

\$~27

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

+ **O.M.P. (COMM) 20/2017**

K.S.S. PETRON PVT. LTD.

..... Petitioner

Through: Mr K.K. Sharma, Senior Advocate
with Mr Vinod Wadhwa, Advocate.

versus

GYPSUM STRUCTURAL INDIA PVT. LTD. Respondent

Through: Dr. Anurag Kumar Agarwal and Mr.
Umesh Mishra, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

18.01.2017

VIBHU BAKHRU, J

IA.No. 685/2017

1. Allowed, subject to all just exceptions.

O.M.P. (COMM) 20/2017 & IA No. 684/2017

2. K.S.S. Petron Private Limited (hereafter 'KPPL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award (hereafter 'the impugned award') dated 08.10.2016 passed by the sole arbitrator.

Factual Context

3. M/s Gas Authority of India Limited (hereafter 'GAIL') awarded certain works relating to the project, "Dhabol Bangalore Pipe Line (DBPL)

for Pipeline Laying and Terminal Works (Spread-D)” to KPPL. The said works included the work of design, engineering and execution of Horizontal Directional Drilling (HDD) for laying main line of OD 24”and 6” CS conduit pipe for OFC duct at Quellosium Area crossing (near Zuari Bund). KPPL in turn awarded the sub-contract for part of the aforesaid works to Gypsum Structural India Private Limited (hereafter ‘GSIPL’) and issued the Work Order No. 24003003 dated 10.01.2013 (hereafter ‘the work order’) on GSIPL.

4. Admittedly, GSIPL completed the HDD works under the work order and raised an invoice dated 29.01.2013 for ₹2,60,38,755/-. Since the amount due was not paid, GSIPL approached GAIL as well as KPPL for settlement of its dues and repeatedly requested that the amounts due be paid.

5. KPPL, by its E-mail dated 22.04.2013, sent a reconciliation statement in respect of the work done. The said statement indicated the total amount of work done as ₹3,60,35,333/-. KPPL had deducted the entire bill of ₹1,13,05,633/- towards works relating to NH-17 - works unconnected with the work order and stated to be in connection with LOI dated 14.08.2012 - and ₹ 5,20,775/- was towards TDS. After accounting for the payment of ₹70,00,000/- the balance sum of ₹1,72,08,895/- was shown as due and payable to GSIPL. KPPL also indicated that the above sum was without accounting for an adjustment of ₹1,40,469/-, towards certain recoveries.

6. According to GSIPL, the payments due were not made; consequently it invoked the arbitration clause and the disputes were referred to the sole arbitrator. Before the arbitrator, GSIPL claimed a sum of ₹1,72,08,895/-

along with interest at the rate of 18% per annum with effect from 29.01.2013 and further, a sum of ₹5 lacs as costs.

7. KPPL disputed the aforesaid claims and asserted that GSIPL had abandoned the site during the execution of the project. It claimed that GSIPL had failed to dispose of Bentonite - which is a hazardous substance - despite various reminders from KPPL and GAIL. KPPL alleged that the works awarded to GSIPL also included excavation of Bentonite containment pits, which GSIPL had failed to perform. In addition, KPPL also raised certain counter-claims before the arbitrator.

Impugned Award

8. The arbitrator examined the relevant material and evidence produced by the parties and observed that there were no disputes with regard to the following facts:-

- i. The parties had in a meeting held on 03.12.2012 agreed on the broad terms for carrying out the work in question;
- ii. that broad agreement is also reflected in the Work Order;
- iii. Claimant raised an invoice dated 29.01.2013 for Rs.2,60,38,755/- inclusive of taxes;
- iv. the Certificate dated 22.02.2013 was issued by Respondent confirming completion of the work and GAIL issued a similar Certificate dated 27.02.2013;
- v. by email dated 22.04.2013 Respondent sent a reconciliation of statement of account which was a consolidated statement of three works including the

Work Order in question and in which the amount payable by Respondent to Claimant was reflected;

- vi. Claimant sent to Respondent letter dated 26.06.2013 to which Respondent replied by its letter dated 08.07.2013 in response to which Claimant sent its letter dated 10.07.2013 but there was no response to the same.”

9. KPPL’s contention that the certificates issued for successful completion of the works, could not be considered as they were not issued for purposes of the contract in question and contained the necessary disclaimer, was rejected as the arbitrator found that the said certificates had not been challenged or disputed earlier. The arbitrator further observed that it was not KPPL’s case that the said certificates did not reflect the correct factual position.

10. The arbitrator considered the statement of reconciliation of accounts dated 22.04.2013 sent by KPPL and concluded that there was no dispute that a sum of ₹1,72,08,895/- was payable to GSIPL for the work performed after adjusting an amount of ₹1,13,05,663/- on account of invoice relating to NH-17 contract and after deducting a sum of ₹5,20,775/- on account of TDS.

11. In the circumstances, the only dispute that remained to be considered was whether GSIPL had breached the contract by not removing Bentonite, which had spilled over during the process of HDD.

12. The arbitrator did not accept KPPL’s contention that GSIPL had breached the contract, principally for two reasons. First of all, for the reason that the said contention was never raised by KPPL after completion of the

works including at the time of issuance of the statement of reconciliation of accounts. Secondly, the correspondence between the parties indicated that GSIPL had performed its obligations.

13. The Arbitrator noted that the issue relating to Bentonite was first mentioned in GSIPL's letter dated 26.06.2013, which was much after the completion of the HDD works. The said letter also indicated that GSIPL had collected the spilled Bentonite in bags manually over a period of three months, on the advice of KPPL, but was having problems in removing the said bags due to obstruction created by the farmers. The said letter also indicated that GSIPL had sought assistance from KPPL. The arbitrator noted that in its response, KPPL did not controvert any of the contents of the letter dated 26.06.2013, however, mentioned that GSIPL should have closed the works on spillage of Bentonite. GSIPL immediately responded to the KPPL's said letter dated 08.07.2013 by clarifying that spillage of Bentonite was natural and although it was to be removed by mechanical means, GSIPL, at the instance of KPPL, had manually collected the same and stored it in bags. However, the bags could not be removed due to the attitude of the farmers and lack of support from KPPL.

14. The arbitrator noted that there was no response to GSIPL's letter dated 10.07.2013 or any denial of the contents of the said letter at the material time. The arbitrator also observed that it appears that in HDD work, Bentonite does spread and for that reason excavation of pits was included in the scope of the works. The arbitrator accepted that the spilled Bentonite had been collected manually on the advice of KPPL and put in bags but could not be removed for want of access to the site, which was the responsibility

of KPPL.

15. Accordingly, the arbitrator awarded a sum of ₹1,72,08,895/- along with interest at the rate of 9% p.a. from the date of the reconciliation statement, 22.04.2013, till the date of payment. KPPL's counter claims were rejected for the reason that they were neither pressed nor substantiated from the material on record.

Submissions

16. Mr K.K. Sharma, the learned senior counsel appearing for KPPL has sought to assail the award on the solitary contention that the arbitrator's finding that GSIPL had not breached the contract, was patently erroneous. He referred to the Annexure to the work order titled "SPLIT OF RESPONSIBILITIES - Quellosium Crossing" and referred to item at Serial No. 12 which indicated that the provision of land outside ROW for excavation of Bentonite Containment pits was the responsibility of GSIPL. However, he fairly stated that there was no infirmity in the facts as recorded by the arbitrator.

Reasons and Conclusion

17. In view of the aforesaid, there is no palpable error in arbitrator's finding that GSIPL had completed the contract satisfactorily and there was no objection raised by KPPL at the material time. Further, there was no dispute as to the amount owed by KPPL to GSIPL except to the extent of ₹5,20,775/- on account of TDS - which was subsequently accepted by GSIPL - and ₹1,40,469/- being the adjustment sought by KPPL on account

of recoveries.

18. The recovery of ₹1,40,469/- as claimed by KPPL is not substantiated by any material and therefore, was rejected by the arbitrator. Further, the arbitrator had considered the correspondence between the parties and after appreciating the material on record, had found that GSIPL had removed the Bentonite from the site and put it in bags on the advice of KPPL, however, its efforts to remove the same were frustrated by agitation of farmers and by lack of assistance on the part of KSS to ensure access to the sites.

19. Thus, the only question to be considered is whether the arbitrator's decision to reject KPPL's contention that GSIPL had breached the contract, is sustainable.

20. As indicated above, the arbitrator had reached its conclusion by appreciating the correspondence between the parties as well as the terms of the work order. Undisputedly, there is no correspondence on record other than the three letters referred to by the arbitrator, that are: letter dated 26.06.2013 by GSIPL; letter dated 08.07.2013 by KPPL; and letter dated 10.07.2013 by GSIPL.

21. The relevant extracts of the letter dated 26.06.2013 sent by GSIPL reads as under:-

“As you know, we have long back completed HDD work at Quallisum area. The Bentonite used for such a long crossing got spread over in nearby land. As usual, this Bentonite was supposed to be removed by mechanical means which hardly take 3-5 days time but due to farmers' adamant attitude and local political

factors, we – based on your advice – collected the spread Bentonite in bags manually which took more than 3 months time & much cost. In the 1st week of June, we were removing these bags from farmers' land, suddenly some farmers came and they forcibly stopped loading of bags for removal. On our persistent request, the farmers finally told us that with GAIL official's intervention only, they would allow us to go to their land.

Sir, now we have an apprehension that consequent upon heavy rains, the left out filled gunny bags in the field may get torn out and the said Bentonite may get spread again over the land. As we are the sub-contractor there, we alone cannot liaise with the farmers. Therefore, we request you to please take immediate necessary action at least to remove these bags from their field/land before the bags are torn to pieces and Bentonite spread in the field/land again followed by required NoC.”

22. KPPL responded by its letter dated 08.07.2013 by stating as under:

“We have noted the content of your letter Dt. 26.06.13 and would like to recall that our site team have had been giving consistent support on Bentonite removal matter and shall continue to give same for obtaining the NOC.

It may be noted that vide Tele communication, mails, etc. we have been intimating you and your site officials for the timely action for the management of Bentonite slippage. It was also suggest that during the HDD operation when Bentonite slippage occurred, M/s Gypsum should have closed at the time only but no action was taken by M/s Gypsum, resulting to villager's grievances and for the situation as of now.

Further in line to your request, we have advised our Site In charge Mr. Mahesh Garg to provide continued

assistance to resolve the matter.”

23. GSIPL responded to the above-mentioned letter by another letter dated 10.07.2013 by stating as follows:

“Apropos your reply dated 8th July in response to our letter dated 26th June, 13 on the subject, we would like to bring to your kind notice that while doing HDD, main focus remains on HDD operation/execution due to apprehension of shot failure; and during HDD operation, slippage of Bentonite on the ground is but natural – especially in such a long crossing. However, immediately after the crossing was over, we, as per your advice, manually collected the Bentonite in bags, resulting in time and cost overruns though but our efforts to remove these bags from farmers’ land were stymied due to their uncompromising and unrelenting attitude and no support from your side.

As a matter of fact, had your support been extended to us, the problem might have been resolved long back. Factually, due to your support not forthcoming for all these months, our team assigned with the task to remove filled in Bentonite bags from the site has been idling there for so many month and would now be constrained to leave the site after a week in case no support is given to us in the matter. The attached photographs are testimony to the fact that consequent upon successful completion of HDD work the spread over Bentonite has been filled in bags and could not be removed due to farmers’ adamant attitude and no support from your side.

Therefore, we request you to kindly extend your support by way of taking up the matter with the

concerned GAIL official to personally intervene in the matter of convincing the farmers to allow our idling team to remove filled in Bentonite bags in the presence of your authorized representative, failing which the onus of responsibility for non-removal of filled in Bentonite bags from the farmers' land will be squarely on you.”

24. The contents of GSIPL's letter dated 10.07.2013 remained uncontroverted. It is clear from the same that GSIPL had done the needful by collecting the Bentonite in bags. The land owners/farmers were obstructing the removal of the bags and consequently GSIPL had sought assistance of KPPL for the necessary access to remove the same. GSIPL had also mentioned that its team was idling at the site since many months and would be constrained to leave the site, in case no support was given in the matter.

25. The item at serial No. 10 of the Split of Responsibilities clearly indicated that KPPL was responsible for liasoning with the farmers or land owners for land access. The said item is set out below:-

“All general statutory permissions required for performing the horizontal directional drilling works like access, road clearance, permissions from various authorities etc. Local liasoning with Govt. agencies, farmers or land owners, land compensation for land/access/approach road/Bentonite pits.”

26. It is apparent from the above that the impugned award is supported by material on record and is informed by reason.

27. The scope of interference with the arbitral award is restricted and this court cannot interfere with an award except on the grounds as set out under Section 34 (2) of the Act.

28. In the facts of the present case, this Court is unable to accept that the impugned award is either without jurisdiction or is opposed to the public policy of India.

29. Accordingly, the petition and pending application are dismissed. No orders as to costs.

JANUARY 18, 2017
pkv

VIBHU BAKHRU, J

