Hindustan Petroleum Corporation Limited Vs Batliboi Environmental Engineers Ltd., formerly known as Hydraulic and General Engineers Ltd. and Shri K. Narayanan, Sole Arbitrator

Court: Bombay High Court

Date of Decision: Nov. 2, 2007

Acts Referred: Arbitration Act, 1940 â€" Section 31(3)
Arbitration and Conciliation Act, 1996 â€" Section 13, 16, 24, 28, 29
Constitution of India, 1950 â€" Article 227
Contract Act, 1872 â€" Section 55

Citation: (2008) 1 ALLMR 736 : (2008) 1 ARBLR 166 : (2008) 1 BomCR 89 : (2007) 109 BOMLR 2440 : (2008) 2 MhLj 542

Hon'ble Judges: J.H. Bhatia, J; D.K. Deshmukh, J

Bench: Division Bench

Advocate: F. Divetre and M.D. Siodia, instructed by Rustamji and Ginwala, for the Appellant; Snehal Shah, instructed by Dhru and Co., for the Respondent

Final Decision: Allowed

Judgement

J.H. Bhatia, J.
The petitioner has preferred this appeal challenging the dismissal of arbitration petition by the learned Single Judge of this

Court, whereby the petitioner had challenged the award passed by the learned Arbitrator granting compensation on different head to the

respondent No. 1 (hereinafter referred to as the "Contractor").

2. Admitted facts are that, the petitioner had invited tenders for construction of sewage water reclamation plant at the petitionerÃ¯Â¿Â½s refinery at

Mahul, Mumbai by tender enquiry dated 20th March, 1991. Tender submitted by the contractor was accepted as per the letter of intent dated

27/2/1992. Parties entered into an agreement for execution of the said contract. Under the agreed terms, the contract value was Rs. 5,74,25,000/-

. The work was to be completed within 18 months from the letter of intent. Admittedly, within the specified period of 18 months, work was not

fully executed and on request made by the contractor, time was extended twice. Work was carried on until 31st March, 1996 and thereafter, the

contractor abandoned the work. Admittedly, by that time 80% work was completed and only 20% work had remained uncompleted. On 4-7-

1996 the contractor made claims on the petitioner for ""extra costs of overheads and profits, extra expenditure on : 3: machinery, etc."" which was

allegedly caused due to the delays in completing the works. The contractor indicated by the said letter that they would complete the balance works

on the amounts claimed by them being paid. The petitioner called upon the contractor to complete the work. By the said letter the contractor also

invoked the arbitration clause and requested for an appointment of arbitrator. By letter dated 5-5-1997, the petitioner called upon the contractor

to resume the works and complete the balance work even during the arbitration proceeding as per the terms of the contract. In August, 1997, the

respondent No. 2 came to be appointed as an arbitrator. The contractor made a claim of Rs. 4,68,87,938/- on different heads as follows:

The petitioner denied the claims of the contractor and made counter claim of liquidated damages as per the terms of the contract in view of the

delays and non completion of the work.

3. It was claimed by the contractor that the delays were caused in completion of the work due to the faults on the part of the petitioner. The work

was expected to be completed within 18 months though in the contract amount, the contractor had taken account of the overheads and profits for

a period of 22 months. Even though the contract period was over in August, 1993 on account of the delays on the part of the petitioner, work

could not be completed and in spite of that the contractor continued to work till the end of March, 1996. The men and machinery of the contractor

remained idle. Even the basic approval for the electrical scheme, with numerous revisions, was kept pending, till the end by the petitioner and,

therefore, the work could not have been completed. Even the arrangement with M.C.G.B. for the supply of sewage water for purification had not

been finalised. The contractor was required to carry out some extra work. Therefore, the contractor made the claim as stated earlier.

4. The petitioner contended that there were no delays on the part of the petitioner. The contractor himself was responsible for the same. It was

contended that the contractor can not make any claim because even though the time was essence of the contract, the time was extended on the

request of the contractor himself and the contractor had nowhere indicated that he would be claiming any damages or compensation for delay in

completion of the work as required u/s 55 of the Contract Act. The petitioner also contended that the contractor is liable to pay an amount of Rs.

57.40 lakhs towards the liquidated damages as the work was abandoned by him. Some other counter claims were also made.

5. Admittedly, no oral evidence was led by the parties. Parties relied upon the documentary evidence only. After hearing the parties, the learned

Arbitrator awarded compensation as follows:

The Arbitrator also reduced the amount of the performance guarantee by 50%.

Claim No. 3 on account of escalation in the cost of material and labour and others was rejected. The counter claims made by the petitioner were

also rejected. The arbitrator directed the petitioner to pay the amounts as per the award to the contractor with interest at the rate of 18% per

annum from 16-5-1997, i.e., from the date of notice invoking arbitration. Award was actually passed on 23-3-1999.

6. The award was challenged by the petitioner on various grounds while it was supported by the contractor. After hearing the parties, the learned

Single Judge dismissed the arbitration petition and thus, the award became rule of the Court. It is contended on behalf of the petitioner/appellant

that the claim No. 1 on account of loss of profits and loss of overheads is exfacie unreasonable, perverse and has resulted in a miscarriage of

justice. It is contended that an amount of Rs. 1,57,37,666/- awarded towards loss of profits and overheads is more than the value of 20%

remaining work. As 80% work was already completed and only 20% work was remained, if that work would have been completed, the

contractor would have received only an amount of Rs. 1,14,87,000/-and in spite of having abandoned and having not completed the work, the

contractor is awarded compensation, which is much more than the said amount. As per the award, this 20% consists of 10% on account of loss of

profits and another 10% on account of loss of overheads and the Arbitrator appears to have made this calculation on total amount of the contract

and even more than that. If 20% of the balance work would have been awarded on these two heads, the contractor could not get more than Rs.23

lakhs. It is also contended that interest could not have been awarded from the date of invoking the award because alleged damages were

unliquidated and it is the settled position that unliquidated damages do not become debt till they are crystalised and quantified. It is contended that

the arbitrator awarded the compensation against the terms of the contract and thus, the Arbitrator acted beyond his jurisdiction, which he got only

under the terms of the contract and not otherwise. The parties are bound by the contract and law of contract and the contractor had never

indicated that he would be claiming compensation or damages for delays in work while seeking extension of time, as required u/s 55 of the

Contract Act. Therefore, he cannot claim compensation on that ground. This was ignored by the Arbitrator as well as the learned Single Judge. It

is contended that award of Rs.12 lakhs granted on account of machinery lying idle for a period of 24 months is unreasoned and without any basis.

It is contended that even though the Arbitrator refers to a site inspection visit, in this respect, no such report of any such visit was made available to

the parties, and, therefore, this is perverse and liable to be set aside. The award of Rs. 1,95,000/- on account of extra work is clearly against the

terms of the contract. It is contended that the contractor made the claim on account of loss of overheads and loss of profits, which was only a

camouflage for escalation in prices which is barred by the terms of the contract.

7. The respondent contractor has however supported the award. It is contended that the arbitrator had considered the complete material placed

before him and has passed the award after taking into consideration the terms of the contract, correspondence between the parties indicating the

delays on the part of the petitioner. It is further contended that under the Arbitration Act, 1996, scope for challenge to the award passed by the

Arbitrator is very limited u/s 34 of the Act. It is contended that there is no ground made out u/s 34 to assail the award. Further it is contended that

the Arbitrator acted within his jurisdiction. It is contended that if the error is committed outside the jurisdiction, it may be challenged but if the error

is committed within the jurisdiction by the Arbitrator, that is no ground to challenge the same. The Court does not sit in appeal over the award of

the Arbitrator and can not re-appraise the whole evidence to come to a different conclusions. It is contended that the escalation of cost is totally

different from the loss of overheads and loss of profits. The learned Arbitrator has rejected the claim on account of escalation being against the

terms of the contract but the award on account of loss of profit and loss of overheads is perfectly justified. Therefore, this Court, particularly after

the petition challenging the award has been dismissed by the learned Single Judge of this Court, can not interfere in appeal and the appeal is liable

to be dismissed.

8. Before dealing with the actual facts of this case, it will be necessary to deal with the objection taken by the learned Counsel for the Contractor

to the challenge of the petitioner to the award. It is contended that the challenges to an arbitratorÃ¯Â¿Â½s award are much restricted under the

Arbitration Act, 1996 in comparison to the challenges, which are available under the Arbitration Act, 1940. It is contended that in the given

circumstances objection could be taken only u/s 34(2)(b)(ii), which provides that an application for setting aside the award may be made and the

award may be set aside by the Court only if the arbitral award is in conflict with the public policy of India. Explanation to the said proviso reads as

follows:

Section 34(2)(b)(ii) Explanation-Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an

award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of

Section 75 or Section 81.

We find that this objection was taken before the learned Single Judge, who has dealt with the same in great length. In paragraph 9 of the judgment,

the learned Single Judge observed that we can now identify some heads to challenge an award as being an award against the public policy of India.

They can be partly summarised as (a) bias (b) jurisdiction of tribunal or the exceeding scope of its authority, (c) member or members not

possessing qualification, (d) an award procured by fraud (e) by corruption (f) in violation of Section 85 or 81. The learned Single Judge observed

that these heads are easily identified challenges available under the head of public policy of India u/s 34(2)(b)(ii). The learned Single Judge dealt

with the question as to whether the perverse or malafide or illegal award can be challenged or not. He observed as follows in paragraph 19:

19. Would, therefore, an award, which is perverse or malafide meaning thereby suffering from legal malafides or arbitrary, be allowed to be

executed. Arbitrariness and malafides are the two sides of the same coin. Would an award, which a High Court in the exercise of extra ordinary

jurisdiction would quash being in excess of its jurisdiction, be saved. Would that not be destructive of the rule of law. u/s 28 of the 1996 Act, an

Arbitral Tribunal must follow the substantive law of India. What happens if the Arbitral Tribunal does not follow the substantive law or does not

apply the law. Would that not amount to an award being contrary to the public policy of India. Outside Section 34(2)(b) there is no other ground

to challenge such an award. Can it be the contention that even such an award cannot be interfered with. Such a submission would be destructive of

the rule of law. An award contrary to the principles of natural justice and fair play is arbitrary and as such against the public policy of India. An

award by an Arbitral Tribunal against which bias is alleged if not waived, is void and, therefore, contrary to public policy. An award by an Arbitral

Tribunal having no jurisdiction, or exercising jurisdiction, beyond the scope of its authority or to the very existence of the arbitration agreement

would be contrary to the public policy of India. These grounds under the head of public policy are apart from the challenges available u/s 34(2)(a)

(i)(ii)(iii)(iv) and (v) and Section 34(2)(b)(i). Another important aspect, unlike the Act of 1940, is Section 31(3). Unless the parties otherwise

agree, the arbitral award shall state the reasons. What would be the import of this Section in construing the provisions of the expression ""public

policy of India"". Would an award in which reasons are required to be given, if based on extraneous material not on record, or reasons which are

perse perverse, or no reasons are given be allowed to be executed, as it does not fall within the expression public policy of India? The Act requires

reasons to be given to enable a Court to consider the challenge to an award. It is not an idle or empty formality. In so far as Section 34(2) is

concerned, the reasons would be material except in the context of those contentions which were raised before the Tribunal and were rejected at a

stage before passing the Award. The reasons if and at all would be material to decide the challenge u/s 34(2)(b)(ii). The Section which provides

that the tribunal must give reasons for the Award must be given its legislative intent. It cannot be rendered otiose. Looking at Sections 13, 16, 24

and 29, it would not have been the intent of Parliament, that under the Municipal law, awards which otherwise would not be enforced by Municipal

Courts merely because they are awards of a Tribunal can be enforced. This itself would be destructive of the rule of law and constitutional

principles. Judgements of Courts, trained to dispose of legal matters are subject to further judicial review. It may be that an Arbitral Tribunal may

consist of some experts on occasions. Would an award for example by a retired Judge be holier than a judgment of a sitting Judge. This, therefore,

could not have been the legislative intent. On the contrary by introducing the expression ""public Policy of India"" the challenges are not confined to

public policy as understood at the relevant moment, but beyond the momentary needs of the community. They are ever expanding as the needs of

the times and the hour.

After discussion of the challenges, which are available within Section 34(2)(b)(ii), the learned Single Judge finally observed as follows in paragraph

23 of the judgment.

23. Therefore, these would be clear indications that Act of 1996 does not in anyway restrict the challenges which were earlier available under the

Act of 1940. On the contrary as discussed earlier by using the expression public policy, Parliament has chosen to provide that new challenges,

which were not available when the Act came into force, would be available to Courts of Law at future point of time. Thus the interpretation of

public policy as discussed earlier, is neither in conflict with the objects clause of the Arbitration & Conciliation Act, 1996 or Section 5 of the Act of

1996 or the various provisions of the Act itself. Section 5 cannot if the Arbitral Tribunal is subject to the supervisory jurisdiction of the High Court

under Article 227 of the Constitution take away that jurisdiction. That is settled law.

9. Arbitrator is creation of the contract between the parties and he gets jurisdiction under the terms of contract. He is expected to interpret and

apply provisions of the contract and pass an award accordingly. While passing the award he has to bear in mind the provisions of Section 28 of the

Act, which clearly provides that in case of domestic arbitration in India, the Arbitral Tribunal shall decide the dispute in accordance with

substantive law for the time in force in India. If the Arbitrator ignores the substantive law in force in India and passes an award, it is bound to cause

injustice and is liable to be set aside. For example law requires that the claim should be within limitation. If the award is passed on a claim, which is

clearly barred by the limitation, that will be against the provisions of law and the award can not be sustained. In the present case, it is the contention

of the petitioner that the learned Arbitrator ignored the terms of the contract, relevant documents as well as the provisions of Section 55 of the

Contract Act and, therefore, the award is liable to be set aside. It will be necessary to examine the record to find out in the light of this contention.

10. It will be useful to refer to some of the terms of the contract. Admittedly, the work was to be completed within 18 months from the date of

letter of intent, which was issued on 27-2-1992. Thus, the work should have been completed by 26-8-1993. Clause (6) of the Contract Act reads

as follows:

Clause 6 : Extension of times If the contractor shall desire an extension of the time for completion of the work on the ground of his having been

unavoidably hindred in its execution or on any other ground, he shall apply in writing to the Engineer before the expiration of the period stipulated in

the tender or before the expiration of 30 days from the date on which he was hindred as aforesaid or on which the cause for asking for extension

occurred whichever, is earlier, and the Engineer may, if in his opinion, there are reasonable grounds for granting an extension, grant such extension

as he thinks necessary or proper. The decision of the Engineer in this matter shall be final.

As per this clause, the contractor could seek extension of time for completion of work by making an application to the petitioner. The contract also

provided that no compensation would be payable by the appellant in the event the work was delayed for the reasons not attributed to either of the

parties. Clause 5 of the letter from the petitioner inviting tenders, which is applicable to the contract reads as follows:

5. In the event the work is delayed due to reasons not attributable to either party, suitable extension in delivery period will be considered. However

no further compensation shall be made for the delayed period.

From this it is clear that though extension in period could be considered, no further compensation shall be made for delayed period. Clause 15 of

the Contract reads as follows:

Clause 15: No compensation for Alteration in Restriction of work. If it any time after execution of the contract documents, the Engineer shall, for

any reason whatsoever; require the whole or any part of the work, as specified in the tendered, to be stopped for any period or shall not require

the whole or part of the work to be carried out at all or to be carried out by the contractor, he shall give notice in writing of the fact to the

contractor who shall thereupon suspended or stop the work totally or partially, as the case may be. In any such case, except as provided

hereunder, the contractor shall have no claim to any payment or compensation whatsoever on account of any profit or advantage which he might

have derived from the execution of the work in full but which he did not so derive in consequence of the full amount of the work not having been

carried out, or an account of any loss that he may be put on account of materials purchased or agreed to be purchased or agreed to be purchased,

or for unemployment of labour recruited by him.

From this it is clear that if any part of the work is not required to be carried out by the contractor or is estopped from doing that work, the

contractor could not claim any compensation on account of any profit or advantage which, he might have derived from execution of the work in full

but which he did not so derive in consequences of full work not having been carried out.

11. Clause 16 of the Contract provides that the contractor shall not be entitled to claim any compensation for the loss suffered on account of the

delay by the owner/petitioner in supply of materials where such delay is caused by:

i. Difficulties relating to the supply of railways wagons.

ii. Force Majeure.

ii. Act of God.

iv. Act of enemies of the state or any other reasonable cause beyond the control of the Owner.

Clause 40 of the Contract provided that the contractor shall not be entitled to any compensation for delay in starting the work. Admittedly, the

contract also provided that the contractor will not be entitled to any escalation charges on account of the escalation in cost of material or services.

12. Section 55 of the Contract Act reads as follows:

55. Effect of failure to perform at fixed time, in contract in which time is essential. When a party to a contract promises to do a certain thing at or

before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or

so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of

the essence of the contract.

Effect of such failure when time is not essential.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to

do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by

such failure. Effect of acceptance of performance at time other than that agreed upon.

If, in case of a contract voidable on account of the promisor''s failure to perform his promise at the time agreed, the promisee accepts performance

of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of

the promise at the time agreed, unless at the time of such acceptance he gives notice to the promisor of his intention to do so.

From this it is clear that if the promisor had accepted the performance of the contract beyond the expiry of the time fixed for the same, he can not

claim compensation for any loss occasioned by the non performance of the terms at the time agreed unless at the time of such acceptance, he gives

notice to the promisor of his intention to claim compensation for the delay.

13. On perusal of the record, it becomes clear that while the period of contract was to expire on 26-3-1993, the contractor sought extension of

time by letter dated 3-7-1993. Paragraph 1 of that letter is material which reads as follows:

1. You are aware of the difficult period that we had gone through in the month of December 1992, January 1993 and March 1993 due to riots.

This difficult period was followed by a labour strike in HPCL in the month of April 1993. A very good working period was lost due to force

majeure conditions.

From this it is clear that delay was not on account of any latches on the part of petitioner. The contractor himself accepted that very good working

period was lost due to the force majeure conditions and this was one of the grounds on which the time could be extended under the contract and in

such circumstances, no compensation could be claimed by the contractor merely because of delay. Admittedly, as per this request, the petitioner

extended time. Thereafter by letter dated 25th August, 1994, the contractor sought further extension of time, explaining the difficulties and

circumstances. On this request, the petitioner extended time by further period of ten months by letter dated 20th September, 1994. Admittedly, the

contractor stopped the work on 31st March, 1996. However, on 4th July, 1996 the contractor addressed a letter to the petitioner pointing out the

causes of delay and by this letter for the first time, the contractor made a claim of Rs. 3,41,24,558/-on different heads including the loss of profits,

overheads, expenditure on machinery, etc. and thereafter on request of the contractor. The dispute was referred to the Arbitrator. From the above

record, it is clear that the contractor sought extension of time twice. First time, he clearly contended that due to the force majeure conditions, work

could not be done, while second time he expressed certain difficulties faced and also sought time. In none of the letters seeking extension of time,

the contractor indicated that he would claim compensation for delay as required u/s 55 of the Contract Act. He had accepted the extension of time

and carried out work upto 31st March, 1996 and admittedly, by that time 80% of the work was completed. It means he had carried on that work

and, that too, much beyond the agreed period of the contract without giving any notice or indication that he would work beyond the agreed period

of time only if he would be compensated for the delay. As he has not given such indication, he could not claim any compensation on account of

delays.

14. The learned Single Judge noted that the petitioner had accepted the findings of the arbitrator that delay was on account of petitioner. However,

the learned Counsel for the petitioner rightly pointed out that in ground (iv) in the petition, the petitioner had contended that the arbitrator had failed

to note the correspondence, which would clearly establish that the respondent No. 1, i.e., the contractor was responsible for the delay and was

therefore, liable for liquidated damages. The learned Counsel also pointed out that in ground (tt) of the memo appeal the petitioner/appellant have

stated that the learned Single Judge erred in stating that the appellants have not challenged the findings as to delay. We find substance in this

contention of the petitioner. The petitioner had consistently taken stand that the delay was caused by the contractor while the contractor contended

that the delay was on account of the petitioner. At least this was raised by the contractor in the second letter seeking extension of time for

completion of work. Taking into consideration the correspondence between the parties, it is difficult to hold that the delay was caused by the

petitioner. At the same time it is also difficult to come to conclusion that the delay was caused by the contractor alone. First letter of the contractor

clearly shows that delay was on account of force majeure, which was beyond the control of both the parties. In view of the terms of the contract,

the contractor could not claim any compensation on account of delay, which could not be attributed to the petitioner and particularly he could not

claim this compensation when he had carried on the work beyond the period of contract without indicating that he would proceed with the work

beyond the period of contract only if he is compensated for delay. It is material to note that the contractor himself sought extension of time for

carrying on the work, therefore, in our considered opinion, the contractor could not claim any compensation on account of loss of profits or loss of

overheads due to delays.

15. It is material to note that total cost of the work was Rs. 474 lakhs and 80% of the work was admittedly completed for which the payment was

also made. Thus, when the work was stopped or abandoned by the contractor, only 20% of the work was remaining and the cost of the 20%

work was only Rs. 114.80 lakhs. If the contractor would have completed the work, he would be entitled to receive Rs. 114.80 lakhs and

according to his own contention and as per the assessment made by the arbitrator, he would be getting 10% on account of overheads and 10% on

account of profits. Thus, the gain of the contractor would be 20% of the said amount, which would be only Rs. 22.96 lakhs. Against this the

Arbitrator awarded Rs. 1,57,37,666/- which is much more than 20% of even the total contract money and, therefore, it can be said that

compensation awarded by the arbitrator was infact arbitrary against the terms of the contract and perverse and, therefore, it may be held that he

acted beyond his jurisdiction. It can not be termed as a mere error within jurisdiction.

16. The arbitrator also awarded amount of Rs. 12 lakhs towards compensation for idle machinery and equipment for a period of 24 months at the

rate of Rs.50,000/-per month. According to the Arbitrator it is based on the inspection visit to the site. The petitioner has rightly pointed out that

no such site inspection report is available on record nor it is made available to the parties. There is no valid reason for grant of this award.

17. The learned Arbitrator also awarded compensation of Rs. 1,95,000/- for extra work. In fact, there is no record to show that the contractor

had issued any notice to the petitioner about any such extra work, nor there is any oral or documentary evidence to support this claim.

18. Taking into consideration the terms of the contract, legal provisions and the award passed by the learned Arbitrator, it is clear that the award is

clearly against the terms of the contract, provisions of law and infact, it is perverse and can not stand judicial scrutiny. In our considered opinion,

the award is liable to be set aside. At the same time, we may also note that the petitioner is also not entitled to any counter claim on account of any

delays on the part of the contractor as the petitioner had extended time on request of the contractor and that too without indicating that the

petitioner would claim any compensation as required u/s 55 of the Contract Act. Though there was provision in terms of the contract for liquidated

damages, in fact as pointed out above, the petitioner also could not establish that delay was only on account of the contractor. In view of the

above, the appeal deserves to be allowed and the impugned judgment and the award are liable to be set aside.

19. In the result, appeal is allowed. Impugned judgment passed by the learned Single Judge in the writ petition and the award passed by the

learned Arbitrator stand set aside. Parties shall bear their own costs.