(2011) 11 DEL CK 0076

In the Delhi High Court

Case No : O.M.P. 315 of 2003, O.M.P. 170 of 2006 and O.M.P. 220 of 2006

Bhandari Engineering and Builders Pvt. Ltd. — APPELLANT

Vs

You One Maharia
 Ultra Construction and Engineering Co. Ltd. Vs M/s Bhandari Engineering and Builders Pvt. Ltd. and Others
 M/s Maharia Raj JV and Another Vs M/s Bhandari Engineering and Builders Pvt. Ltd. and Another — RESPONDENT

Date of Decision : 23-11-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 38(2), 9
Constitution of India, 1950 — Article 18

Citation : (2012) 1 AD 109 : (2012) 1 ARBLR 87 : (2011) 126 DRJ 602

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

Bench : Single Bench

Advocate : S.S. Jauhar, for O.M.P. 315 and 316/2003, Mr. Ravikesh K. Sinha with Mr. Rakesh K. Sinha, for O.M.P. 170, 189 and 220/2006 for Mr. Sandeep Sharma, for for O.M.P. 163/2006, for the Appellant; Ravikesh K. Sinha with Mr. Rakesh K. Sinha, Advocates, Mr. Sandeep Sharma, Advocate for R-4, for O.M. P. 315/2003 and Mr. S.S. Jauhar, Advocate for O.M. P. 163, 170, 189 and 220/2006, for the Respondent

Judgement

Justice S. Muralidhar

1. These petitions arise out of a common set of facts. Two of them, u/s 34 of the Arbitration & Conciliation Act, 1996 ["Act"], O.M.P. Nos. 170 and 189 of 2006 challenge an Award dated 28th December 2005 and two other O.M.Ps Nos. 163 and 220 of 2006 challenge an Award dated 10th January 2006 by the same Arbitral Tribunal. The remaining petitions, O.M.P. Nos. 315 and 316 of 2003 are connected petitions u/s 9 of the Act.

Background Facts

2. The National Highways Authority of India ("NHAI") awarded the contract of eight-laning of KM 16.500 to KM 29.295 of NH-1 in the State of Delhi (known as

Contract Package No. NS-18/DL) in favour of M/s. You One Maharia (JV) ["YOM-JV"] by an agreement dated 31st May 2001 for a total price of Rs. 60,68,53,375.80. The stipulated period of completion was 24 months.

3. YOM-JV, after a detailed discussion with M/s. Bhandari Engineers & Builders Private Limited ["BEBPL"], signed a sub-contract agreement on 27th May 2002 whereby BEPL agreed to undertake the construction of ''Culverts, Bridges & Protective Work'' as specified in Bill No. 5 of Bill of Quantities ["BOQ"] forming part of Contract Package No. NS-18/DL for a price of Rs. 6,84,29,312.80 with a stipulated completion period of twelve months. This sub-contract provided that the provisions of principal contract, other than details of the contractor''s price and quotes as between the employer (NHAI) and the contractor (YOM-JV), shall mutatis mutandis apply to the sub-contract between BEBPL and YOM-JV. In terms of Clause 17 of the sub-contract, YOM-JV was to obtain the approval of the NHAI for the sub-contract.

4. BEBPL states that on signing of the sub-contract, it mobilized the resources of men, material, plant and equipment and requisite wherewithal to complete the undertaken work. According to BEBPL the work could not progress as per the time schedule under the sub-contract because YOM-JV did not hand over the site with clearance and construction drawings at the proper time. In other words, the completion of work was delayed on account of acts of omission and commission of YOM-JV. According to BEBPL, up to 31st May 2003 it had completed the work of the value of Rs. 83,31,188.80 against a contract value of Rs. 6,84,29,312.80. According to BEBPL, the quantities of the work done by it had been duly certified by means of the Interim Payment Certificate ["IPC"] by RITES, the Engineer to the Contract. The payment of the bills submitted by BEBPL for the work executed by it and duly certified had been made to YOM-JV by the NHAI. However, against the total value of the work done by BEBPL in the sum of Rs. 83,31,188.80, the YOM-JV is stated to have paid BEBPL only Rs. 22,01,916.91. The cheques issued by YOM-JV are stated to have been dishonored twice. It was further alleged by BEBPL that the entire payment of Rs. 83,31,188.80 had been received by YOM-JV and yet the corresponding payment was not released to it.

5. BEBPL wrote to YOM-JV claiming compensation by its letter dated 14th July 2003 and notified that the disputes arising under the contract may be referred to the Disputes Resolving Committee ["DRC"] by letter dated 1st July 2003 as per the Clause 25.00 of the Principal Contract. It is stated that instead of referring the disputes to the DRC, YOM-JV terminated the sub-contract on 10th July 2003. BEBPL by its letter dated 14th May 2003 claimed from YOM-JV a sum of Rs. 69,59,517.29 being the dues under the sub-contract which had already been received by YOM-JV from the NHAI after due certification of the bills by RITES and compensation of Rs. 1,10,76,682/-. By its reply dated 14th July 2003 to the aforesaid termination letter dated 1st July 2003, BEBPL invoked the arbitration clause and also nominated an Arbitrator.

O.M.P. No. 315 of 2003

6. On 4th August 2003 BEBPL filed OMP No. 315 of 2003 in this Court u/s 9 of the Act seeking interim measures. On 5th August 2003 while directing notice to issue in the said petition to the Respondents, this Court directed that the bank account of YOM-JV bearing No. 727, UCO Bank, New Subzi Mandi, Delhi shall stand attached to the extent of Rs. 60 lakhs and "status quo shall be maintained in regard to the use of Batching Plant and equipments belonging to the Petitioner lying at the site of work." By a further order dated 28th January 2005 in an application, IA No. 637 of 2005, this Court directed NHAI to withhold a sum of Rs. 60 lakhs out of the payments that were to be made to the Respondent YOM-JV. On 4th March 2005 a further detailed order was passed by which Asphalt Mixing Plant as mentioned in Item No. 2 of Annexure A of IA No. 1556 of 2005 was ordered to be attached till the passing of the Award by the learned Arbitrator and also liberty was given to the Petitioner (BEBPL) to remove its batching plant and other equipments belonging to it, which are lying at the site of the work.

OMP No. 316 of 2003

7. The facts leading to O.M.P. No. 316 of 2003 are that M/s. Maharia Raj Joint Venture ["MR-JV"] was awarded the contract of six laning of KM 44.300 to 66.000 KM of NH-1 in the State of Haryana, a part of North-South and East-West Corridor Projects announced by the Prime Minister of India by NHAI being "Contract Package No. NS-17/HR?. The terms and conditions were identical to NS-18/DL. The contract price was Rs. 69,82,36,016. The agreement dated 31st May 2001 stipulated a completion period of 24 months. Here too a further sub-contract was entered into between MR-JV and BEBPL on 27th May 2002 in terms of which the work of construction of culverts, bridges and protection work as specified in Bill No. 5 of BOQ was to be completed by BEBPL. The total contract value was Rs. 6,88,43,867.20 and the stipulated completion period was twelve months. According to the BEBPL, MR- JV was to obtain the necessary approvals from NHAI for this sub-contract. BEBPL claims that the delays caused by MR-JV led to BEBPL not being able to complete the entire sub-contract.

8. According to BEBPL, it could only complete work valued at Rs. 49,75,476.71 up to 31st May 2003. Although the work completed by it had been duly certified by RITES, it was paid by MR-JV only Rs. 17,41,089/-. According to the BEBPL, MR-JV had received the entire payment from NHAI. BEBPL claimed that it would be entitled to receive a sum of Rs. 29,11,273.90, which sum had already been received by MR-JV from NHAI. Instead of referring the disputes to the DRC, MR-JV terminated the sub- contract on 10th July 2003. By a reply dated 14th July 2003 BEBPL invoked the arbitration clause and also appointed its arbitrator.

9. BEBPL states that it had purchased from MR-JV for consideration a batching plant, transit mixer, admixture and other materials required for the due execution of the work. After the termination of the contract, MR-JV refused to allow BEBPL to remove or dismantle the said batching plant lying at the site along with other raw materials. It is further alleged that after termination of the sub-contract on 10th July 2003 MR-JV stopped manufacturing of concrete from

its batching plant at Rai. On the direction of Mr. Vinod Goel, the Managing Director of MR-JV and its sister concern YOM-JV, broke open the lock of batching plant on 17th July 2003 with the intention of running the said plant for their own purposes.

10. BEBPL lodged a complaint with the local police and through police intervention BEPBL put its own locks on the batching plant. BEBPL claimed that MR-JV had sold to it and handed over the possession of batching plant on 15th June 2002 and that BEBPL was the owner thereof and entitled to shift the batching plant to its other work site. Consequently, BEBPL on 4th August 2003 filed in this Court OMP No. 316 of 2003 u/s 9 of the Act. While directing notice to issue in this petition on 5th August 2003, this Court directed that the bank account of MR-JV bearing No. 23189, Union Bank of India, Ashok Vihar, Delhi would be attached to the extent of Rs. 30 lakhs. Further, status quo was directed to be maintained with regard to the use of the batching plant and equipments belonging to BEBPL lying at the site of work. On 4th March 2005 an interim order was passed directing that wet mixed plant of 250 tonnes be attached till the passing of the Award by the learned Arbitrator. Further, BEBPL was given liberty to remove its batching plant and other equipments belonging to it, which were lying at the work site.

11. Meanwhile, NHAI filed OMP No. 119 of 2005 in this Court u/s 9 of the Act in which an interim order was passed directing that status quo as regards the equipment lying at the work site, i.e, the stretch of NH-1 from km 44.300 to km 66.00 in the State of Haryana shall be maintained. On 5th October 2005 this Court disposed of an application IA No. 2931 of 2005 filed by BEBPL by appointing a Receiver to visit the site, make an inventory of the batching plant and any other equipment, to take charge and thereafter hand them over to BEBPL on "superdari" for an appropriate amount with a direction to produce them in Court as and when required. The aforementioned order dated 5th October 2005 was stayed by the Division Bench of this Court by an order dated 18th October 2005 in FAO (OS) No. 326 of 2005 filed by NHAI. The said appeal came to be ultimately allowed by a judgment dated 11th October 2006 setting aside the order dated 5th October 2005 and directing that before any order in respect of the equipment and plant was passed, NHAI should be heard.

OMP Nos. 163 and 220 of 2006 and 170 and 189 of 2006

12. The disputes between BEBPL and MR-JV arising out of the sub-contract dated 27th May 2002 in relation to construction of culverts, bridges and protective works as specified in Bill No. 5 of BOQ of the agreement dated 31st May 2001 between MR-JV and NHAI (Contract Package No. NS-17/HR) as well as the disputes arising out of the sub-c0ntract between BEBPL and YOM-JV arising out of the sub-contract dated 27th May 2002 for the construction of ''Culverts, Bridges & Protective Work" as listed in Bill No. 5 of BOQ of the agreement dated 31st May 2001 (Contract Package No. NS-18/DL) were referred for adjudication by an Arbitral Tribunal ("Tribunal") consisting of the Presiding Officer and two

other representatives, one of each named by the parties. The said Tribunal filed two separate Awards, one dated 28th December 2005 in relation to Contract Package No. NS-18/DL and another dated 10th January 2006 in relation to Contract Package No. NS-17/HR.

13. Aggrieved by the Award dated 28th December 2005 allowing some of the claims of BEBPL and rejecting its counter claims, YOM-JV filed OMP No. 189 of 2006 whereas M/s. Ultra Engineering & Construction Co. Limited ["UECOL"] [formerly known as You One Engineering & Construction Co. Limited (YOECCL)] filed OMP No. 170 of 2006. Aggrieved by the Award dated 10th January 2006, MR-JV filed OMP No. 220 of 2006 whereas M/s. Dwarika Projects Private Limited ["DPPL"] (formerly known as M/s.Raj Associates) filed OMP No. 163 of 2006.

14. It may be mentioned here that after participating in the some of the hearings of the arbitral proceedings, the Petitioners in OMP Nos. 170 and 189 of 2006 and OMP Nos. 163 and 220 of 2006 ceased to further participate. In the arbitral proceedings arising out of Contract Package No. NS-18/DL BEBPL was the claimant. YOM-JV, Mr. Vinod Goel, Managing Director of the YOM-JV, M/s. Maharia Re-Surfacing & Construction Pvt. Limited ("MRCPL") (described as Partner of YOM-JV) and M/s. You One Engineering & Construction Co. Limited (also stated to be partners of YOM-JV) were arrayed as Respondents 1 to 4 respectively. In the arbitral proceedings arising out of the Contract Package No. NS-17/HR BEBPL was the claimant. MR-JV, Mr. Vinod Goel, Managing Partner of MRJV, M/s. MRCPL and M/s. Raj Associates, Construction Division (stated to be a partner of MR-JV) were arrayed as Respondents 1 to 4 respectively.

Submissions of Counsel

15. The points urged by the Petitioners in all the four petitions, i.e., OMP Nos. 170 and 189 of 2006 (against the Award dated 28th December 2005) and OMP Nos. 163 and 220 of 2006 (against the Award dated 10th January 2006) were more or less similar.

16. Mr. Ravikesh K. Sinha, learned counsel for YOM-JV, MR-JV and UECOL, Mr. Sandeep Sharma, learned counsel for the DPPL (formerly M/s. Raj Associates, Construction Division) and Mr. S.S. Jauhar, learned counsel for BEBPL were heard.

The Tribunal was not biased

17. On behalf of YOM-JV, MR-JV and UECOL, one of the principal submissions was that on account of the criminal case instituted by NHAI in September 2004 and the principal contract dated 31st May 2001 having been terminated in December 2004, a large number of bills of the JV were not paid and also all the plant, machinery and other equipments belonging to the YOM-JV and MR-JV lying at the work site were taken into custody by NHAI. Consequently, YOM-JV was unable to make payments of fees of the Tribunal as well as fees of counsel. As a result counsel for YOM-JV stopped appearing in the arbitral proceedings from 14th May 2005 and 30th July 2005 onwards.

18. It is further submitted on behalf of YOM-JV and MR-JV that after the arguments were concluded in the arbitral proceedings on 28th May 2005 and 26th August 2005 respectively, the members of the Tribunal held three internal meetings among themselves. In those meetings, the advocates and representatives of the sub-contractor were present. After conclusion of the arguments, the affidavit dated 28th September 2005 was allowed to be submitted by BEBPL. Accordingly, it is submitted that the Tribunal acted in collusion with the sub-contractor of BEBPL. It is submitted that the observations of the Tribunal that the claimant BEBPL should pay MR-JV''s and YOM-JV''s share of the fees of the members of the Tribunal meant that the Tribunal was acting in the biased manner and in collusion with BEBPL. It is submitted that the order dated 26th August 2005 passed by the Tribunal asking BEBPL to file an affidavit to show the list of equipment and materials lying at the site on the date of termination of the sub-contract on 10th July 2003 and also to file case law in support of the claims towards loss and profit showed that the Tribunal was acting in a biased manner. The next submission is that the Tribunal could not have taken into account the affidavits, documents and case law submitted by BEBPL after the conclusion of the arguments.

19. The above submissions are without merit. YOM-JV and MR-JV have failed to offer any credible explanation for ceasing to appear in the arbitral proceedings. The mere inability to pay the fees of the Tribunal did not justify their action in staying away from the proceedings unilaterally. They ought to have files an application explaining their difficulty and seeking appropriate directions. IN the circumstances, no fault can be found with the Tribunal in setting YOM-JV and MR-JV ex parte.

20. Also, merely because the Tribunal sought clarification from the claimants "in support of their claims" did not mean that the Tribunal would not consider the merits of the documents submitted and examine whether they in fact supported the claims. There is no basis whatsoever in the allegation that merely because the Tribunal required BEBPL to pay MR-JV''s and YOM-JV''s share and fees of the Tribunal members, the Tribunal was biased. This is permissible u/s 38(2) of the Act. This is of course subject to the final orders that may be passed. This Court does not find any illegality committed by the Tribunal in relying on the document and affidavits filed by the claimant in support of its claims after YOM-JV and MR-JV were set ex parte. The Tribunal was also justified in seeking further evidence in the form of affidavit from the claimant to satisfy itself about the tenability of the claim. The procedure adopted by the Tribunal cannot, therefore, said to be illegal. Consequently, the above submissions made on behalf of the Petitioners are rejected.

Limited scope of interference u/s 34 of the Act

21. With the Tribunal rightly having set YOM-JV and MR-JV ex parte, no fault can be found with the Tribunal not discussing their submissions. Moreover, the scope of interference by this Court u/s 34 of the Act is limited. Once the Court is

satisfied that the Tribunal has given the Award after taking into consideration the available facts and evidence and if the Award is in accordance with the applicable laws, no interference is called for. As explained in the decision of the Division Bench of this Court DSIDC Limited v. Baleswer Verma 2011 (2) RAJ 333 (Del), in order to persuade the Court to interfere u/s 34 it would have to be shown that the Award (i) is contrary to (a) the fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (ii) is patently illegal or (iii) is so unfair and unreasonable that it shocks the conscience of the Court. This has been reiterated in Reliance Securities Limited v. Vivek Sharma 2011 (2) RAJ 245 (Del) and M/s. Bajaj Allianz General v. Ashok Sarin 2011 (2) RAJ 546 (Del).

22. On merits it is submitted by learned counsel for the YOM-JV and MR-JV that under Clauses 2, 3 and 4 of the sub-contract, BEBPL was fully aware of the site condition. BEBPL was in possession of all the documents including the contracts and drawings given by NHAI for the purpose of executing BOQ-5. It is further submitted that the Tribunal wrongly interpreted the documents i.e. Exhibit C-13 and C-31 and erred in giving relief to the sub-contractor i.e., BEBPL. Learned counsel invited the Court to re-appreciate the two exhibits and to hold that the contracts and drawings were issued to YOM-JV and MR-JV much prior to the execution of the sub-contract on 27th May 2002.

23. The scope of powers of this Court u/s 34 of the Act, as already noticed hereinbefore, is limited. The Tribunal has analysed the evidence presented it before in a great detail. This Court is not inclined, therefore to sit in an appeal over the Award of the Tribunal and re-appreciate the evidence. The view taken by the Tribunal on the evidence was a plausible one. This Court is not persuaded to hold that the conclusion arrived at by the Tribunal on the above aspect relating to the supply of drawings is perverse and calls for any interference. The Tribunal clearly found that the "Good for Construction Drawings" were required to be prepared by the Employer (NHAI) and not by the Claimant (BEBPL) as alleged by MR-JV and YOM-JV. The Tribunal found that the there were a lot of variations in the issued drawings. The delay in issuing of the said drawings contributed to the delays. Further, it was the responsibility of MR-JV or YOM-JV to have obtained the approval for the sub-contract from the NHAI. It has been found by the Tribunal that the failure to comply with this requirement in terms of Clause 7.1 of the principal contract should be attributed to MR-JV or YOM-JV.

24. As regards the batching plant and two transit mixers which were purchased by BEBPL from MR-JV, the Tribunal has held that the said equipments were actually deployed at the site and remained at the work site till 10th July 2003. The Tribunal further found that since the MR-JV and YOM-JV had committed breach of contract or illegally terminated the same, they were obliged to compensate BEBPL for the consequent losses.

25. Again on this aspect this Court is unable to hold the finding of the Tribunal is perverse or calls for interference. In the written submission as well as during arguments it was alleged by learned counsel for MR-JV and YOM-JV that the

evidence of the witness of BEBPL ought to be re-appreciated. This Court is not inclined to do so giving the limited scope of interference u/s 34 of the Act.

26. On behalf of the Petitioner in OMP No. 163 of 2006 DPPL (formerly known as M/s. Raj Associates) it was sought to be contended that in terms of Article 18 of the Joint Venture Agreement ("JVA") submitted along with the bid documents for Contract Package No. NS-17/HR, a fresh agreement had to be executed between the JV partners. Once the work was awarded by NHAI, this was never done. It is submitted that Mr. Vinod Goel had no authority to enter any agreement on behalf of DPPL. Further in terms of the specific clauses of the power of attorney dated 19th January 2001, Mr. Vinod Goel had no authority to sub-contract the work to DPPL. A reference is also made to a letter dated 13th November 2005 of the BEBPL addressed to the Tribunal wherein it was submitted by BEBPL itself that DPPL "are not joint partner of Maharia Raj-JV, therefore, M/s. Dwarka Projects P. Limited cannot participate in the arbitration as Respondents." It is accordingly submitted on behalf of the DPPL that the BEBPL had waived its right to seek enforcement of the award against the DPPL. Reliance is placed on the decision of the Supreme Court in State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd 2009 (3) Arb LR 140. It is further submitted that BEBPL had executed the entire work, he would have earned a maximum profit of 7 to 10% but it had executed the work of the value of Rs. 57.72 lakhs and the balance to be executed was of the value of Rs. 6.02 crores. Considering that BEBPL had earned a maximum profit of 7 to 10%, allowing the claim of BEBPL to the extent of Rs. 1,11,31,552/- was illegal.

27. The sequence of events show that there was an existing JV between the DPPL (formerly known as M/s. Raj Associates) and MR-JV. As rightly pointed out by Mr. Jauhar, it is too late in the delay for the DPLL to wriggle out of its obligations under the JV. Having successfully bid for the contract by projecting themselves as a JV, one of the JV partners cannot subsequently seek to disown its liability. Not having participated in the arbitration proceedings before the Tribunal it is not open to DPPLL to challenge the Award on the ground that the Tribunal did not consider its submissions. The other submissions concern the factual findings of the Tribunal and do not call for interference.

Conclusion

28. For all the aforementioned reasons, this Court finds no grounds having been made out for interference with the impugned Awards dated 25th December 2005 and 10th January 2006 of the Tribunal. Accordingly O.M.P. Nos. 163 and 220 of 2006 and O.M.P. Nos. 170 and 189 of 2006 are dismissed with costs of Rs. 10,000/- each which will be paid by the unsuccessful Petitioners in each of the four petitions to the Respondent BEBPL within four weeks. O.M.P. Nos. 315 and 316 of 2003 are disposed of.