

\$~

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

Reserved on: February 16, 2017.

Date of decision: April 13, 2017

+

O.M.P. (COMM) 517/2016

IRCON INTERNATIONAL LIMITED

.....Petitioner

Through: Mr. Chandan Kumar and Mr. Rahul
Kumar, Advocates.

versus

SATYA PRAKASH BUILDERS LIMITED

..... Respondent

Through: Mr. Y.P. Narula, Senior Advocate with
Mr. Aniruddha Choudhury, Mr. Abhey Narula and
Mr. Shashank Katyayan, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

13.04.2017

%

Introduction

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('the Act') by IRCON International Limited ('IRCON') is to an Award dated 27th January, 2015 passed by the Sole Arbitrator in the disputes between IRCON and the Respondent - Satya Prakash Builders Limited - arising out of a contract dated 20th December, 2004 for "construction of 811 dwelling units for the Married Accommodation Project ('MAP') for the Ministry of Defence at New Cantonment, Allahabad".

Background facts

2. The contract was a 'fixed rate contract'. The bid of the Respondent was accepted at 37% above the Bills of Quantity ('BOQ') rates. It is stated that the BOQ rates were to remain firm till completion save and except as provided by statutory variations in tax / cess or imposition of any fresh tax/cess. According to IRCON, the rates were all inclusive. It did, however, provide for payment when quantity varied or when any job not included in the BOQ was ordered and executed. The contract also prohibited claiming any damages on account of extension of time (EOT), which too would be granted only if the contract itself was extended.

3. The scheduled date of completion was 20 months after the date of the contract, i.e. 4th July, 2006. The contract was completed on 31st December, 2008. According to IRCON, the 51st Running Account ('RA') Bill and Final Bill was submitted by the Respondent on 20th April, 2009 and was paid for on 23rd March, 2009, 20th October, 2009 and 21st November, 2009.

4. Even during the pendency of the contract, the Respondent invoked Clause 31 of the Supplementary Agreement whereby disputes or differences were to be referred in the first instance to the Committee for Resolution through Mutual Discussions, Negotiations Deliberations, etc. On 9th June, 2006, the Respondent wrote a letter raising certain disputes. These were referred to the Committee which by a letter dated 22nd November, 2006 gave its decision that was not acceptable to the Respondent.

5. Thereafter the Respondent wrote a letter dated 25th December, 2006 to IRCON requesting that an arbitrator be appointed. The Respondent also set

out the disputes between the parties as of the date of that letter. In that letter, the Respondent also reserved its rights to refer any further disputes that may arise between the parties to arbitration.

6. It is stated that the Competent Authority under the contract refused to appoint an arbitrator. This was conveyed to the Respondent by letter dated 24th January 2007. This led the Respondent to file a petition in this Court under Section 11 of the Act. The said petition was disposed of by an order dated 1st May, 2009 which inter alia directed as under:

“The parties had agreed to a qualification of the Arbitral Tribunal. It was agreed that the Managing Director of the Respondent may himself act as sole Arbitrator or may at his option appoint any person as sole Arbitrator, then a panel of at least three names will be sent to the contractor. Such persons may be working/retired employees of the Respondent, who had not been connected with the work. The contractor shall suggest minimum two names out of his panel for appointment as sole Arbitrator. Managing Director will then appoint sole Arbitrator out of the names agreed to by the contractor. Having regard to the qualification required for the Arbitrator, it is directed that the Managing Director of the respondent shall offer a panel of three retired employees of the respondent and the petitioner shall be entitled to nominate one of them as the sole Arbitrator. The sole Arbitrator shall go into the claims and counter claims, if any, of the parties in accordance with law.

The petition is disposed of in terms of the above order.”

7. Pursuant to the above order, IRCON forwarded to the Respondent names of its ex-employees. Of these names, the Respondent chose and requested that any one of them could be appointed as an arbitrator. It is stated that IRCON took nearly 10 months to comply with the request. Finally, on 8th March, 2010, it appointed one Mr A.A. Khandey, a retired Project Director of IRCON, as the Sole Arbitrator. The first part of the said letter made a reference to the earlier letter dated 9th June 2006 written by the Respondent seeking reference of disputes to the Settlement Committee. The second paragraph of the letter stated that all the disputes and counter claims could be adjudicated upon by the Arbitrator. By this time the work stood already completed.

8. The Arbitrator so appointed, entered upon reference on 19th April, 2010. The Respondent filed its Statement of Claim (SOC) in which it raised as many 17 Claims. IRCON preferred 5 counter-claims.

The impugned Award

9. By the impugned Award, Claim Nos. 5, 6 (a) 6(c), 6(d), 6(e), 8, 10,12, 13 and 16 of the respondent and all the counterclaims of IRCON were rejected.

10. Before the learned Arbitrator, one of the first objections raised was regarding the scope of the reference. This was discussed by the learned Arbitrator in paragraph 6 of the impugned Award. The learned Arbitrator took the view that he was competent to decide all the claims and counter

claims between the parties as per the order dated 1st May,2009.

11. As regards Claim No. 1 for Rs.7,64,740/- relating to jungle clearance by the Respondent prior to commencement of the actual work under the contract, the learned Arbitrator awarded Rs. 6,18,732 in favour of the Respondent. Under Claim No. 2, a sum Rs.1,23,85,729.51 was claimed towards difference in prices of TMT bars for reinforcement in lieu of HYSD. After considering the material produced by the parties, the learned Arbitrator held that replacing 'deformed bars' with TMT bars was a changed item and the claim was allowed in full.

12. Claim Nos. 3 and 4 were also awarded in favour of the Respondent but the Petitioner has not challenged the impugned Award in that regard.

13. Claim No.5 was rejected. As regards Claim No. 6 (a) to (f), the learned Arbitrator held that the delay in completion of work was solely on account of the conduct of IRCON. In other words, the total delay in completion of the project i.e. 29 months and 27 days was only attributable to IRCON. However, Claim 6 (a) for loss of overheads and profit was rejected on the ground that no price escalation could be given to the Contractor except in terms of Clause 18 of Special Conditions of Contract (SCC). As regards Claim No. 6 (b), for loss due to idle machinery and plant, although the amount claimed was Rs.1,72,53,924/- the amount awarded was Rs. 66,36,124/- Claim No. 6 (c) was on account of increase in wages. This was held to be covered under Claim No.7. Claim, 6(d) was for loss due to increase in rates of materials and POL was rejected. Claim 6 (e) for refund of amount recovered for delay in submission of the PBG and for charges

incurred in extension of the PBG was allowed to the extent of Rs.30,889. Claim No. 6 (f) for loss on account of extension of CAR policy was rejected.

14. Claim No. 7 for a sum of Rs.1,73,23,152.39 on account of increase in labour wages was held to be justified and allowed in full. Claims 8 and 9 were rejected. Claim No. 10 was for reimbursement of difference in the Excise duty as increased during the currency of work from 12.24% prevailing on the date of submission of tender to 16.32%. The claim for Rs.5,95,495 on this ground was held justified and allowed in full. Claim No. 11 for Rs.15,43,973/- on ground of providing chicken wire meshes and grooves at Junction & Brick Wall Surfaces was held justified and allowed in full. Claim 12 (A) was for payment of cutting chases and making good after laying PVC conduit for electrical wiring instead of wooden batten wiring. The claim for Rs.18,96,537 was held justified and allowed in full.

15. Claim 12 (B) and 13 were rejected. Claim 14 for refund of amount deducted from the final bill was allowed to the extent of Rs.3,53,034. Claims Nos. 15 and 16 were rejected.

16. Claim No. 17 regarding refund of retention money withheld or reduced was allowed as follows: Rs.7,20,413 (withheld retention money); Rs.22,98,476 (interest on retention money). All five counter-claims of IRCON were rejected.

The present petition

17. It must be mentioned at the outset that against dismissal of its counterclaims, IRCON has not preferred a petition. It is stated in paragraph

4.11.1 of the present petition that IRCON is challenging the impugned Award only in respect of Claim Nos. 1, 2, 6(b), 8, 10, 11, 12(A) and 17.

18. This Court has heard the submissions of Mr. Chandan Kumar, learned counsel for IRCON and Mr. Y.P. Narula, learned Senior counsel for the Respondent.

No-Claim Certificate

19. One of the first objections raised by Mr. Chandan Kumar on behalf of IRCON is that after a no claim certificate ('NCC') was signed by the Respondent on 12th January 2010 no other claims, other than those reserved, survived. It is stated that under Clause 72.2.2 of the General Conditions of Contract ('GCC') disputes that were not referred to arbitration could not have been adjudicated upon. In doing so, the learned Arbitrator went beyond the scope of the reference. Reliance is placed on the decision of the Supreme Court in *State of Goa v. Praveen Enterprises (2012) 12 SCC 581* and *P.K. Ramaiah and Co. v. Chairman & Managing Director, National Thermal Power Corporation 1994 Supp. (3) SCC 126*.

20. In reply it is pointed out by Mr. Narula that under Clause 31 of the supplementary agreement all disputes and references of any kind whatsoever were to be referred for arbitration. Secondly, the reference to arbitration had been made by an order dated 1st May 2009 of the Court. There is no restriction in that order of the disputes that could be referred to arbitration. It included all the claims and counter claims. Thirdly, it is pointed out that the letter dated 9th June 2006 written by the competent authority of IRCON appointing the sole Arbitrator did not have any restriction as to the disputes

that should be referred to arbitration. By the time the learned Arbitrator entered upon reference the work had been completed. Reliance is placed on the decision *Rashtriya Ispat Nigam Ltd. v M/s. Prathyusha Resources & Infra Pvt. Ltd. AIR 2006 SC 891*. As regards the NCC the decision in *Ambika Construction v. Union of India 2006 Arb LR 288 (SC)* is referred to.

21. The learned Arbitrator has dealt with the above issue in some detail in para 6.5 of the impugned Award. As rightly noticed this Court has issued a direction to the Managing Director, IRCON not to restrict the scope of the reference to that contained in the letter dated 9th June 2006. In fact, it directed that the sole Arbitrator shall go into the claims and counter claims, if any, of the parties “in accordance with law”. The letter of appointment dated 8th March 2010 also requested the sole Arbitrator to undertake the adjudication of the disputes/claims of the Claimant and the counter claims of Respondent, if any, under the Arbitration and Conciliation Act, 1996 and as per the relevant clauses of the contract/agreement between the parties. As rightly held by learned Arbitrator if the intention was to restrict the arbitration to the claims of the Petitioner, as noted in the letter dated 9th June 2006, the question of referring the counter claims of IRCON also to arbitration would not arise. More importantly it was noted by the learned Arbitrator that more than 60% of the work was executed during the period of two years after the above letter was issued. Specifically, it was noted that the claim has “added only those claims and amounts that could arise during the intervening period.”

22. The above reasoning and conclusion of the learned Arbitrator appears to be consistent with the evidence placed on record in the form of correspondence between the parties. The Court finds no reason to interfere with the said conclusion. The Court, therefore, negatives the plea of IRCON that after the NCC was issued on 12th January 2010 no other claim, other than those reserved, could have survived.

Challenge to the Award on merits

23. Mr. Chandan Kumar assailed the allowing of Claim No.1 regarding payment for the extra work in clearing the site of jungle and vegetation. In terms of the NCC, according to IRCON, this was not a claim referred for arbitration. Further the allowing of Claim No.1 was contrary to the contract. Reliance is placed on the decisions in ***General Manager, Northern Railway v. Sarvesh Chopra (2002) 4 SCC 45*** and ***Shyama Charan Agarwala and Sons v. Union of India (2002) 6 SCC 201*** both of which have held that if an Award is made plainly contrary to the terms of the contract it would lead to an inference that there is an error apparent on the face of the Award.

24. Mr. Narula, on the other hand, points out that as against Rs.7,64,740 claimed under Claim No.1, the Arbitrator awarded only Rs.6,18,673 after proper application of mind and consistent with the clauses of the contract.

25. The Court would first like to preface its discussion of the above submissions with the settled legal position as regards interference by the Court with an arbitral Award in exercise of its powers under Section 34 of the Act. In ***Maharashtra State Electricity Board v. Sterlite Industries (India) (2001) 8 SCC 482***, it was observed as under:

“that unless the error of law sought to be pointed out by the learned counsel for the petitioners in the instant case is patent on the face of the award, neither the High Court nor this Court can interfere with the award. The exercise to be done by examining clause 14 (ii) of the contract entered into between the parties, construing the same property and thereafter applying the law to it to come to a conclusion one way or the other, is too involved a process and it cannot be stated that such an error is apparent or patent on the face of the award. Whether under the context of the terms and conditions of a contract, a stipulation in the form and nature of clause 14(ii) operates as a special provision to the exclusion of Section 73 of the Indian Contract Act is a matter of appreciation of facts in a case, and when the decision thereon is not patently absurd or wholly unreasonable, there is no scope for interference by courts dealing with a challenge to the award.”

26. In *P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H. Securities Limited (2012) 1 SCC 594*, it is observed as under:

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act.Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

27. In the present case, it is seen that the learned Arbitrator has not allowed the entire claim for the work of jungle clearance. As against the claim of Rs.7,64,740, the learned Arbitrator awarded Rs.6,18,673. The plea of IRCON that the jungle clearance was covered by Items 76 and 81 of the BOQ and, therefore, was not extra work was negated by the learned Arbitrator.

28. It is contended by Mr Chandan Kumar that Clause 56(i) and Clause

3.7(b) of Section III (Zone C) of the SCC ought to have been referred to. It is seen that such a plea was not taken before the learned Arbitrator. in the arbitration proceedings itself. There is also merit in the contention of Mr Narula on the strength of the decision in *Narayan Prasad Lohia v. Nikunj Kumar Lohia (2002) 3 SCC 572* that such a plea cannot be taken for the first time in a petition under Section 34 of the Act if it is not earlier raised before the learned Arbitrator.

29. The learned Arbitrator after examining the documents found that “the details of work done has been elaborated and established. It is also clear that jungle clearing over an area of 66,129.90 sq.m. has been done by the claimant. The respondent has not made payment for this work...” The Court finds that the learned Arbitrator has applied his mind to the question raised regarding payment for extra work in clearing the site of jungle and vegetation. This is a factual determination which the Court does not find to be perverse or shocking to the judicial conscience.

30. For all the aforementioned reasons, the Court finds no ground has been made out for interference in respect of Claim No.1.

31. Claim No.2 was for the payment of difference in the price of TMT bars against HYSD bars on the ground that they were not part of the BOQ. This aspect of the matter has been dealt with by the learned Arbitrator in para 7.2.5 of the impugned Award. The learned Arbitrator has found that Clause 20 of the contract would apply and the rate of TMT bars would have to be calculated in terms thereof. It was held that replacing ‘deformed’ bars with TMT bars is a change of item. Therefore, the rate payable for the TMT bars

was found correctly payable. Here again, the Award is based upon proper analysis of clauses of the contract and does not warrant the Court sitting in appeal over such finding only to come to a different conclusion on the same evidence. Consequently, the Court rejects the challenge to the impugned Award in respect of Claim No.2.

32. As far as Claim 6(b) is concerned, this was on account of loss due to idle plant and machinery. Against the claimed amount of Rs.1,72,53,924 the amount awarded was Rs.66,36,124. The learned Arbitrator found that it was IRCON which was responsible for the inordinate delay in the completion of the work.

33. It is submitted on behalf of IRCON on the basis of Clause 49.5 of the GCC that the learned Arbitrator could not have awarded the said sums on whims and fancies. It is pointed out, and in view of the Court rightly, on behalf of the Respondent that neither Clause 59 nor Clause 49.5 would apply. Even in the absence of escalation clause, the claim in respect of idle plant and machinery was rightly allowed in favour of the Respondent by the learned Arbitrator. The decisions in ***K.N. Sathyapalan v. State of Kerala (2007) 13 SCC 43*** and ***M/s. Simplex Concrete Piles (India) Ltd. v. Union of India*** (judgment dated 23rd February 2010 in CS (OS) No. 614A/2002) support the case of the Respondent in this regard. No interference is called for with the Award in respect of Claim 6(b).

34. Claim No. 7 was for reimbursement of statutory increase and labour charges. The central ground of challenge as far as this claim is concerned is that the increase in labour rate was not due to statutory variation or

imposition of new levy. It was due to increase in the rate and there was no proof provided by the Respondent to justify its reimbursement. In reply it was pointed out that the Respondent was entitled to statutory increase in rate in view of Clause 18 of the Special Conditions of Contract ('SCC') which provided as under:

“However any statutory variation in and/or fresh imposition of such levies/taxes relevant to this contract shall be reimbursed by the employer after submission of documentary evidence by the contractor and verification of the same by the engineer.”

35. In fact in para 7.7.2 of the impugned Award the learned Arbitrator has recorded that IRCON did not dispute the entitlement of the Contractor on the ground of statutory variation in labour charges and increase thereof. the Court finds no merit in the objection as regards the Award in respect of Claim No. 7.

36. Under Claim No. 10, the Respondent claimed Rs.15,95,495 towards reimbursement of excise duty increase. A detailed explanation has, been offered by the Respondent that the increase in excise duty was claimed on the basis of a special condition mentioned in para 18 of the contract agreement filed before the learned Arbitrator. Further the Court finds that there is a factual finding of the learned Arbitrator in para 7.10.4. There is no denial of the fact that the excise duty in fact stood increased. The learned Arbitrator has given detailed reasons why the claim was essentially about the reimbursement of the additional duty paid. The Respondent had submitted the relevant documents regarding the said reimbursement. It is in those facts and circumstances that the learned Arbitrator found that the

Respondent was entitled to Rs.15,95,495. The Court is unable to be persuaded to hold that the finding by the learned Arbitrator as regards Claim No. 10 suffers from any legal infirmity warranting interference under Section 34 of the Act.

37. Claim No. 11 was for extra work for providing Chicken Wire Mesh and Grooves Junction of RCC and Brick Wall Surface. According to Mr. Chandan Kumar, this was against the terms of the contract. This was not a claim reserved or referred to the learned Arbitrator. Clause 20 of the contract has been applied by the learned Arbitrator as these items were considered to be a new item. This factual finding in fact has not been challenged.

38. Claim No. 12 (A) was for payment of cutting chases and making good after laying PVC conduit for electrical wiring instead of wooden batten wiring. The amount claimed was RS.18,96,537. As noted in the impugned Award, IRCON had not challenged the said claim when arguments were advanced. The inconsistent stand of IRCON is evident from the fact that the bills raised during the progress of the work for this item were paid up to a certain stage i.e. till the 49th RA bill but stopped thereafter. This was without rational basis. Here again, the Court is unable to find any legal infirmity in the reasoning or conclusion of the learned Arbitrator.

39. Claim No. 17 relates to refund of retention money. The learned Arbitrator has discussed the relevant clauses and returned a factual finding in favour of the Respondent which is not shown to be perverse or shocking to the judicial conscience.

40. For all of the aforementioned reasons, the impugned award is upheld and the petition is dismissed with costs of Rs. 20,000 which will be paid by IRCON to the Respondent in four weeks' time.

S. MURALIDHAR, J

APRIL 13, 2017

rd/dn

