

\$IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 08.09.2021

+ **O.M.P.(COMM.) 12/2021**

OIL INDIA LIMITED

..... Petitioner

versus

TECHNO CANADA INC.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Tarun Gulati, Senior Advocate with Mr
Ashutosh Kumar and Mr Kumar Sambhav,
Advocates.

For the Respondent : Mr Vikram Nandrajog, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. Oil India Limited (hereafter 'OIL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning an arbitral award dated 01.09.2020 (hereafter 'the impugned award') rendered by an Arbitral Tribunal comprising of a Sole Arbitrator.

2. The respondent (hereafter 'TCI') is an entity incorporated under the laws of Canada and thus, the impugned award was rendered in an

International Commercial Arbitration within the meaning of Section 2(1)(f) of the A&C Act. Concededly, the ground that an arbitral award is vitiated by patent illegality, as set out in Section 34(2A) of the A&C Act is not available to OIL for setting aside the impugned award. It is OIL's case that the impugned award is in conflict with the public policy of India, to the extent that it allows TCI's claims, and therefore, is liable to be set aside in terms of Section 34(2)(b)(ii) of the A&C Act.

3. OIL's challenge to the impugned award rests primarily on its contention that the claims raised by TCI are barred by limitation and the conclusion of the Arbitral Tribunal to the contrary, is manifestly erroneous. According to OIL, the impugned order is in contravention with the fundamental policy of Indian law on account of this error.

Factual Background

4. In May 2014, OIL issued a notice inviting bids for hiring of production testing services for exploratory wells in NELP-VI Block (MZ-ONN-2004-1) in Mizoram. TCI submitted its offer and by a Letter of Award (hereafter the LOA) dated 13.10.2014, OIL awarded the contract to TCI. Thereafter, on 26.02.2015, the parties entered into a formal agreement captioned "*Contract No.: 6205782 for Hiring of Production Testing Services for Exploratory Wells in NELP-VI Block (mz-onn-2004-1) in Mizoram*" (hereafter 'the Agreement').

5. Pursuant to the LOA, OIL issued a notice dated 21.10.2014 calling upon TCI to mobilise its resources at the specified site (Well Aibawk-1 at Location MZ-3) by 28.01.2015 (the Mobilisation Notice).

6. OIL had entered into an Agreement as it was desirous of availing certain services described as “*Surface Production Testing services, Well Activation/Stimulation/Killing services (using coiled tubing unit & nitrogen pumping unit), Tubing conveyed Perforation service and Slickline service (for bottom-hole PVT sampling and bottom-hole pressure & temperature survey*”.

7. The term of the Agreement was for a period of one year extendable for an additional period of one year at the option of OIL. In terms of the Agreement, its duration was to be reckoned from the commencement date till the date of completion of the Well Testing Operations and/or upon issue of the Demobilization Notice by OIL.

8. The total contract price was agreed at USD 4,952,800/-.

9. On 06.01.2015, OIL sent an e-mail requesting TCI to defer mobilisation of equipment till 15.03.2015. OIL also indicated that the delay was on account of ‘slow drilling progress’. TCI responded by an e-mail dated 08.01.2015 informing OIL that it was accepting the delay in mobilisation by diverting the consignment and, holding it at various en-route locations. However, TCI also put OIL to notice that the said exercise was costing it demurrage for holding of the said units at various locations.

10. On 30.01.2015, TCI sent a communication, *inter alia*, stating that it would need clear hundred days for mobilisation from the “Final OIL Approved Mobilisation Notice”. This was considering that only sixty-eight days were available for mobilisation after OIL’s notice dated

06.01.2015 requiring TCI to defer the same. Apparently, this was not accepted by OIL and by its e-mail dated 06.02.2015, it called upon TCI to confirm the arrangement for mobilisation in accordance with the contract between the parties “as already notified”.

11. TCI responded by its letter dated 09.02.2015 highlighting that it had initiated mobilisation of equipment in November, 2014 after receiving OIL’s e-mail dated 21.10.2014. However, on account of the notice dated 06.01.2015 requiring TCI to defer mobilisation, it had diverted the equipment in transit to its yard/ base at Barmer, Rajasthan. TCI sought a clear approval from OIL that it would again initiate equipment mobilisation so that TCI could complete the mobilisation of equipment within 100 days in terms of their contract.

12. On 10.02.2015, OIL sent an e-mail revising its earlier request to complete mobilisation by 15.03.2015 and further, deferring the completion of mobilization to 15.04.2015. It is apparent from the said e-mail that the request for further deferment was made on reviewing the situation of the concerned Well and OIL’s estimate that drilling upto the target depth would be completed by the first week of April, 2015 and the same could be handed over for production testing by 15.04.2015.

13. According to TCI, OIL did not provide sufficient site/facilities for storage and installation of the equipment even after 15.04.2015.

14. The mobilisation was completed on 08.06.2015. Although, initially, OIL claimed that the mobilisation was not complete till

22.06.2015, however, it subsequently accepted that TCI had completed the mobilisation by 08.06.2015

15. On 22.10.2015, OIL issued a notice requiring TCI to demobilise on an interim basis (Interim Demobilisation Notice). And, on 31.03.2016, OIL issued a notice requiring TCI to remobilise the resources (Interim Remobilisation Notice) between 15.05.2016 to 29.05.2016. In the meanwhile, TCI requested payment of Monthly Rental Charges (MRC) in respect of certain items for the period after the Interim Demobilization Notice, which was denied. The same was not acceptable to TCI, and therefore, by a notice dated 06.04.2016, it informed OIL that disputes had arisen which were required to be settled as per the provisions of the contract.

16. Since OIL did not pay the MRC for certain equipment during the period from 23.10.2015 to 29.05.2016, TCI raised invoices for the same. On 06.04.2016, TCI issued a notice requesting OIL to clear the outstanding MRC from October, 2015 failing which it would refer the disputes for Conciliation by an 'Outside Expert Committee'. Since the amounts claimed were not settled, by a letter dated 20.06.2016, the said disputes were referred to the Outside Expert Committee.

17. On 20.08.2016, OIL issued a notice to TCI to carry out final demobilization from Well (Aibawk-1 at Location MZ-3), which would be effective from 12 noon on the said date. It called upon TCI to clear the site within a period of ten days thereafter.

18. The Outside Expert Committee submitted its recommendations on 14.12.2016. It recommended that a sum USD 233,570 plus service tax be paid by OIL to TCI, being 70% of the amount claimed by it in full and final settlement of its claims.

19. The said recommendations were rejected by OIL by its letter dated 12.10.2017.

20. According to OIL, there was a delay of one week in remobilization of the equipment and resources in terms of the Remobilisation Notice dated 31.03.2016. On account of this delay, OIL levied and recovered a sum of USD 24,764 as liquidated damages computed at the rate of 0.5% of the contract amount including mobilisation charges.

21. On 12.04.2018, TCI issued a notice requesting OIL to refer the disputes to arbitration. Pursuant to the aforesaid notice, OIL appointed the learned Arbitrator – Justice (Retired) Deepak Verma, former Judge of the Supreme Court of India – to adjudicate the disputes between the parties. TCI accepted the appointment.

22. TCI filed its Statement of Claims before the Arbitral Tribunal inter alia claiming an aggregate amount of USD 2,934,064/- (as Claim No.1) on account charges payable for the period commencing 28.01.2015. TCI claimed that it had taken the steps for mobilisation of equipment pursuant to the Mobilisation Notice dated 24.10.2014. And, but for OIL's request to defer the same, it would have completed the mobilisation by 28.01.2015. TCI claimed that OIL was liable to pay the

Standby Date Rates (SDR)/Monthly Rental Charges (MRC) for certain Schedule of Rates (SOR) items, in terms of the Agreement. TCI further claimed costs for loading and transportation of equipment up to 06.01.2015, transportation to the storage yard (at its Base) and unloading of the equipment at the said yard as well as GST at the rate of 12%.

23. TCI further prayed for USD \$373,707/- towards payment of MRC for Interim Demobilisation Period from 23.10.2015 to 29.05.2016 at the rate of USD \$45,500 per month (Claim No. 2). TCI also sought refund of USD \$21,000/- (revised from USD \$24,764), which was deducted towards liquidated damages for the alleged delay of one week in remobilization, at the rate of 0.5% of the total contract amount (Claim No. 3).

24. In addition, TCI also claimed establishment cost amounting to USD \$1,00,000/- (Claim No. 4) and USD \$1,00,000/- towards damages (Claim No. 5). It also sought interest on the awarded amount at the rate of 10% per annum from 01.04.2016 till the date of invocation of the arbitration as well as *pendente lite* and future interest at the rate of 10% per annum on the amounts claimed (Claim No. 6). In addition TCI claimed d costs of the arbitral proceedings (Claim No. 7).

25. In its Statement of Defence, OIL accepted that it had not levied any liquidated damages for the period prior to 08.06.2015. However, during the course of the arbitral proceedings, OIL sought to rely on additional documents including those that indicated that OIL had

deducted liquidated damages for the period 15.04.2015 to 08.06.2015. TCI claimed that OIL had never informed it regarding the levy of such liquidated damages prior to filing of the application for placing the additional documents on record.

26. In this context, on 12.09.2019, TCI filed an application under Section 23(3) of the A&C Act seeking to amend its Statement of Claim to claim refund of liquidated damages amounting to USD \$173,348/- levied by OIL for the purported delay in mobilization from 15.04.2015 to 08.06.2015 – Claim no. 3A.

27. The Arbitral Tribunal considered the rival contentions and partly allowed the claims preferred by TCI. It held that TCI was entitled to USD \$26,19,700 on account of contractual compensation due to loss on account of deferment of mobilisation and delay in mobilisation completion; USD \$3,73,707 on account of payment of MRC for Interim Demobilisation Period from 23.10.2015 to 29.05.2016; refund of USD \$21,000/-, which was deducted as liquidated damages due to TCI's failure to complete the re-mobilization within time; refund of USD \$173,348/- towards wrongful deduction of liquidated damages by OIL for the delay between 15.04.2015 and 08.06.2015; and; ₹54,90,000/- as costs incurred during the arbitral proceedings. The Tribunal rejected TCI's prayer for damages. The Tribunal further awarded past, *pendente lite* and future interest at the rate of 12% per annum.

28. The reading of the impugned award indicates that the Arbitral Tribunal did not find any merit in TCI's claim of USD \$100,000/- on

account of establishment costs (Claim no. 4) and the said claim was rejected as untenable. However, the operative part of the impugned award has incorrectly entered an award in favour of TCI against the said claim.

Submissions

29. Mr Gulati, learned senior counsel appearing for OIL, assailed the impugned award, essentially, on two grounds. First, he submitted that the claims made by TCI with regard to compensation / contract charges for a period prior to mobilization on 06.08.2015 were *ex facie* barred by limitation. He stated that the breach, if any, on the part of OIL occurred on 06.01.2015 when TCI was asked to defer mobilization to 15.03.2015. He submitted that the Statement of Claims filed by TCI also explicitly acknowledged that the cause of action with regard to the said claim (Claim No.1) arose on 06.01.2015. He referred to Article 55 of the Schedule to the Limitation Act, 1963 and contended that the limitation period for compensation of a breach of contract was prescribed as three years from the date from “*when the contract is broken....*”. He submitted that since the Contract was allegedly broken on 06.01.2015, the period of limitation to claim compensation would start running from the said date. TCI had issued the notice of arbitration on 12.04.2018, which was received by OIL on 27.04.2018. He submitted that by that time, the period of limitation had already expired and therefore, Claim No.1 was, *ex facie*, barred by limitation. He has also pointed that TCI had not raised any such claim before the Outside Expert Committee.

30. Insofar as Claim No.3A – which was for the refund of liquidated damages levied by OIL – is concerned; Mr Gulati submitted that no such claim had been made either in the notice invoking arbitration or prior to that date. The said claim had been introduced by way of an application seeking amendment in the Statement of Claims, which was filed on 12.09.2019. He submitted that OIL had levied liquidated damages for delay in mobilization, which was computed up to 22.06.2015. Subsequently, OIL accepted that the mobilization of equipment and resources was completed on 08.06.2015 and therefore, reduced the liquidated damages by USD \$74,292 to USD \$173,348. He stated that the excess amount of USD \$74,292 was added to TCI's invoice of USD \$486,342 and the total amount of USD \$539,579.26 was remitted to TCI and received by it on 30.10.2015. He stated that it was apparent that as on that date, TCI was fully aware of the levy of liquidated damages and the period of limitation for making a claim in that regard, thus, expired by 30.10.2018. He submitted that Claim No.3A was completely different from Claim No.3 which pertained to recovery of liquidated damages for delay in completion of remobilization beyond the deadline of 29.05.2016. The levy of such damages was not related to the liquidated damages levied for delay in mobilization from 15.04.2015 till 08.06.2015. He submitted that therefore, the award of Claim No.3A is contrary to the most basic notions of justice and morality.

31. Mr Gulati referred to the decision of the Supreme Court in ***State of Gujarat v. Kothari and Associates: (2016) 14 SCC 761***, in support

of his contention that in terms of Article 55 of the Limitation Act, 1963, the period of limitation for an action on account of breach of contract is required to be reckoned from the date when such breach gives a cause of action to a party to rescind the contract or possibly claim compensation.

32. He submitted that an arbitral award, which is entered in respect of disputes that are barred by limitation, would offend the public policy of India. He referred to the decisions in the case of *Vinitha Associates Ltd. and Ors. v. Lakshna Holdings Pvt. Ltd. and Ors.*: (2007) 4 Arb. LR 575 (Mad.); *Nirav Securities Pvt. Ltd. v. Mrs. Prabhuta Motiram Adhvaryu*: 2002 (4) Mah. LJ. 478; and *Jagmohan Singh Gujral v. Satish Ashock Sabnis and Ors.*: 2004 (1) Arb. LR 212 (Bom.), in support of his contention.

33. Mr Gulati also referred to the impugned award and pointed out that the Arbitral Tribunal had rejected OIL's defence that TCI's claims were barred by limitation by holding that the limitation period for the claims (other than Claim no. 3A) would commence from the date of notice under Section 21 of the A&C ACT for invoking the arbitration. He submitted that this is, *ex facie*, erroneous and therefore, the impugned award is liable to be set aside.

34. Next, Mr Gulati submitted that TCI had unconditionally accepted the revised dates for mobilization and therefore, waived its right to claim any compensation for the delay. He submitted that by virtue of Sections 55 and 63 of the Indian Contract Act, 1872, TCI could

not raise any claims for compensation of loss due to deferment of mobilization after such unconditional acceptance.

35. He also contended that the award of compensation to TCI for delay in mobilization was unsustainable as TCI had failed to prove that it could have completed the mobilization by the original deadline; (ii) that the equipment could not have been productively utilized elsewhere; (iii) that it suffered actual damages; and (iv) the delay in mobilization from 15.04.2015 to 08.06.2015 was wholly on account of the respondent. However, Mr Gulati conceded that review on merits was not permissible and examination of the aforesaid contention would entail a review of the Arbitral Tribunal's findings on merit. He confined his contentions to assail the impugned award on the ground that the disputes were barred by limitation; TCI had waived its right to claim any compensation by unconditionally accepting deferment of deadlines; and the Arbitral Tribunal had awarded interest beyond the claims raised by TCI.

36. Mr Gulati also contended that the Arbitral Tribunal had committed a patent error in awarding pre-award interest on claims at the rate of 12% per annum considering that TCI had confined its claim for interest in the notice of arbitration to only interest on Claim No.2. He stated that the impugned award was contrary to Section 3(1)(b) of the Interest Act, 1978. In addition, he also contended that the Arbitral Tribunal had erred in awarding costs, which according to him, were excessive in the facts and circumstances of the case.

37. Mr Vikram Nandrajog, learned counsel appearing for TCI countered the aforesaid submissions. He submitted that OIL had not raised any defence of limitation in its pleadings and the said defence was raised for the first time in oral submissions made at the stage of final hearing. He submitted that even at that stage, OIL had not contended that the period of limitation would run from the date of OIL's request for deferment of mobilization (that is, on 06.01.2015); OIL had contended that the payment of compensation for the period prior to 08.06.2015 was made for the first time when the Statement of Claims was filed on 27.09.2018, which was after the expiry of three years from 08.06.2015 and thus, the claims were barred by limitation.

38. He submitted that the contention that the breach had occurred for the first time on 06.01.2015 was never advanced before the Arbitral Tribunal. He submitted that OIL had also not referred to the decisions as are cited before this Court as it was not their case that the period of limitation was required to be reckoned from 06.01.2015.

Reasons and Conclusion

39. At the outset, it is material to note that it is conceded on behalf of OIL that it had not raised the defence of limitation in the pleadings filed before the Arbitral Tribunal. OIL had raised such a defence only in respect of Claim No.3A, which was made by TCI, by amending its Statement of Claims. OIL had filed a separate Statement of Defence in respect of Claim No.3A. In that Statement of Defence, OIL pleaded that the claim for refund of liquidated damages, which were levied for delay

in mobilization from 15.04.2015 to 08.06.2015, was barred by limitation as TCI was aware of the levy of such liquidated damages as early as 03.09.2015. OIL stated that it had deducted an amount of USD \$247,640 while making payment against TCI's invoice dated 13.07.2015. The said invoice was for a sum of USD \$388,170 and OIL had paid a sum of USD \$123,679 against the said invoice. OIL averred that the same was accepted by TCI. The said deduction was made considering 22.06.2015 as the date on which TCI had completed the mobilization. Subsequently, OIL agreed to consider 08.06.2015 as the date of completion of initial mobilization instead of 22.06.2015. Accordingly, OIL had decided to levy liquidated damages for a delay of only 54 days instead of 68 days as levied earlier. Therefore, a sum of USD \$74,292 was refunded to TCI by adding the same to its invoice for USD \$486,342 submitted by TCI for the subsequent month. Since no claim for refund of liquidated damages was made by TCI prior to filing its application for amendment of Statement of Claims, the said claim was barred by limitation.

40. Insofar as other claims are concerned, OIL raised no such defence. It is material to note that notwithstanding that no such plea was raised in the Statement of Defence, it was submitted on behalf of OIL during the course of oral submissions that other claims made by TCI were also barred by limitation. However, OIL's contention was not that the cause of action had arisen on 06.01.2015 as is canvassed before this Court; OIL contended that the notice of completion of mobilization was issued under Clause 2 of the GCC on 08.06.2015, thereby, the initial

mobilization was completed on the said date. But no claim was raised within a period of three years from that date or from 22.06.2015, when the inspection was completed. The said claim was made only before the Tribunal on 27.09.2018 by filing the Statement of Claims. Thus, according to OIL, the period of limitation commenced on 08.06.2015 or on 22.06.2015, but since the Statement of Claims was filed beyond the period of three years from that date, TCI's claims were barred by limitation. The aforesaid is apparent from the plain reading of the written submissions filed on behalf of OIL before the Arbitral Tribunal. Paragraph 36 of the said written submissions is set out below:

“36. That it is apposite to mention that the Claimant gave a notice under clause 2 of the GCC on 08.06.2015 thereby admitting that the initial mobilization was completed on the said date, however, no claim was raised on 08.06.2015 and/or 22.06.2015 when the inspection was completed. It is pertinent to mention that for the first time, a claim regarding payment of amounts, under various heads, as claimed in Claim No.1 was made only before this Hon'ble Tribunal while filing the SOC on 27.09.2018 which was much after the period of limitation ending on 07.06.2018/21.06.2018. It is to be noted that no application seeking condonation of delay was also preferred by the Claimant. In view thereof, it is submitted that the said claims are barred by time and ought to be so held by this Hon'ble Tribunal. It is also apposite to mention that no such claim was raised by the Claimant for reference to the OEC which was limited to its alleged claim during the interim demobilization period making it evident that claim No.1 has been raised as an after thought and merits no consideration.

41. It was also contended before the Arbitral Tribunal that TCI had raised the said claim for the first time in its Statement of Claims and had not raised the same before the Committee of Outside Experts. The Arbitral Tribunal rejected the said contention. It held that TCI could not be precluded from raising a claim before the Arbitral Tribunal because it had not raised such a claim before the Committee of Outside Experts. The Arbitral Tribunal noted that OIL had rejected the Committee's recommendation for an amicable resolution of the disputes and therefore, could draw no sustenance from the said proceedings as admittedly, the disputes between the parties remained unresolved.

42. It is also apparent from the impugned award that the Arbitral Tribunal also found that for considering the question whether a claim was barred by limitation, the notice issued under Section 21 of the A&C Act was relevant and not the date when the Statement of Claims was filed.

43. At this stage, it is relevant to refer to Section 21 of the A&C Act, which reads as under:

“21. Commencement of arbitral proceedings.—

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

44. Concededly, OIL's contention that the period of limitation in respect of the dispute would end on the filing of the Statement of Claims

is erroneous. The period of limitation would end on receipt of notice under Section 21 of the A&C Act.

45. In terms of Section 21 of the A&C Act, the arbitral proceedings in respect of disputes between the parties commenced on receipt of the notice dated 12.04.2018, which OIL claimed it received on 27.04.2018.

46. Mr Gulati drew the attention of this Court to the following passage from the impugned award:

“Since, in the instant case, Respondent has with respect to each Claim, raised by Claimant repeatedly raised, issue of limitation, Tribunal deems it fit to clarify for once and all that the limitation period of all Claims raised in the present arbitration proceedings barring Claim No.3A will commence from the date of notice invoking arbitration and not from the date of notice of completion of mobilisation/or when the inspection was completed.”

47. He contended that the proposition of law that limitation would commence from the date of notice invoking the arbitration is, *ex facie*, erroneous and, the impugned award is liable to be set aside on this ground.

48. There can be no quarrel with the proposition that the period of limitation for commencing the arbitral proceedings, in respect of a dispute, would stop running with the issuance of a notice under Section 21 of the A&C Act. This is because, in terms of Section 21 of the A&C Act, the arbitral proceedings would commence on receipt of the notice invoking arbitration.

49. The observation in the impugned award that “*the limitation period of all Claims raised in the present arbitration proceedings barring Claim No.3A will commence from the date of notice invoking arbitration*” is, *ex facie*, erroneous. However, if one examines the context in which the said conclusion was drawn, it is obvious that the same is error in semantics rather than one of any substance.

50. As noticed above, it was contended on behalf of OIL before the Arbitral Tribunal that TCI’s Statement of Claims was barred by limitation. It is relevant to note that there is a clear distinction between limitation for commencement of arbitral proceedings in respect of claims and the limitation period for taking any precipitate steps thereafter. It is relevant to refer to Sub-sections (1) and (2) of Section 43 of the A&C Act. The same are set out below:

“43. Limitations.— (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.
(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21.”

51. Section 43(1) of the A&C Act makes it amply clear that the Limitation Act 1963, would apply to proceedings under the A&C Act. Unlike a suit where the limitation period would stop running on filing of the plaint in a court, the limitation period in respect of any claims is required to be reckoned till the arbitral proceedings are commenced in terms of Section 21 of the A&C Act. This is made explicitly clear by

virtue of Sub-section (2) of Section 43 of the A&C Act. The period of limitation in respect of further steps thereafter, is to be reckoned from the date of Section 21 of the A&C Act. Thus, the period for filing an application under Section 11 of the A&C Act or for taking other steps would commence on the date of receipt of the notice invoking arbitration (See: *Bharat Sanchar Nigam Ltd. and Anr. v. Nortel Networks India Pvt. Ltd.*: 2021 5 SCC 738 and *Golden Chariot Recreations Pvt. Ltd. v. Mukesh Panika & Anr.*: 253 (2018) DLT 219.)

52. It appears that the Arbitral Tribunal's observations as set out in Paragraph 17 above, were made in the context of filing of the Statement of Claims and the contentions advanced on behalf of OIL. It does appear that the Arbitral Tribunal clearly intended to hold that the period of limitation would run till the notice invoking arbitration. As noticed above, it was OIL's contention before the Arbitral Tribunal that the period of limitation would run from 08.06.2015 till filing of the Statement of Claims before the Arbitral Tribunal. The Arbitral Tribunal has rejected this contention. In this context, it had referred that the limitation period would end on the date of notice invoking arbitration (which has been incorrectly mentioned as "*will commence from the date of notice invoking arbitration*"). It was nobody's case before the Arbitral Tribunal that the period of limitation would commence from the date of issuance of notice invoking arbitration. The only controversy before the Arbitral Tribunal was whether the period of limitation would end with the receipt of notice invoking arbitration or

on filing of the Statement of Claims. OIL cannot draw any sustenance with respect to the apparent error as noted above.

53. The question whether any dispute is barred by limitation is also a mixed question of law and fact. The question whether the cause of action had arisen on 08.06.2015 on TCI completing the mobilization or on 06.01.2015, is required to be determined in the factual context as well as the terms of the Agreement. Concededly, OIL had never set up the defence that the cause of action for the claims raised by TCI had commenced on 06.01.2015 or on 28.01.2015 (the date on which the mobilization was required to be completed). OIL cannot be permitted to now set up a new defence that requires some examination as to the facts of the case. The said contention is an afterthought and is liable to be rejected on that ground alone.

54. OIL's contention that it had committed a breach on 06.01.2015 by requesting for a deferment of mobilization and the period of limitation for raising claim for compensation for deferment of mobilization would commence from the said date is a contentious one. The reliance on the decision in case of *State of Gujrat vs Kothari and Associates (supra)* is premised on the basis that Agreement was broken on that date. However, the TCI had kept the Agreement alive and performed its obligations. In the case of *State of Gujrat vs Kothari and Associates (supra)*, the court found the case to be one of successive breaches and the site was required to be made available each year for 15th November to 14th June each year and there were successive delays in handing over the site each year. This is not a case of successive

breaches. OIL had requested that the mobilization be deferred till 15.03.2015 and thereafter, to 15.04.2015. It was TCI's case that it had agreed to delay the mobilization at OIL's request, however, that did not preclude TCI from claiming compensation on the ground that it had taken all steps to mobilize the resources by the due date (28.01.2015) and was on the verge of doing so.

55. It is also TCI's case that it had taken steps for mobilization, however, OIL was not ready to receive the equipment and had not provided the necessary space/area for storage and initialization of the equipment at site, thus, resulting in further delay in mobilization from 15.04.2015 to 08.06.2015. Thus, according to TCI, the cause of action for Claim no.1 would commence on 08.06.2015. OIL had never disputed that the period of limitation for Claim No.1 would commence on 08.06.2015. On the contrary, it had contended before the Arbitral Tribunal that the period of limitation did commence on 08.06.2015.

56. The Agreement did not provide for any payment prior to the completion of mobilization. Thus, the claim for compensation for the period 28.01.2015 to 08.06.2015 could be made at the end of the period for completion of mobilization. OIL's contention in respect of limitation, before the Arbitral Tribunal, was also founded on this premise. Plainly, it is not open for OIL to now contend quite to the contrary, before this Court.

57. The contention that TCI is precluded from raising any claim in respect of delay in mobilization on the ground that TCI had waived its

right to make any claims by unconditionally accepting the same by its communication dated 08.01.2015, is unmerited.

58. It is relevant to refer to the letter dated 08.01.2015, which is set out below:

“Chief Manager (Materials)-NEF 08.01.2015
OIL INDIA LIMITED
NEF PROJECT
DULIAJAN, DIST DIBRUGARH
ASSAM – 786 602

Subject: Tender no CNG3382P15 for hiring of Production Testing services in connection with exploratory drilling in NELP – VI Block (MZ-ONN-2004/1) in Mizoram

Attn : Mr. U.N. Jena – Chief Manager (Materials) – (NEF)

Dear Sir,

Further to your deferment notice dated 6th Jan 2015 please be informed that we have commenced mobilisations actions as per the original notice given on 28th Oct. However based upon OIL’s present request, we are accepting to delay the mobilisation till the 15th March by diverting our consignments and holding them at various en-route locations. This is costing us demurrage for the holding of the units.

Kindly be informed that we will now be moving to site as per this notice of 6th Jan by the 15th March, ir-respective of the actual drilling progress since we can’t keep equipment and resources waiting en-route yet again at different locations waiting for the completion of the well and also maintain the delivery schedule as per the contract simultaneously.

We trust this will be acceptable to OIL.

Thanking you.

For Techno Canada Inc

S/d

Ranjeet Das
Coordinator – F&A
Date : 08.01.15
Place : New Delhi”

59. A plain reading of the aforesaid letter indicates that TCI had agreed to delay the mobilization till 15.03.2015 by diverting its consignments and holding them at various en-route locations. However, TCI had also put OIL to notice that this was costing demurrages for holding the said units. Reading the said letter in its perspective, this Court is unable to accept that TCI had waived any right to receive compensation or contractual charges in respect of the mobilization.

60. Concededly, no such defence that TCI had waived its right to claim compensation for the deferment in mobilization was raised by OIL before the Arbitral Tribunal, either in its pleading or even in oral submissions. OIL cannot be permitted to raise fresh pleas at this stage.

61. In any view of the matter, the said controversy does not in any manner fall within the scope of Section 34(2)(b)(ii) of the A&C Act. As noticed above, the impugned award was rendered in an International Commercial Arbitration and therefore, it cannot be assailed on the ground that it suffers from any patent illegality. Thus, unless the Court finds that the impugned award contravenes the fundamental policy of

Indian law or offends the most basic notions of morality and justice, it would be impermissible to interfere with the impugned award.

62. OIL's contention that TCI's claim for recovery of liquidated damages levied for the period 15.04.2015 to 08.06.2015 is beyond the period of limitation, is also unmerited. In its Statement of Claims, TCI had averred that OIL had not attributed any mobilisation delay to TCI. It had never even remotely suggested in any meeting that TCI was responsible for any part in the delay in mobilisation. TCI had also averred that OIL would have invoked Clause 17 of the GCC and levied liquidated damages in the event TCI was responsible for the deferment or delay in mobilisation. In its Statement of Defence, OIL accepted that liquidated damages had not been levied but it refuted TCI's contention that it was not responsible for the delay in mobilisation.

63. Concededly, OIL had sought to introduce the fact regarding levy of liquidated damages in respect of the delay prior to 08.06.2015 before the Arbitral Tribunal by filing additional documents. It is in this background that the Arbitral Tribunal permitted TCI to amend its Statement of Claims. TCI averred that it was never informed that OIL had levied any liquidated damages prior to the hearing held on 05.08.2019.

64. The Arbitral Tribunal accepted TCI's contention that it was never informed regarding the levy of liquidated damages in the past and such information was disclosed for the first time during the arbitral proceedings. It is admitted that OIL had placed no communication on

record, whereby, it had informed TCI regarding the levy of liquidated damages. OIL had contended that the same could be inferred from the fact that it had not paid TCI's initial invoice in full. The said contention was not accepted by the Arbitral Tribunal.

65. This Court finds no infirmity with the decision of the Arbitral Tribunal in rejecting OIL's contention that TCI's claim for refund of liquidated damages was barred by limitation. In any view, the said controversy does not fall within the grounds as contemplated under Section 34(2)(b)(ii) of the A&C Act.

66. The next question to be examined is regarding the award of USD \$100,000 in favour of TCI in respect of establishment cost (Claim No.4).

67. The operative part of the impugned order allows TCI's claim of USD \$1,00,000/- on account of establishment cost (Claim No.4). As noticed above, the Arbitral Tribunal had found that the said claim was untenable. In view of the said finding, the Arbitral Tribunal could not have awarded the said claim in favour of TCI. Mr Nandrajog had conceded that the same was an apparent error and the award to the said extent, was liable to be set aside.

68. In so far as the question of award of interest is concerned, TCI in its Statement of Claims had claimed past-interest at the rate of 10% per annum from 01.04.2016 to the date of invocation of arbitration. TCI had also sought *pendente lite* and future interest at the rate of 10% per annum. The written submissions filed on behalf of TCI also indicate

the said claim. However, the Arbitral Tribunal has awarded interest at the rate of 12% per annum, which is in excess of the claims made by TCI. Clearly, the award of interest in excess of the claim made, amounts to entering an award, which is beyond the disputes referred to arbitration. The dispute before the Arbitral Tribunal was essentially whether TCI was entitled to the claims made by it. The Arbitral Tribunal could not have travelled beyond the scope of the disputes and entered an award in excess of the claim made by TCI.

69. In view of the above, the impugned award to the extent that it awards establishment cost of USD \$1,00,000/- (Claim No.4) and to the extent that it awards interest (past, *pendente lite* and future) in excess of 10% per annum, is set aside.

70. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

SEPTEMBER 08, 2021
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