



2024:DHC:4739



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **O.M.P. (COMM) 212/2019****HCL INFOSYSTEMS LIMITED**

..... Petitioner

Through: Mr. Harsh Kaushik, Mr. Harsh
Prakash, Advs.

versus

OIL & NATURAL GAS CORPORATION LIMITED

..... Respondent

Through: Mr. Abhishek Gupta, Ms. Tanya,
Advs. (VC).

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*Date of Decision: 13.05.2024.***CORAM:****HON'BLE MR. JUSTICE DINESH KUMAR SHARMA****J U D G M E N T****DINESH KUMAR SHARMA, J. (Oral)**

1. The present Petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (herein referred to as "*the A&C Act*"), against the final Arbitral Award (herein referred to as "*AA*") passed by the Arbitral Tribunal (herein referred to as "*AT*") comprising of a Sole Arbitrator on 16.01.2019 wherein the learned Sole Arbitrator has rejected all the claims of the petitioner, except one claim.

2. Briefly stated, the Respondent invited bids for carrying out the work of supply, installation and commissioning of NETWORK OPERATION CENTRE ('NOC') on turnkey basis. The Respondent awarded the tender to

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the petitioner by way of Notice of Award dated 10.10.2008 ('NOA'). Thereafter, the petitioner and the Respondent also executed an agreement dated 12.02.2009 ("Agreement"), specifying the scope of the work that was to be undertaken by the petitioner for setting up of the NOC, technical specifications, contract price schedule, and the project schedule. Under the Agreement, the petitioner was required to set up a facility/tool to quickly detect problems across different technology layers in the network, IT, and communication infrastructure in ONGC, isolate them, and fix them proactively before users were affected. The NOC project was to be executed on a turnkey basis and was to be completed within a period of 10 months from the date of NOA.

3. Further, during the course of the execution, certain disagreements arose between the parties as the Respondent demanded that the petitioner shall perform certain works that were stated to be outside the Scope of Work by petitioner as defined under the Agreement. The petitioner informed the respondent that additional work would entail additional costs and thereafter executed the additional work of the respondent. Petitioner raised bill amounting to Rs.3,52,07,839/- (Rupees Three Crores Fifty-Two Lacs Seven Thousand Eight Hundred and Thirty-Nine Only) which was not paid by the respondent. Further, the respondent raised a bill of Rs.90,48,966/- as liquidated damages on account of the delayed implementation and execution of the project and also withheld a sum of Rs. 21,89,398 which was paid by the petitioner on account of the service tax imposed on the softwares which were installed by the petitioner under NOC project.



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4. Thereafter petitioner invoked the arbitration clause vide notice dated 23.11.2011 after which the respondent appointed an Outside Expert Committee which gave its report in favour of petitioner, however respondent deposited only part payment of claimed amount to petitioner as full and final payment. Thereafter petitioner moved a petition Arb.P.No. 469/2014 for appointment of arbitrator and this court vide order dated 26.11.2014 appointed a sole arbitrator. Thereafter, AA (Arbitral Award) was passed on 16.01.2019 vide which petitioner's claim towards the additional work and illegal imposition of liquidated damages were rejected and held that the alleged additional work was covered under the Agreement and liquidated damages have rightly been imposed in accordance with the terms of the Agreement.

5. Ld. Sole Arbitrator vide the same allowed AA the claim of the petitioner towards reimbursement of the service tax, holding that the Respondent is bound to reimburse the petitioner an amount of Rs. 21,89,398/- together with 9% interest from the date of the submission of the statement of claim till the same is finally paid.

6. Learned counsel for the petitioner submits that the findings of the arbitral tribunal are ex-facie contrary to the terms of the agreement as admittedly there was a dispute between the parties; whether the end user monitoring of internet was covered by the Agreement or not; In terms of Clause 2.3.3.5 read with Clause 8.1.1.4 and Clause 8.1.1.6(h) of the Agreement and in the event of any dispute in respect of any such additional work, the petitioner in the interest of the project was required to undertake such work without prejudice to its contentions that the same constitutes a



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change order and the dispute was to be referred to Arbitration for adjudication, if the parties could not reach a consensus. It is submitted that in response to the direction of the Respondent for monitoring of end-user monitoring of internet, the petitioner vide its letter dated 15.12.2009 had informed the Respondent that as per the Agreement, the petitioner was required to manage and monitor ONGC's internal resources only and the solution as sought by the Respondent for monitoring and managing internet sites which were not controlled by the Respondent, was outside the scope of work of the contract. Reiterating the aforesaid stance, the petitioner vide its letter dated 18.01.2010 informed the Respondent that if the Respondent desired to avail the solution of end user monitoring of internet, which is beyond the scope of the contract, the same may be taken up by way of change order process.

7. It is further submitted by the counsel for the petitioner, that the Ld. Arbitrator contrary to material on record, has wrongly recorded in the AA, that the witness produced by the petitioner in response to Q. No. 54 has deposed that the end user monitoring of internet was part of the contract, whereas a bare perusal of the cross examination transcript would demonstrate that witness had deposed that the monitoring of end user response time over intranet is covered under the contract.

8. Learned counsel for the petitioner further submitted that the Ld. Sole Arbitrator failed to take note of the fact that the end user monitoring of internet was never part of the NOC Project as provided for under the Agreement. Further, the objective of the NOC Project was to quickly detect problems across different technology layers in Network, IT and



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&Communication Infrastructure in ONGC, isolate them and fix them before the users are affected. Reliance is placed upon Clauses 3.2(f) and 6.1.3.2.3(g) of the Agreement.

9. Learned Counsel submitted that the Ld. Arbitrator has held that since no change order was issued by the Respondent and that the solution for the two way data replication had been provided by the petitioner, the said work was deemed to be included within the scope of the Agreement. It was further submitted that just because no change order was issued by the Respondent for procuring solutions for two way online data replication does not conclude that the said work was within the scope of the Agreement. Clause 2.3.3.5 read with Clause 8.1.1.4 and Clause 8.1.1.6(h) of the Agreement sets out the course which was to be adopted by the Parties in the event there was a dispute pertaining to the scope of work.

10. Learned counsel further submitted that the Ld. Sole Arbitrator did not take in to consideration the fact that the two way replication was never part of the NOC Project as provided for under the Agreement. As per clause 8 (d) of Part IV-C of the Design Criteria “Security Information Management correlation systems at Delhi and Mumbai shall work as redundant systems so that Mumbai system can be used in case of any problem with system installed in Delhi”, thus making it amply clear that the petitioner was only required to provide one way data replication and was required to provide a Disaster Recovery site at Mumbai only in case the system at Delhi failed. Therefore, it is submitted that a finding of fact which is arrived at by ignoring or excluding relevant material or taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer



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from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in law. Reliance has been placed upon *Excise and taxation Officer-cum Assessing Authority vs GopiNath& Sons* 1992 Supp (2) SCC 312 which has been further relied upon in *Associate Builders vs DDA* (2015) 3 SCC 49.

11. It has further been submitted that the learned Arbitrator in contravention to the settled legal position has without examining whether the Respondent has suffered any damages or loss, awarded liquidated damages to the Respondent on the ground that the imposition of liquidated damages was envisaged under Clause 6.3.2 of the Agreement. Ld. Arbitrator has committed a patent illegality by upholding the levy of liquidated damages without determining as to whether the Respondent suffered any loss or injury owing to the delayed execution of the NOC Project. Ld. Arbitrator has not even recorded in the AA that there was a loss and/or injury suffered by the Respondent and that it was difficult to prove the losses suffered by the Respondent.

12. Learned counsel for the petitioner further submitted that it is a settled position of law that in a particular case where there is a clause of liquidated damages, the aggrieved party shall be entitled to only reasonable compensation, but it would not follow from there that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. It is submitted that Section 81 of the Act is not applicable to the OEC report as the proceedings before the OEC never proceeded as per the procedure prescribed under the Act and moreover, the OEC was unilaterally appointed



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by the Respondent and not as per the procedure prescribed under Section 64 of the Act.

13. Lastly, the learned counsel submitted that even though the Ld. Arbitrator has allowed the claim of the petitioner towards the reimbursement of the service tax amount, but has failed to give any reason or justification for awarding the interest on same from the date of statement of claim and not from the date when the said amount became due and payable by the Respondent.

14. Learned counsel for the respondent submitted that none of the grounds under Section 34 of the A&C Act to set aside an award are made out in the facts and circumstances of the present case. The following propositions of law are being canvassed and relied upon by respondent:

(i) An arbitral award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. Reliance is place upon ***DAMEPL vs. DMRC***; (2022) 1 SCC 131

(ii) Construction and interpretation of the terms of the contract is within the domain of the Arbitral Tribunal and ought not to be interfered with by this Hon'ble Court. Reliance is placed upon ***Associate Builders vs. Delhi Development Authority***, (2015) 3 SCC 49; ***M. P. Housing Board vs. Progressive Writers***, (2009) 5 SCC; ***State of Rajasthan vs. Puri Construction Co. Ltd. & Anr.***, (1994) 6 SCC 485; ***McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.***; (2006) 11 SCC 181.

(iii) An Arbitral Tribunal's decision on a question of fact is final and ought not to be interfered with, as long as the view taken is a possible view and is



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not arbitrary or capricious Reliance is placed upon *Associate Builders vs. Delhi Development Authority*, (2015) 3 SCC 49.

(iv) The following are within the domain of the Ld. Arbitral Tribunal being findings of fact, which cannot be assailed at this stage:

a. The question of who is responsible for the delay is a finding of fact.

Case Law: *National Highways Authority of India vs. G.S. Engineering and Construction Corporation*, FAO (OS) 562/2011 (Delhi)

b. Whether time is of the essence of a contract or not is a finding of fact
Case Law: *M. P. Housing Board vs. Progressive Writers*, (2009) 5 SCC 678; *Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan and Ors.*, (1999) 5 SCC 651; *Arosan Enterprises Ltd. vs. Union of India*, (1999) 9 SCC 449.

c. The issue as regards the true scope of work is purely factual in nature
Case Law: *McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.*; (2006) 11 SCC 181.

(v) The order declining permission to file additional documents is merely a procedural order that conclusively determines an application to file additional documents. The same has also not been challenged by HCL herein Case Law: *ONGC Petro Additions Limited vs. Technimont S.P.A. & Anr.*; 2019 SCC OnLineDel 8976.

(vi) Whether a particular amount was liable to be paid is a decision within the competency of the Arbitrator Case law: *Oswal Woollen Mills Ltd. vs. Oswal Agro Mills Ltd.*, (2018) 16 SCC 219.

15. Learned counsel further submitted that in response to HCL's contention with respect to non-consideration of recommendations of OEC



by the Arbitrator, it is submitted that the OEC proceedings were governed and conducted in accordance with Part III of the Act, as evidence from the OEC Report dated 01.07.2013 and the Letter dated 17.07.2012 issued by the Respondent. No proceedings, evidence or recommendation or finding can be looked into when arbitration is invoked. That no exception can be taken against the grant of interest by the Arbitrator @ 9% on the amount of service tax from the date of statement of claim till its final payment by ONGC. The contract precludes pre-reference or *pendent lite* interest on claims and stipulates that such claims would be void. Further, under Section 31(7)(a) of the Act, if the agreement between the parties prohibits award of interest for the pre-award period (i.e. pre-reference and *pendent lite* period), the Arbitrator cannot award interest for that period. Reliance is placed on **Bright Power Projects (India) Private Limited**, (2015) 9 SCC 695 and **Garg Builders V. Bharat Heavy Electricals Limited**, (2022) 11 SCC 697 in this regard.

16. Learned counsel for the respondent lastly submitted that the Section 34 petition filed by the petitioner is not maintainable as it seeks modification of the AA. Petitioner has challenged the AA with respect to the claims towards the additional work and refund of liquidated damages which have been rejected by the Arbitrator. Further, with respect to the claim for reimbursement of service tax, the Petitioner has sought modification to the extent that this court allows the claim of interest on the amount only from the date of submission of statement of claim instead from the due date of such amounts. Learned counsel for respondent submits that section 34 of the A&C Act does not empower the Courts to modify the AA and to grant



additional/alternative reliefs which were not allowed by the Arbitral Tribunal. Learned counsel has placed reliance upon ***Project Director, National Highways vs. M. Hakeem and Another***; (2021) 9 SCC 1, ***Larsen Air Conditioning vs. Union of India & Ors.***; 2023 SCC OnLine SC 982 and ***Angel Broking Ltd. vs. Sharda Kapur***; 2017 SCC OnLine Del 8211.

17. In the present case the petitioner is challenging the arbitral primarily on the following ground i.e. the arbitrator failed to provide valid reasoning as to whether the end user monitoring of the internet and two way online data replication were covered under the Agreement or not. The petitioner is also challenging the AA on the ground that the arbitrator has not took into consideration the report of Outside Expert Committee Report (OEC).

18. The learned arbitrator framed the following issues during the arbitral proceedings:

- “(i) Whether the claimant provided services out of the scope of agreement between the claimant and the respondent?*
- (ii) Whether the demand of the respondent with regard to monitoring end user transaction to the internet browsing from end user was within the contract?*
- (iii) Whether the delay in execution of the contract is attributable to the respondent inter alia due to requisition made by the respondent over and above the terms of contract?*
- (iv) Whether the demand of the respondent with regard to network attached storage with at least 7TB storage at Delhi and Mumbai and network attached storage at Delhi and Mumbai to have two way online replication were within the scope of work?*
- (v) Whether the claimant is entitled to a sum of Rs. 35,20,7,839.00 from the respondent for providing goods and services beyond the scope of the contract?*



- (vi) *Whether the respondent was entitled to deduct an amount of Rs.90,48,966.00 on account of liquidated damages despite the respondent having delayed its delivery bill in the implementation and execution of the contract?*
- (vii) *Whether the respondent was entitled to withheld the payment of Rs.21,89,398.00 on account of service tax?"*

19. I have gone through the AA and with respect to the issue no. (i) the AT has given proper and just finding. The learned arbitrator after taking into consideration clause 8.1.1, Clause 6.1.2(f), clause 6.1.3.2.3 gave the following finding:

".....Clause 3.2.7 of the contract is very specific. It says that no invoices for extra work or change order on account of change order will be submitted by the contractor unless the said extra work/change order has been authorized/ approved by the Company in writing in accordance with clause 8.1 of the contract.

The change order requires a direction in writing to the contractor to include any addition to the scope of work. It is submitted that if any change order is made which includes any cost factor in the cost of the contract, then as per clause...

..... As has been mentioned above, the contract was never amended in view of the cost escalation. There is no evidence that because of this demand of the respondent, the contract was sought to be annulled or because of the addition cost involved for providing the solution the contract was amended. On the contrary, it is admitted fact that the solution has been provided by the claimant and the NOC Centre is fully functional. In such situation, the only conclusion which can be drawn that the end user response monitoring of interest was very much covered by the contract hence this issue is decided against the Claimant."



20. Further with respect to the issue no. (ii), the AT gave the following finding:

“I have given a thoughtful consideration to the rival contentions and the various provisions of the contract and I am of the view that alleged additional work of data recovery for security information management is very much covered by the contract and the plea that it was not included in the cost of the total work under the contract, cannot be accepted in view of the reasons mentioned above. It was necessary for the claimant to claim any amount for additional work to have raised an invoice after obtaining written request or order form the respondent. No such invoice or any written direction by the respondent has been placed on record. No doubts, the Solutions have been provided as per the requirement of the NOC system and the system as required to be created is how fully operational.

In view of above, the contention of the claimant that end user response monitoring of internet and two way data replication are beyond the scope of the work contract cannot be accepted.”

21. Similarly with respect to the remaining issues, this court finds that adequate reasoning and consideration has been given to the pleadings and documents present on record before the AT. It is a well settled law that the court while entertaining a petition under section 34 of the A&C Act has to only see whether any perversity or patent illegality is present in the AA. The expression ‘perverse’ refers to where the award is either not supported by any evidence on record, is against the law, suffers from any procedural irregularity or is such that it has ignored some pivotal evidence.¹ The court cannot re-interpret the clauses which have been interpreted by the learned

¹(2006) 11 SCC 181



arbitrator merely on the ground that a different plausible view can be considered, therefore this court has to only look into prima facie view.

22. Thus taking into account the totality of the facts, it would be reasonable enough to reject the contention of the petitioner with respect to the coverage of the additional work in the agreement as this court is not sitting in appeal but only to look into the patent illegality (if any) or any finding affecting the public policy of India. This court has limited jurisdiction while navigating the parameters in setting aside the AA, i.e. it cannot sit in appeal and there can neither be any reappraisal of evidence nor any enquiry into the merits. The AA can only be set aside if it is found to be contrary to the fundamental policy of Indian Law, interest of country, justice or morality or if it is patently illegal. Therefore, the court must limit itself to checking whether the impugned arbitral award violated the “public policy of India,” or is against the principles of natural justice/ “most basic notions of morality or justice” or whether there exists any patent illegality in the same. Further the contention of the petitioner that the arbitrator did not look into the report of the OEC is also not plausible as AT has given the following observation regarding this contention which seems enough:

“It has been argued by the learned Counsel for the claimant that before invoking the arbitration this dispute was referred to Outside Expert Committee comprising Dr. T.S.VijayRaghvan, Sh.P.S. Hota and Sh. S.C. Tripathi, all IAS bureaucrats. They submitted their recommendation which has been quoted at page 31 of the SOC. It is contended by the claimant counsel that SOC has in fact made the recommendation for the payment of the claimed amount on account of additional work and service taxes and the half of the liquidated damages imposed. Suffice will be



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to say that as per Section 81 of the Arbitration Act, no proceedings, evidence or recommendation or finding can be looked into when the arbitration is invoked.”

23. Lastly, the petitioner has contended that the AT allowed the claim of the petitioner towards the reimbursement of the service tax amount but has failed to give any reason or justification for awarding the interest on same from the date of statement of claim and not from the date when the said amount became due and payable by the Respondent. With respect to this, clause 1.3.2.6 of the GCC provides for that no exception can be taken against the grant of interest by the Arbitrator @ 9% on the amount of service tax from the date of statement of claim till its final payment by ONGC. The contract precludes pre-reference or *pendent lite* interest on claims and stipulates that such claims would be void.

24. Considering the observations of the AT and the above discussions, this court is of the view that this court cannot examine into the arbitral award as an appellate court and has very limited power under section 34 of the A&C Act. The court do not find any patent illegality or perversity in the award passed by the arbitral tribunal.

25. Hence, the present petition is dismissed.

DINESH KUMAR SHARMA, J

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