

(2018) 07 DEL CK 0081

In the Delhi High Court

Case No : O.M.P. (Comm) 6 Of 2016 & Ia No. 5054 Of 2016

Airport Authority Of India

APPELLANT

Vs

M/S B.R. Arora & Associates (P) Ltd

RESPONDENT

Date of Decision : 03-07-2018

Acts Referred:

Arbitration & Conciliation Act, 1996 — Section 34
Indian Contract Act, 1872 — Section 73

Citation : (2018) 07 DEL CK 0081

Hon'ble Judges : VIBHU BAKHRU, J

Bench : Single Bench

Final Decision : Dipped Of

Judgement

VIBHU BAKHRU, J

1. The petitioner (hereafter "AAI") has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the

Act") impugning the arbitral award dated 30.07.2015 (hereafter "the impugned award") passed by the Arbitral Tribunal comprising of a sole

arbitrator, namely, Sh Pradeep Kumar Gupta (hereafter "the Arbitral Tribunal"). The impugned award was rendered in the context of disputes that

have arisen between the parties in relation to a contract for "Expansion of Apron, Construction of Additional Link Taxi Way, Helicopter Parking

Bay and allied works at Bagdogra Airport".

2. By the impugned award, the Arbitral Tribunal has awarded an aggregate sum of ₹ 1,56,37,019/- to the respondent along with interest at the rate

12% per annum. The impugned award is premised on the Arbitral Tribunal's conclusion that AAI has, inter alia, committed a fundamental breach of

contract and the performance of the contract (completion of works awarded) had

been inordinately delayed for reasons attributable to AAI. It is contended on behalf of AAI that the impugned award is perverse and contrary to law and, thus, is liable to be set aside.

Factual background

3. AAI is a body constituted by the Central Government under Airport Authority Act, 1995 for the purposes of construction and development of airports across India. AAI issued a Notice Inviting Tender (NIT) for the work of Expansion of Apron, Construction of Additional Link Taxi Way, Helicopter Parking Bay and allied works at Bagdogra Airport in West Bengal. Pursuant to the aforesaid NIT, the respondent submitted its tender and quoted an amount of ₹ 18,53,20,401.33/-. The said tender was accepted and, on 20.09.2007, an acceptance letter was issued to the respondent.

4. Thereafter, on 04.10.2007, the parties entered into an agreement (hereafter the Agreement), whereby the respondent agreed to execute the works relating to expansion of Apron, Construction of Additional Link Taxi Way, Helicopter Parking Bay and allied works at Bagdogra Airport. The said work was to be commenced on 30.09.2007 and the stipulated date of completion of the said works was 29.09.2008. Admittedly, there was a delay of four months in handing over the site to the respondent.

5. On 04.01.2008, the petitioner sent a letter to the respondent enclosing revised drawing/plan/BOQ for the said works. The respondent replied to the said letter on 17.01.2008 complaining that the scope of work was drastically reduced by Rs. 5,66,41,106/-, which is approximately 31% of the contract sum. The respondent further stated that it would suffer huge losses on account of such significant reduction in the value of work. Thereafter, several letters were sent by the respondent citing the non-handing over of the complete site as the main reason for the delay caused in the completion of works. On 20.04.2009, AAI sent a letter informing about the deviation in the total cost of work and further stating that the total cost of the project work would now be approximately ₹ 1300 lacs. Thereafter, the respondent sent several letters requesting for refund of excess bank guarantee, which was submitted based on the value of the work as initially awarded. However, AAI did not accede to the said request.

6. The respondent applied for extension of time (EOT) for completion of the

works and AAI granted EOT till 19.09.2009.Â

7. Admittedly, there was a delay of three hundred and fifty five days in the completion of the aforesaid works: the said works were completed on

19.09.2009. In terms of the Agreement, there was a provision for the defect liability period of twelve months from the date of completion, that is, till

19.09.2010.Â

8. The final bill was paid on 16.09.2010. Thereafter, disputes arose between the parties for non-payment of the amounts raised by the parties in the

final bill. Consequently, on 18.01.2012, the respondent invoked the arbitration clause and, accordingly, a sole arbitrator was appointed by AAI. The

parties referred the disputes to the Arbitral Tribunal, and the arbitral proceedings culminated in the impugned award.Â Â Â

Impugned Award

9. Before the Arbitral Tribunal, the respondent preferred eleven claims, which are summarized below:

(i) Claim no. 1: a sum of ₹ 15,31,018/- on account of refund of recovery made in the final bill on account of cement. AAI claimed that the respondent

had used PPC cement due to nonavailability of OPC cement and had given an undertaking for adjustment of cost difference in the final bill on account

of the same.Â Â

(ii) Claim no. 2: a sum of ₹ 5,70,870/- for compensation on account of delay in payments of running bills and final bill as well as unjustified recoveries.

It was contended on behalf of the respondent that AAI, by delaying the payment of final bill and by making recoveries in running bills, committed a

breach of contract.Â

(iii) Claim no. 3: a sum of ₹ 1,79,60,600/- for damages due to the losses incurred due to increase in overhead charges on account of prolongation of

contract period due to default on part of AAI. The respondent claimed that the delay in the completion of works was caused due to reasons

attributable to AAI such as delay in handing over the site, reduction in scope of work etc. AAI disputed the same and contended that the prolongation

of work was due to the faults/delays attributable to the respondent.

(iv) Claim no. 4: a sum of ₹ 3,14,71,000/- as loss of profit due to reduction in turnover due to default on the part of AAI. Whilst, the respondent claimed

that it had suffered loss due to reduction in turnover, AAI contended that the reduction in the scope of work was within its right as per Clause 39 of

the Agreement and it was not open for the respondent to claim any consequential loss on that account including for loss of profit.

(v) Claim no. 5: a sum of ₹ 12,44,300/- for the loss suffered due to the wages for idle labour. The respondent claimed that AAI had caused a delay of

four months initially in handing over the site and that had resulted in a loss to the respondent on account of idle labour charges. AAI claimed that the

respondent's claim for idle labour charges was unsustainable on account of lack of evidence.

(vi) Claim no. 6: a sum of ₹ 29,72,750/- for damages due to idling of machinery due to hold ups and non availability of site. It was contended by AAI

that WMM works were not started on time as the respondent itself had not mobilized machinery in advance and the other delays were only incidental,

as they were caused due to shifting of machinery from Phase-I site to phase-II site.

(vii) Claim no. 7: a sum of ₹ 64,93,600/- on account of escalation during the extended period of contract due to abnormal increase in prices of inputs.

(viii) Claim no. 8: a sum of ₹ 1,58,090/- on account of expenditure incurred on renewal of Bank Guarantees from time to time which had to be

extended for no fault of the claimant. AAI claimed that, as per the terms of the Agreement, the respondent was required to furnish two bank

guarantees at the rate of 5% of contract value, one of which was to be refunded after the defect liability period and the other was to be refunded after

the completion of the contract.Â

(ix) Claim no. 9: a sum of ₹ 18,89,764/- on account of refund of interest recovered on mobilization advance from running bills. It was claimed by the

respondent that it was entitled to be awarded the aforesaid claim as the delay was caused due to reasons attributable to AAI.

(x) Claim no. 10: Interest at the rate of 18% per annum from the date of invocation of arbitration clause till the date of payment.Â

(xi) Claim no. 11: a sum of ₹ 15,00,000/- as cost of arbitration.Â

10. AAI also raised five counter claims: (i) ₹ 20 lakhs as payment towards loss due to extension of watch hours; (ii) ₹ 16,80,000/- as payment towards

administrative charges; (iii) ₹ 15,50,500/- as payment towards refund of

escalation amount paid to the agency; (iv) Interest; and (v) cost of arbitration.Â

11. The Arbitral Tribunal rejected respondent's claim no.1, as it found that AAI had granted the permission to use PPC cement in place of OPC

cement and, hence, the recovery by AAI on this account was justified. Claim no.2 for compensation on account of delay in payments of bills was also

rejected by the Arbitral Tribunal as, admittedly, the respondent had submitted the final bill after the completion of stipulated time. Further, the

respondent had failed to (a) submit the rate analysis for extra items; (b) apply for Extension of Time (EOT); and (c) cure the defects of proper groove in concrete etc.

12. Claim no.3 and Claim no.7 were taken up together by the Arbitral Tribunal, as both pertained to the damages suffered by the respondent due to

prolongation of the contract. Admittedly, there was a delay of three hundred and fifty-five days (11.63 months) in the completion of the works. The

Arbitral Tribunal held that the said delay was caused due to the factors attributable to AAI. The Arbitral Tribunal further observed that there was also

a reduction in scope of work, as the final work executed was for a value of ₹ 11,92,06,275/- as against the initial/original value of ₹ 18,53,20,401/-.

Accordingly, the Arbitral Tribunal awarded a sum of ₹ 64,65,828/- against Claim no.3. In this view, the Arbitral Tribunal also awarded a sum of

₹ 43,21,501/- to the respondent against Claim no.7, which was for escalation during the extended period of the contract. The escalation amount was

calculated on the basis of the Wholesale Price Index as on the date of submission of the bids and the average during the extended period of the

contract.

13. The Arbitral Tribunal also held that Clause 39 of the Agreement couldn't be applied in this case as AAI, itself, had granted EOT to the respondent

till 19.09.2009 without levying any compensation and also committed a fundamental breach of the contract. Accordingly, a sum of ₹ 33,05,706/- was

awarded to the respondent against Claim no.4. Insofar as Claim no. 5 is concerned, the Arbitral Tribunal held that the whole site couldn't be handed

over to the respondent at one go, as it was an operational airport, and further observed that the site was not available to the respondent for a period of

86 days and, accordingly, awarded ₹ 6,72,795/- to the respondent as per the

agreed rates under the Agreement.

14. Claim no. 6 " damages on account of idling of machinery " was allowed in favour of the respondent only for a period of 6.63 months instead of 11.63 months. Accordingly, a sum of ₹ 7,32,042/- was awarded to the respondent. In relation to Claim no.8, the Arbitral Tribunal held that as there was a reduction in scope of work of about 36% and therefore, keeping of the bank guarantees in custody by AAI was not required. Accordingly, the Arbitral Tribunal awarded ₹ 1,39,147/- against Claim no.8. However, the Arbitral Tribunal rejected respondent's claim no.9 for refund of interest recovered on mobilization advance from the running bills as it was observed that that the respondent had used the mobilization advance for works other than as stipulated in the contract.

15. The Arbitral Tribunal also awarded interest at the rate of 12% per annum in respect to the aforesaid claims from the date of invocation of arbitration till the date of payment but rejected the claim for cost of arbitration. All the counter claims preferred by AAI were also rejected by the Arbitral Tribunal on the ground that no details had been furnished by AAI to substantiate the said counter claims.

Submissions

16. Mr Ahuja, learned counsel appearing for AAI contended that the Arbitral Tribunal had erred in computing the overhead charges on the original value of the contract. He submitted that the scope of works had been reduced almost at the inception and the respondent was fully aware of the same. Therefore, overheads, if any, ought to have been computed only on the basis of the reduced scope of work and not the work as originally awarded. He next contended that the escalation charges awarded by the Arbitral Tribunal were also unsustainable, as the respondent had not produced any material to show increase in the cost for execution of the works. In absence of any such evidence, escalation in the value of the works could not be awarded.

17. Next, he contended that the award of the loss of profits on the reduction of the scope of work was also unsustainable as Clause 39 of the GCC expressly provided that AAI was entitled to reduce the scope of works and no award on account of loss of profits or consequential loss would be payable by AAI.

18. Mr Ahuja also assailed the impugned award inasmuch as the Arbitral Tribunal had awarded damages for idle labour and idle machinery. He

contended that the airport in question was an operational airport and the respondent could not expect AAI to handover the entire site to the

respondent.Â The respondent was required to mobilize sufficient resources commensurate with the availability of site. He further submitted that the

Arbitral Tribunal had erred in awarding damages for idle machinery as mobilization of plant and machinery commenced only after 26.12.2007. He also

urged that the claim for charges for bank guarantees and interest was also not sustainable.Â Â

19. Mr Dang, learned counsel appearing for the respondent countered the submissions made on behalf of AAI. He submitted that the contract was

accepted on 20.09.2007 and a contract value was fixed at ₹ 18,53,20,401.33/- and the reduction in the scope of work was informed to the petitioner by

a letter dated 20.04.2009, which was nearly six months after the stipulated date for completion of the works. He submitted that, therefore, the Arbitral

Tribunal had rightly computed the overheads on the original value for the extended period of the contract. He also disputed that the Arbitral Tribunal

had not followed the formula as provided in the CPWD Manual for computing the escalation payable.Â Â

20. Insofar as the claim for idle machinery is concerned, he submitted that the claim was rightly allowed by the Arbitral Tribunal. He submitted that

AAI had admitted deployment of various machinery at site. He further submitted that the Arbitral Tribunal had awarded damages for idle of

machinery after February 2008 and only for a period of 6.63 months instead of 11.63 months, as claimed by the respondent. Further, the Arbitral

Tribunal had also scaled down the rates as per DSR - 2014 since the contract was for a period prior to the 2014 (that is, prior to publication of the

DSR - 2014).Â Â

21. Mr Dang also supported the award made in respect of the bank guarantee charges.Â He pointed out that although the respondent was obliged to

provide the bank guarantee, however, AAI had refused to accede to the respondent's request for reduction in the bank guarantee amount on account

of reduction in the scope of work. Further, the respondent was also compelled to extend the validity of the bank guarantee due to prolongation of the

contract, which was not for reasons attributable to the respondent.Â Â

Discussion and Conclusion

22. At the outset, it is relevant to state that the Arbitral Tribunal had examined the rival contentions and after considering the material on record had

found that the AAI was in fundamental breach of the Agreement.Â The Arbitral Tribunal observed that at the time of submission of the tenders, the

bidders were not informed that complete site was not available and would be given in parts/phases. It also held that AAI was obliged to provide

hindrance free site for construction, all architectural / structural drawings and to provide timely decision to resolve all problems. The Arbitral Tribunal

held that AAI was responsible for various lapses and had also failed to assess the quantum of work involved. This is apparent from the fact that the

quantum of work was reduced substantially. The work finally executed is valued at ₹ 11,92,06,275/- against awarded work valued at ₹ 18,53,20,401/-.

This indicates a reduction to the extent of 35.68%. The Arbitral Tribunal concluded that the AAI had not fulfilled its fundamental obligations and,

therefore, had committed fundamental breach of the Agreement.Â Â

23. The finding of the Arbitral Tribunal is based on the appreciation of the evidence and the material placed on record and, therefore, cannot be

interfered with in these proceedings. It is well settled that an Arbitral Tribunal is the final arbiter in respect of findings of fact and unless such findings

are based on no material or are perverse, the same cannot be interfered with.Â In this view, this Court finds no ground to interfere with the

conclusion of the Arbitral Tribunal that AAI was responsible for the delays in execution of the works.

24. The claims awarded by the Arbitral Tribunal in favour of the respondent must be considered keeping the aforesaid finding in view; that is, that

AAI was in fundamental breach of its contractual obligations.

25. The first and foremost issue to be decided is whether the Arbitral Tribunal had erred in computing the loss of overheads on the basis of the

contract value as originally awarded. There is no dispute that the original tender amount was for a value of ₹ 18,53,20,401.40/- and the stipulated period

for completion of the contract was twelve months and the same was to be completed by 29.09.2008. However, the scope of the work was reduced at

almost the commencement of the project as AAI had, by its letter dated

04.01.2008, revised the plans and the drawings. It was contended by Mr Dang that reduction in the scope of the work was communicated only on 20.04.2009, which was nearly six months after the stipulated date of completion of the works. This contention cannot be accepted because the respondent had, by its letter dated 17.01.2008, complained that the value of the work had been drastically reduced by ₹ 5,66,41,106/-, which is approximately 31% of the contract value.Â Thus, it is apparent that the respondent was fully aware of the reduction in the scope of the works from ₹ 18,53,20,401/- to ₹ 12,86,79,295/-. The Arbitral Tribunal had computed the expenditure on overheads during the extended period on the basis of the value of the work initially tendered. This is an apparent error. If the overheads are to be calculated on the basis of the value of works, the Arbitral Tribunal was required to compute the same on the value of works as reduced by AAI at the initial stage itself.

26. Thus, the award of the sum of ₹ 64,65,828/- against overhead expenditure during the extended period of contract (11.63 months) cannot be sustained.Â Â

27. The Arbitral Tribunal has also awarded escalation in the value of material (Claim No. 7) in favour of respondent.Â

28. Admittedly, the price variation / escalation clause was not applicable.Â Nonetheless, the Arbitral Tribunal had concluded that since the execution of the contract had been prolonged due to reasons attributable to AAI, the respondent must be compensated for the escalation in the cost of material.

Clearly, no interference with this conclusion is warranted. The Arbitral Tribunal referred to the decision of the Supreme Court in K.N. Sathyapalan

(Dead) by LRs v. State of Kerala and Anr.: (2007) 13 SCC 43 and held that even though the escalation formula was not applicable to the contract, the

respondent would be entitled to the same. The Arbitral Tribunal computed the escalation on the basis of the difference in the WPI as on the date of

submission of the tender and the average WPI during the extended period of the work.Â Mr Ahuja, learned counsel for AAI had contended that the

said formula was not as per CPWD Manual and Mr Dang had controverted the said contention. It is not necessary to entertain any controversy in this

regard as it is apparent that the formula used is a rational one and this Court

finds no infirmity in use of this formula to compensate the respondent for escalation in the cost of material.Â Â

29. The next issue to be examined related to the award of loss of profits on account of reduction in the scope of works. The Arbitral Tribunal had held that AAI was in breach of the contract and, therefore, the respondent was entitled for compensation under Section 73 of the Indian Contract Act,

1872. The Arbitral Tribunal referred to the decision of the Supreme Court in M/s A.T. Brij Paul Singh & Ors. v. State of Gujarat:Â (1984) 4 SCC 59

and held that the respondent was entitled to reasonable profits on the unexecuted portion of the works, which was computed at ₹ 6,61,14,126/- being the difference in the contract value as originally tendered and the value of works finally executed (₹ 18,53,20,401.40/- - ₹ 11,92,06,275/-). The Tribunal

further computed the expected profit at the rate of 5% of the aforesaid amount.Â Â

30. The Arbitral Tribunal rejected AAI's contention that in terms of Clause 39 of the GCC, AAI was entitled to reduce the scope of works and the

contractor was not entitled to any loss of profits. The Arbitral Tribunal reasoned that Clause 39 of GCC was not attracted, as AAI had granted

extension of time for completion of the contract till 19.09.2009 without levy of compensation and also committed a fundamental breach contract.Â

31. At this stage, it would be relevant to refer to Clause 39 of the GCC which reads as under:-

â??39.Â If at any time after acceptance of the tender AAI shall decide to abandon or reduce the scope of the Works for any reason whatsoever

and hence not require the whole or any part of the Works to be carried out, the Engineer-inCharge shall give notice in writing to that effect to the

Contractor and the Contractor shall have no claim to any payment of compensation or otherwise whatsoever, on account of any profit or advantage

which he might have derived from the execution of the Works in full but which he did not derive in consequence of the foreclosure of the whole or

part of the Works.â??

32. It is apparent from the plain reading of Clause 39 of the GCC that AAI was entitled to reduce the scope of work â??at any time after acceptance

of the tenderâ?. As noticed above, the respondent was aware of the reduction of work and had complained about the same in its letter dated

17.01.2008.Â Thus, in terms of Clause 39 of the GCC, the respondent was not entitled to claim any amount on account of loss of profits or any other

compensation for the advantage which the respondent may have derived from execution of the works in full.Â Â

33. It is difficult to understand as to why Clause 39 of the GCC would not be attracted merely because AAI had granted extension of time till

19.09.2009. Further, the Arbitral Tribunal had held that Clause 39 of the GCC would not be applicable as AAI had committed the fundamental breach

of the contract. Plainly, the respondent would be entitled for damages of breach of contract; however, that cannot entitle the respondent to claim loss

of profits on reduction of scope of work, as the parties had expressly agreed that the contractor would have no such claim.Â

34. In view of the above, the award of ₹ 33,05,706/- awarded on account of loss of profits on the unexecuted portion of works cannot be

sustained.Â Â

35. Insofar as the award against the claim for idle labour and idle machinery is concerned, this Court finds no reason to interfere with the impugned

award. The Arbitral Tribunal had on the basis of documents on record concluded that the respondent had employed one mate, three mazdoors (men)

and three mazdoors (boy) in addition to a site engineer. Their wages were computed on the basis of DSR 2002 + 48.43% cost index for Civil

Works as provided in Schedule E to the GCC. This Court finds no reason to interfere with this decision.

36. The Arbitral Tribunal also computed damages on account of the idle machinery based on documents available on record. The AAI's contention

that the machinery was not at site and could be moved as required is not persuasive. This is so because the Arbitral Tribunal found that as a matter of

fact the machinery was available at site and the damages have been computed, accordingly. Although, the respondent had claimed a sum of

₹ 29,72,750/-, the Arbitral Tribunal had computed the idle charges at ₹ 7,32,042/-.Â Â

37. The Arbitral Tribunal found that the rates for idle machinery as claimed by the respondent were on the higher side and, accordingly, had reduced

the same on the basis of DSR - 2014.Â Â

38. Mr Ahuja had contended that the Arbitral Tribunal had erred in referring to

DSR - 2014 for computing the rates for idle machinery. It was submitted that the contract was executed in the year 2008-09, and DSR - 2014 was not applicable. This contention is unpersuasive, as the Arbitral Tribunal had found that the rates claimed by the respondent were excessive and in this context had referred to DSR 2014 rates. However, the Arbitral Tribunal had not accepted the said rates and had reduced the rates claimed by the claimant by 50%.

39. This Court also finds no merit in AAI's claim that the award of expenditure incurred on renewal of bank guarantee, is unsustainable. Admittedly, the scope of works had been reduced and in terms of the contract, the respondent was required to provide bank guarantee as a security to the extent of 5% of the contract value and a performance bank guarantee for an equivalent sum. Since the contract value had been reduced, AAI ought to have acceded to the respondent's request for reduction in the value of the bank guarantees furnished by the respondent. Further, this Court finds no infirmity with the decision of the Arbitral Tribunal that the petitioner ought to be compensated for the charges incurred for keeping the bank guarantees alive for the extended period caused due to the delays attributable to AAI.

In view of the above, the impugned award to the extent of amount awarded against Claim No.3 (₹ 64,65,828/- as overhead expenditure) and against Claim No. 4 (₹ 33,05,706/- on account of loss of profits on the reduction in the scope of works) is set aside. The pending application is also disposed of. The parties are left to bear their own costs.