

(2017) 02 DEL CK 0383

In the Delhi High Court

Case No : 557 of 2016

CALCUTTA HALDIA PORT ROAD COMPANY LTD

APPELLANT

Vs

M/S ARSS INFRASTRUCTURE PROJECTS LTD.

RESPONDENT

Date of Decision : 28-02-2017

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 34](#), [Section 34\(2\)\(B\)\(II\)](#) - Application for setting aside arbitral award - Application for setting aside arbitral award

Citation : (2017) 02 DEL CK 0383

Hon'ble Judges : Vibhu Bakhru

Bench : SINGLE BENCH

Advocate : Ramesh Kumar, Udita Malviya, Kiran Suri, Purvesh Buttan, Fahad Tamtiaz

Judgement

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") inter alia impugning an arbitral award dated 10.05.2013 (hereafter "the impugned award") made by the Sole Arbitrator. The petitioner was constituted as a special purpose vehicle by the National Highways Authority of India (NHAI). The petitioner entered into an agreement dated 24.07.2002 with M/s CWHEC-HCIL (JV) - hereafter "the contractor" - for four laning of National Highway No. 41 from Kolaghat to Haldia in the State of West Bengal.

2. The petitioner alleged that the contractor had committed a fundamental breach of the contract and, accordingly, terminated the said contract on 26.04.2007. The petitioner claimed that in terms of the contract with the contractor, it became the deemed owner of all vehicles, materials, plants and equipments belonging to the contractor, which were lying at the site as a consequence of the termination of the contract. The petitioner further claimed that a sum of ₹20.61 crores was due to it by the contractor and decided to auction the materials, machinery and equipment of the contractor lying at the site after inviting bids.

3. The petitioner issued a notice of auction inviting bids on 10.06.2009 and fixed the reserve price for all equipments at Rs. 7.16 crores plus taxes as applicable. Admittedly, the petitioner did not receive any bids above the reserve price and hence the auction failed. Thereafter, the petitioner issued another notice dated 03.08.2009 inviting fresh bids for the sale of materials and equipments in question.

4. Pursuant to the aforesaid notice, respondent submitted its bid for a price of Rs. 11,25,00,000/- which was accepted by the petitioner by a letter of acceptance dated 04.09.2009. Admittedly, the respondent deposited the entire bid amount and the same was duly acknowledged by the petitioner by its letter dated 08.10.2009. The respondent was also called upon to deposit a further sum of Rs. 1 crore so that the required amount could be deposited with the Sales Tax Department and any excess amount would be refunded.

5. By a letter dated 17.10.2009, the petitioner asked the respondent to lift all materials and equipment from the site except the two pavers (hereafter referred to as "the pavers") that were seized by the customs department on 14.10.2009.

6. Admittedly, the petitioner could not deliver the said pavers. Notwithstanding the same, the petitioner also declined to refund any part of the consideration paid by the respondent.

7. Apparently, the pavers had been imported by the contractor on a condition that they would be used for the project and would not be sold prior to expiry of a specified period. According to the custom authorities, the conditions for exemption from import duties chargeable on the import of the pavers had been violated and, therefore, custom duty was payable in respect of the two pavers. The petitioner declined to pay the custom duty and claimed that it was the obligation of the respondent, being the auction purchaser, to discharge the said liability. The respondent disputed the same.

8. In view of the above disputes, the respondent invoked the arbitration clause and approached Indian Roads Congress to appoint a sole arbitrator and the disputes between the parties were referred to arbitration.

9. Before the Arbitral Tribunal, the respondent claimed a refund for a sum of Rs. 2 crores as it claimed that that was the value of the pavers, which the respondent had included in the bid amount of Rs. 11.25 crores. The respondent also sought reimbursement of interest paid to bank on the sum of Rs. 2 crores paid to the petitioner.

10. The claims made by the respondent as summarised by the Arbitral Tribunal, are as under:-

Claim	Description of Dispute in brief
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Amount of claim

Claim No.1	Refund against Bid value of the Dynapac Paver Finishers
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Rs 2,00,00,000

Claim No.2 Reimbursement of interest paid to the bank.

Rs 1,55,30,092

Claim No.3 Idling and over head charges of assets auctioned other than two pavers.

Rs.5,00,00,000

Claim No.4 Reimbursement of Expenses for non-release of two pavers or bided cost thereof.

Rs.25,00,000

Claim No.5 Interest Past, pendetelite and future interest at 18% p.a.

11. Subsequently, the respondent withdrew claim No.3 - claim of Rs. 5,00,00,000/- on account of idling and overhead charges of assets other than the pavers. The Arbitral Tribunal accepted the claims and awarded a sum of Rs. 2 crores as refund for the pavers. In addition, the Arbitral Tribunal also awarded the interest incurred by the respondent for financing the consideration paid to the petitioner. The interest actually incurred by the respondent from 14.09.2009 (when the amount was paid to the petitioner) to 31.03.2003 was quantified at Rs. 1,06,48,000/-. The Arbitral Tribunal further awarded future interest that may be paid or accrued to the bank from 01.04.2013 till the date of refund of the amount of Rs. 2 crores.

12. The petitioner had also made counter-claims including for excise duty for a sum of Rs. 95,12,503/- along with interest and other charges that may be levied by the customs department. The counter-claims made by the petitioner were rejected by the Arbitral Tribunal.

13. Mr Ramesh Kumar, learned counsel appearing for the petitioner advanced contentions mainly on three broad grounds. First, he contended that the Arbitral Tribunal had grossly erred in accepting the respondent's claim that it was not liable for payment of the custom duty. He earnestly contended that neither the petitioner nor the respondent were aware of the levy of custom duty and, therefore, the petitioner could not be held responsible for the same.

14. Second, he submitted that on the adjudication made by the custom authorities, the petitioner had paid the custom duty and, therefore, the Arbitral Tribunal ought to have called upon the respondent to lift the pavers instead of accepting the respondent's claim for refund of the consideration.

15. Third, he contended that the quantification of Rs. 2 crores was without any basis and, therefore, the impugned award was liable to be set aside. Mr Kumar drew the attention of this Court to the calculation submitted by the respondent in support of its claim wherein the Written Down Value (WDV) of the pavers was computed at Rs. 1,25,29,306/-. He submitted that, at best, the respondent could

have been awarded the WDV of the pavers but not any premium as claimed by the respondent.

16. Ms Kiran Suri, learned Senior Counsel appearing for the respondent countered the submissions made on behalf of the petitioner and drew the attention of this Court to various findings of the Arbitral Tribunal. She further contended that the Arbitral Tribunal had indicated the reasons in support of its conclusions (the award) and reappraisal of the rival contentions was beyond the scope of the present proceedings.

Reasoning and Conclusion

17. It was the petitioner's case that in terms of clause 2(f) of the bid document, the respondent (auction purchaser) was liable for all custom duty. Clause 2(f) of the bid document reads as under:- "Clause-2(f)

The Reserve Price as fixed by the Seller for this auction is Rs. 7.16 Crores (Rupees Seven Crore Sixteen Lacs only). Only those bidders bidding equal to or more than the Reserve Price as fixed by the Seller are eligible for participating in this bidding process. It may be noted that the bidder is to pay sales tax in the name of the Seller as per prevailing rate as applicable in excess of his bid price. All the relevant taxes, levies, duties, etc. which may be required for removing the plants, equipments and materials from the Seller's premises shall also be payable by the bidder as extra."

18. A plain reading of clause clearly indicates that the taxes, levies and duties contemplated to be paid by the auction purchaser are such duties as were payable for removal of the equipment and material from the petitioner's premises. Plainly, the duties contemplated under clause 2(f) did not include custom duty that was payable for import of the pavers. The Arbitral Tribunal had considered the aforesaid contention and had concluded that the respondent had no liability towards custom duty. Further, the Arbitral Tribunal had also examined the order passed by the customs authority wherein the adjudicating authority (Commissioner of Customs) had held that the petitioner had withheld information as to the custom liability from the respondent and had also held that the liability to pay custom duty could not be fastened on the respondent.

19. It is important to observe that the petitioner was selling the pavers as its deemed owner and, therefore, could not escape the liability on account of custom duty which was chargeable on the pavers as the incidence of their import into the country. This Court is unable to accept that the findings of the Arbitral Tribunal are perverse, patently illegal or warrant any interference under Section 34 of the Act. There is some controversy as to whether the petitioner was aware of the liability and had received summons from the custom authorities prior to the auction. However, the said controversy would not be material since the finding that the petitioner being the deemed owner of the pavers, was liable to pay the import duty is neither patently illegal nor perverse.

20. The contention that the respondent was not entitled to refund of the consideration cannot be accepted. The petitioner had failed to effect the delivery of the pavers and the same had been reduced to scrap. In the circumstances, the Arbitral Tribunal had concluded that the respondent was entitled to a pro-rata reduction in the consideration paid for all the materials and equipment. This conclusion is neither perverse nor patently illegal and cannot be considered as contravening the fundamental policy of Indian law.

21. The contention that the award for refund of Rs. 2 crores is without basis is also bereft of any merit. The respondent had asserted that it had included a sum of Rs. 2 crores on account of pavers as a part of its consolidated bid of Rs. 11.25 crores. In addition, the respondent had also produced the proforma invoices from the manufacturers of the pavers to establish their value. The respondent had computed the cost of two pavers including custom duty to be Rs. 2,82,37,903/- in the year 2003-04. Accordingly, the respondent had also computed the WDV of the pavers to be Rs. 1,25,29,306/- after accounting for depreciation on the rates prescribed under the Income Tax Act, 1961. Further, the respondent had pointed out that the value of all assets had been computed by the petitioner at Rs. 7.16 crores and the respondent's bid was 62% higher than the floor price. Thus, the premium included in the bid on account of pavers was computed at Rs. 71,41,704/- being the pro rata premium paid by the respondent on the floor price of all materials/equipment. In view of the above, the contention that the respondent had not produced any material to substantiate its claim that it had included Rs. 2 crores in its bid for the two pavers, cannot be sustained. It is well settled that the Court while considering a petition under Section 34 of the Act would not examine the sufficiency of material or reappreciate the evidence considered by the Arbitral Tribunal. The Supreme Court in *P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H. Securities Private Limited And Others* : (2012) 1 SCC 594 had stated the above principle in the following words. "21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a nonmember, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

22. Since the respondent had produced cogent material before the Arbitral Tribunal and the Arbitral Tribunal had in its wisdom accepted the same; it would

not be open for this court to interfere with the impugned award.

23. The award of interest by the Arbitral Tribunal also cannot be faulted. The respondent had established that it had funded the consideration for the pavers by borrowing from the Bank of India and the plant and equipment purchased was also to be hypothecated to Bank of India.

24. The Arbitral Tribunal's conclusion that the respondent was, thus, entitled for interest incurred by it on the amounts paid to the petitioner does not fall foul of the public policy test under section 34(2)(b)(ii) of the Act.

25. In view of the above, there is no ground for interference with the impugned award. The petition is, accordingly, dismissed.