

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

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

+ **O.M.P. (COMM) 214/2021**

OIL AND NATURAL GAS CORPORATION LTD. Petitioner

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

versus

M/S UNITED DRILLING TOOLS LIMITED Respondent

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

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

I.A. 9357/2021 (Exemption)

Exemption allowed subject to just exceptions.

The application stands disposed of.

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1. The instant petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed on behalf of the petitioner seeking the following reliefs:-

"A. Call for the records of the arbitral proceedings in respect of the impugned Arbitral Award dated 10.08.2020

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passed by the Ld. Sole Arbitrator;

B. Quash and set aside the Award dated 10.08.2020 to the extent that the Ld. Arbitrator directs refund of the Liquidated Damages amounting to USD 1,46,400 deducted by the Petitioner from the delayed portion of supplies of winches;

C. Quash and set aside the Award dated 10.08.2020 to the extent the Ld. Arbitrator allows Claim No. 1 of the Respondent on account of delay due to deviation in vendor list/makes for bought-out items;

D. Award costs of present proceedings against the Respondent and in favour of the Petitioner..."

2. The Petitioner-ONGC (Respondent in the Arbitral proceedings) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996, aggrieved by the impugned Arbitral Award dated 10th August, 2020 passed by the learned Sole Arbitrator whereby the learned Arbitrator erroneously allowed the Claim No. 1 of the Respondent- UDT (Claimant in the Arbitral proceedings) *apropos* the refund of the Liquidated Damages amounting to USD 1,46,400 deducted by Petitioner from the delayed portion of supplies of winches. However, the learned Arbitrator has rightly dismissed the Claim No. 2 of the Respondent with respect to the pre-suit Interest in view of Clause 42(6) of the General Conditions of Contract of the Purchase Order.

3. The brief facts of the case are that the Petitioner-ONGC is a Maharatna Public Sector Undertaking (PSU), incorporated in the year 1955, and was converted into a Corporation in the year 1993. It has its registered office at Deendayal Urja Bhawan, Plot No. 5, Nelson Mandela

Marg, Vasant Kunj, New Delhi - 110070 and is engaged in exploration and production of oil and natural gas. The Petitioner-ONGC floated Tender No. ZNJMC10004 on 26th October, 2010 for procurement of 17 Nos. truck mounted heavy-duty dual skid hydraulic single drum wireline winch units (referred as "wireline winches"). Wireline winches are manufactured for all applications of down hole Production, reservoir and logging services with special features to provide a safe smooth and trouble-free operation. Such Winch Units are generally deployed at oil and gas wells for safe bottom hole operations for using other associated down hole tools to diagnose the health of reservoir for better monitoring of the field and optimization of production. A pre-bid meeting was held on 26th November, 2010, whereby queries submitted by 5 bidders, including the Respondent-UDT, were replied by the Petitioner. It is pertinent to mention that upon a request made by the Respondent during pre-bid discussions, the Petitioner extended the delivery period from 9 months to 12 months in case of the Respondent. Further, no grievance was ever raised by the Respondent with respect to imposition of Liquidated damages in the Tender. The Respondent submitted its bid no. UDT/MKTG/EBID/2010-11/514. The Petitioner issued a Notification of Award (NOA) dated 28th September, 2011 in favour of the Respondent for the procurement of the winch units. Thereafter, on 24th February, 2012, the Purchase Order no. 4010061848 was issued by the Petitioner in favour of the Respondent for supply and installation of Wireline Winch Units. It was alleged by the Respondent that the Petitioner illegally, unlawfully, malafidely and unconstitutionally deducted USD 1,46,400

from the Respondent's account towards alleged Liquidated Damages which gave rise to disputes and differences between the parties. Accordingly, the Petitioner vide letter dated 17th January, 2019 appointed Shri P. K. Jain as sole Arbitrator for adjudication of disputes and differences between the parties.

4. The learned Arbitrator passed the Award dated 10th August, 2020 whereby the claim no. 1 of the Respondent-UDT (Claimant in the Arbitral proceedings) 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.

5. Being aggrieved by the award (claim no. 2), the Petitioner-ONGC has filed the present objection Petition.

6. Learned counsel appearing on behalf of the Petitioner-ONGC (Respondent in the Arbitral proceedings) submitted that the impugned award is erroneous and merits being set aside to the extent it allows Claim No. 1 of the Respondent-UDT on account of delay due to deviation in vendor list/makes for bought-out items in view of the contractual obligation set out in the contract read with the evidence led by parties and the fact that the issue of the levy of liquidated damages under Clause 13 was not raised during pre-bid discussions. The Award suffers from impropriety, perversity and inadequacy in the reasoning. It is further submitted that the impugned Award has been passed overlooking the salient terms and conditions of the contract with respect to the levy of liquidated damages by the Petitioner. The findings rendered by the Arbitrator on the delay occasioned in the execution of contract fall foul of

the evidence on record and run counter to the terms of the contract and essentially re-write the contract. It is also submitted that the learned Arbitrator allowed Claim No. 1 of the Respondent wrongly *sans* assigning any proper reasons. The findings of the Tribunal are perverse and unreasonable as they are based on no evidence, or evidence which is thoroughly unreliable, and no reasonable person would act upon it. The Award ought to be set aside since the view taken by the Tribunal was not even a possible interpretation, therefore, the award being unreasonable and unfair, suffers from perversity. Moreover, the Arbitral Award fails to consider the material on record which reflects that the delay in execution of works is on account of acts and omissions of the Respondent.

7. It is submitted that it is trite that the Arbitral Tribunal has to adjudicate the dispute within the four corners of the contract, and thus, reversing the levy of liquidated damages contemplated under Clause 13 of the General Conditions of Contract is perverse and patently illegal. The learned Arbitrator ought to have considered that the time and date of delivery was the essence of the contract and that the Petitioner could not have afforded any lapse of time in respect of the present project. Even so, the Petitioner gave several opportunities to the Respondent, however, the Respondent failed miserably in supplying the wireline winch truck units within the extended time. It is further submitted that the impugned award is vitiated by patent illegality since the Arbitral Tribunal has failed to determine the terms of the agreement in a reasonable manner and that the agreement has been construed in such a way that no fair minded or reasonable person could do.

8. Learned counsel appearing on behalf of the Petitioner submitted that the impugned award is erroneous and merits being set aside as it is contrary to the substantive provisions of the Indian Contract Act, 1872 as well as the terms and conditions of the Agreement, and thus, is liable to be set aside. The findings of the learned Sole Arbitrator are *ex-facie* contrary to the Agreement Terms. It is submitted that the present petition pertains to a commercial dispute as defined under Section 2(1)(c)(vi) of the Commercial Courts, Commercial Division and Commercial Appellate Division of the Delhi High Court Act, 2015, 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 Respondent-UDT has failed to bring out any grounds so as to warrant interference by this Court under Section 34.

9. *Per contra*, learned counsel appearing on behalf of the Respondent-UDT submitted that the grounds taken in the objection Petition are not covered under any of the Clauses of Section 34 of the Arbitration and Conciliation Act, 1996. It is submitted that the Petitioner has not come before the Court with clean hands and has, in fact, misled the Court. It is further submitted that the Petitioner has not placed all the documents which formed part of the Arbitration record. It is also submitted that the Petitioner has filed alleged documents with the Petition which never formed part of the Arbitration record.

10. It is submitted that the learned Arbitrator has rightly passed the impugned Award and there is no scope that the award suffers from impropriety, perversity and inadequacy in the reasoning. It is also

submitted that the Award has been passed considering the salient terms and conditions of the contract with respect to levy of liquidated damages. Hence, the objection Petition is not maintainable and is liable to be dismissed.

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

12. In the instant case, the Petitioner floated a tender bearing no. ZNJMC10004 for procurement of truck mounted heavy duty dual skid hydraulic single drum wireline winch units. Accordingly, the Respondent submitted its bid dated 31st January, 2011 for supply of 17 nos. wireline winch units. The bid of the Respondent was accepted by the Petitioner and the Petitioner issued NOA dated 28th September, 2011 to the Respondent and thereafter the Petitioner issued Purchase Order dated 24th February, 2012 in favour of the Respondent. The dispute arose in the instant matter when it was alleged by the Respondent that the Petitioner has withheld USD 1,46,400 illegally from the Respondent's account towards alleged Liquidated Damages. The Petitioner, 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 Respondent 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 filed the present petition.

13. The instant petition is filed on the ground that the Award dated 10th

August, 2020 is patently, illegal, against the public policy and violative of principle of Natural Justice.

14. 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, have explicitly agreed to waive any claim for pre-suit interest or *Pendente-lite* interest.

15. 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 settled law that Section 34 of the Act, 1996 does not confer any power on the Courts to modify the Arbitral Award.

16. 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.]”

17. 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. Parties 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."*

18. 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.”

19. 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.

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

21. The order be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

DECEMBER 12, 2022
Dy/mg

[Click here to check corrigendum, if any](#)