



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

% Reserved on : 04.09.2023
Pronounced on : 06.12.2023

+ **O.M.P. (COMM) 269/2023 & I.A. 13793-94/2023**

IN THE MATTER OF:

STEEL AUTHORITY OF INDIA LIMITED Petitioner
 Through: Mr Shaiwal Srivastava, Advocate.

versus

BEIJING SINO STEEL INDUSTRY AND TRADE GROUP
 CORPORATION , CHINA & ORS. Respondents
 Through: Mr Gaurav Lavania and Mr Soorya
 B., Advocates for respondent No.3.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. By way of present petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter, '*the A&C Act*'), the petitioner seeks setting aside of final Award dated 11.04.2023 passed by the three-member Arbitral Tribunal (hereafter, '*the AT*') under the Rules of Arbitration of the International Chamber of Commerce (hereafter, '*the ICC Rules*').

2. The impugned Award came to be passed in context of disputes that arose between the parties in respect of turn-key contract dated 13.10.2007 for setting up a Top Pressure Recovery Turbine at petitioner's Ispat Steel Plant in Burnpur India (hereafter, '*the Contract*'). The Contract was executed between the petitioner and the respondents' consortium. Article 10.1 of the Contract provided for resolution of disputes by way of arbitration



under the A&C Act.

3. Arbitration in the present case was governed by procedural rules of International Court of Arbitration (‘ICA’) of the International Chamber of Commerce. Under Article 18(1) of the ICC Rules, the place of arbitration was to be fixed by the Court, unless agreed by the parties. With the consent of parties, the place of arbitration was fixed at New Delhi. A three-member Tribunal was constituted which has delivered the award in question in the present proceedings.

DISPUTES BEFORE THE AT

4. The disputes between the parties pertain to termination of the Contract by the Petitioner vide their letter dated 29.11.2012, alleging delays in completion of works by the respondents/contractors. The Contract was stipulated to be completed in 24 months from 12.10.2009, the effective date of the Contract. It is alleged that despite several extensions, the contractors could not complete the works, which forced the petitioner to get the works completed at the cost and risk of the contractors by hiring a third-party contractor on 13.02.2013, which completed the work on 29.03.2018 when the Final Acceptance Certificate (‘FAC’) was issued. Petitioner further claimed that prior to termination of the Contract, the contractors were issued warnings from time to time to expedite the performance however, the same did not yield any results.

5. The delays on the part of the Contractor were attributed inter-alia to the following reasons:

- (i) Drawings were not finalised till 25.08.2008.
- (ii) Respondent No. 3 (hereafter, ‘the GAC’), could not commence work at the site.



(iii) Unilateral change of design by the respondent Nos. 1 and 2 (hereafter, 'SSIT' and 'Tangshan Iron' respectively).

6. Petitioner sought to explain the gap between the termination of Contract on 29.11.2012 and invocation of arbitration on 07.01.2020, by raising the following three contentions. It was contended that the cause to sue did not arise until 29.03.2018, when the work was completed by the third-party contractor at the cost and risk of the contractors. Petitioner also referred to Clause 44.2.6 of General Conditions of Contract (hereinafter, 'GCC') to contend that the cost of completion of the remaining work was quantified only after the completion of works and the same was submitted to the SSIT and GAC on 05.05.2018. Upon the failure of the said parties to respond to the demand, the cause to sue arose. From 05.05.2018, the invocation on 07.01.2020 is within three years. Additionally, it was argued that the parties were engaged in settlement talks, which is evident from the emails filed by the petitioner in the arbitral proceedings. From the breakdown of settlement talks, which are claimed to have happened on 28.03.2017 & 29.03.2017, the arbitration was invoked within three years on 07.01.2020. During the course of arguments, petitioner submitted that it fell in the third limb of Entry 55 of the Schedule I of the Limitation Act 1963, as per which the cause of action was continuing even after termination, since the petitioner got the work completed from a third-party contractor under Clause 44.2.6 of GCC. Broadly speaking, petitioner's plea is that from all angles, the claim is within 3 years of limitation period and is therefore not time barred.

7. Per contra, SSIT resisted the claim and challenged the maintainability on the ground of limitation. It claimed that the cause to sue arose when the



Contract was terminated on 29.11.2012 by the petitioner, and therefore invocation of arbitration on 07.01.2020 after nearly 7 years, was time barred. SSIT referred to precedents in Ancient Infratech (Pvt.) Ltd. v. National Buildings Construction Corporation Ltd. & Ors.^{1]} and KLA Construction Technologies Pvt. Ltd. v. Chadha Sugar and Industries Pvt. Ltd.² to contend that completion of remaining work by the third-party contractor on 29.03.2018 will not postpone the accrual of cause to sue which originally accrued on 29.11.2012 when the Contract was terminated. In continuation of this argument, SSIT also submitted that quantification of costs incurred in the completion of remaining works under Clause 44.2.6 of GCC will not postpone the cause to sue.

8. SSIT further claimed that the petitioner failed to pursue the mandatory pre-arbitration conciliation conceived in Article 10.1 of the Contract, which rendered the arbitration as pre-mature and consequently the disputes non-arbitrable. On merits, it was contended that the Contract did not provide for completion of works by the petitioner though a third-party contractor at the cost and risk of the respondents/contractors. In the absence of a provision in the Contract, the damages could not be claimed from the contractors. It was further contended by the contractors that the work awarded to the new contractor was much wider in scope than the remaining works sought to be completed upon the termination of the Contract. It was further alleged that the petitioner was responsible for delays as it had failed to provided gas supply for the blast furnace, which it was supposed to under the Contract.

Contractor also claimed that the Contract was divisible whereby each

¹ 2019 SCC OnLine Del 8153

² 2018 SCC OnLine Del 10226



of the respondent was responsible for the performance of their respective parts of the Contract. The scope of work of each of the respondent was separately and clearly earmarked.

9. The three contractors were impleaded separately as respondent Nos. 1, 2 and 3.

i) SSIT filed its reply to the claim and also raised a counter claim for a sum of USD 504,600.53 alongwith 18% interest p.a. However, the same was deemed to be withdrawn on 27.08.2021 pursuant to Article 37(6) of ICC Rules for respondents' failure to pay the balance of the separate advance on costs fixed for the respondents' counterclaims.

ii) Tangshan Iron did not participate in the arbitral proceedings before the AT.

iii) GAC filed its Statement of Defence and also raised a counter claim of Rs.39,645,424 alongwith 18% interest p.a. however the counter claim was deemed to be withdrawn on 27.08.2021 pursuant to Article 37(6) of ICC Rules for respondents' failure to pay the balance of separate advance on cost fixed for respondents' counter claims.

10. Based on the pleadings, the AT framed following final issues for consideration :-

“110. The final list of issues as settled by the Tribunal on 25 May 2022 , after considering the parties' submissions, is set out below.

Jurisdiction /Admissibility

111. Is conciliation a pre -condition to arbitration under Article 10 of the Contract ?

a. If so, was the pre -condition complied with?



i. If the pre - condition was not complied with, is this an issue of jurisdiction or admissibility ?

112. Are SAIL's claims time barred under the Limitation Act , 1963?

a. Is this an admissibility / maintainability issue ?

Contractual liability

113. Is Respondents ' performance of the Contract divisible ?

a. What is the effect of divisible performance of the Contract on the Respondents ' liability under the Contract ?

i. Are the Respondents jointly and severally liable to SAIL under the Contract ?

Contractual claims

114. Did :

a. SSIT breach any of its obligations for its scope of work under the Contract ?

b. Tanghan Iron breach any of its obligations for its scope of work under the Contract ?

c. GAC breach any of its obligations for its scope of works under the Contract ?

115. Was time for completion under the Contract set at large by SAIL's actions ?

116. Was SAIL's termination of the Contract on 29 November 2012 valid under the terms of the Contract ?

Risk Purchase Issues

117. Is SAIL entitled to its claim of INR 17.02 Crores ?

a. Has SAIL complied with the contractual requirements for



- a Risk Purchase claim ?*
- b. Did SAIL refuse GAC's offer to complete SSIT's works under the Contract ?*
 - i. If so , does this discharge GAC from liability for SAIL's Risk Purchase claim ?*
 - 1. If so , does this discharge GAC from liability for SAIL's Risk Purchase claim ?*
 - a. Divisible*
 - b . Indivisible ?*
- c. Was the Alternate Contractor's scope of works under the Risk Purchase Contract the same as the Respondents ' scope of work under the Contract?*
 - i. Was the Alternate Contractor's scope only for the balance work of the Respondents, or was there any change in scope/deviation therefrom ?*
 - 1. Did SAIL reduce the scope of the Risk Purchase Contract to account for the work done by the Respondents between the invitation for the Risk Purchase Tender and the award of the Risk Purchase Contract to the Alternate Contractor ?*
- d . Did SAIL take steps to mitigate its losses ?*
 - i . Which party bears the burden of proof on mitigation ?*
 - 1. Has the burden of proof been discharged ?*

Other issues

118. Which of the Parties, if any, is entitled to interest - on what amount , for what period and at what rate ?

119. Which of the Parties, if any , is entitled to costs of the arbitration ? If so, what is the amount and from which Party is this due ?”

11. Vide impugned Award, the AT dismissed the petitioner’s claim on the



issue of limitation itself. The AT awarded legal fee and other costs of Rs.1,16,92,032/- to GAC.

12. Petitioner has objected to the award under Section 34 on the ground that the AT failed to appreciate the effect of Clause 44.2.6 of GCC, which survived the termination, due to which, the cause to sue would not arise until the completion of remaining work by the third-party contractor and final costs thereof was ascertained. Petitioner has faulted the AT's reliance on decision in Ancient Infratech (Supra) and KLA Construction (Supra), which according to the petitioner did not deal with a contract having a clause similar to Clause 44.2.6 of GCC. Petitioner is further aggrieved by AT's refusal to rely upon the decision in Bell Alloys Steels (P) Ltd. v. National Small Industries Corporation Ltd.³ which petitioner is convinced as being squarely applicable to the facts of the case.

13. According to the petitioner, the judgment by this court in IOCL v. SPS Engineering Ltd.⁴ is closer to the facts with similar contract provisions as in the present case whereby the court sitting in Section 34 jurisdiction, set aside the AT's decision to reject a similar claim on limitation. According to the petitioner, the court rejected the contention that the cause to sue arose upon the termination of the contract.

14. Petitioner drew a line-by-line comparison of the contract provisions that fell for interpretation in IOCL (Supra) and the one in the present case (Clause 44.2.6 of GCC) and urged that the AT did not deal with IOCL's contention in the award, which lead to the erroneous conclusion drawn by the AT on limitation, rendering the award legally infirm. Petitioner did not

³ 1980 (1) Legal Serv (Mad) 85

⁴ 2018 SCC OnLine Del 7756



dispute the applicability of Entry 55 of Schedule 1 of the Limitation Act 1963, however, it disputed the application of facts and case laws by the AT to reach its finding that the claim is time barred.

15. Attempting to rebut the petitioner's contention, GAC has contended that the postponement of cause could not be for an indefinite period to await the completion of works, which in this case took about 6 years from the time the work was awarded to the new contractor on 13.02.2013 and when the same was completed on 29.03.2018. Petitioner has not shown why it took 5 years for completion of the work and if the scope of the work and the costing were the same as the originally contracted works. According to the respondent, the cost was known to the petitioner in February 2013 when the work was awarded to the new contractor which contradicts petitioner's assertion that the costs could only be ascertained in 2018 upon the completion of works. It was further contended that the Risk and Cost notice under Clause 44.2.6 of GCC was issued by the petitioner on 26.09.2015, and the same was refuted and disputed by the GAC on 15.10.2015 and even from this date the claim is time barred.

16. The case law on the power under Section 34 tells us that the scope of judicial intervention is narrow and strict. In the enquiry conducted under Section 34 courts are cautioned against re-appreciation of facts and evidence and even to over-look errors committed by the arbitrator(s), as long as the arbitrator(s) followed a judicial approach in adjudication. However, since in the present case, the challenge is mainly to the application of judicial precedents to the facts of the case, it is deemed apposite to examine if the AT's application of judicial precedents cited and relied upon was completely off the mark and shakes the judicial conscience of the court.



17. AT relied upon Ancient Infratech (Supra), KLA Construction (Supra) and Delta Foundation and Construction, Kochi v. State Construction Corporation Ltd., Ernakulam⁵ to reach the conclusion that Clause 44.2.6 of GCC shall not postpone the cause to sue, which arose upon the termination of contract on 29.11.2012, alleging breaches against the contractors.

18. In Ancient Infratech (Supra), contractor's claim of amounts due under its final bill were not claimed by the contractor immediately upon the termination of the works by NBCC (employer). Ancient Infratech contended that it had to wait till the completion of remaining work by NBCC, executed by engaging a third-party contractor, and it could not have filed a suit until the work was completed and the amounts spent by NBCC in the completion of works was ascertained, based on which the sums payable to it in the final bill would have become known. The court rejected the contention and held that under Entry 55 of the Schedule of Limitation Act 1963, the cause to sue arose when the contract was terminated and the contractor had no reason to await the completion of the remaining work by NBCC to file its suit. Court held that the cause to sue shall not be postponed until completion of remaining work, which was carried out at the cost and risk of the contractor by NBCC, apparently, under Clause 72.3(f) and 73.1 of GCC.

19. Petitioner's contention is that the decision in Ancient Infratech (Supra) does not apply to the facts of the present case since in the said case there was no provision similar to Clause 44.2.6 that enabled the petitioner to complete the remaining works at the cost and risk of the contractor. However, in Ancient Infratech (Supra), the court does refer to Clause 72.3(f)

⁵ AIR 2003 Ker 201



and 73.1 of GCC but does not discuss what they contained. A perfunctory reference is made in the judgment that the remaining work was carried out at the cost and risk of the contractor under the aforesaid clauses.

20. AT was persuaded by the consistency of the ratio laid down by the courts, first in KLA (Supra) and then reaffirmed in Ancient Infratech(Supra), about non-postponement of cause to sue until after the completion of remaining works. AT, further, relied upon the decision in Delta (Supra) to state that completion of remaining works at the cost and risk of the contractor, will not amount to successive breaches of the contract by the contractor. The AT held that since it is not a case of successive breaches, the cause to sue for breach of contract under Entry 55 would be when the breach was committed which led to termination of the contract.

21. According to this Court, the AT committed a fundamental error by not examining if the ratio laid down in KLA (Supra) and Ancient Infratech (Supra) could be contextually applied to what the parties had specifically agreed to in Clause 44.2.6 of the GCC, where the consequences of termination are laid down in some detail, including guidance to the parties about how the accounts of the contractor will be settled. Clause 44.2.6 of GCC reads as under:

“If the Employer completes the Facilities, the cost of completing the Facilities by the Employer shall be determined.

If the sum that the Contractor is entitled to be paid, pursuant to Sub-Clause 44.2.5 hereof, plus the reasonable costs incurred by the Employer in completing the Facilities, exceeds the Contract Price, the Contractor shall be liable for such excess.

If such excess is greater than the sums due to the Contractor under Sub-Clause 44.2.5 hereof, the Contractor shall pay the



balance to the Employer, and if such excess is less than the sums due the Contractor under Sub- Clause 44.2.5 hereof, the Employer shall pay the balance to the Contractor.

The Employer and the Contractor shall agree, in writing, on the computation described above and the manner in which any sums shall be paid.”

22. It gives a right to the petitioner to claim costs for the completion of remaining works and claim the same from the respondents. There is an obligation cast on the respondents to pay the excess amount received by them under the contract if the costs of completion of the remaining work s is less than the contract value. Likewise, if the eventual cost incurred turns out to be more than the contract value, the respondents are obliged to reimburse the same to the petitioners in the final settlement of account.

23. Noticeably, the claim made by the petitioner does not relate to the consequences of breach of contract and the delays caused by the respondents in completion of the work- there is no claim for liquidated damages provisioned for in Article 9 of the Contract, but the claim is specifically restricted to the costs incurred in completion of the remaining work. According to this Court, the cause to sue for such claim could not have arisen until the cost were ascertained and incurred by the petitioner. It arose only 29.03.2018, and certainly did not arise as soon as the termination was effected on 29.11.2012. The claim was specifically made under Clause 44.2.6 of the GCC, which was a consequence of termination, but matured later when the costs were incurred. AT fell in error by expecting the petitioner to make its claim even prior to settlement of account under Clause 44.2.6 of GCC, which could have only happened with the final assessment



of costs.

24. The above follows from what has been held by the Supreme Court in its judgment dated 03.02.2011 in Civil Appeal No 1282 of 2011 titled as IOCL v. SPC Engineering⁶, which precedes the decision of Delhi High Court in IOCL (Supra) and referred to above by the petitioner. The Supreme Court was hearing an appeal against the dismissal of a similar claim on limitation by the Designate Judge hearing a petition under Section 11 of the A&C Act, for appointment of arbitrator. The Supreme Court did not approve of the High Court' deciding the issue of limitation in a Section 11 petition however held that the finding on limitation was wrong. Following is the excerpt from the judgment:

“24. xxx

(ii) Finding : As the work was completed on 29.12.2007 and as the award was made only on 27.10.2008, the appellant ought to have crystalised the extra cost and claimed it in the first arbitration proceedings.

The assumption that the appellant ought to have made the claim for extra cost which arose after the commencement of the arbitration proceedings, in the pending proceedings by way of amendment, has no basis either in law or in contract. If the cause of action arose after the completion of pleadings and commencement of hearing in the first round of arbitration, nothing prevented the appellant from making a separate claim by initiating a second arbitration.

(iii) Finding : Once a risk and cost tender is issued at the risk and cost of a person, then, the amount which is to be claimed from the person who is guilty of breach.....

⁶ (2011) 3 SCC 507



becomes crystallized when the risk purchase tender at a higher cost is awarded.

This may be true as a general proposition. But it may not apply if there is a specific provision in the contract (like clause 7.0.9.0) which requires that the employer should claim as extra cost, only the difference between the "amounts as would have been payable to the contractor in respect of the work" and "the amount actually expended by the owner for completion of the entire work.

xxx”

25. That said, certainly, the limitation clock did not start ticking away from 29.11.2012. AT’s reliance on the abovementioned judicial precedents to peg the start date at 29.11.2012, was a fundamental error since it ignored Clause 44.2.6 of GCC. The ratio laid down in Ancient Infratech (Supra) and KLA (Supra) cannot have a universal application to all contractual clauses and facts. If there is a provision in the contract that guides the parties’ mutual rights and obligations upon termination of the contract, then such clause has to play itself out post the termination and the claim based on such clause would only mature once the disputes arise in relation to the rights of the parties under such clause.

26. When did the limitation clock start? That’s exactly what AT could have ascertained by giving the parties an opportunity to lead evidence, sticking to the rule that limitation is a mixed question of fact and law.

27. According to this Court, even if the AT had proceeded on merits, it was still incumbent upon the petitioner to prove by leading evidence that the claim was not time barred. Petitioner still had to prove the exact date when



the costs were ascertained by it and that it was not responsible for any delays in completion of the remaining works, enabling it to delay the commencement of limitation. Petitioner would have still required to prove in answer to the respondent's allegation, why the date of commencement of limitation could not be 13.02.2013, when the work was awarded to the new contractor and the contract value of the new work was known to the petitioner. After all, it may well be that the petitioner is not able to prove by leading evidence that the claim was within time.

28. In view thereof, this court finds that the AT committed an error by not recognising the right of the petitioner under Clause 44.2.6 Of GCC. It was not a case where issue of limitation could have been decided without conducting a trial.

29. Consequently, the award is set aside. Petitioner is free to take steps to pursue its claim, in accordance with law. The pending applications are disposed of.

**MANOJ KUMAR OHRI
(JUDGE)**

DECEMBER 6, 2023

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