

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

ARBITRATION PETITION NO. 5 OF 2015

Mahanagar Telephone Nigam Ltd.	...Petitioner
vs	
M/s.Jaya Intercom Corporation	...Respondent

Mr.Niranjan Shimpi for Petitioner.
Mr.Ramesh Ramamurthy with Saikumar Ramamurthy for Respondent.

CORAM : S.C.GUPTE, J.

DATE : 25 FEBRUARY 2019

P.C. :

This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of a construction contract between the Respondent contractor and the Petitioner employer.

2 The contract was for the work of construction of underground cable ducts at two places, i.e. Navghar Road and Datar colony in Mumbai. It was the case of the Respondent contractor that though, as per the contract, the stipulated date of completion was 13 November 1999, permission to start the work could not be obtained for no fault of the Respondent; permission for part of the work could not be obtained as the location was in dispute between the Railway authorities and the Municipal Corporation of Greater Mumbai, whilst for the other part, permission could not be obtained due to non-availability of road to lay the duct in spite of efforts by both parties. The Respondent had, in the premises, asked for extension of time, putting the Petitioner to notice that compensation would be claimed for extended period of contract. The Petitioner duly paid RA

bills of the Respondent upto 15 March 2004. Finally, on 26 March 2004, the work was completed and handed over to the Petitioner. On 25 July 2005, the final bill raised by the Respondent was partly paid by the Petitioner. Just before this payment, a notice was issued by the Chief Engineer of the Petitioner, imposing liquidated damages for delay in the sum of Rs.15,810/-. Since the Respondent's claims were not fully paid by the Petitioner, the Respondent finally, by its letter dated 2 April 2008, invoked the arbitration agreement forming part of the contract. That is how the disputes were referred to the learned arbitrator.

3 The learned arbitrator, by his impugned award, allowed three claims of the Respondent contractor, namely, claim no.1 for compensation for underutilisation of overheads, such as engineer, supervisor, watchman, etc. partly in the sum of Rs.6,81,070/, claim no.2 for compensation for underutilisation of labour due to overstay at site partly in the sum of Rs.1,38,391.50 and claim no.8 for escalation under clause 10(C) of clauses of contract partly in the sum of Rs.9,20,679/-. The arbitrator awarded interest on all three claims at the rate of 10% per annum from the date of handing over of the work and until the date of payment. This award is challenged by the Petitioner on several grounds.

4 Learned Counsel for the Petitioner, in the first place, submits that the Respondent's claim was barred under the provisions of clause 25 of clauses of contract. Relying on the stipulation in clause 25(a), which *inter alia* requires the contractor to make a demand in writing for arbitration within 90 days of receipt of intimation about readiness of the final bill for payment and discharge of the employer and its release from all liabilities

under the contract in respect of claims for which such demand is not made by the contractor within 90 days. Learned Counsel submits that for none of these claims the arbitration clause was invoked within 90 days and as such the claims were barred under clause 25(a). The learned arbitrator did not accept the Petitioner's contention and instead, proceeded on the basis of statutory limitation of three years from the date of finalisation of the final bill for raising of these claims. It is not in dispute that the final bill was finalised and paid on 25 July 2005, whereas the arbitration agreement was invoked by the Respondent contractor on 2 April 2008. Though there is no discussion in the impugned award and it is by no means clear whether this particular submission based on clause 25(a) was actually made before the learned arbitrator at the hearing, it cannot possibly be argued after the amendment of Section 28(a) of the Contract Act, 1872 by Act of 1 of 1997 with effect from 8 January 1997, that a clause, such as clause 25(a) in the present case, could actually have the effect of barring any claim or discharging the counter-party. Every agreement extinguishing the rights of any party thereto or discharging any party thereto from any liability under or in respect of any contract on the expiry of a specified period or restricting any party from enforcing his rights, is void to that extent. A clause, such as clause 25(a) of the Contract Act, is thus clearly void under amended Section 28 and no argument can possibly be based on the strength of such clause for barring the contractor from enforcing his rights under the contract.

5 Learned Counsel for the Petitioner relies on Exception 1 to Section 28 in this behalf. Relying on this exception, it is submitted that an agreement of arbitration along with all its clauses would be saved from the

main provision of Section 28. That is not quite correct. Section 28, by reason of Exception 1, does not have the effect of rendering illegal any contract of arbitration. In other words, to the extent the arbitration agreement provides for a reference to arbitration and any amount awarded in such arbitration being the only recoverable amount in the dispute, such agreement is saved and is not prohibited by Section 28. That, however, does not mean that all subsidiary clauses of such arbitration agreement including a clause providing for relinquishment of rights and discharge of liability after expiry of a specified period, which is expressly prohibited under clause (b) to Section 28, must also be given the protection of the saving clause in Exception 1. The arbitrator, having correctly proceeded on the basis of limitation of three years available to the Respondent contractor under the Limitation Act, has reasonably and correctly applied the statute of limitation for adjudication of claims and no fault can be found with the same.

6 In particular reference to the award on claim no.1, learned Counsel for the Petitioner submits that the award is based on no evidence. It is submitted that costs of one supervisor and two watchmen-cum-storekeepers for watch and ward of materials during the extended period of contract of 52.39 months is purely a matter of speculation. Learned Counsel for the Respondent, on the other hand, refers to clause 36 of the contract, which provides for the contractor's liability to provide at least one Engineer during the execution of the work and for a penalty if such Engineer is not available at site. The learned arbitrator appears to have proceeded on the basis of the claimant's obligation to maintain a skeletal staff at the site of work during the extended period of contract. Though the

arbitrator's claim in respect of a supervisor and two watchmen-cum-storekeepers for watch and ward of materials appears to be a pure speculative matter without there being any material to support it, so far as the cost of Engineer at the rate of Rs.4000/- per month is concerned, the same cannot be faulted, since, admittedly, there is a duty on the part of the contractor to keep engaged one Engineer all the time at site and non-engagement attracts a penalty under clause 36. It is not claimed by the Petitioner employer that at any time during the execution of the contract including its extended period, no such Engineer was engaged by the Respondent contractor or that the Respondent was liable to pay any penalty in respect of such non-engagement. That being the case, costs of an Engineer, taken at a modest Rs.4000/- per month, during the extended period of contract cannot be faulted as an impossible view, though the costs of supervisor and watchmen can be termed as supported by no evidence. Since the cost of Engineer is clearly severable from the costs of maintaining a supervisor and watchmen-cum-storekeepers, this part of the award can be modified so as to exclude the costs of supervisor and watchmen from the compensation awarded by the learned arbitrator.

7 In particular reference to claim no.2 partly awarded by the arbitrator, learned Counsel for the Petitioner submits that even this award is based on no evidence. It is apparent from the award that the Respondent contractor had produced evidence in the form of vouchers covering a total expense of Rs.9,22,610/- towards labour charges. There being some evidence, and its acceptance being a matter exclusively within the authority of the arbitrator, the estimation of compensation of about 15% of the amount of Rs.9,22,610/- appears to be a possible view of the material

placed by the parties before the arbitrator. No serious fault can be found with this assessment within the parametres of the law of challenge to an arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996.

8 Coming now to the award on escalation under clause 10(C) (claim No.8), partly awarded in the sum of Rs.9,20,679/-, it is firstly submitted by learned Counsel for the Petitioner that this claim was clearly barred even under the ordinary statute of limitation. It is submitted that the claim was made for the first time on 22 January 2009 and thus even if one were to take the date of finalization of the final bill (which was on 25 July 2005) as the start date for limitation, the claim was beyond time. It may be noted at the outset that the Petitioner never contested this particular claim on the ground of bar of limitation. The Respondent's statement of facts on additional claim No.8 (pages 261 to 264 of the petition herein) and the Petitioner's reply thereto (pages 293 and 294 of the petition) make this very clear. There being no issue of limitation raised in this behalf, and limitation being a mixed question of law and facts, it cannot be urged for the first time before the challenge court. Even otherwise, it is possible to say that the dispute concerning losses suffered by the Respondent on account of extended period of work, of which claim no.8 is a part, were claimed and made part of the invocation notice generally. (See, invocation notice of 2 April 2008 read with contractor's demands of 28 October 1999 and 2 November 2001.)

9 The main objection by learned Counsel for the Petitioner on merits of this claim is that since, in this particular case, there was no

extension of time by the Engineer and since, on the other hand, compensation was charged by the Engineer on account of delay under clause 2, escalation under clause 10(C) was not payable. Learned Counsel submits that the Chief Engineer's decision on the amount of compensation to be charged for failure to complete the contract work within time is to be final and binding. Learned Counsel submits that the Engineer has charged compensation at 0.25% of the tender amount in the sum of Rs.15,810/-. Learned Counsel, in the premises, submits that on the express terms of Clause 10(C), no compensation on account of escalation was payable to the contractor thereunder. The learned arbitrator has, in the first place, come to a categorical finding, such finding being a pure question of fact, that the Respondent contractor was not responsible for any delay in completion of the work and that levy of compensation or penalty under clause 2 by the Chief Engineer was, in the first place, incorrect. Apropos of the Engineer's exclusive right to determine the compensation on account of liquidated damages under clause 2, the learned arbitrator held that though quantum of such compensation was a matter exclusively within the authority of the Chief Engineer, his decision on whether or not the work was delayed and if so, who was responsible, could not be said to be an excepted matter where his decision is final. That appears to be a possible view of the contract in the present case. On a fair and reasonable reading of clause 2, it would appear that what is final and binding is the Chief Engineer's decision on whether the amount of compensation equal to 1% of the contract value per week during which the work was not completed or any smaller amount as may be decided by the Chief Engineer. It does not imply that the factum of delay as well as determination of responsibility for such delay are matters only for the Chief Engineer to decide and in that sense, excepted matters.

The arbitrator also considered the fact that the Respondent contractor had applied for extension twice in writing but that these applications were neither rejected nor accepted by the Engineer or the Petitioner employer. Since, however, the Respondent was clearly allowed to do further work and was not put to notice that any compensation would be recoverable from him on account of this delay till the date of actual completion of work and handing over of the site by the Respondent, the Petitioner, according to the learned arbitrator, should be deemed to have accepted the former's request of extension till the date of completion of work, i.e. till 26 March 2004. The arbitrator, in the premises, did not find favour with the Petitioner's initiation of action under clause 2 about 14 months after the site was handed over by the Respondent upon completion of work. It is not in dispute that this action of levying compensation towards LD charges was initiated by the Petitioner for the first time on 20 May 2005, i.e. after 14 months of completion of work and handing over of site. Once again, the arbitrator's views in this behalf can be said to be possible views. The views are based on a reasonable construction of the suit contract; they are supported by some evidence; they cannot be described either as views based on no evidence or an unreasonable and perverse construction of the suit contract. These cannot be termed as views, which no fair or judiciously minded person could have taken or views that would shock the conscience of the court. Accordingly, these do not merit any interference under Section 34 of the Arbitration and Conciliation Act, 1996.

10 Accordingly, the arbitration petition partly succeeds. The impugned award dated 18 March 2014 is set aside to the extent it allows claim no.1 in the sum of Rs.4,71,510/- as costs of one supervisor and two

watchmen-cum-storekeepers. The rest of the award is sustained. The stipulation of interest on claim no.1 also shall stand modified accordingly.

(S.C. GUPTE, J.)