

(2007) 05 DEL CK 0160

In the Delhi High Court

Case No : OMP No"s. 136 and 227 of 2007

China Coal Construction Group Corporation

APPELLANT

Vs

National Highways Authority of India
 National
Highways Authority of India Vs China Coal Construction
Group Corporation

RESPONDENT

Date of Decision : 07-05-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2), 9

Citation : (2007) 05 DEL CK 0160

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : A.S. Chandiok, T.K. Ganju and A.S. Chadha and Ranjeet Prakash, Neelam Rathore, Ajay Saroya and Arvind Gupta, for the Appellant; Sandeep Sethi and Rajiv Nayar and Krishan Kumar and Divya Jain, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—National Highways Authority of India (hereinafter referred to as NHAI) floated a tender for award of a work of a

four lining and strengthening of the existing two lane section for a specified length on NH-2 in Uttar Pradesh resulting in a contract being awarded

to China Coal Construction Group Corporation (hereinafter referred to as M/s. China Coal) as per the contract dated 28.3.2002. This was

preceded by a letter of acceptance of the bid of M/s. China Coal and submission of performance bank guarantees by M/s. China Coal. The total

value of the contract was Rs. 1,57,56,29,637.00.

2. In the performance of the aforesaid work disputes arose between the parties. The conditions of the contract provided for settlement of disputes

by arbitration and thus an Arbitral Tribunal was constituted in terms of the

arbitration clause consisting of three arbitrators" Mr. M.K. Agarwal, Engineer-in-Chief (Retd.), Haryana PWD as presiding arbitrator, Mr. Ninan Koshi, Director General (Retd.), Road Development and Additional Secretary (Retd.) Ministry of Road Transport and Highways as arbitrator and Justice J.K. Mehra (reted.) as an arbitrator. The arbitrators made and published an award on 7.3.2007 holding that an amount of Rs. 5,03,26,204.00 was payable to M/s. China Coal by NHAI while NHAI was entitled to a counter claim of an amount of Rs. 10,96,31,279.00 leaving a net amount of Rs. 5,93,05,075.00 in favor of NHAI along with interest. This amount was in addition to the amount of Rs. 21,57,40,515.00 to be recovered by NHAI by way of encashment of bank guarantee for mobilization and machinery advances furnished by M/s. China Coal. A direction was also issued in view of the finding of the Arbitral Tribunal that there were contributory defaults of both the parties leading to non-performance of the contract and no specific charge had been claimed by NHAI on the performance bank guarantee, the said bank guarantee dated 13.3.2002 extended up to 15.3.2007 for Rs. 25,66,56,930.00 Plus (+) US \$ 12,38,326.00 would be returned to M/s. China Coal and would no longer be enforced. Two remaining bank guarantees were to be encased by NHAI.

3. The award was sought to be challenged by both NHAI and M/s. China Coal by filing two separate OMPs u/s 34 of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as the said Act). M/s. China Coal also filed separately an application u/s 9 of the said Act in which

certain directions were issued by this Court which were upheld by the Division Bench. However, NHAI aggrieved by the same filed a SLP (Civil)

No. 6703/2007 which came up before the Apex Court on 13.4.2007. The orders passed by this Court were modified to the extent that the

performance bank guarantee which was directed to be returned in terms of the award was directed to be continued till the main matter was

disposed of. The main matter was listed on 30.7.2007, which was directed to be proposed to 3.5.2007 for disposal by 31.5.2007. It was also

observed that in case the matter was decided against NHAI it would be open to the learned single Judge to pass an order to compensate M/s.

China Coal in accordance with law. Thus, this matter was put on a fast track by

the Apex Court and was accordingly finally heard on 3.5.2007 and 4.5.2007. It may be noticed that in terms of the earlier order dated 22.3.2007 while listing the matter for final disposal on 30.7.2007, the counsels for the parties were asked to keep ready short synopsis running into not more than three pages each. At the commencement of arguments, unfortunately neither side had any synopsis ready even though the matter was directed to be put on a fast track.

4. In order to appreciate the rival submissions of the parties, the legal position in respect of scrutiny of objections u/s 34(2) of the said Act must first be addressed. The scope and ambit of the same has been discussed at length in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., .

It has been held that the court's power u/s 34(2)(a)(v) extends to setting aside an award contrary to substantive provisions of law or the provisions of the said Act or against the terms of the contract as the same would be patently illegal. Another aspect emphasized was that for construction of contract the intention of the parties is to be gathered from the words used in the Agreement, more so where an Agreement has been drafted by experts. The expression "public policy of India" used in Section 34(2)(b)(ii) of the said Act was given a wider meaning to include the authority of the Court to set aside an award, if it was contrary to the fundamental policy of Indian law, interest of India, justice or morality or was patently illegal or is so unfair and unreasonable that it shocks the conscience of the court. Illegalities of trivial nature were to be ignored. The sum and substance of the directions given by the Apex Court was that a court is not devoid of the powers to set aside an award in the aforesaid eventualities arising.

5. It is in view of the aforesaid that it was put to learned Counsels for the parties that their submissions must confine to these parameters as it is not for this Court to sit as a first appeal court to analyze both facts and law. That was neither the position under the Arbitration Act, 1940 (hereinafter referred to as the 1940 Act) nor under the said Act. It is certainly not within the scope of scrutiny of this Court to reappraise the evidence before the arbitrator as that would amount to this Court sitting as a court of appeal. Even if this Court thought that a different conclusion could be arrived at on the same set of facts, the court would not interfere unless the award was

totally perverse. It was in these circumstances that it has been observed by the Apex Court while dealing even with the 1940 Act that in the absence of an award being absurd, reasonableness is not a matter to be considered by the court as appraisal of evidence by an arbitrator is not ordinarily a matter for the court. In this behalf the judgment in Food Corporation of India Vs. Joginderpal Mohinderpal, and Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, may be referred to. In fact, even while construing as to whether the award is as per the contract, all that has to be seen is that something that is not provided for at all in the contract, is not awarded by the arbitrator. Insofar as the interpretation of a contract is concerned, the same is a matter for the arbitrator to consider on which the court cannot substitute its own decision as observed by the Apex Court in Sudarsan Trading Co. Vs. Government of Kerala and Another, . The Apex Court, in fact, observed that so long as the view taken by the arbitrator is plausible, though perhaps not the only correct view, the award cannot be examined by the court. Thus, it is not for this Court to examine different items clause by clause as awarded by the arbitrator and to hold that under the contract these were unsustainable in the facts found by the arbitrator.

6. Another important aspect to be taken note of is the nature of arbitrators appointed. In DDA v. Bhagat Construction Co. (P) Ltd. and Anr. 2004 (3) Arb. LR 548 it was held that in view of a technical member going into the matter in dispute, the court should not substitute its own view with that of an arbitrator even if the court comes to a different conclusion until and unless the decision of the arbitrator is manifestly perverse or has been arrived at on the basis of wrong application of law.

7. In the present case, a bare perusal of the qualifications of the arbitrators would show that one is a retired Engineer-in-Chief of the Haryana PWD, while another one is a retired Director General, Road Development and Additional Secretary in the Ministry of Road Transport and Highways. Thus, the Arbitral Tribunal consists of two technical people, who are fully familiar with the nature of dispute. The third arbitrator is a retired Judge of the High Court who would be fully acquainted with the legal position. A unanimous award has been rendered by the three arbitrators. It is, thus, with great circumspection that this Court should interfere

with such an award and the grounds of such interference are as enunciated in ONGC v. Saw Pipes case (supra).

8. Now coming to the award and the rival contentions of the parties, it has to be noticed that the award is one running into 96 pages with each of the claims and the contentions of the respective parties discussed in detail.

9. The plea advanced by learned senior Counsel for M/s. China Coal was that once the arbitrators came to a conclusion that M/s. China Coal was justified in terminating the contract the natural consequence of such termination would be that no damages could have been awarded against M/s.

China Coal. The contract was terminated by both M/s. China Coal and NHAH on the same date.

10. On the other hand, learned senior Counsel for NHAH sought to challenge the award on the ground that the contract was validly terminated by

NHAH on account of non-performance by M/s. China Coal and that NHAH was entitled to all the damages, as prayed for. The breaches on the

part of NHAH were stated to be minor and not affecting the performance of M/s. China Coal who took no steps for proper implementation of the contract.

11. Learned senior Counsel for NHAH drew the attention of this Court to page 19 of the award where it has been noticed that both the parties

have terminated the contract on the same date, i.e. 9.6.2004 and thus it was necessary to examine and consider the merits and validity of the

termination of contract. The Arbitral Tribunal's views are available on page 20 of the award. A reading of the same, in my considered view, shows

that all that has been stated by the Tribunal is that M/s. China Coal had followed the procedure required in reduction in rate of work and then in

termination of its employment under the contract. It was in these circumstances that such acts were held to be valid in terms of Clause 69 of the

GCC and M/s. China Coal was held eligible to the payments as set out therein. It cannot be ignored that simultaneously the Tribunal took the view

on page 22 of the award that even NHAH had also followed the required procedure in accordance with the provisions of GCC for termination of

the contract and thus the termination was valid. I am, thus, unable to accept the plea of the learned Counsel for M/s. China Coal which sought to

put the observations made on the earlier part of the award on a much higher

pedestal as if there was no fault of M/s. China Coal while NHAH had committed what were called "fundamental breaches". This aspect is further clear from the findings of the Tribunal at pages 80 and 81 of the award where the mode and manner of calculations of damages in that behalf have been examined. For example it was found that the Engineer of NHAH had acknowledged that almost 30.6 kilometers out of 59.02 kilometers of the land was not accessible to M/s. China Coal at least as on the relevant date. Simultaneously, it was found that there had been serious loopholes on the part of M/s. China Coal in not effectively mobilizing the resources and efficiently managing the work at site. It is in view thereof that the Tribunal found that it would be fair and equitable to compensate NHAH to some extent but only for proportionate losses vis-a-vis a new contract since NHAH had entered into another contract on risk purchase. This finding of the Tribunal is based on the principle of contributory breaches which is certainly a known principle in law and thus the Tribunal cannot be said to have relied upon the some unknown legal principle to come to a finding while quantifying the damages.

12. In view of the aforesaid it is not possible to accept the contention of the learned Counsel for M/s. China Coal that what was held payable to

M/s. China Coal is all that was liable to be awarded and that no amount on account of damages could have been adjusted against the same as held payable by the Tribunal to NHAH.

13. Learned Counsel for NHAH, on the other hand, has sought to refer to various aspects like delays in personnel deployment by M/s. China Coal

as referred to aforesaid and discussed on page 38 of the award. It is also pointed out that even in the award there is a finding that even where the portion of the site was available only earthwork was done.

14. Learned Counsel has also sought to draw attention of this Court to the mode and manner of calculations while assessing damages in respect of the counter claims and the apportionment thereof.

15. In my considered view, such a course of scrutiny is not open to this Court to reassess the damages. Technical experts have gone into the

question as to how and in what manner the damages have to be assessed and it is not for this Court to substitute another formula merely because

NHAH does not find the methodology favorable.

16. A grievance is also sought to be made by learned Counsel for NHAI arising from the exclusion of certain days in the computation of the period within which M/s. China Coal had to do the work. This plea arose out of the fact that letter of commencement of work was initially not issued by the Engineer as required under the contract but by NHAI and since the same was not protested the date of such communication ought to have been taken. The Arbitral Tribunal, however, excluded the period till such time as the communication was addressed by the Engineer. In this behalf it cannot be lost sight of that where a contract provides for a persona designata to do a particular act it is expected that the act would be done in that manner. This task was entrusted to the Engineer. Be that as it may the view taken by the Tribunal in this behalf can hardly be doubted based on that principle.

17. The basic theme of the award is that it is a case of contributory defaults by both the parties. It is that fundamental principle which had been kept in mind by the Arbitral Tribunal while examining the principles of award of damages which can hardly be doubted. The endeavor of the parties cannot be to make this Court go into every paragraph of the award, every claim and counterclaim to re-scrutinise the same as a court of appeal in view of the settled legal position. In fact, that is the nature of the grounds raised in the OMP filed by NHAI, which is wholly impermissible. Fortunately, learned Counsels for the parties confined the submissions to the aforesaid aspects as discussed by this Court, and rightly so, in view of the limited scope of scrutiny by this Court under the provisions of Section 34(2) of the said Act.

18. I am, thus, of the considered view that there is no ground to challenge the award by any of the parties.

19. The last aspect to be considered is of the consequence of the order passed by the Supreme Court on 13.4.2007. Learned Counsel for M/s.

China Coal stated that since the performance bank guarantee has been kept alive in pursuance to the directions of the Apex Court with the condition that at the stage of disposal of the matter it would be open for this Court to compensate M/s. China Coal in accordance with law, the charges imposed on M/s. China Coal by their bankers for continuing the bank guarantee must be borne by NHAI. I find force in the said

submission and thus direct that M/s. China Coal must obtain from its bankers a certificate certifying the amounts charged for extension of the bank

guarantee beyond 15.3.2007 (since bank guarantee was extended up to that date and was directed to be released by the award dated 7.3.2007)

and the same to be forwarded to NHA I for payment within 15 days thereof. NHA I shall also now release the bank guarantee so that the same can

be discharged by the bank and the needful be done within 15 days.

20. Both the petitions are dismissed in the aforesaid terms leaving the parties to bear their own costs.