

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

Reserved on: 12.07.2017
Pronounced on: 25.07.2017

+ **FAO (OS) (COMM) 136/2016, C.M. APPL.44278/2016**

GREAT EASTERN ENERGY CORPORATION LIMITED

..... Appellant

Through: Sh. Gopal Jain, Sr. Advocate with Sh. Aseen
Chaturvedi and Ms. S. Agrawal, Advocates.

Versus

UNION OF INDIA

..... Respondent

Through : Sh. S. Sharma with Sh. K.R. Sasiprabhu,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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1. The unsuccessful petitioner in a proceeding under Section 34 of the *Arbitration and Conciliation Act, 1996* (hereafter “the 1996 Act”) appeals against the judgment of a learned Single Judge which affirmed the arbitration award.

2. The facts are that in 1992, the respondent Union expressed interest in allowing private participation in exploitation and development of Coal Bed Methane (CBM). Modi McKenzie Methane Limited, the predecessor of the appellant (hereafter referred to as “the Great Eastern Energy Corporation Ltd.” or “GEEC”), who was interested in conducting that business and

sought approval for its participation. The Union granted the approval on 28.12.1992; resultantly, the parties entered into a Memorandum of Understanding (MoU). The agreement contained a condition which is the bone of contention in these proceedings – as it was before the Tribunal, i.e. Clause 15.1(b) that required Great Eastern Energy Corporation Ltd. (GEEC) to deposit a one-time lump sum Signature Bonus. The condition read as follows:

“15.1(b) A fixed one time lump sum signature bonus of United States Dollars zero point three (US\$0.3) million is payable by the Company. Rs. One (1) crore of signature bonus already paid by GEECL to Coal India Limited will be adjusted against the signature bonus of United States Dollars zero point three (US\$0.3) million payable by GEECL to the Government on the date of signing of the Contract as per the exchange rate applicable on that date.”

3. GEEC had, in the meanwhile, paid ₹1 crore to Coal India Limited on 27.01.1994. The formal contract was executed on 31.05.2001. According to the petitioner, the Signature Bonus stood paid, payable in terms of clause 15.1(b) had been satisfied at the time it paid ₹1 crore. The Union disputed the GEEC's contention, saying that ₹1 crore paid on 27.01.1994 did not set-off the amount payable under Clause 15.1(b) entirely and that in terms of the exchange rate prevailing on 31.05.2001, the balance, i.e. US\$ 0.3 million worked out to ₹1.41 crore, thus rendering GEEC liable to pay ₹41 lakhs after adjusting ₹1 crore paid under the MoU. Since the disputes could not be resolved by parties through mutual settlement, a reference was made to arbitration, i.e. a three-member tribunal, after considering the rival contentions concluded as follows:

“With reference to Article 15.1(b) the Signature Bonus of US\$ 0.3 million will be payable by the company and a sum of Rs.1 crore of Signature Bonus already paid to Coal India Limited will be adjusted against Signature Bonus and 0.3 million US\$ payable to the Government on the date of signing of the contract as per exchange rate applicable on that date.”

4 GEEC moved the Tribunal under Section 33 of the Act, contending that an alternative plea with respect of set-off of interest accrued upon ₹1 crore deposited by it in the year 1994 had not been taken into consideration. This application was rejected by the Tribunal on 12.05.2014. The award was challenged under section 34 of the Act.

5. GEEC urged that having regard to the dictionary meaning of the term “adjusted”, the US\$ 0.3 million, according to the understanding of the parties, was the equivalent value on the date of the MoU. GEEC further contended that the Union, as a result, could not demand the balance payment though the expression “Signature Bonus” signified that it had to be paid before the signing of the contract. It was urged that the Tribunal’s view, was patently unreasonable and contrary to the contract and required interference. The impugned judgment firstly noted that the Tribunal’s interpretation of the contract falls within the exclusive domain – for which purpose it relies upon *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India* 2010 (11) SCC 296; *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* 2012 (5) SCC 306 and *Mcdermott International Inc. v. Burn Standard Co. Ltd. and Ors.* 2006 (11) SCC 181. Learned Single Judge held that the challenge under Section 34 of the Act was untenable because the Tribunal’s view was a plausible one.

6. Sh. Gopal Jain, learned senior counsel reiterated the grounds urged in support of the appeal and contended that the impugned judgment fell into error in not considering that the figure of US\$ 0.5 million corresponded with ₹1 crore in terms of the MoU dated 15.12.1993 and that it was not a whimsical number. This amount was paid on 27.01.1994. Consequently, there was no question of further payment as held by the Tribunal. It was further argued that the receipt of ₹1 crore was accepted without demur and that the Union was precluded from demanding any amount on an alleged interpretation that balance sums were payable. It was also contended that the learned Single Judge completely overlooked that the Tribunal did not adduce any reason towards dismissal of the application under Section 33.

7. Learned senior counsel argued that in upholding the award of interest @ 18% per annum on the amount too, the Tribunal fell into grave and patent error which called for interference. Here, learned senior counsel submitted that several judgments of the Supreme Court have uniformly ruled that with the fall in the interest rates, the award of very high rates of interest would be unrealistic and would amount to unjust enrichment. In support of this submission, learned senior counsel relied upon *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy* 2007 (2) SCC 720; *Rajasthan SRTC v. Indag Rubber Ltd.* 2006 (7) SCC 700; *Rajendra Construction Co. v. Maharashtra Housing and Area Development Authority* 2005 (6) SCC 678; *Flex Engineering Ltd. v. Antarctica Construction Company and Anr.* 2007 (96) DRJ 90; *Mukand Ltd. v. Hindustan Petroleum Corporation Ltd.* 2006 (9) SCC 383; *MMTC v. Al Bamar Company Ltd.* 2009 (110) DRJ 236 (DB); *B.L. Gupta Construction (P) Ltd. v. Bharat Cooperative Group Housing*

Society Ltd. 2004 (1) SCC 110 and National Highways Authority of India v. Agrawal-JMC (JV) 2011 SCC Online Del 3365.

8. Replying to objections on behalf of the Union, it was argued, that the application under Section 33 of the Act in this case had the effect of extending the time available for challenging the award under Section 34 and that in these circumstances, the objection as to limitation was baseless. Learned senior counsel also highlighted that even though GEEC approached the Tribunal within the time provided for the purpose under Section 33 application, the Tribunal dealt with and rejected it on 12.05.2014. In these circumstances, GEEC had no control over the time spent for the consideration of the application.

9. Learned counsel for the respondents urged that given the circumscribed jurisdiction of this Court under Section 34, it cannot be said that the impugned judgment overlooked the patent illegality, and upheld the award. Learned counsel argued that whereas the condition, i.e. Clause 15.1(b) recognized that ₹1 crore already paid could be adjusted, nevertheless it did contemplate that the balance amount, i.e. between the equivalent of US\$ 0.3 million and ₹1 crore was payable by GEEC – a condition it failed to fulfill. The view expressed by the Tribunal was a plausible one which meant that there was no patent illegality. Furthermore, learned counsel argued that the view of the learned Single Judge that the interpretation of the contract fell within the domain of the arbitrator is supported by settled authority. Learned counsel lastly argued that even if the application under Section 33 for correction/rectification was made within the time stipulated, the unduly long period of more than two years and three months taken by the Tribunal

in disposing it of rendered its order a nullity and consequently the petition under Section 34 was time barred.

10. It was lastly argued that so far as the interest is concerned, the statute, i.e. Section 31(7) of the Act recognizes that in the event of silence in an award, default interest @ 12 % per annum is payable. In the absence of any prohibition in law restricting the Tribunal's power from awarding interest @ 18% per annum, the fact that in certain cases the Court exercised discretion to alter it did not mean that the award is not based on any sound principle or patently illegality.

11. The scope of this appeal thus is confined to consideration of two aspects:

(1). Whether the Tribunal's view with respect to payment of Signature Bonus is patently illegal or manifestly unreasonable as alleged by GEEC and;

(2). Whether the award @ 18% per annum is untenable as being contrary to law and, therefore, being illegal.

12. So far as the first aspect is concerned, the Court notes that all the salient facts, i.e. the signing of the MoU on 15.12.1993; payment of ₹1 crore on 27.01.1994 and the signing of the contract on 2001 were noticed in the proceedings; they were also taken into account by the learned Single Judge. The award was conscious of the fact that clause 15.1(b) itself mandated adjustment of ₹1 crore. The Tribunal thus noted that the parties were agreed that if any amounts remained outstanding after the adjustment, that became payable by GEEC. This interpretation was premised upon the exchange rate

prevailing as on a particular date. As opposed to this, GEEC urged that US \$ 0.3 million as on 15.12.1993 itself was equivalent to ₹1 crore and that consequently no amount was payable. It was also urged that there was no question of paying Signature Bonus twice over. The learned Single Judge held that the view of the Tribunal is a plausible one and, therefore incapable of interference under Section 34. He also took note of various authorities to say that the decision of the Tribunal on the interpretation of contract falls within its exclusive jurisdiction. This Court sees no ground to interfere with the learned Single Judge's reasoning on that score at all. The interpretation of contract is a matter falling within jurisdiction of a Tribunal; the award is incapable of scrutiny as regards the interpretation. If, however, the interpretation leads to a condition or liability un contemplated by parties, the Court can intervene under Section 34. Here, the Court sees no reason or legal principle to interfere with the award.

13. As far as the second aspect, i.e. the rate of interest @ 18% is concerned, this Court notices that GEEC has relied upon several authorities where the courts took into account a drop in the rates of interest in the light of lowering of lending rates of public banks, to alter the arbitral awards.

14. Those authorities, in the opinion of this Court, cannot be construed as laying a general principle that any interest above the prime lending rates or rates offered on deposits by the public banks would *per se* be "unreasonable". There is no prohibition in law nor was one shown to the Court during the hearing which curtails the arbitrator's discretion to award interest. After all, money withheld in the course of a commercial conduct, has a negative impact in terms of restricting access to capital to the one

entitled to it and in some cases even forces the creditor to resort to borrowing upon payment of commercial interest. In recognizing this, the Tribunal awarded interest keeping in mind market conditions, the prevailing economy and other considerations. A straitjacket formula such as one indicating a cap on the arbitrator's discretion based upon bank rates (unless) agreed upon by the parties in the contract or arbitration agreement cannot be termed as illegal.

15. For the above reasons, the appeal has to fail and is dismissed.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

JULY 25, 2017

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