

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

% **Date of order: 12th December, 2022**

+ **O.M.P. (COMM) 574/2020**

UNITED DRILLING TOOLS LTD. Petitioner

Through: **Mr. Rajesh Banati and Mr. Ashish
Sareen, Advocates**

versus

OIL AND NATURAL GAS CORPORATION LTDRespondent

Through: **Mr. Abhishek Gupta, Ms. Ikshita
Singh, Mr. Dishant Bhati and Ms.
Tanya, Advocates alongwith Mr.
Vishista Saunya, DCLA**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

I.A. 9233/2021 (Delay)

1. This is an application under Section 5 of Limitation Act, 1963 on behalf of the petitioner for condonation of delay in filing the rejoinder to the reply of the respondent.
2. For the reason stated in the application, the delay of 80 days in filing the rejoinder to the reply of the respondent.
3. The application is disposed of.

O.M.P. (COMM) 574/2020

1. The instant petition under Section 34 of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as "The Act, 1996") has been filed on behalf of the petitioner seeking the following relief:-

" (a). allow the present Petition and set aside the Award dated 10.08.2020 only in respect of Claim no. 2..."

2. The brief facts of the case are that the Petitioner is a company registered under the Companies Act, 1956, having its office at A-22, Phase-II, District Gautam Budh Nagar, Noida-201305, U.P. and the Respondent is a public sector undertaking having its registered office at Deen Dayal Urja Bhawan, 5, Nelson Mandela Marg, Vasant Kunj, New Delhi-110070. The Respondent floated a tender bearing no. ZNJMC10004 for procurement of Truck mounted heavy-duty dual skid Hydraulic Single Drum Wireline Winch Units. Accordingly, the Petitioner submitted its Bid No. UDT/MKTG/EBID/2010-11/514 dated 31st January, 2011 for supply of 17 Nos. Wireline Winch Units. The bid of the Petitioner was accepted by the Respondent and the Respondent issued NOA dated 28th September, 2011 to the Petitioner and, thereafter, the Respondent issued Purchase Order dated 24th February, 2012 in favour of the Petitioner. Thereafter, the Petitioner supplied 17 nos. of wireline winch units well within time. But, the Respondent illegally, unlawfully, malafidely and unconstitutionally deducted USD 1,46,400 from the Petitioner's account towards alleged Liquidated Damages, arising disputes and differences between the parties. Accordingly, the Respondent vide letter dated 17th January, 2019 appointed Shri P. K. Jain as sole Arbitrator for adjudication of disputes and differences between the parties.

3. The learned Arbitrator passed the Award dated 10th August, 2020 whereby the claim no. 1 of the Petitioner pertaining to refund of Liquidated damages amounting to USD 1,46,400 was allowed but the claim no. 2 which pertained to award of interest on withheld sum was declined.

4. Being aggrieved by the part of award (claim no. 2), the Petitioner has filed the present objection Petition.

5. Learned counsel appearing on behalf of the Petitioner submitted that as per law if a person is deprived of the money which he is legitimately entitled to, the said person is liable to be compensated in form of interest or damages. Since the learned Arbitrator came to the conclusion that withholding of USD 1,46,400 by the Respondent is illegal and had wrongly imposed Liquidated Damages on the Petitioner, the Petitioner ought to have been granted the interest on the said amount which had been illegally withheld by the Respondent. It is further submitted that the circular dated 17th August, 2020 issued by the Respondent clearly entitles the Petitioner to get interest, being a small-scale industry.

6. It is submitted by learned counsel appearing on behalf of the Petitioner that the Respondent never filed any counter claim against the Petitioner nor could justify the withholding of USD 1,46,400 for nine years. Therefore, the Petitioner is very much entitled to interest on withheld amount. It is further submitted that the learned Arbitrator is empowered to grant *Pendente-lite* and future interest on the sum awarded in the Award. It is also submitted that the part of the Award (claim no. 2)

dated 10th August, 2020 is patently illegal, against the public policy and violative of principle of Natural Justice. Hence, the part of the Award (claim no. 2) is liable to be set aside.

7. Furthermore, to support his arguments, learned counsel appearing on behalf of the Petitioner has placed reliance on the case of ***Ambica Construction vs. Union of India, (2017) 14 SCC 323***. He has stressed upon the paragraphs no. 1, 4, 5 and 6.

8. *Per contra*, learned counsel appearing on behalf of the Respondent submitted that the grounds taken by the Petitioner to assail the arbitral award are baseless and do not stand to reason. It is submitted that the learned Arbitrator has rightly rejected the claims for pre-suit interest in view of express terms and conditions of the contract; specifically Clause 42(6) of General Conditions of Contract forming part of the contract, wherein both the parties have explicitly agreed to waive any claims for pre-suit interest or *Pendente-lite* interest. It is trite that under Section 31(7)(a) of the Act, 1996 if the agreement between the parties prohibits award of interest for the pre-award period (i.e. pre-reference and *Pendente-lite* period), the Arbitrator cannot award interest for the said period. Even otherwise, it is now well settled that Section 34 does not confer any power on the Courts to modify the Arbitral Award, and as such, the Section 34 petition filed by petitioner ought to be dismissed as non-maintainable.

9. Learned counsel appearing on behalf of the Respondent has also taken a plea that the scope under Section 34 of the Act, 1996 is very limited and it is a settled proposition of law that this Court cannot sit as

an Appellate authority over the findings recorded by the Arbitral Tribunal. It is, accordingly, submitted that the Petitioner has failed to bring out any grounds so as to warrant interference by this Court under Section 34.

10. Heard learned counsel for the parties and perused the record.

11. In the instant case, the Respondent floated a tender bearing no. ZNJMC10004 for procurement of truck mounted heavy duty dual skid hydraulic single drum wireline winch units. Accordingly, the Petitioner submitted its bid dated 31st January, 2011 for supply of 17 nos. wireline winch units. The bid of the Petitioner was accepted by the Respondent and the Respondent issued NOA dated 28th September, 2011 to the Petitioner and thereafter the Respondent issued Purchase Order dated 24th February, 2012 in favour of the Petitioner. The dispute arose in the instant matter when the Respondent withheld USD 1,46,400 illegally from the Petitioner's account towards alleged Liquidated Damages. The Respondent, vide letter dated 17th January, 2019 appointed Shri P. K. Jain as sole Arbitrator for adjudication of disputes and differences between the parties. The learned Arbitrator passed the Award dated 10th August, 2020 whereby the claim no. 1 of the Petitioner pertaining to refund of Liquidated damages amounting to USD 1,46,400 was allowed but the claim no. 2 which pertained to award of interest on withheld sum was declined. Being aggrieved by the part of award (claim no. 2), the Petitioner has filed the present petition.

12. The instant petition is filed on the ground that the part of the Award (claim no. 2) dated 10th August, 2020 is patently, illegal, against

the public policy and violative of principle of Natural Justice. In support of his case, learned counsel appearing on behalf of the Petitioner relied on the judgment passed by the Hon'ble Supreme Court in the case of **Ambica Construction (Supra)**.

13. For proper adjudication of the instant matter, Clause 42(6) of the General Conditions of Contract forming part of the Contract is reproduced herein below:-

“42. ARBITRATION (Applicable in case of supply orders/ Contracts with firms, other than Public Sector Enterprises)
6. Parties agree that neither party shall be entitled for any pre-reference or pendente-lite interest on its claims. Parties agree that any claim for such interest made by any party shall be void.”

The parties in the aforesaid Clause 42(6) of the General Conditions of Contract forming part of the contract, wherein both the parties have explicitly agreed to waive any claim for pre-suit interest or *Pendente-lite* interest.

14. As per Section 31(7)(a) of the Act, 1996, if the agreement between the parties prohibits award of interest for the pre-award period (i.e. pre-reference and *Pendente-lite* period), the Arbitrator cannot award interest for the said period. In view of the above facts and circumstances, the scope of the instant petition under Section 34 of the Act, 1996 is very limited and it is a settled law that Section 34 of the Act, 1996 does not confer any power on the Courts to modify the Arbitral Award.

15. The Section 34 of the Act, 1996 is reproduced herein below:-

“(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in

accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application 1[establishes on the basis of the record of the arbitral tribunal that]--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

1[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud

*or corruption or was in violation of section 75 or section 81;
or
(ii) it is in contravention with the fundamental policy of
Indian law; or
(iii) it is in conflict with the most basic notions of morality or
justice.*

*Explanation 2.--For the avoidance of doubt, the test as to
whether there is a contravention with the fundamental policy
of Indian law shall not entail a review on the merits of the
dispute.]*

*2[(2A) An arbitral award arising out of arbitrations other
than international commercial arbitrations, may also be set
aside by the Court, if the Court finds that the award is
vitiated by patent illegality appearing on the face of the
award:*

*Provided that an award shall not be set aside merely on the
ground of an erroneous application of the law or by
reappreciation of evidence.]*

*(3) An application for setting aside may not be made after
three months have elapsed from the date on which the party
making that application had received the arbitral award or,
if a request had been made under section 33, from the date
on which that request had been disposed of by the arbitral
tribunal:*

*Provided that if the Court is satisfied that the applicant was
prevented by sufficient cause from making the application
within the said period of three months it may entertain the
application within a further period of thirty days, but not
thereafter.*

*(4) On receipt of an application under sub-section (1), the
Court may, where it is appropriate and it is so requested by
a party, adjourn the proceedings for a period of time
determined by it in order to give the arbitral tribunal an
opportunity to resume the arbitral proceedings or to take*

such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

3[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]”

16. The Arbitral Tribunal has carefully evaluated the evidences produced before it and also, examined entire documents filed by the parties. In order to consider the plea raised by the parties, it is relevant to extract the Award indicating that the Arbitral Tribunal had deliberated on the issue is extracted herein below:-

“21. I have analysed the documents / pleadings, examination of the witnesses, written synopsis submitted after the oral arguments, supporting judgements presented by both the parties , before this Tribunal, are being appreciated and being dealt claim - wise, in this Arbitral Award.

Claim No 1: Claim of LD amount deducted by ONGC : USD 146,400

Respondent has deducted LD amounting to USD 146,400 @ 5% from the delayed portion of supplies of Winches. As deliberated above the delay on account of deviation in issue of Vendor list /Make for the Bought Out Items in Detailed Purchase Order in deviation to as submitted with the Bid , is on the part of Respondent . Hence as per terms of Clause 14.3 of General Terms and Conditions of PO, the Claimant is entitled for Time Extension for the delivery without LD.

The Original list of vendors / Make, as submitted by Claimant, was attached as per Amendment No 1 Dated 15th June 2012 . Further , the Final Layout drawing of the truck mounted wire line winch units· was also attached with this amendment only .Claimant is entitled extension of CDD of 12 months from 15th June 2012 i.e. upto 15th June 2013 without LD. Since the Supplies were completed by 13th June 2013 , no LD is deductible by Respondent. Hence, LD amounting to USD 146,400, already deducted by Respondent, needs to be refunded.

Claim No. 2: Interest Pre-Suit: USD 100,474

This claim is for interest @12% till 17th January 2019, evidently in the form of interest - pre-suit. Claimant has invoked Arbitration under Clause 42 of GTC attached to this Purchase Order , such claim has been specifically barred under Sub Clause 6 of Clause 42 of GTC of Purchase Order as produced below:-

"Parties agree that neither party shall be entitled for any pre-reference or pendent-lite interest ,an its claims. Parti.es agree that any claim for such interest made by any party shall be void"

In view of above, the Claim. No. 2 is not tenable.

ORDER

- 1. In response to **Claim No 1** the claim of USD 146,400 is allowed.*
- 2. In response to **Claim No 2**, the claim is not allowed."*

17. The High Court of Orissa in the case of **GMR Kamalanga Energy Ltd. Vs SEPCO Electric Power Construction Corporation, 2022 SCC OnLine Ori 1979** has held as under:

"17. It is well-settled that an Arbitrator is a master of the proceedings and procedures [see Section 19(3) of the Arbitration Act]. The Court in seisin of the matter under

Section 34 of the Arbitration Act would not interfere with the award merely because it would have done things differently, but only when there is a real bias for alleging that arbitral process was conducted irrationally or capriciously. In the instant case, ex facie the award has only been rendered on the issues where proper pleadings were made by both parties, evidence was duly led, and written submissions were exchanged etc. There is not a single document or piece of evidence, regarding which it can be said that a party was not afforded with an opportunity to respond, in accordance with law. There is nothing on record which would suggest that the Petitioner-GKEL was denied a fair hearing by learned Tribunal.

18. Hon'ble Supreme Court in the case of Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd., reported in (2022) 1 SCC 753 has categorically held that even the ground of perversity is not available to challenge the award rendered in an international commercial arbitration, relevant paragraph of which reads thus;

“60. The judgment in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] noted in para 29 that Section 48 of the Act has also been amended in the same manner as Section 34 of the Act. The ground of “patent illegality appearing on the face of the award” is an independent ground of challenge which applies only to awards made under Part I which do not involve international commercial arbitrations. Thus, the “public policy of India” ground after the 2015 Amendment does not take within its scope, “perversity of an award” as a ground to set aside an award in an international commercial arbitration under Section 34, and concomitantly as a ground to refuse enforcement of a foreign award under Section 48, being a pari materia provision which appears in Part II of the Act. This argument must therefore stand rejected.”

19. Thus, the grounds, on which the instant petition under Section 34 of the Arbitration Act has been filed, are not subject to scrutiny by this Court in the instant proceeding

33. In support of its case, the Petitioner relied upon the English law in the case of Rock Advertising Ltd. v. MWB Business Exchange Centres Ltd., reported in 2018 UKSC 24. The relevant portion of the case law reads as under:—

“..... the scope of estoppels cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself.”

37. It is also well-settled that an award is liable to be set aside if the principles of natural justice have been breached or Section 18 of the Arbitration Act has been violated. In view of the discussions made above, it can neither be said that principles of natural justice has been violated nor the parties to the arbitration have been treated unequally.”

18. Upon perusal of the aforesaid reasons given by the learned Arbitrator while passing the impugned Award, this Court does not find any cogent reason to interfere in the impugned Award dated 10th August, 2020.

19. Accordingly, the petition alongwith pending applications, if any, stands dismissed.

20. The order be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

DECEMBER 12, 2022

Dy/mg

Click here to check corrigendum, if any