract document' for total price of Rs.10,43,61,200/-.

22.The contract had been amended to include within its scope the supply and guarantee of UV Membranes for a period of five (5) years. The clause, Article 48.7 reads thus:

Membrane Guarantee & Replacement	Add new clause as 48.7 "Membrane Guarantee & Replacement" 48.7 MEMBRANE GUARANTEE & REPLACEMENT 48.7.1 For UF Membranes During the first year of operation any membrane shall be replaced in totality as per clause 48.7.2 All the membranes shall be guaranteed for a period not less than 5 years by the bidders. A warranty certificate to this effect should be produced from the membrane manufacturer by the bidders. Bidder shall undertake integrity test of the UF membranes on an annual basis. The cost of the test shall be included in the Lumpsum price for the whole guarantee period. The first year of membrane guarantee will be met from the 10% guarantee (PBG) given by the bidders for the entire project for the first year, which will be available till the defect liability period. After the defect liability period and till the end of 5 year warranty period, i.e. for a 4 year period bidder shall provide Rs.10 lakhs as membrane guarantee.
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23.The period of guarantee in respect of the UV Membranes under the contract was for a period of five (5) years and expired only on 19.03.2011. Thus, according to IEL, the right to sue would accrue only thereafter, and the reference to Arbitration on 05.06.2012 is thus proper and within time.

24.The detailed submissions of Mr.Senthil Kumar, learned counsel appearing for CPCL and Mr.Ramakrishnan Viraraghavan, learned Senior Counsel appearing for Mr.G.Shiva Shankaran, learned counsel for IEL have been heard and the documents and case laws presented have been studied in detail.

25.The primary defence of IEL, in a nutshell, is that the challenge to award has to be limited to those situations that come within the sweep and ambit of section 34 alone. Even otherwise, it is argued, the award of the learned Arbitrator is a well reasoned and proper award that warrants no interference therewith.

26.The learned Arbitrator deals with the issue in extenso in paragraphs 31(A) to (M) of the award. The discussion is exhaustive and the award proceeds on the basis that the recovery of the liquidated damages from the bills was, in accordance with the terms of the contract (clause 34 of the general conditions and clause 58 of special conditions), for the Engineer-in-Charge to decide. It is an admitted position that as on date no such decision has been

arrived at or communicated by the Engineer-in-Charge. The bar that operates under the contract in invoking the arbitration clause is only if such a decision had been taken in this regard. In a situation where there, admittedly, has been no decision taken by the Engineer-in-Charge, the invocation of the arbitration clause was held to be proper.

27. Moreover, the learned Arbitrator has also gone into the specific issue of when the contract period came to an end - whether on the date of completion or on the date of expiry of guarantee period. After examining the various clauses as well as the scope of the contract, the learned Arbitrator comes to the conclusion that the date of completion would be 19.03.2011, being the date of expiry of guarantee period.

28. The provocation for interference in an award has to be serious and limited to the situations enumerated under section 34 of the Act. The issue before me is one of limitation. Though limitation has been held to be a mixed question of fact and law, in the present case, it really is only a question of fact, such fact being whether limitation would commence from 19.12.2005 as CPCL would contend or 19.03.2011 as IEL would argue, which has been accepted by the learned Arbitrator.

29.The learned Arbitrator has dealt with the question in detail, concluding that the invocation of arbitration on 05.06.2012 was not hit by the bar of limitation. This court, bound as it is by the rigor of section 34, is bound to consider if the view adopted by the learned Arbitrator is perverse. Any reference to the merits of the matter would be adverted to only thereafter, if at all.

30.The learned Arbitrator has considered the question in detail concluding that limitation would run only from 19.03.2011 with regard to the claim of liquidated damages. Before me, the petitioner reiterates the submissions already made and considered by the learned Arbitrator. No perversity is made out in regard to the said view except to state, in sum and substance, that the conclusion ought to be re-appreciated.

31.Courts are normally reluctant to interfere in an award except if the facts on which the conclusion is based are shown to have been mis-appreciated or erroneously stated. In the present case, there is no such error made out, much less perversity.

32.In *Swan Gold Mining Ltd., Vs. Hindustan Copper Ltd.*, (2015) 5 SCC 739, the Supreme Court states:

'11. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of

sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal.

12. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.'

33. In *Navodaya Mass Entertainment Ltd. V. V.J.M. Combines* (2015) 5 SCC 698, the Bench states thus:

'8. In our opinion, the scope of interference of the Court is very limited. Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator.'

34. As far as the refund of liquidated damages is concerned, the learned Arbitrator has discussed the matter in extenso and has rendered findings of fact in this regard that are not liable to be interfered with, particularly since they are not alleged, let alone, established to be perverse.

35. In the light of the discussion above, I see no merit in this Original Petition that stands dismissed.

Sd/. A.S.M.J

13.12.2017

//Certified to be true copy//

Dated at Madras this the day of 2018.

R.s/05.04.2018

COURT OFFICER (O.S.)

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