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

+ **O.M.P. 129/2009**

Reserved on: December 7, 2016

Date of decision: January 10, 2017

INDIAN OIL CORPORATION LTD

..... Petitioner

Through: Mr. Abhinav Vasisht, Senior Advocate
with Mr. Rajat Navet and Mr. Roshan Yadav,
Advocates.

versus

MAN INDUSTRIES (INDIA) LTD

..... Respondent

Through: Mr. Vinod Mehta and Mr. Nikhil Mehta,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

10.01.2017

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by the Petitioner, Indian Oil Corporation Limited ('IOCL') is to the impugned Award dated 28th November, 2008 passed by the learned sole Arbitrator in the disputes between IOCL and the Respondent, Man Industries (India) Limited, arising out of the a Purchase Order ('PO') dated 16th September, 2003 for supply of 74,350 metres of 28" OD API5LX-65 grade line pipes @ Rs. 6,550 per metre for a total contract value of Rs. 48,69,92,500.

2. The thickness of the pipes was to be 11.1 mm with no negative tolerance

allowed. Clause 17 of the PO also mandated that there shall be no deviation from the standard terms and conditions. The contractual delivery date was 15th February, 2004. There was a grace period of one week thereby extending contractual due date of delivery to 22nd February, 2004.

3. On 31st January, 2004, the Respondent wrote to IOCL stating that raw material for the pipes, namely, steel had been received in two lots from Ukraine. While undertaking production, some plates were found to be stacked up. As a result, about 450 piles were found to be slightly under thickness. It was stated that these were within the API specifications and IOCL was asked to grant technical acceptance of the said pipes which had been kept on hold. The list of such pipes was also enclosed with the said letter.

4. This was followed by another letter dated 25th February, 2004 stating that around 1300 pipes were found to be under thickness at particular spots ranging from 11.01 to 11.09. By a letter dated 27th February, 2004, IOCL asked the Respondent to immediately send details of the number of pipes manufactured, number of pipes placed under hold and also its plan to remove such holds completing the PO quantity of acceptable pipes. The Respondent was also asked to send details of the rectification procedure.

5. By a letter dated 29th March, 2004, IOCL offered to accept the defective pipes from the Respondent and a discount of 11% on the purchase order prices. It was to be a “one time acceptance” under special circumstances and with additional requirements. One such requirement was its applicability to the pipes “having only negative tolerance problem and are otherwise

meeting the P.O. specification requirement.” By its letter dated 30th March, 2004, the Respondent requested IOCL to accept the defective pipes “without any financial implication or discount.” IOCL was requested to review the case sympathetically and reschedule the delivery date of the bare pipe to 30th April, 2004 and coating schedule to 31st May, 2004.

6. By its letter dated 5th April, 2004, IOCL rejected the above request and reiterated that pipes would be accepted at a discount of 11%. In response to the said letter, the Respondent by its letter dated 13th April, 2004 requested that IOCL should issue necessary guidelines for release of the Inspection Release Note (‘IRN’) so that the coating activity would be undertaken without delay. There was, however, no mention about the reply to IOCL’s offer of accepting the defective pipes at a discount of 11%.

7. The case of IOCL is that pursuant to its offer dated 29th March, 2004, the Respondent accepted the offer and agreed to have pipes inspected by the nominated third party investigating agency for delivery production. Thereafter, the Respondent progressively completed delivery of 1252 pipes which met the revised specification by 29th April, 2004. IOCL contends that by doing so, the Respondent accepted IOCL’s fresh offer by its letter dated 29th March, 2004 which resulted in a separate contract for supply of the said defective pipes. IOCL contends that the price payable for such defective pipes was revised at Rs. 1,08,11,909 less than the price payable under the original PO and that this differential amount constituted 11% of the agreed price quoted in the PO that was payable for 1252 pipes.

8. IOCL further contends that apart from 1252 pipes, there were 231 pipes of approximately 2.8 km in length to be supplied by the Respondent which were found to be detected with “ovality” i.e., were not completely round in shape and also required rectification. 365 pipes measuring approximately 4.43 km in length also formed part of the same lot of pipes, of which the 231 pipes detected with ovality were part of it. In other words, the other pipes also could not be supplied till the pipes suffering from ovality were not rectified. Thus, a total lot of 596 pipes of approximately 7.23 km in length were finally furnished by the Respondent progressively between 3rd April, 2004 and 18th April, 2004, i.e., after a delay of approximately 2 months from the contractual delivery dated (‘CDD’) of 22nd February, 2004.

9. IOCL contends that in terms of Clause 4.13.1 of the General Conditions of Contract (‘GCC’) forming part of the PO, it was entitled to levy a price discount @ 1% of the value of the pipes for each fortnight’s delay upto a maximum of 10% of the total landed contract value. Accordingly, IOCL recovered a price discount of Rs. 18,21,086 for the delay of 596 pipes. IOCL also recovered a sum of Rs. 43,296 from the amounts payable to the Respondent towards price of 6.61 metre of pipe, which was supplied in excess of the PO quantity.

10. Thus from the bills of the Respondent, the following recoveries were made:

“(a) A sum of Rs. 1,08,11,909/- on account of 11% discount for accepting 1252 under thickness pipes in terms of Applicant’s letter dated 29th March, 2004.

(b) A sum of Rs. 18,21,086/- on account of price discount levied

under Clause 4.13.1 of the General Condition of Contract for delayed supply of 596 pipes.

(c) A sum of Rs. 43,296/- on account of price paid for pipe length (6.61 metre) beyond contractual quantity.”

11. By its letter dated 27th March, 2006, the Respondent requested for release of the balance amount of approximately Rs. 1.2 crores that had been withheld by IOCL. This was revised by IOCL by its letter dated 28th March, 2006 and this led to the Respondent requesting, by its letter dated 12th June, 2006, for disputes to be referred to arbitration.

12. Before the sole Arbitrator, the Respondent filed its statement of claim where it raised the following claims:

- (a) The amount deducted as liquidated damages – Rs. 18,21,086.
- (b) The amount deducted against change in thickness – Rs. 1,08,55,206.
- (c) Loss of profit suffered by the Respondent.
- (d) Interest at the rate of 24% on (a+b+c of the above) from the date of invoice till final payment and realization.”

13. IOCL filed its reply denying any amount was due and payable to the Respondent. In the rejoinder, the Respondent reiterated its claim. Both the parties filed their respective affidavits in evidence and agreed that there was no requirement of cross-examination of such deponents.

14. By an order dated 15th September, 2008, the learned sole Arbitrator asked IOCL to file evidence and/or proper justification for arriving at 11%

discount in price or pipes with reduced thickness. By the impugned Award dated 28th November, 2008, the learned Arbitrator allowed the claims of the Respondent while directing that:

- (a) in respect of the 1252 under thickness pipes, IOCL was permitted to retain 1% of the PO price and pay the balance amount out of the total deducted amount on this account (1% being discount offered by the Respondent in its correspondence with IOCL);
- (b) Since there was no delay of delivery in regard to 596 pipes, the Respondent was entitled to receive the amount of Rs. 18,21,086 from IOCL on this account;
- (c) With regard to 6.61 metres of excess quantity of pipes, it was held that a sum of Rs. 43,296 had been wrongly deducted by IOCL; and
- (d) the Respondent was also granted interest on the aforementioned sum of Rs. 43,296.

15. Mr. Abhinav Vashisht, learned Senior counsel for IOCL, made the following submissions:

- (i) the conclusion of the learned sole Arbitrator as regards Claim A of the Respondent holding that IOCL is entitled to 1% discount of the PO price towards defective pipes and pay back the balance 10% deducted by it to the Respondent was not only in contravention of Section 8 of the Indian Contract Act, 1872 ('ICA') but also ignored vital evidence. In particular, the learned Arbitrator failed to mention the Respondent's letter dated 13th April, 2004 wherein it had not even

discussed the issue of price discount any further. Thereafter, the Respondent had made supplies with effect from 17th April, 2004.

(ii) The learned Arbitrator had wrongly relied upon the Respondent's letter dated 21st April, 2004 whereby it had requested IOCL to accept the defective pipes at discount of 1% without appreciating that the Respondent had in fact performed the contract pursuant to IOCL's offer made by its letter dated 29th March, 2004. Thus, a new contract had come into existence.

(iii) Relying on the decision in *India Tourism Development Corporation Limited v. Integrated Digital Solution (P) Limited 2014 (3) RAJ 744 (Del)* it was submitted that IOCL had the option under Clause 4.3.0 of the GCC to outright reject the under thickness pipes meeting the contractual requirements at no extra cost and within the specified time. With IOCL having not exercised that option, it was entitled to deduct 11% discount on the PO prices.

(iv) IOCL had no occasion to exercise the above option since the Respondent had in fact accepted IOCL's proposal made in its letter dated 29th March, 2004 and had, in fact, effected supplies pursuant thereto. On the other hand, the Respondent could have opted to manufacture pipes as per the specification instead of accepting IOCL's offer for accepting the defective pipes at 11% discount.

(v) As regards Claim B i.e., a sum of Rs. 18,21,086 deducted by IOCL towards delay in supply of 596 pipes, Mr. Vashisht submitted

that finding of the learned Arbitrator that the reason for delay in clearance of the pipes was on account of the decision of IOCL was, again, without any evidence and, in any event, contrary to the records. The pipes were stuck with the TPI due to the defects and this was admittedly attributable only to the Respondent. Therefore, IOCL was within its rights to impose price discount in terms of Clause 4.13.0 of the GCC. Therefore, the finding in respect of Claim B was also perverse and based on conjectures and surmises.

(vi) The finding of the learned Arbitrator that the use of the defective pipes by IOCL in the project indicated that the said pipes had been accepted as good pipes is contrary to the record and is based on no evidence. Reliance was placed on the decision of the Supreme Court in *Associate Builders v. Delhi Development Authority (2015) 3 SCC 49*.

16. Mr. Vinod Mehta, learned counsel appearing for the Respondent submitted that no ground is made out by IOCL under Section 34 of the Act warranting any interference with the impugned Award. Mr. Mehta further submitted that after the Respondent addressed a letter dated 30th March, 2004 requesting IOCL to accept pipes without financial implications or discount and without any amendment to the PO being issued by IOCL, the pipes were inspected and its first lot was accepted by IRN dated 3rd April, 2004 and, thereafter, all pipes supplied by the Respondent were accepted by IOCL. Since the marginal difference of less than 1% to the original specified wall thickness did not really affect the quality and strength of pipes. It is

submitted that while IOCL had an option to either accept or reject the under thickness pipes but did not have the discretion to accept the same on unilateral decision of 11% discount contrary to and inconsistency with the contract/tender documents/PO.

17. Mr. Mehta also pointed out the inconsistent stand of IOCL. While in reply to the claim petition it was sought to be explained by IOCL that 11% deduction “is for possible loss which Respondent might have suffered had IOCL not accepted the supplied pipes”, in its counter affidavit filed by IOCL before the learned Arbitrator, it was stated that 11% discount was for “gross negligence of the Respondent to manufacture and supply pipes as per specification.” In the rejoinder statement before the learned Arbitrator, IOCL again shifted its stand by stating that 1% deduction was for thickness difference but additional 10% was for presumptive delay of five months and beyond. The Respondent maintains that the pipes were dispatched by 2nd May, 2004 i.e., within one month of their first IRN dated 3rd April, 2004.

18. As regards the delayed delivery, Mr. Mehta explained that the Respondent could not dispatch all the pipes which were due since they were put on hold in January 2004 by IOCL. Mr. Mehta also pointed out that the learned Arbitrator observed that the delay in delivery of the pipes was attributable to IOCL and not to the Respondent and the Respondent was entitled to receive the withheld amount from IOCL. The refusal by IOCL to pay for the excess supply of 5.51 meters showed a biased and adamant behaviour on its part and therefore, IOCL’s conduct was held to be arbitrary. The above findings were challenged by IOCL.

19. The above submissions have been considered. The facts narrated show that there was clear and distinct offer by IOCL to the Respondent by its letter dated 29th March, 2004 stating that it was a 'one-time acceptance' where it would accept the defective pipes but at a discounted price of 11% on the PO price.

20. Mr. Vashisht was right in pointing out that the learned Arbitrator did not even mention that the Respondent replied vide its letter dated 13th April, 2004 without discussing the issue of discount but nevertheless made the supplies on 17th April, 2004. On the other hand, the learned Arbitrator appears to have referred to the Respondent's letter dated 21st April, 2004 whereby it had requested IOCL to accept the defective pipes at a discount of 1%. By this time the Respondent had already acted on the offer on 29th March 2004 and made supplies of pipes.

21. Section 8 of the ICA reads as under:

“Acceptance by performing conditions, or receiving consideration: - Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.”

22. The letter dated 29th March, 2004 written by IOCL to the Respondent making an offer and the Respondent's subsequent response dated 13th April, 2004 demonstrated that the Respondent accepted the proposal because no mention in the said letter about the defective pipes being accepted at a discount of 11% was made. How this letter dated 13th April 2004 escaped the attention of the learned sole Arbitrator is a mystery. The Court agrees

with the submissions of Mr. Vashisht that in terms of the above letter the Respondent should be held to have accepted the said offer thus bringing into existence a separate and distinct contract. At no point in time did the Petitioner accept the Respondent's offer dated 30th March, 2004 asking for reconsideration of the decision of IOCL regarding defective goods being accepted at discount of 11%.

23. Section 28 (3) of the Act requires the Arbitrator to decide only in accordance with the terms and conditions of the contract. With the Respondent having accepted by its conduct the offer of the Petitioner made by its letter dated 29th March, 2004, there was no occasion for the Petitioner to take recourse of Clause 4.13.0 or 4.13.1 of the GCC.

24. The Respondent could not have laid a claim as regards the delay in the supply of 596 pipes. This was contrary to Clause 4.13 of the GCC which reads as under:

“4.13.0 Delay in delivery

4.13.1 If delay occurs in delivery of any pipes beyond a free period of 7 (seven) days from the date of delivery relative thereto stipulated in the Delivery Schedule, the Purchaser may at its option, without prejudice to any right it may have:

i) Accept in whole or part the delayed delivery, in which event the purchaser shall be entitled to a discount of 1% (one percent) in the price of the product(s) delivered late for every fortnight of delayed delivery or part thereof, subject to a maximum discount of 10% (ten percent) of the total FOB (stowed /C & F (landed) value of the contract, and/or

(ii) Terminate in whole or part the contract insofar as concerns the product not delivered in time and

(a) Purchase the same or any part thereof elsewhere at the risk and cost of the Vendor or

(b) recover from the Vendor the difference between the market price and the contract price in respect thereof prevailing on the date of termination so far as covered under (a) above.”

25. The Court is unable to agree with the submissions of Mr. Mehta in that there is grave inconsistency in the stand of IOCL in the pleadings. The stand taken by the learned Arbitrator that 1% deduction was for thickness difference and the additional 10% was for presumptive delay of five months was a possible explanation for 11% deduction as far as the defective pipes are concerned was not acceptable appears to be incorrect. The submission that IOCL had somehow accepted the Respondent's request for 1% discount is not borne out by the record at all. The submission overlooks what came out as a result of the letter of IOCL dated 29th March, 2004 followed by the supply made in terms thereof by the Respondent, which brought into existence an entirely new contract. Even as regards the excess quantities, IOCL was under no obligation to accept them. The said action could not be said to be arbitrary as it was completely supported by the clauses of the contract.

26. The Court is satisfied that the impugned Award suffers from patent illegality inasmuch as it overlooks the binding clauses of the contract and is also contrary to Section 28 (4) of the Act. It also overlooks material evidence which was before the Arbitrator. Both the grounds mentioned in *Associate Builders v. Delhi Development Authority* (*supra*) appear to be attracted i.e., ignoring the vital evidence (for instance the letter dated 13th

April, 2004 of the Respondent) and ignoring the binding clauses of the contract.

27. The impugned Award is, therefore, in contravention of the public policy of India as it is in contravention of the substantive law which goes to the root of the matter.

28. For all the aforementioned reasons, the Court sets aside the Award dated 28th November, 2008 passed by the learned Arbitrator. The petition is allowed but, in the facts and circumstances of the case, with no orders as to costs.

JANUARY 10, 2017

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S. MURALIDHAR, J