

(2013) 09 DEL CK 0047

Delhi High Court

Case No: Rev. Petition No. 472 of 2012 in FAO (OS) 89 of 2008

Mecon Limited

APPELLANT

Vs

Pioneer Fabricators
Ltd.

RESPONDENT

Date of Decision: Sept. 25, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34

Hon'ble Judges: Siddharth Mridul, J; Pradeep Nandrajog, J

Bench: Division Bench

Advocate: S.K. Taneja, Instructed by Mr. Rajesh Gupta, Mr. Sumit R. Sharma, for the Appellant; Raman Kapur Instructed by Mr. R.P. Singh, Ankur Gosain, Dhiraj Sachdeva and Mr. Aviral Tiwari, for the Respondent

Final Decision: Dismissed

Judgement

Pradeep Nandrajog, J.

CM No. 14509/2012 (Delay)

For the reasons stated in the application the delay of 45 days in filing the review application is condoned.

Rev. Pet. No. 472/2012

1. FAO(OS) 89/2008, laying a challenge to the order dated November 21, 2007 passed by the learned Single Judge disposing of OMP No. 473/2006 was disposed of by us on May 15, 2012. The appeal was partially allowed. Review of said order dated May 15, 2012 is prayed for vide RP No. 472/2012; stating that there is an error apparent on the face of the record as per facts noted in paragraph 16, 24, 29 and 30 of the order sought to be reviewed, in that, it is alleged that it has wrongly been noted (as a fact) that the "No Claim Certificate" dated February 14, 2003 was without demur i.e. was not under protest. To understand the reason for the review we

simply note that one of the issue which arose for consideration pertained to accord and satisfaction and it is in this context the issue of the No Claim Certificate" being unconditional i.e. without demur or whether it was a result of coercion and hence under protest arose for consideration.

2. In our decision dated May 15, 2012, we had noted that Mecon Ltd. invited offers, as per tender documents, to construct five retail outlets for Indian Oil Corporation Ltd. It was a case of a back to back contract. The Bill of Quantities i.e. works to be executed were quantified in detail and the price bid required item-wise price to be quoted. Pioneer Fabricators Pvt. Ltd. (hereinafter referred to as "Pioneer") was one amongst the many firms/companies which submitted offer, and being the lowest bidder, had its offer, in sum of Rs. 2,38,92,519/- accepted; resulting in a work order dated May 31, 2000 being issued to it. It was a term that the work plan shall be finalized and accordingly, styling it as a Letter of Award, on June 13, 2000 the parties finalized, in the said written memorandum, the detailed work-plans to complete the work, and as per which, the time within which the work had to be completed at the five sites was fixed at 80 days; commencing from the date when a particular site would be handed over. The Letter of Award dated June 13, 2000 clearly recorded that the bid quoted, pertained to works to be executed as per Bill of Quantities items, and in respect of any extra item(s) of work, which may be required to be executed, price would be paid at mutually determined/prices fixed by the parties.

3. It was further noted that out of the five sites possession of four was handed over on June 06, 2000 and thus qua said four sites the work had to be completed by August 25, 2000 and the remaining one site was handed over on July 12, 2000, requiring the work to be completed at said site by September 30, 2000. It was noted that during execution of the works, Mecon required Pioneer to execute 31 extra items of work and this obviously required the parties to sit across the table and decide the price, to be paid to Pioneer, for having executed the said 31 extra items of work. It was further noted that the parties were a little inofficious in their dealings. They did not sit across the table and decide the price at which extra items, got executed, were to be paid for. The work progressed and was completed by October 31, 2001 at all the sites. Thus, it was noted that it was apparent that qua four sites, possession whereof was handed over on June 06, 2000, for which the works had to be completed by August 25, 2000, the delay was 14 months and for the fifth site, possession whereof was handed over on July 12, 2000 and for which the works had to be completed by September 30, 2000, the delay was of 13 months. It was further noted that as the work progressed, interim bills were raised and running payments released from time to time. This was obviously subject to the works being measured upon completion, since payment had to be made with reference to each item of work with reference to the Bill of Quantities and pertaining to the extra items of work, as per measurements recorded, and at the rate agreed. It was further noted that notwithstanding the works being completed by October 31, 2001, the parties showed no sense of urgency to finalize the issue of

payment to be made. Correspondence was exchanged on the subject of the price to be paid for the extra items. Rival versions for the rate, as sought by Pioneer and as offered to be paid by Mecon, find a mention in the said correspondence. It was noted that consensus eluded the parties, requiring a meeting across the table to be held and this took place on August 07, 2002. A rate-list, running into three pages was drawn up pertaining to the 31 extra items of work executed, detailing each extra item of work; the rate claimed by Pioneer; the rate offered by Mecon and the rate which was ultimately agreed to be received by Pioneer. The said document was not only signed by the representative of both parties, but additionally had an endorsement by Pioneer as under:-

"Agreed"

Sd/- (7-8-2002)

We do not have any other

extra items except EI-1 to

EI-31 mentioned above.

Sd/- (7-8-2002)

4. It was further noted that having agreed to the rate at which extra items of work had to be paid for, the parties had to jointly measure the works at site, so that the payment could be released after joint measurements were completed and finally recorded in the measurement book. This happened till the last week of September 2002, by which week, the parties reconciled the issue pertaining to the work executed at site. It was noted that thereafter on October 08, 2002, Pioneer submitted a final bill and as per which it raised a demand, pertaining to extra items of work, in sum of Rs. 1,05,05,374/- and for the works executed as per Bill of Quantities, in sum of Rs. 1,92,81,990.62. This bill was verified and there being discrepancies, was accepted in sum of Rs. 2,88,74,334/- by Mecon, representing the value of the work done and after adjusting running payments made pursuant to interim bills raised, finalized the amount payable at Rs. 57,41,541/-. There was again a lull, till when on February 14, 2003, Pioneer sent a letter under a caption "No Claim Certificate" writing to Mecon as under:-

This is with reference of above mentioned work order number. We hereby certify that we have no further claim (except release of LD Charges etc.) than those given in the final bill which includes the work done bill and release of retention money etc. We shall accept this payment as full and final settlement of our claims and we shall not resort to the provisions of Indian Arbitration Act 1940 thereafter.

5. It was further noted that on May 05, 2003, Mecon sent a letter to Pioneer informing that if it would confirm that revised contract price for the work done was accepted by it in sum of Rs. 2,88,74,334/-, Mecon would make the necessary

payment. But, prior thereto, Pioneer notified 16 claims vide its letter dated March 19, 2003 addressed to the DGM and Product Coordinator of Mecon at 14th-15th Floor, Scope Minar, Laxmi Nagar, New Delhi-110092, which letter Mecon claims was never received by it, and it was further noted that the said letter dated June 13, 2000, styled as a Letter of Award, vide Clause No. 15 specifically provided that all correspondence pertaining to the contract would be in duplicate and addressed to: (i) Deputy General, Manager Mecon Ltd., 208-216 Aurobindo Place, Hauz Khas, New Delhi-110016; and (ii) General Manager, Mecon Ltd., 208-216 Aurobindo Place, Hauz Khas, New Delhi-110016. It was noted further that as per the letter, Pioneer invoked the arbitration clause in the agreement and called upon Mecon to forward three names to enable it to appoint a sole arbitrator from out of the panel. It was in this context that Mecon wrote for the first time that it had issued the No Claim Certificate under protest.

6. It was noted by us that the letter dated February 14, 2003 addressed by Pioneer to Mecon under the caption No Claim Certificate did not so record. This letter was not responded to by Mecon for the reason it claimed not having received the letter. Pioneer thereafter appointed Sh. K.D. Bali as a Sole Arbitrator and in respect of whose jurisdiction to adjudicate the claim, we had noted that an objection was taken before him by Mecon, but an order was passed against Mecon by the learned Arbitrator. While challenging the award grounds were urged to challenge the very appointment of the arbitrator by Pioneer and hence his jurisdiction to enter upon reference, but the decision has been pronounced against Mecon. We had noted that in the memorandum of appeal, grounds had been urged on the subject of Sh. K.D. Bali having no jurisdiction to adjudicate the claim, but no submissions were advance thereon during arguments of the appeal and thus we had thought it fit not deal with the issue.

7. We had accordingly noted that the only argument advanced during hearing of the appeal was that the bar of accord denuded Pioneer to raise the claims before the learned Arbitrator, and for which, the facts which we had noted hereinabove were pressed into aid.

8. Thereafter, in paragraphs 13 to 34 of our decisions under review, we had observed/recorded/concluded as under:-

13. Before the Arbitrator 16 claims were raised by Pioneer. Before discussing the claims, the learned Arbitrator noted the facts and the events as they transpired after the work order dated May 31, 2000 was issued. The learned Arbitrator noted that the works had to be executed at five sites: Faridpur, Gulamkhera, Kesarpur, Bankatra and Transport Nagar and from the evidence on record found that there were principally five reasons which had occasioned the delay in executing the works: (i) late handing over of all the sites, (ii) belated drawings and designs being furnished by Mecon, (iii) belated instructions by Mecon requiring Pioneer to execute the work, (iv) belated supply of material to be issued to Pioneer, and (v) belated

payments released under running bills disrupting the cash flow of Pioneer. The learned Arbitrator has extensively noted the evidence to bring out the aforesaid, and suffice would it be to state that these are matters of fact and as long as there is evidence to support the finding returned by the learned Arbitrator, are immune from challenge.

14. Unfortunately, on the issue of there being an accord, there is no meaningful discussion by the Arbitrator in the award, save and except a non-reasoned observation in paragraph 34(e) of the award. We quote: "It also cannot be denied that the respondent has been withholding a large sum due to the claimant from payment and must have exercised undue influence on the claimant to agree to the respondents terms howsoever unfair."

15. We may highlight that while narrating the facts, in paragraph 10 of the award, the learned Arbitrator has recorded that the No Claim Certificate issued by Pioneer on February 14, 2003 was under protest and reserving right to other payments.

16. This is a wrong reproduction of a material fact. As noted in para 9 above, the letter dated February 14, 2003, under the caption "NO CLAIM CERTIFICATE" does not contain any such reservation of it being under protest. The letter is unequivocal in its language. It is only the letter dated March 19, 2003, which Mecon claims not having been received by it, which for the first time contains the writing that Pioneer had issued the No Claim Certificate without prejudice to its claims. It is also relevant to note that in the letter dated March 19, 2003 Pioneer never took the stand that it was constrained to issue the No Claim Certificate on February 14, 2003 under duress.

17. With respect to the claims, claim No. 1 in sum of Rs. 66,15,716/- has been allowed by the learned Arbitrator in view of the settlement between the parties in sum of Rs. 57,41,541/-, and thus there is an acknowledgment, in unwritten words, by the learned Arbitrator that the accord arrived at between the parties, with the rates agreed upon at the meeting which took place on August 07, 2002, and the exact work done as recorded in the measurement book in the last week of September 2002 would bind the parties. While discussing this very issue, the learned Arbitrator has held that since delay in executing the works is not attributable to Pioneer, the liquidated damages levied by Mecon are unjustified. Thus, claim has been allowed in sum of Rs. 57,41,541/-, which we highlight is the exact amount payable as noted by us in para 8 above.

18. Needless to state, as a result thereof, the learned Arbitrator has held, with respect to Pioneer's claim to be paid even the liquidated damages levied i.e. claim No. 16, that since full amount was ordered to be paid under claim No. 1, the same need not be separately awarded under claim No. 16.

19. It is apparent that claim No. 1 and claim No. 16 adjudicated by the learned Arbitrator are in complete harmony with the accord between the parties.

20. The learned Arbitrator has thereafter discussed claim No. 2, which was for interest to be paid on delayed payments of the running bills, claim No. 3 for short payment under the running bills, claim No. 4 for alleged extra work pertaining to soiling below asphaltic drive, claim No. 5 for additional work for lead of earth at Dankatara and Gulamkhera works, claim No. 6 for under payment relating to CC flooring in drive way, claim No. 7 for extra expenditure incurred in removing slush and water from tank pits, claim No. 8 for overhead charges during prolongation of the contract, claim No. 9 for loss of profit due to reduction in productivity i.e. alleged loss of business which contractor i.e. Pioneer could have executed during the period the contract got prolonged, claim No. 10 with respect or rise in cost of material and labour during contract prolonged period, claim No. 11 for expenditure incurred on watch and war, claim No. 12 for wages of idle labour, claim No. 13 for renewal of guarantee bond during contract prolonged period, claim No. 14 for payment to remove water logging and claim No. 15, which we note was not finally pressed.

21. The learned Arbitrator has allowed claim No. 2, not in full, but in sum of Rs. 11,85,000/-, claim No. 3, not in full, but in sum of Rs. 27,000/-, claims No. 4, 6, 7, 8 and 14 in full. Rejecting claims No. 5, 12 and 13, claims No. 9, 10 and 11 have been allowed in part.

22. From the facts noted hereinabove in paras 1 to 12, it would be quite apparent that the issue of the price at which work executed beyond Bill of Quantities would be paid for, was the subject matter of correspondence exchanged between the parties and being resolved at a meeting held on August 07, 2002. No other demands were ever raised by the contractor. All extra items of work were listed and rate at which payment had to be made was agreed upon. By September 2002, the dispute relating to the measurements was also resolved and on October 08, 2002, Pioneer raised a bill in sum of Rs. 2,97,87,364.62, which was found to be having discrepancies and was finally settled at Rs. 2,88,74,334/- adjusting running payments made against interim bills Rs. 57,41,541/- was payable and on February 14, 2003, Pioneer sent a letter under the caption "No Claim Certificate", contents whereof have been noted by us in para 9 above.

23. Thus, it is clear that all issues were settled between the parties after due deliberations, save and except the issue of release of liquidated damages.

24. Before the learned Arbitrator, the plea of accord was raised by Mecon and aforesaid evidence placed before the learned Arbitrator, and regretfully has been totally ignored by the learned Arbitrator. We find not even an attempt made by the learned Arbitrator to discuss on the subject of there being an accord and a No Claim Certificate issued by Pioneer, except a vague reference in paras 34 (e) of the award that since Mecon had withheld a large sum due to Pioneer, there must have been exercised undue influence. Further, as already noted by us, in para 10 of the award, the learned Arbitrator has incorrectly recorded that the No Claim Certificate sent on February 14, 2003, was expressly made to have been submitted "under protest".

This wrong finding has apparently influenced the learned Arbitrator. We are unable to write anything more, with reference to the award, for the reason the award does not discuss the issue at all. A cryptic wrong fact has been noted in para 10 of the award, and a non reasoned and a presumptive reasoned finding on undue influence has been returned in para 34(e) of the award.

25. We find that the learned Single Judge has simply held that an issue of accord and satisfaction can be the subject matter of an arbitrable claim and since the same would be an issue of fact, a decision by the Arbitrator would bind the parties. With reference to the decision of the Supreme Court reported as [Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.](#), the learned single Judge has held that the scope of judicial interference u/s 34 of the Arbitration and Conciliation Act, 1996 is narrow.

26. The issue, whether a plea of accord and a no claims issued, can or cannot be the subject matter of arbitration has vexed the Courts on the very arbitrability of the claim. For, if there is an accord, there is no arbitrable dispute. If there is no arbitrable dispute, where is the question of a reference to an Arbitration? This is one view. The other view is that if a party alleges undue influence while executing the document recording an accord, it would then be an arbitrable dispute on the subject: Whether there was an undue influence.

27. Thus, it was the duty of the learned Arbitrator to have discussed the evidence, for one of his mandate was to decide: Whether the No Claim Certificate issued by Pioneer on February 14, 2003 was the result of an undue influence. The Arbitrator has just not discussed the evidence on the subject. We do not find the Arbitrator having returned any meaningful finding thereon. The award therefore suffers for an illegality contemplated by the decision of the Supreme Court in Saw Pipes" case (supra).

28. The learned Single Judge has no doubt discussed this issue, but has not noted the relatable evidence, which we have noted in paras 6 to 10 above.

29. On the subject of an accord being the result of a free will of the parties or undue influence, the learned Single Judge has noted various decisions, the latest being [Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors](#), The learned Single Judge has highlighted that when Pioneer gave the No Claim Certificate, it was expressly made clear that the same was "Under Protest".

30. Now, this is factually incorrect. As noted by us, the No Claim Certificate is actually a letter dated February 14, 2003, contents whereof have been noted by us in para 9 above. It has no endorsement "Under Protest". It is the letter dated March 19, 2003, which Mecon claims not to have been received, which records for the first time that the No Claim Certificate had been given "Under Protest".

31. The learned Single Judge has missed the point.

32. On the subject of an accord being out of free will or a result of undue influence, apart from the decision in Reshmi Construction's case (supra) the issue was discussed by the Supreme Court in five prior decisions reported as [Union of India \(UOI\) and Another Vs. L.K. Ahuja and Co., P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn.,](#) Nathani Steels Ltd. v. Associated Constructions , [Union of India Vs. M/s. Popular Builders, Calcutta,](#) Jayesh Engineering Works v. New India Assurance Co. Ltd.,

33. The ratio of law which can be culled out from the aforesaid decisions has been pithily stated by the Supreme Court in Reshmi Constructions" case (supra) by highlighting, in para 39(ii), that where there is evidence of parties negotiating prior to a settlement taking place resulting in a full and final discharge voucher/receipt being executed, later on the party executing the receipt cannot turn around and reprobate to claim that the accord was not voluntary.

34. Though the learned Single Judge has noted the decision of the Supreme Court in Reshmi Constructions" case (supra), but has missed para 39(ii) thereof.

9. We had thereafter concluded that from the facts noted it is clear that the parties negotiated since October 31, 2001 on the issue of payment to be made for extra items of work and arrived at a consensus on August 07, 2002. Thereafter, by September 2002 the parties arrived at a consensus on the exact work executed and on October 08, 2002 Pioneer submitted the final bill followed by issuing the letter dated February 14, 2003 which is the No Claim Certificate. Pioneer never raised the demands as were subsequently raised. There is clear cut evidence of there being an accord on all the disputes except whether liquidated damages could be levied. Claims pertaining to alleged extra items beyond the 31 which were listed by Pioneer and in respect of which rates were agreed between the parties after protracted correspondence, by sitting on the table on August 07, 2002, could not have been raised and the accord reopened.

10. As noted above, seeking review it is urged that the letter dated February 14, 2003 clearly mentioned that it was under protest and for which our attention is drawn to the pleadings of Pioneer before the learned Arbitrator and Annexure-IX thereto.

11. The letter in question reads as under:-

PFL/MECON/MRT/-3/78

February 14, 2003

UNDER PROTEST

To

The DGM & Project Co-ordinator

M/s. Mecon Ltd.

14-15 Floor,

Scope Minar, Laxmi Nagar,

New Delhi-110092

Subject: Construction of IOCL, R.O"s under LSTK Scheme Zone C",

W.O. No: 05.66.P944 IOCL.002C dated 31/05/2000

Dear Sir,

As desired by you we are giving a No Claim Certificate for the above mentioned work. Please find the same as enclosed.

Hope you will find everything in line. If you require further clarification/details please feel free to contact us.

Thanks,

For Pioneer Fabricators (P) Ltd.

Sd/-

Authorized Signatory

Encl: No Claim Certificate No. PFL/MECON/MRT/03/78 Dt. 14/02/2003.

12. But, as reproduced in paragraph 5 above was the No Claim Certificate dated February 14, 2003, which we had noted as issued by Pioneer.

13. Concededly, the No Claim Certificate which we had noted does not record that it is under protest.

14. Learned counsel for Mecon would urge that at the hearing of the appeal parties had referred to the No Claim Certificate dated February 14, 2003, contents whereof were noted by us in paragraph 9 of our decision and that the respondent had not made any mention or a reference to the letter dated February 14, 2003, contents whereof we have now noted in the present order in paragraph 12 above. This took learned counsel to the debate on the point whether or not letter dated February 14, 2003 was at all received by Mecon or was it a contrived letter.

15. We find an endorsement on the letter acknowledging Mecon having received the same on February 15, 2003, vide Diary No. 938. But, we find that before the learned Arbitrator the No Claim Certificate statedly enclosed under cover of the said letter was not filed. Annexure-IX to the pleadings of Pioneer is only the letter, without its enclosure.

16. We have reproduced the letter in paragraph 12 above and we find that the number of the letter is "PFL/MECON/MRT/03/78" and the letter clearly records: Encl:

No Claim Certificate No. PFL/MECON/MRT/03/78/Dt. 14/02/2003". Now, the number of the letter and the number of the enclosure is the same; a fact of some relevance to show a contrivance, for the reason it is normally expected that two documents would have different despatch numbers assigned. Further, where is the NO Claim Certificate enclosed with the letter dated February 14, 2003? There was no answer.

17. On the contrary we find that the No Claim Certificate dated February 14, 2003, contents whereof have been noted by us in paragraph 5 above, is on the letterhead of Pioneer and bears a despatch number: PFL/MECON/MRT/03/77" and has been received by Pioneer on February 15, 2003 vide receipt at the Despatch and Receipt Section at No. 937.

18. Learned counsel for Pioneer did not dispute that the No Claim Certificate dated February 14, 2003 on the letterhead of Pioneer was the No Claim Certificate sent by Pioneer to Mecon and that it was received in the Receipt Section of Mecon on February 15, 2003 vide Diary No. 937.

19. Now, if a certificate is sent as an enclosure to a letter, the receipt number is always one: pertaining to the letter and not a separate receipt number assigned to the enclosure.

20. Thus, no case is made out to review our decision for the reason firstly this factual aspect of the matter was not debated upon when we heard the appeal and secondly for the reason the No Claim Certificate with reference where to the parties had argued the appeal was the one which we had noted in paragraph 9 of our decision in review; and for the further reason, that a debate on the factual aspect of the matter requires us to hold in favour of Mecon; and we need to highlight that lest we be accused of entering into a factual debate on an award, an area prohibited for us to be entered into, we have done so for the reason the learned Arbitrator had eschewed a complete reference to material evidence and as a matter of fact has not even discussed the issue of there being an accord. It is trite that where an issue of law or fact arises for being answered before an Arbitrator, an award which does not deal with the same would be vitiated in law. Further, from the fact that much prior to February 14, 2003, the parties had sat across the table on August 07, 2002 and agreed to the rate at which 31 extra items of work to be executed had to be paid for and had reduced the same into writing, meaning thereby that the accord which took place as a matter of fact was on August 07, 2002 and the No Claim Certificate issued on February 14, 2003 was a mere ministerial act to satisfy the procedures of Mecon to close the contract and pay the money due. As we have already highlighted in our opinion under review that after the parties had agreed to the rate, the quantity of the work executed at the site had to be measured before final bill could be raised and that issues pertaining to measurement of the quantity executed at site were thereafter discussed and measurements recorded in the measurement book. We highlight once again that our decision brings out that the accord took place when the parties sat across the table and reduced the agreed rate at which extra works

had to be paid for in the writing dated August 07, 2002. The review application is accordingly dismissed but without any order as to costs.