Unitech Limited Vs Housing and Urban Development Corporation
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Court: Delhi High Court

Date of Decision: Sept. 27, 2012

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 28(3), 31, 31(7), 31(7)(a), 34
Contract Act, 1872 â€" Section 23, 28, 34, 55, 73

Citation: (2012) 194 DLT 481 : (2013) 1 ILR Delhi 384

Hon'ble Judges: Dr. S. Muralidhar, J

Bench: Single Bench

Advocate: Vishal Malhotra in O.M.P. 3 of 2001 and Mr. Anurag Kumar in O.M.P. 391 of 2001, for the Appellant; Anurag Kumar, Advocate O.M.P. 3 of 2001 and Mr. Vishal Malhotra, Advocate O.M.P. 391 of 2001, for the Respondent

Judgement

Justice S. Muralidhar

1. The challenge in these petitions u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act") is to an Award dated 10th August 2001 passed by

the learned Arbitrator in the dispute between the Housing and Urban Development Corporation ("HUDCO") and Unitech Limited ("Unitech")

arising out of a contract entered into between them for construction of civil works of HUDCO Bazar, Plot No. 25, Bhikaji Cama Place, New

Delhi (since named as August Kranti Bhawan). To the extent that the learned Arbitrator rejected Unitech"s Claim 3 (g) for

escalation/compensation, Unitech has filed OMP No. 3 of 2001. To the extent Unitech"s claims have been allowed, HUDCO has filed OMP No.

391 of 2001. The date of the start of work was 17th December 1990. The stipulated date of completion was 16th September 1992, 21 months

after the date of commencement. The arbitration clause (Clause 91) of the general conditions of contract ("GCC") was superseded by a

supplementary agreement dated 14th November 1994 in terms of which the disputes were agreed to be referred to a sole Arbitrator instead of

two Arbitrators as originally agreed to. Unitech"s claims were referred to the sole Arbitrator in four stages along with the counter-claims of

HUDCO.

2. HUDCO contends that the impugned Award to the extent it granted Unitech Rs. 24,27,270 under Additional Claim 5A towards extra

expenditure on site establishment, Rs. 5,37,785 under Additional Claim 6A towards extra expenditure on insurance for extended period and Rs.

3,64,717 against Additional Claim A7 for extra expenditure on bank guarantee ("BG") for extension beyond stipulated period was contrary to

Clause 66 of the GCC in terms of which the Contractor has to notify the Employer (HUDCO) in writing in advance where the Contractor intends

to make a claim for any extra work or expense. HUDCO also contends that the Award in the sum of Rs. 2 lakhs by way of interest on "the

mobilization advance of Rs. 10 lakhs not paid" under Additional Claim 3 (a) and in the sum of Rs. 25,000 towards interest on excess recovery of

mobilization advance and security deposit under Additional Claim 3 (b) was hit by the prohibitory Clause 20.1 and Clause 66 of the GCC.

Likewise, the award of a sum of Rs. 5,81,133 under Additional Claim 3 (f) for removal of malba is also assailed by HUDCO. HUDCO is also

aggrieved by the rejection of its entitlement to levy liquidated damages ("LD") in terms of Clause 61 of the GCC. In awarding a sum of Rs. 28

lakhs in favour of Unitech towards BG, the learned Arbitrator is alleged to have overlooked the fact that HUDCO encashed the BG in the sum of

Rs. 26.35 lakhs. It is further submitted that award of interest under Claim 6 (fourth reference) was also hit by the prohibitory Clause 20.1 of the

GCC read with Section 31 (7) (a) of the Act.

3. In reply, Unitech submits that appreciation of facts and evidence, interpretation and construction of the clauses of the contract, are matters within

the jurisdiction of the learned Arbitrator and not open to appeal or review by the Court u/s 34 of the Act. According to Unitech, the bar under

Clause 20.1 of the GCC on the grant of interest applies only to the officials of HUDCO and not to the learned Arbitrator. In any event, the dispute

concerning the interest was referred to the Arbitrator for adjudication. It was within his jurisdiction to construe the said clause and decide the issue

of interest. Secondly, it is submitted that the award of compensation was barred by Clause 55 of the GCC. According to Unitech the prohibition

thereunder was only to the grant of compensation on account of the failure of HUDCO to discharge its obligation of providing site in time whereas

Unitech"s claim for compensation was on account of the breach of contract by HUDCO and the failure to perform its other reciprocal obligations.

Unitech further submits that Clause 57.1 prohibits the claim for compensation on account of extension of time ("EOT"), only if EOT was granted

due to force majeure, suspension of work by owner, damage caused by fire etc. and not due to time overrun/delay in execution of the work due to

breach of the contract by HUDCO. It is further contended that Clauses 20, 55, 57 and 66 of the GCC are void u/s 23 of the Indian Contract Act,

1872 ("CA") as they are opposed to public policy. Otherwise Unitech would be left remediless and Sections 55 and 73 of the CA would be

rendered redundant. Reliance is placed on the decisions of this Court in Tehri Hydro Development Corporation Ltd. v. Lanco Construction Ltd.

2007 (3) Arb. LR 194 (Delhi), Union of India v. Suchita Steels (India) 2006 (1) Arb. LR 83 (Delhi) (DB), Union of India v. Pam Development

Pvt. Ltd. 2005 (3) Arb. LR 548 (Cal), Union of India v. R.C. Singhal 2006 (Suppl) Arb. LR 274 (Delhi), T.P. George v. State of Kerala 2001

(1) Arb.LR 490 (SC), Union of India v. Royal Construction 2001 (Suppl) Arb.LR 488 (Calcutta) (DB), Pandit Construction Company v. Delhi

Development Authority 2007 (3) Arb.LR 205 (Delhi) and M/s. A.S. Sachdeva & Sons v. Delhi Development Authority [order dated 6th October

2009 in CS (OS) No. 73 of 1996].

4. In support of its plea that the learned Arbitrator had wrongly rejected Additional Claim 3 (g), Unitech refers to Amendment No. 3 to Clause 7

and submits that it nowhere provides that escalation beyond 10% could not under any circumstance be provided and that it had to be read with

Clause 3 of the special conditions of the contract ("SCC") which stipulates that the work should be completed in 21 months. Moreover, HUDCO

itself paid escalation up to March 1994 when the time limit was breached. Therefore, 10% limit was applicable only within the stipulated period.

5. The above submissions require examination in the background of the settled law concerning the scope of the powers of the Court to interfere

with an Award u/s 34 of the Act. Section 28 (3) of the Act mandates that the Arbitrator has to decide the disputes in terms of the contract. As

explained by the Supreme Court in New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation, , ""the arbitrator being a creature of

the agreement, must operate within the four corners of the agreement and cannot travel beyond it.

6. While discussing Additional Claim 5A, the learned Arbitrator noted that there was delay in grant of permissions for purchase of steel, delay in

handing over complete and clear site, delay in issuing of working drawings, revisions and instructions, delay in approval of samples, directions and

clarifications, delay in making payments (mobilization advance and interim bills), failure to make payment of full escalation and the effect of stay

order. On an examination of the evidence, the learned Arbitrator concluded that both the parties were equally responsible for delay in completion

of the project and prolongation of the contract.

7. The question that therefore arose for decision was whether HUDCO was liable to compensate Unitech for the delay, notwithstanding that there

are prohibitory clauses in the GCC which read as under:

Clause 55.0 Possession of Site:

55.1 The owner will make available to the Contractor the site or the respective work fronts to enable the Contractor to commence and proceed

with the execution of works in accordance with the agreed programme. If there is delay in making available any area of work, the owner shall on

the recommendation of the Architect and the Consultant grant reasonable extension of time for the completion of work. The Contractor shall not

be entitled to claim any compensation, whatsoever on this account.

Clause 57.0: Extension of Time:

57.1 If the works are delayed by force majeure, suspension of work by the Owner, serious loss or damage by fire, ordering of altered, additional

or substituted work or other special circumstances other than through the default of the Contractor, as would fairly entitle the Contractor to an

extension of time and which in the discretion of the Owner is beyond the control of Architects and the Contractor then upon the happening of any

such event causing delay, the Contractor shall within 10 days of the happening of event give notice thereof in writing to the Engineer, stating the

cause and the anticipated period of delay, then in any such event. Managing Director on the recommendations of the Architect and the Consultant

may give a fair and reasonable extension of time for the completion of work.

57.2: Such extension shall be communicated to the Contractor by the Engineer in writing. The Contractor shall not be entitled to claim any

compensation or over-run charges whatsoever for any extension granted.

Clause 66.0: Claims:

66.1: The Contractor shall send to the Chief Special Projects/Consultants/Engineer/Architect once every month as account giving particulars, as full

and detailed as possible of all claims for any additional payment to which the Contractor may consider himself entitled and of all extra or additional

work ordered in writing and which he has executed during the preceding month.

66.2: No claim for payment for any extra work or expense will be considered which has not been included in such particulars. The Owner may

consider payment for any such work or expense where admissible under the terms of the contract, if the Contractor has at the earliest practicable

opportunity notified the Employer in writing that he intends to make a claim for such work and expense and it is certified by the Consultant in

consultation with the Architects that such payment was due.

66.3: Any claim which is not notified in two consecutive monthly statements for two consecutive months shall be deemed to have been waived and

extinguished.

8. However, a perusal of the impugned Award shows that there is no reference to Unitech having urged that any of the prohibitory clauses was

opposed to Sections 23 and 28 of the CA. Whereas while discussing Additional Claim 3 (g) the learned Arbitrator referred to Clause 7 and

Amendment No. 3 thereto and while discussing Claim No. 6 he referred to Clause 20.1, while discussing Additional Claims 5A, 6A and A7 he did

not discuss any of the other prohibitory clauses. Clause 57.2 specifically states that ""the Contractor shall not be entitled to claim any compensation

or overrun charges whatsoever for any extension granted."" Further Clause 55.1 also clearly states that if there is delay in making available any area

of work, the Contractor shall not be entitled to clam any compensation when EOT is granted as a result thereof.

9. There was no justification for the learned Arbitrator not to have even noticed the said clauses. If the learned Arbitrator had after noticing the said

clauses, interpreted them one way or the other, it might be possible for Unitech to argue that the Court should not interfere with such conclusion

only because another view is possible. However, where the said prohibitory clauses are not even noticed by the learned Arbitrator the impugned

Award becomes vulnerable to invalidity on the ground that it is contrary to the clauses of the contract.

10. In Pandit Construction Company, the Court was examining clauses that extinguished the right of a party to prefer a claim if it was not made

within a period that was far shorter than the normal period available under the law of limitation. After referring to the decision of the Supreme

Court in National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, , it was held that a clause in the contract that restricted the

right of a party to seek legal redress would be hit by Section 28 of the CA. In the same decision it was noticed that ""there could be agreements

which do not seek to curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is

commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the

Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself

unless exercised within a specified time is permissible and can be enforced."" It was further noticed that by virtue of the amendment to Section 28 of

the CA, Clause (b) was introduced which stated that an agreement which extinguished the right of a party thereto or discharged any party thereto

from any liability under or in respect of any contract on the expiry of a specified period as to restrict such party from enforcing his rights, would be

in restraint of legal proceedings and therefore void. However, the said amendment was brought into effect from 8th January 1997. It did not apply

to a case where the entire work was completed prior thereto.

11. In the case on hand, the question of applicability of the amended Section 28 of the CA does not arise. Admittedly, the contract was completed

long prior to 8th January 1997. Clause 66 of the GCC does not prescribe a period shorter than that provided under the law of limitation for

making a claim. Clause 66.3 states that any claim which is not notified in two consecutive monthly statements for two consecutive months ""shall be

deemed to have been waived and extinguished."" In other words it extinguishes the right to make a claim. In light of the law explained in Pandit

Construction Company, the said clause was perhaps not opposed to Section 28 of the CA. In any event, the fact remains that true purport of the

prohibitory clauses with reference to the Additional Claims 5A, 6A and A7 was not considered by the learned Arbitrator.

12. In S.K. Jain Vs. State of Haryana and Another, the Supreme Court considered whether a clause in an agreement which required the Claimant

to deposit before the arbitral Tribunal 7% of the total claim made as a precondition to the claim being considered was opposed to public policy.

The Supreme Court referred to its earlier decision in Assistant Excise Commissioner and Others Vs. Issac Peter and Others, and negatived the

plea of the Claimant. In Issac Peter it was observed that the doctrine of fairness which was developed in the administrative law cannot be ""invoked

to amend, alter or vary the express terms of the contract between the parties."" It was categorically stated that ""in case of contracts freely entered

into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract

(State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State."" After referring

to the decisions in Central Bank of India Ltd. Vs. Hartford Fire Insurance Co. Ltd., , General Assurance Society Ltd. Vs. Chandumull Jain and

Another, , the Supreme Court in S.K. Jain v. State of Haryana held that ""in interpreting documents relating to a contract of insurance, the duty of

the Court is to interpret the words in which the contract is expressed by the parties, because it is not for the Court to make a new contract,

however, reasonable, if the parties have not made it themselves.

13. The plea of Unitech, urged for the first time in reply to the petition u/s 34 of the Act, that the above prohibitory clauses are opposed to public

policy and contrary to Sections 23 and 28 of the CA, is inconsistent with the law explained in Issac Peter and S.K. Jain. In any event the impugned

Award fails to notice, much less consider the effect of, the prohibitory clauses of the contract. Consequently, this Court upholds the objection of

HUDCO to the impugned Award in respect of Additional Claims 5A, 6A and A7.

14. The next major objection to the impugned Award is to the grant of interest. Under Claim 6 the learned Arbitrator has awarded pre-reference

and pendente lite interest and under Additional Claims 3 (a) and 3 (b) he has granted future interest. Clause 20.1 of the GCC which prohibits the

payment of interest reads as under:

20.1 No interest shall be payable on any money due to the Contractor against earnest money, security deposit, interim or final bills or any other

payments due under this contract.

15. The prohibition on the payment of interest under the above clause is not only as regards ""earnest money, security deposit, interim or final bills

but ""any other payments due under the contract"" as well. This very clause was interpreted in D.S.A. Engineers (Bombay) Vs. Housing and Urban

Development Corporation, . After referring to the decision in Secretary, Irrigation Department, Govt. of Orissa v. G.C. Roy (1991) Supp. 3 SCR

417, the learned Single Judge of this Court held that there was a complete prohibition on the arbitral Tribunal awarding interest on any sum. The

said decision was upheld by the Division Bench in DSA Engineers (Bombay) v. Housing & Urban Development (HUDCO) 2009 (1) R.A.J. 276

(Del). A reference was made to Section 31 (7) (a) of the Act which opens with the words ""unless otherwise agreed by the parties.

16. On this aspect, reference may also be made to the decision of the Supreme Court in Sayeed Ahmed and Co. Vs. State of U.P. and Others,

which discussed the purport of Section 31 (7) of the Act. It was observed:

13. ....Having regard to sub-section (7) of Section 31 of the Act, the difference between pre-reference period and pendente lite period has

disappeared insofar as award of interest by the arbitrator. The said section recognises only two periods and makes the following provisions:

(a) In regard to the period between the date on which the cause of action arose and the date on which the award is made (pre-reference period

plus pendente lite), the Arbitral Tribunal may award interest at such rate as it deems reasonable, for the whole or any part of the period, unless

otherwise agreed by the parties.

(b) For the period from the date of award to the date of payment the interest shall be 18% per annum if no specific order is made in regard to

interest. The arbitrator may however award interest at a different rate for the period between the date of award and date of payment.

(Emphasis supplied)

17. Resultantly, the impugned Award to the extent it grants Unitech pre-reference and pendente lite interest under Claim No. 6 cannot be sustained

in law. Equally the award of interest under Additional Claims 3 (a) and 3 (b) on non-payment of mobilization advance and on the excess sum

recovered was impermissible. Therefore, the impugned Award in respect of Claim 6 and Additional Claims 3 (a) and 3 (b) cannot be sustained in

law and is hereby set aside.

18. Additional Claim 3 (f) pertained to removal of malba. The learned Arbitrator has given detailed reasons for not accepting the claim of Unitech.

After calculating the actual quantity of malba, the learned Arbitrator assessed that Rs. 64 per cum was reasonable given the prevalent conditions

and computed the amount payable to Unitech at Rs. 5,81,133 as against the claimed amount of Rs. 34,81,600. this Court is unable to discern any

patent illegality in the decision of the learned Arbitrator as regards Additional Claim 3 (f).

19. On the issue of LD, the learned Arbitrator has under Claim 1 (fourth reference) given a declaratory Award stating that since EOT was granted

on 26th April 1999 long after the date of completion, the HUDCO could not have withheld the amount to the tune of Rs. 55 lakhs from running

accounts bill on account of LD. The learned Arbitrator has in the impugned Award recorded the date of completion as 31st January 1998.

Therefore, LD should have if at all been levied within a reasonable period thereafter. A lapse of nearly 15 months after the date of completion for

levy of LD cannot be considered reasonable. Also the mere mention of Clause 61 in the letter of HUDCO indicated only its intention to levy LD.

No show cause notice was issued to Unitech before levy of LD. this Court finds no ground to interfere with the declaratory Award under Claim

No. 1 (fourth reference).

20. Under Claim No. 3 (fourth reference), the learned Arbitrator has held that the two BGs, one for a sum of Rs. 26 lakhs and the second for Rs.

2 lakhs furnished by Unitech towards retention money were refundable. The case of HUDCO avers in ground "I" that the actual amount encashed

under the BGs was Rs. 26.35 lakhs. This has not been specifically denied by Unitech in its reply. Consequently, the Award in respect of Claim 3

(fourth reference) is held to refer to the actual amount encashed by HUDCO under the two BGs which would be refundable to Unitech.

21. The objection by Unitech to rejection of its Claim 3 (g) is without merit. The learned Arbitrator has given cogent reasons why in his view the

Amendment 3 to Clause 7 does in fact restrict the total escalation payable to only plus or minus 10%. this Court finds no error in the analysis or the

reasoning of the learned Arbitrator for rejecting Claim 3 (g).

22. In conclusion, the impugned Award dated 10th August 2001 in respect of Additional Claims 5A, 6A and A7 as well as Additional Claims 3

(a) and 3 (b) is hereby set aside. Under Claim 3 (fourth reference) it is clarified that actual encashment amount of the BG or of Rs. 28 lakhs

whichever is lesser should be refunded to Unitech. The award of pre-reference and pendente lite interest under Claim 6 is set aside. In all other

respects, the impugned Award is upheld. O.M.P. No. 3 of 2001 filed by Unitech is dismissed and OMP No. 391 of 2001 filed by HUDCO is

disposed of in the above terms, but in the circumstances, with no order as to costs.