

(2017) 02 DEL CK 0117
In the Delhi High Court
Case No : O.M.P. (COMM) 559 of 2016

Calcutta Haldia Port Road Company Ltd	APPELLANT
Vs	
M/s Cwhec-Hcil(Jv)	RESPONDENT

Date of Decision : 20-02-2017

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2017) 238 DLT 414

Hon'ble Judges : Mr. Vibhu Bakhru, J.

Bench : Single Bench

Advocate : Mr. Ramesh Kumar and Ms. Udit Malviya, Advocate, for the Petitioner; Mr. Arvind Minocha, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Mr. Vibhu Bakhru, J.—Calcutta Haldia Port Road Company Ltd. (hereafter "the Employer"), a company constituted under Section 3 of the National Highways Authority of India Act, 1988, has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") impugning an arbitral award dated 27.04.2007 (hereafter "the impugned award") rendered by the Arbitral Tribunal.

2. By way of the impugned award, the Arbitral Tribunal, inter alia, accepted the claim of the respondent (hereafter "the Contractor") that it is entitled to be paid for the work relating to sub-grade and has further assessed that the said work be paid at the rate of 382 per cubic meter. The Arbitral Tribunal has further directed that the said rate would be subject to price adjustment in terms of clause 47 of the Agreement between the parties. The Employer was also held liable to pay interest on the amounts payable to the Contractor.

3. The disputes between the parties, essentially relates to the question whether the Contractor is entitled to be paid additional amount for the work of sub-grade on account of using a mixture of fly ash and sand, and if so at what rate. It is the

Contractor's case that fly ash and sand was not one of the approved items in the Bill of Quantities (BOQ) and, therefore, the Employer was liable to pay for the same at the market rates. The Employer on the other hand claimed that use of fly ash was envisaged under the Agreement between the parties and, therefore, was not a variation for which any additional payment could be claimed. It is further claimed that the Contractor was permitted to use a mixture of fly ash and sand albeit on a condition that no additional charges would be payable and, therefore, none could be claimed by the Contractor. The Employer further claimed that the interim bills were raised and paid at the contractual rates, that is, without taking into account any additional payment for use of fly ash for sub-grade work and the same were accepted by the Contractor without any protest.

4. The Arbitral Tribunal has found in favour of the Contractor; aggrieved by the same, the Employer has filed the present petition, inter alia, claiming that the impugned award is contrary to the express terms of the Agreement, patently illegal and fails the public policy test under section 34(2)(b)(ii) of the Act.

5. Briefly stated the relevant facts necessary to address the controversy are as under:-

5.1 The Employer floated a tender for execution of the project of "Four laning of Km 0/500 to Km 52/700 of Kolaghat-Haldia section of NH-41 [known as Package WB (Haldia)] in the State of West Bengal" (hereafter "the project"). The Contractor is a joint venture firm between two companies - M/s China National Water Resources & Hydropower Engineering Company of P.R. China, (subsequently named as Syno Hydro Power Engineering Corporation) and M/s Harish Chandra (India) Ltd. The Contractor bid for the project and was awarded the contract for execution of the project at a contract price of Rs. 2,19,98,91,379/- by a letter of acceptance dated 22.11.2001. Subsequently, the parties also executed the contract on 24.07.2002 (hereafter "the Agreement") and the date of commencement of the Agreement was fixed as 10.09.2002. The Agreement was an item rate contract and the Contractor had quoted for the rates for various items as detailed in the BOQ.

5.2 It is the Contractor's case that soil having the value of CBR-7 (as specified under the Agreement), suitable for the work of sub-grade was available in only fourteen areas in the vicinity of the project and it was not feasible to exploit those areas for various reasons. Despite best efforts, the Contractor could not locate suitable soil for execution of the work of sub-grade. It is stated that this problem was brought to the notice of the Employer and the Contractor also approached the Consultants/ Engineer for assistance in identifying more areas from where the soil of requisite specifications could be arranged. It is claimed that joint inspections were conducted to locate suitable areas, however, only 14 areas - which had already been identified by the Contractor - were found to contain earth having CBR value of 7. The Contractor claims that the said areas could not be exploited for various reasons including that the quantity available was too small; the areas were inaccessible for construction machinery and

transport vehicles; or were within the area under the control of the forest department; or were owned by private parties who were not ready to permit exploitation of their areas. The Contractor claimed that in the meetings that followed, it was suggested that the Contractor explore alternative proposals of using sand blended with fly ash as sub-grade. This was stoutly disputed by the Employer who claimed that the proposal to use fly ash with sand was made by the Contractor.

5.3 On 06.10.2003, the Engineer issued a formal approval for use of fly ash and sand for sub-grade in the proportion of 80:20 subject to certain conditions which included the condition that no additional cost would be paid.

5.4 It is claimed that, thereafter, the Contractor once again reiterated its stand by a letter dated 14.10.2003. However, the receipt of the said letter is disputed by the Employer.

5.5 The Contractor executed the work of sub-grade by using the mixture of fly ash and sand in the ratio of 80:20. Subsequently, the Contractor raised a dispute regarding payment of additional amount for use of fly ash and sand for sub-grade work and made a claim before the Arbitral Tribunal seeking approval of a rate of Rs. 545 per cubic meter for the said work in addition to further escalation and interest.

6. Before the Arbitral Tribunal, the Employer contended that the use of fly ash for the work of subgrade was included in the Technical Specifications forming a part of the Agreement and, therefore, the Contractor could not claim any amount in excess of the contractual rate agreed to for the said item of work. The Arbitral Tribunal rejected the aforesaid contention and held that the use of fly ash did not fall within the scope of Technical Specifications agreed under the Agreement. The Arbitral Tribunal further assessed that the rate payable for sub-grade work was about Rs. 497 per cubic metre. However, the Arbitral Tribunal awarded the claim to the extent of Rs. 382 per cubic metre as that was the rate claimed by the Contractor in its letter dated 25/28.04.2005. Submissions

7. The learned counsel appearing for the Employer contended that the impugned award was perverse and contrary to the terms of the Agreement. He assailed the award principally on three grounds. First, he submitted that the use of fly ash for subgrade work was included in the Technical Specifications by virtue of clause 305.1.2 as introduced by the Additional Technical Specifications. He contended that in view of the express inclusion of fly ash as a material for the work of embankments, the Arbitral Tribunal's conclusion that the Contractor was entitled to additional payment ran contrary to the express terms of the Agreement. Second, he submitted that the Contractor was responsible for arranging the specified material for subgrades and, therefore, could not charge any additional amount on account of its inability to find the requisite material. Third, he claimed that the Arbitral Tribunal had no material or evidence to assess the rate payable for subgrade work at Rs. 497 per cubic meter. Further, the award of Rs. 382 per

cubic meter was only on the basis of the claim made by the Contractor and there was no material on record which established the said claim.

8. Mr Minocha, the learned counsel appearing for the Contractor countered the submissions made on behalf of the Employer. He submitted that the Arbitral Tribunal had interpreted the Agreement and the Arbitral Tribunal's conclusion being a plausible one, could not be challenged in these proceedings.

9. He further submitted that the members of the Arbitral Tribunal were technically qualified and fully competent to assess the rate payable for the works executed. He submitted that they had worked out the rate at 497 per cubic meter on the basis of norms given in the data book for analysis of rates, published by IRC and, therefore, their assessment could not be challenged in these proceedings.

Reasoning and conclusion

10. In order to address the controversy whether the use of fly ash was included in the Technical Specifications, it would be necessary to refer to clause 305.1 of the Technical Specifications forming a part of the Agreement, which contains the provisions for "EMBANKMENT CONSTRUCTION". Clause 305.2 of the Technical Specifications, inter alia, provides for the materials to be used in the embankments. The relevant extract of clause 305 of the Technical Specifications is set out below:-

"305. EMBANKMENT CONSTRUCTION

305.1. General

305.1.1. Description: These Specifications shall apply to the construction of embankments including subgrades, earthen shoulders and miscellaneous backfills with approved material obtained from roadway and drain excavation, borrow pits or other sources. All embankments, subgrades, earthen shoulders and miscellaneous backfills shall be constructed in accordance with the requirements of these Specifications and in conformity with the lines, grades, and cross-sections shown on the drawings or as directed by the Engineer.

305.2 Materials and General Requirements

305.2.1. Physical requirements:

305.2.1.1. The materials used in embankments, subgrades, earthen shoulders and miscellaneous backfills shall be soil, moorum, gravel, a mixture of these or any other material approved by the Engineer. Such materials shall be free of logs, stumps, roots, rubbish or any other ingredient likely to deteriorate or affect the stability of the embankment/subgrade.

The following types of material shall be considered unsuitable for embankment:

(a) Materials from swamps, marshes and bogs;

- (b) Peat, log, stump and perishable material; any soil that classifies as OL, OI, OH or Pt in accordance with IS : 1498;
- (c) Materials susceptible to spontaneous combustion;
- (d) Materials in a frozen condition;
- (e) Clay having liquid limit exceeding 70 and plasticity index exceeding 45; and
- (f) Materials with salts resulting in leaching in the embankment."

11. Sub-clause 305.1.2 was introduced in the Technical Specifications and reads as under:-

"305.1.2. In case the contractor wishes to use fly ash for construction of embankments, he may do so, subject to special provisions as given in Additional Technical Specification for Clause 305, Embankment Construction with fly ash (Appendix I) and approval of the Engineer."

12. A plain reading of sub-clause 305.1.1 of the Technical Specifications indicates that the expression "embankments" would include subgrades, earthen shoulders and miscellaneous backfills. The said works were to be executed by approved material obtained from roadway and drain excavation, borrow pits or other sources. However, by virtue of sub-clause 305.1.2, the Contractor was also entitled to use "fly ash for construction of embankments" subject to certain other provisions. It is not disputed that if the use of fly ash was included within the scope of the Technical Specifications, no additional amount would be payable to the Contractor for the item of work in question. The Arbitral Tribunal also proceeded on the aforesaid basis as is clear from paragraph 7.3 of the impugned award which reads as under:-

"7.3 The basic question before us is as to whether the work of sub-grades as executed is covered by the Technical specification Clause 305 or not. If it is covered by Clause 305, then it is covered by BOQ item No 2.05 also otherwise not."

13. The Arbitral Tribunal considered the provisions of sub-clause 305.1.2 of the Technical Specifications and held that the said clause only permitted use of earthen material for subgrades and, therefore, the use of fly ash was not included in the Technical Specifications. The Arbitral Tribunal also held that the expression "any other material approved by the Engineer" must be read in conjunction with the basic intent of the main clause which was to permit only earthen material and, therefore, the expression "any other material" would be material of a similar nature and could not mean fly ash. The Arbitral Tribunal further held that the use of fly ash was permissible only in respect of embankments and not for subgrade work.

14. This court is unable to concur with the Arbitral Tribunal's interpretation because sub-clause 305.1.1 of the Technical Specifications clearly specifies that the specifications provided therein would apply to "construction of

embankments" including subgrades, earthen shoulders and miscellaneous backfills. Thus, sub-clause 305.1.2, which enables the Contractor to use fly ash for "construction of embankments" must be read in conjunction with 305.1.1. The meaning of embankments in sub-clause 305.1.1 and sub-clause 305.1.2 of the Technical Specifications cannot be interpreted differently. Therefore, the Contractor was well within its right to use fly ash for subgrade work.

15. Having stated the above, it is also necessary to state that the scope of judicial review under Section 34 of the Act is highly restricted. Although, this court is unable to concur with the Arbitral Tribunal's interpretation of the Technical Specifications, it cannot be denied that the Arbitral Tribunal's interpretation is a plausible one and cannot be stated to be perverse or a view that no reasonable person could hold.

16. The Arbitral Tribunal's view is indisputably a plausible view and even though, this court considers the same to be erroneous, it would not fall within the limited scope of judicial review as is permissible under Section 34 of the Act. (See: *Mcdermott International Inc. v. Burn Standard Co. Ltd and Others*: (2006) 11 SCC 181, *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.*: (2009) 10 SCC 63 and *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India*: (2010) 11 SCC 296).

17. The next issue to be addressed is whether the Contractor was entitled to additional payment for execution of subgrade work. It is not disputed that in terms of the Agreement, it was the Contractor who was responsible for arranging suitable material for execution of subgrade work.

18. Paragraph 1 of clause 305.2.2.2 as amended by the Additional Technical Specifications reads as under:-

"Clause 305.2.2.2 Borrow Materials

No borrow area shall be made available by the Employer for this work. The arrangement for the source of supply of the material for embankment and subgrade as well as compliance to the different environmental requirements in respect of excavation and borrow areas as stipulated, from time to time, by the Ministry of Environment and Forest, Government of India and the local bodies, as applicable shall be the sole responsibility of the Contractor."

19. As pointed out earlier, the Agreement between the parties was an item rate contract and the Contractor was to be paid for the item of work executed at the rate agreed for that item of work. The Contractor had clearly admitted before the Arbitral Tribunal that arrangement of the source of material for sub grade and all other items of BOQ was its responsibility. Admittedly, the Contractor was required to apprise itself of the site and other conditions before bidding for the project. It was the Contractor's case that no source could be located. Clearly, the failure of the Contractor to locate the source of material within the vicinity of the site cannot be the ground to mulct the Employer with additional costs. The failure

on the part of the Contractor to arrange the material as per the Agreement cannot entitle it to payment of additional amount. It is not any body's case that the material as specified under the Technical Specifications was non-existent. The only contention is that the areas located by the Contractor were not feasible for exploitation. This only implies that the Contractor would face certain commercial difficulties in arranging the materials in question. It is difficult to understand as to how the Contractor could claim additional amounts on account of its commercial difficulties and failure to find the source of material that could be exploited economically. The Arbitral Tribunal has not considered this aspect at all and has merely proceeded on the basis that since the mixture of fly ash and sand was used and that was not included in the Technical Specifications, the Contractor would be entitled to additional payment.

20. Another aspect of the matter is that although, the Employer had agreed that mixture of fly ash and sand could be used as subgrade material, it expressly denied that any additional payment would be made on that count.

21. It is not disputed that a proposal was made by the Contractor, through a letter dated 01.07.2003, to use fly ash and sand as subgrade. In response to the aforesaid letter, the Engineer sent a letter, inter alia, stating that the mix formula as proposed by the Contractor was a departure from the specification and, therefore, the Contractor would have to submit an undertaking to the effect that the material proposed to be used was at the Contractor's convenience; there would be no time overrun and no extra time would be claimed; and no extra amount would be claimed on that account. The Contractor responded to the above letter on 31.07.2003, declining to give the undertaking and further claimed that extra cost would be payable in terms of the tender conditions. Admittedly, the Engineer did not approve the same and, therefore, the Contractor claims that the matter was escalated to Member (Finance) of the Employer and a meeting was held on 12.09.2003. The minutes of the said meeting indicate that the alternative technical solution suggested by the Contractor was accepted but it was also stated by the Member (Finance) of the Employer that the alternate proposal shall be at no extra cost to the Employer. The Contractor claims that the minutes of the meeting dated 12.09.2003 were objected to and the Contractor had clarified that it had not agreed for an alternate technical solution of using fly ash and sand without extra cost.

22. On 06.10.2003, the Engineer issued a formal approval for use of fly ash and sand for subgrade work.

23. The said letter dated 06.10.2003 reads as under:-

"Dear Sir,

Your proposal for subgrade using mixture of Fly ash and sand in proportion of 80:20 was examined and approved by the Engineer with the following conditions in accordance with the Clause 305.2.1.1 of the General Technical Specifications of the Contract agreement.

1. Nothing extra shall be payable to the Contractor as per Contract Clause 305.2, 2.2 it is the sole responsibility of the Contractor to arrange the supply of material for embankment and subgrade.

2. No additional time will be considered on this account

3. Regular tests have to be carried out to ensure that it satisfies the provisions of the Clause 305 of the Contract Specifications.

Subject to your acceptability of the above conditions you are requested take necessary action in the matter immediately."

24. Although, it is stated that the Contractor once again reiterated that it would claim additional cost by a letter dated 14.10.2003, there is a serious dispute whether the said letter was received by the Employer. It is apparent from the above that the Employer had never agreed for payment of additional amount over and above the agreed rate for execution of subgrade work as stated above. It is also admitted that subgrade work was executed using fly ash and sand as the Contractor could not locate feasible source which was its responsibility under the Agreement. In view of this, the impugned award cannot be sustained.

25. The next issue to be considered is whether there is any material on record which would sustain the award of an additional amount of 382 per cubic meter for subgrade work. The Arbitral Tribunal has directed that subgrade work in question be paid at the rate of 382 per cubic meter. The relevant extract of the impugned award reads as under:-

"7.15 On the basis of the rates of various materials used in the sub-grade, as ascertained by AT during site visit during December 2006, keeping in view other norms as given in the Data Book for Analysis of rates, published by IRC, and all the provisions of Clause 40 of the Contract, the assessment of the reasonable rate payable to the contractor was done by AT . The rate so worked out comes to about Rs. 497 per Cu M against a claim of Rs. 545 / per Cu M preferred before the AT. However, AT can not loose sight of the fact that the Contractor had claimed a rate of Rs. 382/- per Cu.M when the notice of dispute was given by them to the Respondent vide their letter dated 25/28 April,2005, under Clause 24 of the Agreement. Therefore AT is of the considered opinion that the Contractor is entitled to a claim of Rs. 382/- per Cu. M for the item of Sub-grade executed by them."

26. Although the Arbitral Tribunal had assessed the rate payable at Rs. 497 per cubic meter, there is no indication in the impugned award as to how the said figure was arrived at. The Arbitral Tribunal has stated that the said figure was ascertained by it during the site visit in 2006 and keeping in view, the data book for analysis of rates published by IRC. However, there is no indication as to what was found at site during the visit in December 2006 which would throw light as to the assessment made by the Arbitral Tribunal.

27. Mr. Minocha was pointedly asked to show any material which was before the

Arbitral Tribunal on the basis of which the rate of Rs. 497 per cubic meter, as assessed by the Arbitral Tribunal could be sustained. The hearing was also adjourned to enable the learned counsel to respond to the same. However, despite opportunity, the learned counsel has not been able to show any material collected by the Arbitral Tribunal during the site visit which would justify the rate of Rs. 497 per cubic meter or even the rates considered by the Arbitral Tribunal to arrive at the aforesaid figure. The Arbitral Tribunal has, thus, merely accepted the claim made by the Contractor in its letter dated 25.04.2005, without the Contractor establishing the same, and has awarded a sum of Rs. 382 per cubic meter for use of fly-ash and sand for subgrade work. It is well settled that award of damages on no evidence at all falls foul of the public policy test under section 34(2)(b)(ii) of the Act. The impugned award is, thus, not sustainable.

28. For the aforesaid reasons, the petition is allowed and the impugned award is set aside.