
(2013) 09 DEL CK 0276
In the Delhi High Court
Case No : O.M.P. 855 of 2013

M/s. JSC Centrodorstroy

APPELLANT

Vs

M/s. National Highways Authority of India

RESPONDENT

Date of Decision : 05-09-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2013) 9 AD 676 : (2013) 4 ARBLR 245

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Vatsal Kumar, for the Appellant; Padma Priya, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.—This is a petition filed u/s 34 of the Arbitration & Conciliation Act, 1996 (in short the Act). The matter came up for the first time on 30.08.2013 when, Mr. Sandeep Sharma, Advocate for the petitioner, was heard in support of the petition. Since Ms. Padma Priya, who represents M/s. M.V. Kini & Company, the concern on the panel of the respondent, was present in court, Mr. Sandeep Sharma was asked to supply a copy of the petition to her. Ms. Padma Priya was asked to assist the court to obtain the respondent's response in the matter. The matter was posted for hearing on 02.09.2013. On the said date a request for passover was made. Since it was not possible to passover the matter on the said date, the matter was stood over till today, i.e., 05.09.2013. The date was given with the consent of counsels for the parties.

2. Today, Mr. Vatsal Kumar, Advocate, appears in court on behalf of the petitioner and seeks accommodation on the ground that Mr. Sandeep Sharma is away on professional work to another city. The request is declined as the date was fixed with the consent of counsels for the parties. In any event, as indicated in the opening, Mr. Sandeep Sharma was heard on 30.08.2013.

3. The short issue which is raised, in the present petition to assail the award

dated 01.06.2013 is: whether the petitioner is entitled to claim compensation towards overheads and loss of profit in respect of items qua which either quantities were reduced or completely omitted from the work contract. Hereinafter collectively referred to as variations.

4. The petitioner lodged a claim in respect of the said variations, the details with respect to which are given hereinafter, based on clause 52.2 of the Conditions of Particular Application (COPA). It must be said, at the outset, that the arbitral tribunal examined the claim made by the petitioner in terms of clause 52.2 of the COPA and came to a considered view that the claim was not sustainable under the said clause. To put the matter beyond doubt, the arbitral tribunal examined the tenability of the said claim under clause 52.3 of the COPA, as well. The result was the same and, accordingly, the claim made by the petitioner was rejected. It is this decision of the arbitral tribunal which has been assailed in the captioned petition.

5. In order to appreciate the arguments advanced on behalf of the petitioner, the following brief facts need to be noticed.

5.1 The petitioner was awarded a contract on 12.03.2001. The total value of the contract was a sum of Rs. 265.38 crores. It appears that during the execution of the work, the Engineer In-Charge reduced certain quantities, which were referred to in the Bill of Quantities (BOQ). The two items which were varied were: (i) Item No. 8.02(a); and (ii) Item No. 8.02(c). While in respect of item no. 8.02(a) quantities were reduced to a certain extent, item no. 8.02(c), was completely omitted. To be noted, qua the first item, i.e., item no. 8.02(a), the variation was ultimately found to be to the extent of 54.54%. Since item no. 8.02(c), was completely omitted, as is obvious, variation was 100%.

5.2 Being aggrieved, the petitioner for the first time laid a claim on 13.03.2006, to which, a response was given by the Engineer In-Charge, on 20.03.2006. Since, it was the petitioner's understanding that a formal and a crystallized claim could be made only on completion of work, the petitioner preferred a claim with the engineer of the respondent on 22.10.2011. Evidently, this did not elicit a response from the engineer.

5.3 The petitioner, went through various processes established under the contract executed with the respondent; which required that in such an eventuality, the petitioner had to issue a notice of dispute, which it did, on 12.12.2011. Evidently, there was no response within the prescribed notice period by the Dispute Review Board (DRB). This occurred, apparently, on account of resignation of one of the members of the DRB, whose replacement was not found, within the period prescribed.

5.4 Consequently, the petitioner invoked arbitration, which led to the passing of the award.

6. Both before the arbitrator and before me, the argument of the petitioner is

briefly as follows:

6.1 That clause 52.2 of the COPA was applicable in the present case and, therefore, the petitioner ought to have been granted the compensation demanded both towards overheads and loss of profit. To trigger clause 52.2, the variation in quantities and price is required to be equivalent to the extent indicated therein. The variation price is required to be of more than 2% of contract value, while qua quantities, the variation has to be of more than 25%. For the sake of convenience, the relevant extracts of clause 52 are extracted hereinafter:

52.1 Valuation of Variations

All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as "varied work") shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the Contract does not contain any rates or prices applicable to the varied work, the rates and prices, in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such rates or prices as are, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60....

....52.2 Power of Engineer to Fix Rates.

Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the works or to any part thereof, is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item of the works, is, by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.....

..... Provided further that no change in the rate or price for any item contained in the Contract shall be considered unless such item accounts for an amount more than 2 percent of the Contract Price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of Quantities by more than 25 percent....

(emphasis is mine)

6.2 I may only add that as a necessary consequence of this argument, the petitioner also claimed price variation.

6.3 In order to demonstrate that clause 52.2 was applicable, the petitioner made the following submissions:

(i) That the reduction in quantities in respect of both items, i.e., item nos. 8.02(a) and 8.02(c), was more than 25%, which is what is prescribed under clause 52.2 of the COPA. As indicated hereinabove, in respect of item no. 8.02(a) the reduction was 54.54%, whereas in respect of item no. 8.02(c), the reduction was 100% as the entire item was omitted.

(ii) The variation in the amounts in the BOQ, in respect of each of the two items, in the BOQ, is more than 2% of the contract price. It was stated, which is a fact not in dispute, that the reduction in percentage terms was 2.41% in respect of item no. 8.02(a), and similarly, in respect of item no. 8.02(c), the reduction was 2.28%.

6.4 To be noted, the percentage is calculated having regard to the total contract price. It was thus submitted that since, the conditions prescribed in clause 52.2 of the COPA vis-?-vis reduction in quantities and variation in price were fulfilled, the petitioner ought to have been compensated in respect of overheads as well as loss of profit. Accordingly, a total sum of Rs. 5,16,97,643/- was claimed. As indicated hereinabove, in this claim, price variation was also factored in, which was a sum of Rs. 1,98,26,046/-. Thus the total amount claimed, was a sum of Rs. 7,15,23,689/-.

7. The respondent, on the other hand, submitted that clause 52.2 of COPA, had no application. A stand, consistent with the one taken before the arbitral tribunal, was taken, which was that, there is no provision in the contract for compensation qua reduction or omission of items from the contract. It was also submitted that for the work executed under item no. 8.02(a), the petitioner was paid at the contracted rate, which was accepted without demur.

8. After recording the contention of the learned counsels of the parties, the arbitral tribunal returned the following findings in respect of the applicability of clause 52.2 of the COPA:

...5.4 The AT finds that:

(a) As stipulated in sub clause 51.1 of GCC all variations instructed by the Engineer are to be valued in term of clause 52 of the conditions of contract.

(b) According to sub clause 52.1 of GCC, all variations instructed by the engineer and any addition to the contract price which are required to be determined in accordance with clause 52 (for the purpose of this clause referred to as "varied works") shall be valued at rates and prices as set out in the contract, if they shall be applicable.

(c) Work included in variation is to be valued in accordance with sub clause 52.2. The impact of variation which deals with exclusion of work from the BOQ, is to be considered under sub clause 52.3.

(d) Valuation of "varied works", according to sub clause 52.2 is to be considered by review and determination of new rates/prices, if required, and on the basis of rates and prices in the contract.

(e) Valuation of reductions in quantities cannot be in terms of rates or prices as they do not involve actual work done. It has to be in the form of addition to the Contract price considering loss, if any, on account of fixed costs, overheads etc. Such valuation is outside the scope of sub clause 52.2 and the appropriate contractual clause for it sub clause 52.3.

5.5 It has been contended by the Claimant that on account of the reduction in quantities under the two items, the "price" of the item has become inappropriate and inapplicable. Having perused the contract documents, the AT finds that no "price" became inappropriate or inapplicable. Apparently, the Claimant has misconstrued the meaning of the word "price". It would be evident from the following:

(a) The present contract is based on FIDIC condition of contract. In the notes on the condition of contract at page 129 of the Contract documents, it is stated that FIDIC condition of contract have been prepared for an admeasurement (unit price or unit rate) type of contract.

(b) The following two extracts i.e., para 4 and 9(b) from the Preamble to Bill of Quantities are relevant.

4. A rate or price shall be entered against each item in the priced Bill of quantities, whether quantities are stated or not. The cost of items against which the Contractor has failed to enter rate or price shall be deemed to be covered by other rates and prices entered in the Bill of Quantities.

9(b) Where there is a discrepancy between unit rate, the total sum derived from multiplication of the unit price and the quantity, the unit rate as quoted will govern, unless in the opinion of the Employer there is an obviously gross misplacement of the decimal point in the unit price in which event the total amount as quoted will govern and the unit rate will be corrected.

(c) Bill of Quantities is a list of item giving their description and estimated quantities of work to be executed. This however, does not preclude the inclusion of a number of "lump sum items" provided the scope of work covered by such "lump sum items" is adequately defined. That the contract may contain "lump sum items" is obvious from sub clause 57.2 of GCC. The view of the AT is that the word "rate" in the contract applies to general items of the BOQ while the word "price" is specific to the "lump sum items". To cover valuation of both types of item of BOQ, sub clause 52.1 and 52.2 of the condition use the words "rates" and "prices" together and these words appear together a number of times in sub

clauses 52.1 and 52.2....

9. A reading of the aforesaid observations of the arbitral tribunal would show that the arbitral tribunal came to the conclusion that expression "rate" used in clause 52.2 of the COPA applies to general items of the BOQ, while the word "price" applies to lumpsum items. The arbitral tribunal rejected the contention of the petitioner that the word "price" appearing in the said clause, i.e., clause 52.2 of the COPA, would mean total price of the BOQ, which could only be arrived by multiplication of quantity with rate. The arbitral tribunal clearly returned a finding that such a submission was inconsistent with the contractual terms. It is the arbitral tribunal's view that the word "price" used in clause 52.2 of the COPA had been used in the same sense as the word "rate". Price related to lump sum items of BOQ, while the rate was relatable to other items of the BOQ. The net result of the arbitral tribunal's deliberation appears to be that since no rate or price became inappropriate or inapplicable due to variation in quantities, as indicated above, clause 52.2 of the COPA was not applicable to the case in issue.

10. As indicated hereinabove, the arbitral tribunal also examined the case of the petitioner under clause 52.3 of the COPA. Reference to the calculations made in that behalf is made in paragraph 5.8 of the award. The net result of the calculation, which came through, is that against the effective contract price of Rs. 2,64,11,89,877/-, the petitioner had executed work of the value of Rs. 2,43,39,48,388/-. Therefore, the difference on account of reduction in work was merely a sum of Rs. 20,72,41,489/-. The arbitral tribunal has noted that in percentage terms the difference was only 7.84% of the effective contract price. As per clause 52.3 of the COPA, no compensation was required to be paid to an aggrieved party if the variation was less than 15%. In this case, as indicated above, the variation was only 7.84%.

11. Having regard to the above, the arbitral tribunal rejected the claim of the petitioner both under clause 52.2 and 52.3 of the COPA.

12. After hearing the counsels for the parties and perused the record, I find that there is no flaw whatsoever in the rationale provided in the award. The interpretation of clause 52.2 of the COPA cannot be made a subject matter of challenge u/s 34 of the Act. It cannot be said that the arbitral tribunal has gone beyond the terms of its reference. See observations of the Supreme Court in *Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.*, at page 79 in paragraph 18(ii):

....(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award....

Also see *Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd.*,

12.1 As a matter of fact, the arbitral tribunal having examined the matter under clause 52.3 of the COPA, has also satisfied itself even on equitable grounds, in

coming to the conclusion that the variation was miniscule having regard to the total value of the contract. The variation was only 7.84% and any variation below 15% could not be compensated. The award, in my view, does not call for interference on the grounds articulated by the petitioner.

In these circumstances, the petition is dismissed, though the parties are left to bear their own costs.