

(2012) 09 DEL CK 0098

In the Delhi High Court

Case No : CS (OS) No. 1896 of 2003 and I.A. No. 776 of 2004

M/s. Ali Mohammed Baba and Sons

APPELLANT

Vs

National Hydro-Electric Power Corporation Ltd.

RESPONDENT

Date of Decision : 11-09-2012

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Contract Act, 1872 — Section 51, 52, 53, 54

Citation : (2012) 09 DEL CK 0098

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

Bench : Single Bench

Advocate : Z.A. Shah, with Ms. Purnima Bhatt, for the Appellant; Kailash Vasdev with Mr. Ajit Pudussery, Ms. Joanne Pudussery and Mr. Dinesh Khurana, for the Respondent

Judgement

Justice S. Muralidhar

1. National Hydroelectric Power Corporation Limited ("NHPC") has filed I.A. No. 776 of 2004 under Sections 30 and 33 of the Arbitration Act, 1940 ("Act") raising objections to an Award dated 30th April 2003 passed by the sole Arbitrator adjudicating the disputes between NHPC and the Plaintiff M/s Ali Mohammed Baba and Sons arising out of an agreement dated 14th September 1989.

Relevant clauses of the Contract

The above agreement was for the supply of materials, erection including associated civil works, testing and commissioning of a 33 KV transmission line for the URI hydro-electric project situated in the Baramulla district of Jammu and Kashmir ("J&K"). The line was required for supplying construction power to URI Civil AG as per contractual obligations of the NHPC with a Swedish consortium which was then engaged in the construction of the URI Project. In terms of the Letter of Award ("LoA") dated 13th July 1989 the entire work, including supply of materials, erection, testing and commissioning of the line was to be completed

within a period of nine months from the date of issue of the LoA i.e. by 12th April 1990. The general conditions of contract ("GCC") for supply and erection were annexed as Annexure II to the contract.

2. Clause 2 of the GCC stated that the Contractor shall be deemed to have carefully examined the general conditions, specifications, schedules and the drawings and also have satisfied himself as to nature and character of the work to be executed and, where necessary, of the site conditions and other relevant matters and details. Clause 13 of the GCC dealt with power to vary or omit work. It is stipulated that no alterations, amendments, omissions, additions, substitutions or variations of the work under the contract shall be made by the Contractor except those directed in writing by the Engineer. However, the Engineer was to have full power from time to time during the execution of the contract by notice in writing, to instruct the Contractor to make such variation as will not result in change of the scope of the contract and the Contractor shall carry out such variations, and be bound to carry out such variations as if they occurred in the contract. The difference in the cost as a result of such variation was to be added to or deducted from the contract price as the case would be. Under Clause 14 where the Contractor neglected to execute the work as agreed with due diligence and expedition or refused or neglected to comply with any reasonable orders given by the Engineer or contravened any provisions of contract, NHPC could after giving seven days' notice in writing, apply any balance which may be otherwise due to the Contractor towards payment of cost of executing such work. NHPC could also recover it from the Contractor in any lawful manner.

3. Clause 17 required the Contractor to provide the full programme of the work in detail to the NHPC. Any delay in performance of the contract within the time fixed or any extended period would result in rejection of the contract price which should not exceed 10% of the contract value. Clause 18 of the GCC provided for the consequences of the delay in delivery of failure to supply where again the reduction could not exceed 10% of the contract value. Under Clause 25, a fortnightly progress report had to be submitted to the Engineer.

4. Clause 49.2 stated that for the purpose of the agreement, force majeure shall include, "without limitation, wars, insurrections, civil disobediences, strikes, riots, epidemic, earthquakes, storms, floods, exploitations or fires not caused by Contractor's negligence, lightening, acts of God or the public enemy which is of such nature as to delay, curtail or prevent timely action by either party." Clause 53 dealt with breach of contract and read as under:

In case of non-performance in any form of shape of the covenants and conditions in this contract by the contractor the Corporation shall have power to annul, rescind, cancel, or terminate the contract and, upon its notifying in writing to the contractor that it has so done, this contract shall absolutely determine. The decision of the Corporation in this regard shall be final and binding.

The disputes between the parties

5. The case of the NHPC was that right from the beginning the Contractor did not adhere to the time schedule as set out in the bar chart for the supply of materials. The supply part of the contract was not completed by 31st October 1989 as agreed. Till April 1990 the failure to complete supplies continued after which the Contractor failed to complete even the construction part. It is submitted that the Contractor also did not submit progress reports and ultimately abandoned the contract.

6. The case of the Contractor was that they took up the execution of the work in all seriousness and offered the first lot of 127 rails vide letter dated 22nd August 1989 for inspection. This was even before the formal contract was signed on 14th September 1989. It is stated that the inspection was done by NHPC on 7th October 1989 and dispatch instructions were issued on 13th October 1989. However, it is stated that "ACSR DOG conductor" was offered for inspection on 12th October 1989 and was rejected on 7th November 1989. The fresh conductors offered were inspected on 18/19th December 1989 and dispatch instructions were issued on 11th January 1990. Insulators were offered for inspection by the Contractor on 26th December 1989 and inspection was carried out by NHPC on 8th February 1990. The Contractor alleged that there was delay in inspection being carried out at every stage and delay in NHPC making payments for the supply of materials.

7. The disputes between the parties were referred to the sole Arbitrator after this Court passed an order in Suit No.854A of 1995 on 16th December 1999. The appointment of the sole Arbitrator was made by the Chief Engineer, In-charge of the URI Hydro-Electric Project on 1st February 2000. During the course of the arbitral proceedings, one sitting was held at URI Hydro-Electric Project Campus during which the learned Arbitrator conducted random physical inspection of the route, topography of the area and other things associated with the matter in dispute. On behalf of the Contractor seven witnesses were examined and on behalf of the NHPC there were four witnesses.

Issue of delays on the part of NHPC

8. The first claim of the Contractor considered by the learned Arbitrator was for a sum of Rs.1,81,285.16 towards the loss suffered by the Contractor on account of delay in NHPC undertaking inspections of the materials being supplied and on account of delay in making payments for the said supply. The learned Arbitrator went into the question of supply of the ACSR DOG conductor, the insulators, the electrical fittings and hardware fittings, structural materials and assistance on their part. It was noticed that the Contractor went on offering the materials much beyond the scheduled period of supplies and NHPC kept accepting the same after resorting to the formalities in minute details. The learned Arbitrator took note of the fact that the 33 KV transmission line that was ultimately erected was with the materials supplied by the Contractor. These were the same materials which

were offered initially for the inspection, which were then inspected and for which dispatch instructions were issued and ultimately delivered and received by the consignees concerned. The transmission line even at the time of arbitration had been in operation for several years. The learned Arbitrator concluded that "this goes to establish the quality of the materials conforming to the desired technical standard". Further, it showed that the materials and fittings were procured by the Contractor from the sources/manufacturers approved by the NHPC. However, since the Contractor could not adhere to the prescribed time schedule, and NHPC by its conduct and acquiescence went on extending the period of supply by accepting the materials as and when they arrived, the learned Arbitrator held that the said claim was not justified.

Recoveries made by NHPC

9. The second issue considered is whether the Contractor was entitled to recover Rs.5,42,537.70 deducted by the NHPC from the bills raised by the Contractor approximately @ 10% of each bill. In their reply to the statement of claim, NHPC submitted that as per Clause 2 of the LoA, 10% value of the pro-rata supply was to be released only upon successful supply, erection, testing, commissioning and handing over the transmission line. However, the materials had not been supplied in full quantity.

10. The learned Arbitrator accepted the case of the Contractor that in terms of Clause 3.19 of the special conditions of contract ("SCC"), NHPC was required to report shortages within 30 days of the receipt of the consignment to the Contractor by returning the receipted challans indicating the shortages. The Contractor was to then make good the loss within a maximum period of three months after the notice of such loss. The supplies for replacement for losses were deemed to be covered within the scope of the contract. If the Contractor failed to make good the loss so notified, recovery to that extent could be made from the pending bills by the NHPC. The learned Arbitrator noted that there was no material on record to show that NHPC gave any such notice in respect of any shortages. The only occasion in which the shortage was reported was during the 4th arbitration proceedings on 8th September 2000. NHPC's witness sought to suggest during his cross-examination that notice of shortage was given by a letter dated 13th April 1994. However, the learned Arbitrator noted that these were about shortages ascertained during June to August 1995 and, therefore, a letter could not have been written in September 1994 in that regard. This witness testified that the 33 KV transmission line between lower Jhelum point and Buniyar Sub-station was commissioned and energized on 4th December 1994. Further, the materials supplied by the Contractor were handled, utilized, erected for execution of the work by several other agencies including the NHPC much before ascertaining and identifying the shortages. There was no formal notice to the Contractor about this or of any alleged shortages. The learned Arbitrator after analysing the facts concluded that the materials were taken over unilaterally by the NHPC for the contract in the months of April and May 1992

and utilized in the erection, without proper notice and knowledge of Contractor. The entire line involved in the subject contract, had been erected and energized on 29th January 1997 and the verification was done by the Manager (E) who was himself looking after the erection work.

11. Before the learned Arbitrator, the Contractor explained the reasons why it could not reach the stage of erecting, testing and commissioning of the 33 KV transmission line. In the first place, the NHPC had to approve the route map based where-upon detailed survey could be undertaken by the Contractor. NHPC had to also approve the sag template for plotting of the pole spots and profile of the 33 KV transmission line. The route map was finally approved and delivered to the Contractor on 11th March 1991. The NHPC had to provide Right of Way ("ROW") to the sites of work and had to make available the spots where structures were to be pitched and erected as also the space through which the line was to be laid. It is stated that the NHPC failed to do so and, therefore, had not discharged its reciprocal contractual obligation. A further reason was that the land owners and zamindars resisted digging of holes and erection of towers on their land unless they were duly compensated. During the period from the end of 1989 till 1991, the condition in the J&K valley was abnormal and movement of materials and men was very difficult. This resulted in the Contractor not being able to perform the contract. Later, when NHPC paid compensation to the land owners after 1995, the work of digging holes and commissioning of the 33 KV transmission line could commence. The assertion of the Contractor was denied by the NHPC.

12. The learned Arbitrator noted that NHPC's own witness RW-III in reply to Question No.4 had admitted that the Contractor had submitted a route map before he joined the project. There was no document to indicate that the said route map was approved and given to the Contractor. The learned Arbitrator noted the statement of RW-II, Mr. Jatindra Singh on behalf of NHPC that the approved route map was delivered to the Contractor on 11th March 1991. Thereafter, the sag template curves were drawn on the basis of design approved by the Chief Engineer ("CE") (Design) on 28th April 1991 by the Contractor. However, till November 1991, the NHPC had not approved the sag template curves. The learned Arbitrator noted that a 33 KV transmission line is a high voltage (tension) line and the sag template was used for the purpose of its erection and commissioning. He further noted the importance of the sag template curve which was used for plotting of the pole tower spots and drawing the profiles of transmission lines indicating the topography of the land, important land marks, ground clearances, span limitation etc. The witness examined on behalf of the Contractor included the Executive Engineer ("EE") with the Government of J&K on deputation to the NHPC as Manager (Civil) who had stated that "the position in the valley was absolutely bad and law and order machinery has virtually collapsed in the valley from 1990 to 1992". In the cross-examination this witness named the officers who had abandoned their work and had withdrawn from their places of posting "primarily with a view to save their

lives from the ongoing insurgency."

13. As regards the compensation to the land owners/zamindars, the learned Arbitrator referred to the deposition of CW-IV, Mr. Mohd. Afzal, who had been working in the land acquisition Office. He testified that between March 1995 to February 1997, the land owners/zamindars were compensated @ Rs.425 per pole for the power line being taken through their land and did not object. He clarified that the payments of compensation were made to land owners by account payee cheques and no compensation had been paid from 1990 to 1994. These statements were based on records which were examined by the learned Arbitrator. The statements were not controverted during cross-examination. The case of the NHPC that this compensation was paid for crops and trees damaged was not believed, since the compensation was paid at the uniform rate of Rs.425 per pole. The learned Arbitrator referred to Sections 51 to 54 of the Indian Contract Act, 1872 and noted that in terms thereof NHPC had to perform the reciprocal obligations of making available the ROW and sites to work upon, before the erection of the structures and the laying of the transmission line by the Contractor could commence. Reference was also made to Clauses 31.1 and 42 of the contract for this purpose. Consequently, it was held that NHPC was not justified in withholding Rs.5,42,537.70 from the bills of the Contractor and the amount was liable to be refunded to the Contractor.

14. The submissions of Mr. Kailash Vasdev, learned Senior counsel appearing for NHPC was that once the learned Arbitrator had given the clear finding that the Contractor did not adhere to the time schedule in making supplies, there was no question of NHPC having to perform any reciprocal promise. The 10% amount was payable only upon NHPC taking over of the work after completion. Once, it was clear that the Contractor had abandoned the work NHPC was justified in retaining 10% of each bill. He further submitted that Clause 49 was a force majeure clause which covered wars, insurrections, civil disobediences, strikes, riots etc. This clause required the Contractor, claiming inability to perform, to notify NHPC. If the NHPC had been so notified it might have extended the time. However, no such notice was issued in the instant case and NHPC had to complete the work by resorting to Clause 14 and take over the materials, tools tackles etc. for completing the work at the risk and cost of the Contractor. NHPC had also to make substantial payments to URI Civil AG on account of the failure to supply construction power.

15. Mr. Vasdev submitted that in a letter dated 17th January 1992 much after the time within which the contract was to be completed, the Contractor had highlighted the problem relating to non-availability of site due to nonpayment of compensation to the land owners. By a letter dated 23rd February 1992, this had been disputed by the NHPC. It is submitted that since this was in any event far beyond the stipulated date of completion of the contract, this could not be taken to be a justification for the Contractor for not completing his part of the contract.

16. Mr. Z.A. Shah, learned Senior counsel appearing for the Contractor, pointed

out that with the consent and knowledge of NHPC, the contract was continued even beyond the period of nine months. In fact, the Contractor was engaged till 1993. The work was thereafter got completed by NHPC through other agencies in 1997. He pointed out that Clause 39.1 would not apply since no payment was received by the Contractor. He also pointed out that no particular clause of the contract had been violated by the learned Arbitrator.

17. The above submissions have been considered. The impugned Award in respect of Claim No.2 contains elaborate reasons in support of the decision of the learned Arbitrator. Even while rejecting the Contractor's claim for losses on account of delays of the NHPC in accepting the materials offered for supply, the learned Arbitrator did come to the conclusion that at various points of time NHPC kept accepting the supplies even though they were supplied after the stipulated time. The learned Arbitrator did find that NHPC delayed the giving of approvals to the supply of the materials but considered this to be "natural and sometimes incidental to the working of Public Undertaking Offices". Therefore, there was no unqualified finding of the learned Arbitrator as regards the delay on the part of the Contractor in making supplies. On the other hand the learned Arbitrator returned a definite finding as regards failure of the NHPC to approve the sag template which was critical for laying of the 33 KV transmission line. There was also a clear finding that NHPC failed to provide ROW to the sites of the work and make available the spots where structures were to be pitched and erected as also the space through which the line was to be laid. NHPC also did not create a conducive atmosphere for work.

18. The submission that the compensation paid to the land owners was on account of crops and trees damaged was rightly rejected by the learned Arbitrator. The witnesses who deposed in the arbitral proceedings and the record produced showed that the compensation was calculated at the rate of Rs.425 per pole. Further no compensation was paid during the years when the Contractor was at the site due to the resistance of the land owners. It was only during the years 1995 to 1997 that the land owners were paid compensation. Clearly, the Contractor could not be blamed for the failure to complete the erection and commissioning of the 33 KV line. With NHPC not facilitating the laying of the line, it was unjustified on its part to invoke Clause 38(B)(ii) of the LoA and deduct 10% from the bills of the Contractor.

19. The view taken by the learned Arbitrator was a plausible one. He was an experienced Arbitrator and also undertook a field inspection. He was aware of the ground realities. His conclusion that NHPC was in breach of its reciprocal obligations was based on a correct interpretation of the relevant clauses of the contract. The reasons given in the impugned Award for allowing Claim No.2 were consistent with the evidence on record and suffer from no error much less any patent error.

Claim for extra items

20. Claim No.3 was for a sum of Rs.2,45,410 on account of supply of additional/ extra items. The criticism of Mr. Vasdev was that the Award in this regard was not based on any evidence. It is submitted that under Clause 3.17 of the contract, the deviations asked to be undertaken by the Contractor were integral to it. Under Clause 3.18 NHPC had the right to vary the quantities up to 25% and there was no provision for compensating the Contractor. He also referred to Clause 27.2 of the GCC and Clause 3.1.2 of the SCC. He submitted that no challans regarding supply of extra materials were produced in the proceedings.

21. The above clauses have been taken note of by the learned Arbitrator. He has observed that these extra items were apparently used in the actual laying of the 33 KV line after the Contractor left the site. If they were not required, NHPC should have asked the Contractor to take them back either immediately or within a reasonable time. The fact that the extra items supplied by the Contractor were used in the 33 KV line had not been denied by the NHPC. The designs and drawings for pole structures were varied subsequently by the NHPC and this naturally required a number of extra components. The learned Arbitrator has referred to challans, dispatch instructions and other documents to come to the above conclusion. It cannot therefore be said that the finding in relation to the above claim was not based on evidence. The learned Arbitrator did not accept the rate analysis submitted by the Contractor. He re-calculated and modified the rate analysis and set out the calculations in detail in para 21.08 of the Award. As against the claim of Rs.2,45,410, the learned Arbitrator awarded Rs.1,97,959.50. this Court is unable to detect any error in the above determination by the learned Arbitrator.

Other claims

22. The next item of claim was for a sum of Rs.1,00,269.47 on account of price escalation in relation to Rails and ACSR Conductor. The learned Arbitrator upon a proper analysis of the entire evidence awarded Rs.39,532 only. No error has been pointed out as far as the above determination is concerned.

23. The next claim was for a sum of Rs.17,64,775 for compensation for losses suffered by the Contractor due to delay in approval of route map, non-availability of sites etc. The claim was split up as under:

(i)

Re-arrangement of staff and infrastructure at alternate sites

Rs. 2,00,000.00

(ii)

Establishment charges including Staff, employees etc.

Rs. 12,00,000.00

(iii)

Work loss

Rs. 2,00,000.00

(iv)

Tools and Plants forceably taken By NHPC workers

Rs. 1,64,775.00

24. The learned Arbitrator did not entertain claims at Item Nos.(i) & (iii). Even as regards Item No.(ii), the Contractor was allowed only Rs.1,25,000. On Item No. (iv), the learned Arbitrator calculated the allowable amount as Rs.1,41,775 again based on the evidence produced by the parties. It is submitted on behalf of NHPC that this portion of the impugned Award was contrary to Clause 14 of the GCC. It is submitted that the Award was based on surmises and conjectures and was without any evidence.

25. A perusal of the impugned Award in relation to the aforementioned claim does not bear out the above submission of the NHPC. Detailed findings in relation to the other claims as regards to the ground situation in the valley have also to be kept in view while perusing the Award in relation to this claim. The affidavits by way of evidence submitted by the Contractor's witnesses were unable to be controverted. As a matter of fact, the learned Arbitrator held that the tools and tackles left at the site by the Contractor had been taken over unilaterally by the NHPC and utilized in the work. Also, till such time the Contractor was involved in the work i.e. up to May 1992, some skeleton staff would have been maintained. The expenditure on this account at Rs.5,000 per month can hardly be said to be erroneous.

26. The finding of the learned Arbitrator as regards the Contractor's claims being within limitation is also based on the evidence on record and suffers from no illegality.

Award of Interest

27. Finally, Mr. Vasdev submitted that the Award of interest "compounded annually" was contrary to the contract which did not provide for payment of any interest. He referred to the decision of the Supreme Court in State of Haryana and Others Vs. S.L. Arora and Company, . He referred to Clauses 39.1 to 39.3 and submitted that they contained an express prohibition on the payment of interest.

28. Clauses 39.1 to 39.3 of the contract read as under:

39.1 All costs, claims, damages or expenses which the Corporation may have paid for which under the contract the Contractor is liable, may be deducted by the Corporation from Performance Guarantee or from any moneys due or may be recovered from the Contractor.

39.2 Any sum of money due and payable to the Contractor (including

Performance Guarantee returnable to him) under this contract may be appropriated by the Corporation and set off against any claim of the Corporation out of or under any contract made by the Contractor with the Corporation.

39.3 It is an agreed terms of the contract that the sum of money so withheld or retained under this clause by the Corporation shall be kept, withheld or retained as such by the Corporation till the claims arising out of in the same contract are either mutually settled or determined by the Arbitrator, and the Contractor shall have no claim for interest or damage whatsoever on this account or any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the Contractor.

29. The above clauses have to be read together to understand what is intended in Clause 39.3. It is only where NHPC retains money payable under the performance bank guarantee then the Contractor shall have no claim for interest or damage. The prohibition of payment of interest does not apply to legitimate claim made by the Contractor for a wrongful withholding of the moneys payable to him by the NHPC. Also, the prohibition is only till such time the claims have been determined by the Arbitrator. In any event, there is no prohibition against the payment of post-Award interest. Once, it is held that some of the money due to the Contractor was not legitimately withheld then obviously the prohibition against the payment of interest would not apply.

30. However, there is merit in the contention that compound interest was not intended to be paid. Therefore, to the extent the learned Arbitrator has awarded compound interest on the principal amount, the impugned Award requires to be modified. It appears that in para 26.06 of the Award, the learned Arbitrator has, while calculating interest, used the method of compounding the interest, the total principal sum being Rs.12,34,002. Interest would be payable on the principal sum of Rs.12,34,002 from 1st January 1993 till the date of payment at the rate of 10% simple interest per annum.

31. The counter-claims of the NHPC have been discussed in great detail in the impugned Award. There was no clause in the SCC requiring the Contractor to bear the burden of costs in case of delay or non-completion. The conclusion that "no liability rests with the Claimants" on account of the fact that the NHPC itself took time from May 1992 to January 1997 to complete the work, was a plausible one and cannot be held to be erroneous.

Conclusion

The impugned Award is modified to the limited extent by directing that interest would be payable by NHPC to the Contractor Plaintiff on the principal sum of Rs.12,34,002 from 1st January 1993 till the date of payment at the rate of 10% simple interest per annum. The impugned Award as modified to the above extent is made rule of the Court. The decree sheet be drawn up accordingly. The suit and the pending application are disposed of in the above terms.