

(2007) 08 DEL CK 0280
In the Delhi High Court
Case No : OMP 196 of 2001

Gayatari Projects Limited

APPELLANT

Vs

Airport Authority of India

RESPONDENT

Date of Decision : 30-08-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 19(2), 19(3), 24, 34
Constitution of India, 1950 — Article 265, 269, 270, 271, 274
Essential Commodities Act, 1955 — Section 3

Citation : (2007) 3 ARBLR 418

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Arvind Nigam Amit and Anant Kumar, for the Appellant; Harish Malhotra and S.K. Chandwani, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—In January 1995, the respondent invited tenders for the extension and strengthening of runway at 28 end of the Calicut Airport. In response thereto, several bids were received by the Respondent. The petitioner/claimant is stated to have submitted its bid on 10.04.1995. The bid submitted by the petitioner was found suitable for the award of the contract.

2. It is stated that after the bidding, the respondent stipulated a reduction in time period for the completion of the work from 48 to 42 months. The petitioner/claimant avers that the reduction of the time period was made after a lapse of nine months since the submission of the bid i.e. in December 1995. The petitioner/claimant accepted the reduction in time period vide a letter dated 13.12.1995 and requested the issuance of the letter of intent within seven days for immediate commencement of the work.

3. The contract was awarded to the petitioner vide a letter dated 19.12.1995 which stated that the reduced time period would be computed from the tenth day after the issue of the said letter. The date of completion of the project was 28.06.1999. However the work had not been completed though arbitration

proceedings commenced and were concluded. The respondent is stated to have extended the date of completion from time to time. The contract was concluded only after the award and the work done certificate is dated 05.12.2002 which records the date of completion of the work as 30.11.2001.

4. In view of changes in government policy and sharp escalation in the price of bitumen, the petitioner invoked Clause 10F of the General Conditions of Contract and sought reimbursement of the differential between the "controlled" prices on the day of the award of the contract and the increased/"decontrolled" prices that it had to pay for procuring bitumen. As the respondent disputed the coverage of the claim by the said Clause 10F of the contract, a dispute arose and a claim of Rs. 98,88,820.13 was lodged by the petitioner. The chairman of the respondent vide letter dated 25.02.2000 appointed Sh. M K Koundinya, sole arbitrator to decide and make his award regarding the claims.

5. Aggrieved by the said award, the petitioner has filed the present petition u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act") challenging the award published on 25.11.2000.

6. The petitioner claims that although the project was executed with due diligence on its part, it suffered enormous losses on account of escalation in the prices of materials due to change in policies of the Government and hindrances caused due to acts of omission and commission attributable to the respondent.

7. Learned Counsels for the parties were heard at length.

Objections regarding procedure

8. The case of the petitioner is that the arbitrator did not record oral evidence, gave no opportunity to lead evidence and that no examination or cross examination has taken place and only informal discussions took place, only the gist of which has been recorded by the arbitrator.

9. Learned Counsel for the petitioner referred to Section 19(2) and (3) of the said Act which provide that the parties are free to agree on the procedure to be followed by the arbitral tribunal subject to the provisions in chapter V of the said Act and in the absence of an agreement, the tribunal may conduct the proceedings in the manner it considers appropriate. Section 24 of the said Act provides that unless the parties have agreed otherwise, the arbitrator is to decide whether to hold oral hearings or whether the proceedings will be conducted on the basis of documents and other materials. It was submitted that while the procedure adopted by the arbitrator as per para 2 of the award reveals that oral evidence was to be recorded, the arbitrator filed an entirely different procedure and did not record oral evidence or make available any opportunity to lead evidence. The said provision is as under;

24. Hearings and written proceedings. (1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall

be conducted on the basis of documents and other materials:

Provided that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party, unless the parties have agreed that no oral hearing shall be held.

...

10. The petitioner argued that the entire procedure is vitiated as the arbitrator rejected claims for purported lack of proof.

11. Learned senior Counsel for the respondent on the other hand contended that opportunities were granted but no affidavit was filed or witness produced. Learned senior Counsel drew the attention of the court to the copies of the records of the arbitral proceedings wherein in the proceedings of 05.09.2000 it has been recorded that copies of the arbitrator's notes of proceedings were given to the parties and Sh. Tarkeshwara (technical consultant who was one of the representatives of the plaintiff) accepted these as complete representation in brief of what he has said. Learned Counsel further referred to the proceedings dated 07.09.2000 wherein again the arbitrator has recorded that notes of the hearing dated 06.09.2000 were given to the parties and the parties have confirmed that it was the correct representation of what they had said. Similar observations have been recorded in the proceedings dated 2.11.2000.

12. In the proceedings dated 2.11.2000, it has also been noted that the parties have nothing more to add or summarize and have agreed to close the case for award.

13. The award of the sole arbitrator records that full opportunity has been given to the claimant and respondent to file any document/detail and lead oral evidence, if any and take inspection of the documents/records filed and/or produced and relied upon by other party if so desired. It has also been noted that both parties have agreed in writing that they have concluded the case and closed the case for award and that the claimants and respondents had filed the statement of facts, counter claim, rejoinders, documents etc and all such statements and documents filed and the pleadings advanced have been considered and the copies of the brief notes of all the notes of the arbitrator regarding the hearings have been made available to the parties and the parties have agreed to the same as representing correctly their pleadings.

14. There is no dispute in the legal position that the parties in an arbitration are free to agree to the procedure to be followed subject to the provisions of the said Act and in the absence of such agreement, the arbitral tribunal may conduct the proceedings in the manner that it considers appropriate.

15. It is apparent from the facts and proceedings referred to aforesaid that the parties were given the opportunity to lead evidence. Both parties had filed their respective claims and documents which have been considered by the arbitrator. Insofar as the notes of the proceedings are concerned, the award as also the

notes of the proceedings themselves show that the notes have been made available to the parties and the parties had agreed to the same as representing their pleadings and what was stated correctly. The petitioner cannot at this stage take the plea that the only the gist of the discussions have been recorded when the same were accepted by them correct representation of what was stated. No objection appears to have been taken before the arbitrator that evidence was not being permitted to be led. In fact the proceedings were closed for the award only on the parties stating that they had nothing further to add or summarize. Thus, the parties chose not to lead any further evidence and the petitioner cannot thus now plead that it was not given the opportunity to lead evidence. I am thus of the view that there is no merit in the plea of the petitioner that the procedure is vitiated.

Objections to Claim 1

16. The first claim pertains to the difference in the amount on account of additional levy imposed on 30/40 grade bitumen. In this behalf, learned Counsel for the petitioner submitted that at the time of the tender, bitumen was under the administered price mechanism (hereinafter referred to as "APM") imposed by the government of India and was consequently subsidized. The APM was discontinued by the Government of India on 22.07.1997 resulting in removal of the subsidy and thus, escalation was sought by the petitioner under Clause 10F of the contract. The said notification/memo declares that Bitumen would be a "free trade product" with the transport price to be fixed by the OCC on import parity basis every month. The memo further states that separate transfer prices would be fixed by OCC for 80-100, 60-70, and 30-40 grades of bitumen with appropriate differentials for quality. The existing FSP mechanism under APM for bitumen movements is discontinued.

17. Learned Counsel further referred to the letter of Indian Oil Corporation dated 04.02.1998 addressed to the plaintiff wherein it has been stated that as a result of the policy change the prices are being fixed every month on the basis of import parity which is fluctuating every month. It has also been stated that the prices for all three grades of bitumen i.e. 80-100, 60-70, and 30-40, effective 1.08.1997, are different for each of the grades and the superior grades of bitumen are costlier. The price on 1.1.1998 and 1.2.1998 has been stated to be Rs. 10,614.50/mt and Rs. 10,292.50/mt respectively for 30/40 grade packed bitumen. It is stated that CST @ 11 per cent will be charged as a result of which the prices for January and February will work out to Rs. 11,782.10/mt and 11,424.68/mt.

18. Learned Counsel for the petitioner contended that the granting of a subsidy under the administered price mechanism is a statutory act as is the withdrawal of a subsidy resulting in increased prices of the commodity and thus it would be Clause 10F of the General Conditions of Contract which would be applicable and not Clause 10CC which has been applied by the arbitrator. The relevant part of Clause 10F reads as under:

Clause 10F : Reimbursement of Taxes/Levies

(i) Tendered rates are inclusive of all taxes and levies payable under the respective statutes. However, pursuant to the constitution (forty sixth amendment) Act, 1982 if any further tax or levy is imposed by statutes, after the date of receipt of tenders, and the contractors thereupon necessarily and properly pays such taxes/levies, the contractor shall be reimbursed the amount so paid provided such payment, if any is not in the opinion of the Superintending Engineer (whose decision shall be final and binding) attribute to delay in executing of work within the control of the contractor.

(ii) ...

19. Learned Counsel drew the attention of the court to the Petroleum Products (Supply and Distribution) Order, 1972 wherein, bitumen has been specifically mentioned in the definition of petroleum products in Clause 2(f). The said order has been issued by the central government in exercise of powers conferred u/s 3 of the Essential Commodities Act, 1955.

20. Learned senior Counsel for the respondent on the other hand contended that Clause 10F has no application in the present matter as it relates to the reimbursement of taxes and levies imposed by a statute after receipt of a tender and in the present matter, there is neither any levy nor any imposition of a fresh tax after the execution of a contract and the reference to Clause 10F of the contract was uncalled for. Learned senior Counsel submitted that withdrawal of subsidy if any was not within the purview of Clause 10F.

21. Learned senior Counsel referred to the clarifications in the agreement between the parties. Against the clause with reading "Suggest to fix up basic price of Bitumen and Cement so that escalation could be released based on actuals", it is stated that "Release of escalation for cement and bitumen as per actuals is not acceptable. Escalation as per Clause 10CC shall only be admissible." It is, thus, contended that only Clause 10CC would apply.

22. A reference was made to the provisions of Article 265 of the Constitution of India which states that which states that "no tax shall be levied or collected except by authority of law". Further, learned senior Counsel placed reliance on Article 271 and 274 which read as under:

271. Surcharge on certain duties and taxes for purposes of the Union. - Notwithstanding anything in articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

...

274. Prior recommendation of President required to Bills affecting taxation in which States are interested. - (1) No Bill or amendment which imposes or varies

any tax or duty in which States are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian Income Tax, or which affects the principles on which under any of the foregoing provisions of this Chapter moneys are or may be distributable to States, or which imposes any such surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) In this article, the expression "tax or duty in which States are interested" means-

(a) a tax or duty the whole or part of the net proceeds whereof are assigned to any State; or

(b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State.

23. Learned senior Counsel drew the attention of the court to the letter dated 25.06.2002 sent by the respondent to the plaintiff wherein the date for completion of work was extended to 30.11.2001 without levy of compensation and without prejudice to the right of the respondent to recover damages as per the contract agreement.

24. Learned senior Counsel referred to the notification dated 22.07.1997 whereunder bitumen was declared to be a "free trade product" to contend that the same was not a statutory Act. It was thus contended that it is Clause 10CC which is applicable to the claim of the petitioner and not Clause 10F as claimed by the petitioner and that the provisions cannot be re-interpreted.

25. A perusal of Clause 10F shows that the same is applicable in cases where an further tax or levy is imposed by a statute and the contractor has paid such taxes or levies. A further condition is that such payment must not in the opinion of the Superintending Engineer be attributable to delays on the part of the contractor. Clause 10CC on the other hand provides the formula for calculating cost escalation. The same is applicable where the prices of materials and/or wages of labour required for the execution work increase and provides for compensation to the contractor in accordance with the provisions of the said clause. The clause provides for compensation for escalation during the stipulated period of the contract including valid extensions. The relevant portion of Clause 10CC is as under:

If the prices of materials (not being materials supplied or services rendered at fixed price by the department in accordance with Clause 10 and 14 hereof) and/or wages of labour required for the execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contractor shall be accordingly varied subject to the condition that is compensation for escalation in prices shall be available only for work done

during the stipulated period of the contract including such period for which the contract is validly extended under the provisions of Clause 5 of the contract without any actions under Clause 2 and also subject to the condition that no compensation shall be payable for a work for which the stipulated period of completion is 12 months or less. Such compensation for escalation in the prices of materials and labour when due to shall be worked out based on the following provisions.

...

26. Thus, claims for compensation by reason of escalation in prices or wages during the stipulated period of the contract would lie under Clause 10 CC of the General Conditions of Contract, claims on account of further tax or levy under a statute would lie under Clause 10F.

27. The contract was awarded to the petitioner vide letter dated 19.12.1995. The order dated 22.07.1997 issued by the Ministry of Petroleum and Natural Gas to various petroleum companies inter alias discontinued the existing FSP mechanism under the APM for bitumen movements and provided that the oil industry would have the freedom to fix selling prices of 60/70 and 30/40 grade bitumen in relation to their respective transfer price.

28. In my considered view, it is obvious that Clause 10CC and Clause 10F operate in different fields as the operation arises in case of different eventualities. It is not in dispute that escalation as per Clause 10CC has been paid. The only dispute is as to whether Clause 10F would apply whereby the petitioner would apparently get a higher amount than what has been awarded under Clause 10CC.

29. In my considered view, it is Clause 10F which comes into play. This conclusion is based on the fact that bitumen was under APM imposed by the Government of India and was subsidised. Such APM came into being on account of the Petroleum Products (Supply and Distribution) Order, 1972 where bitumen has been specifically mentioned in the definition of petroleum products in Clause 2(f). This Order in turn has been issued by the Central Government in exercise of powers conferred u/s 3 of the Essential Commodities Act, 1955. I am in, thus, agreement with the submission of learned Counsel for the petitioner that such APM clearly has a statutory flavour and the withdrawal of such APM whereby bitumen was declared a free trade product would, thus, fall within the category of reimbursement required for taxes/levies. If any further tax or levy falls under Clause 10F, there is no reason why the withdrawal of such a statutory APM would not fall within the same clause. It is, however, not possible to compute the differential amount and, thus, the matter would have to be remanded back to the arbitrator for computation.

Objections to claim 2

30. The second claim made by the petitioner/claimant before the arbitrator was

for damages on account of idling of machinery and loss of progress on account of non-closure of road, non-diversion of overhead lines and non-finalization of design of base culvert.

31. The petitioner, insofar as this claim is concerned has taken the objection that the arbitration proceedings on 06.09.2000 recorded by the arbitrator only records "Explains details of claim from the claim statement" and a similar observation as regards the entire discussion on claim 2 but what has been explained has not been mentioned. The petitioner thus sought to challenge the finding of the arbitrator on claim 2 on the ground of improper procedure of hearing. The petitioner further claimed that no allegation had been made that machinery was not deployed or was under deployed and thus the petitioner is entitled to idling claims. The petitioner has also contended that a document being Ex. 27/2 has been ignored and the arbitrator has not even considered the same.

32. Learned Counsel for the respondent contended that the arbitrator has considered the entire claim and has categorically given the finding of lack of evidence in this regard. The learned arbitrator has found that the petitioners was in the know about the narrow roads, rush due to fish market and possibility of delays in diversion of a national highway and could have selected more quarries on a side where there would be least or no obstruction.

33. Learned senior Counsel for the respondent referred to the award wherein the arbitrator has observed that if the claimant had entered into any agreement with hired equipment owners to permit no reduction with adequate notice or no reductions even in the monsoon period, then it is by their own choice and the respondents cannot bear loss due to it.

34. Insofar as the question of the procedure adopted is concerned, as noted above, the notes of the arbitration proceedings were accepted by the parties as representing correctly what was stated and even the proceedings were closed for the award only on the parties stating that there had nothing further to add or summarize and thus the petitioner cannot be permitted to raise the objection at this stage.

35. A perusal of the award on this aspect shows that the arbitrator has considered the documents referred to by the parties and found that the claim is not based on any proven data. The arbitrator has noted that while the petitioner has stated that they had vouchers for payments but did not base the claim on them and also did not produce the vouchers. Payments made to the owners of the hired equipment for the idle periods were also not established. The arbitrator observed that it has not been established as to why it is the respondent's liability against provisions to the contrary in the contract agreement and Therefore the claim was found to be not admissible and not justified.

36. Insofar as the documents referred to by the petitioner is concerned, it is not in the scope of scrutiny of this Court to re-appreciate the evidence. The arbitrator

has reached a finding on a consideration of the documents before him and submissions of the parties. The conclusion of the arbitrator on this aspect thus cannot be interfered with.

Objections to Claim 3

37. Claim 3 of the petitioner was with regard to the watering of public roads on account of which the plaintiff claimed an amount of Rs. 75,16,300/- and Rs. 1,35,69,870/- on account of additional expenses due to forced one way traffic.

38. The contention of the petitioner on this aspect is that while the extra expenses of watering the public roads and on account of re-routing due to law and order problems was not denied, the arbitrator rejected the claim on the basis of Clause 32 of the NIT which did not have any application to the nature of the claim. Clause 32 of the NIT reads as under:

32. Before tendering, the contractor shall inspect the site to fully acquaint himself about the conditions in regard to accessibility of site, nature and extent of grounds, working conditions including space for stacking of materials, installations of T & P etc. conditions effecting accommodations and movements of labour etc. required for the satisfactory execution of the contract. No claim whatsoever on such account shall be entertained by the department in any circumstances.

39. A perusal of the award shows that the arbitrator observed that after the initial experience of spillage requiring water, the claimant could have taken precautions to avoid spillage. On the pleadings, arguments and details, the arbitrator came to the conclusion that the claims could not be sustained under the provisions of the contract and that the petitioner has failed to prove that the respondent has to bear such a liability.

40. Clause 32 of the NIT provides that the contractor was required to acquaint himself, inter alia, with the working conditions at the site prior to tendering and no claim on such account can be entertained in any circumstances. The petitioner failed to show before the arbitrator that the respondent had any liability in this behalf.

Objections to Claim 4

41. Insofar as claim 4, pertaining to claims on the ground of losses suffered due to idling of resources is concerned, learned Counsel for the petitioner submitted that the respondent had not disputed the law and order problems or the prolonged monsoons due to which there was idling of resources but the arbitrator rejected the claims on the basis of Clause 32 of the NIT and Clauses 28 and 29 of the special conditions of contract. Learned Counsel contended that the said clauses have no application in the present case.

42. Learned senior Counsel for the respondent pointed out that in view of Clause 29 of the special conditions of contract, no payment could be made to the

contractor for damage caused due to rains or other natural calamities. The said clause reads as under:

29. No payment will be made to the contractor for damage caused by rains or other natural calamities during the execution of the works and no such claim on this account will be entertained.

43. Attention of this Court was also invited to the letter dated 25.6.2002 whereby extension was granted up to 30.11.2001 without levy of compensation. Along with this letter, a letter dated 11.10.1999 was filed by the respondent which enclosed the abstract of hindrance. Out of the total delay of 437 days, 397 days arose on account of rain. Therefore, really speaking, it is only the rain which delayed the contract and that is why the extension was granted.

44. Insofar as claims of losses on account of prolonged rains are concerned, Clause 29 of the special conditions of contract clearly provides that no payment would be made to the contractor on account of rains or any other natural calamity. The petitioner cannot really claim any losses on this ground. The finding of the arbitrator in this behalf thus cannot be faulted.

45. The arbitrator has taken note of the fact that the respondent had taken up the law and order situation with higher authorities and got the police to control the situation as assistance to the claimant and that the respondents cannot be held liable for any losses suffered on the basis of theoretical outputs never achieved. It was noted that the respondent maintained a record of hindrances and granted extension of time till 31.10.2000. The arbitrator had observed that the claim is based on 60 percent due to monsoons and 40 per cent due to the law and order problems and it has not been established that any loss was incurred. The arbitrator has also relied on Clause 32 of the NIT under which the contractor is required to inspect the site and fully acquaint himself with the conditions regarding accessibility of the site, working conditions etc required for the satisfactory execution of the contract and no claims on such account would be entertained in any circumstances. The arbitrator came to the conclusion that it has not been established that the petitioner incurred any losses and also that the respondents liability beyond the assistance already given was not established. The finding of the arbitrator in this behalf thus cannot be interfered with.

Conclusion

46. The result of the aforesaid is that the award is set aside to the extent of the findings on claim 1 and remanded back to the arbitrator for calculations in respect of claim 1 to be made in accordance with the provisions of Clause 10F of the General Conditions of Contract. It is however made clear that the petitioner would be entitled only to the differential between the amount calculated under Clause 10F and the amount calculated as per the provisions of Clause 10CC. Parties are left to bear their own costs.