
(2019) 07 DEL CK 0583

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 1232 Of 2012

M/S National Highways Authority Of India

APPELLANT

Vs

M/S Pcl Suncon (Jv)

RESPONDENT

Date of Decision : 17-07-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2019) 07 DEL CK 0583

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Padma Priya, Soumya Priyadarshinee, Kritika Shukla

Final Decision : Dismissed

Judgement

Navin Chawla, J

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 23.08.2012 passed by the Majority of Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the work of Four laning and Strengthening of existing 2-lane Highway section from Km 317+000 to Km 65+000 on NH-2 (Package IV-A) in the State U.P. and Bihar - Construction Package IV A - (Contract Agreement No.GTRIP/5).

2. Disputes between the parties arose in relation to the claim of the respondent for refund of the amount recovered by the petitioner for the work done for re-development of Borrow areas paid under BOQ item 8.26 including escalation as also for payment of the balance portion of the said work. The Majority of the Arbitral Tribunal has, on interpretation of the Contract, concluded as under:

"5.11 In view of the facts and circumstances of the case as discussed above, AT holds;

i) That redevelopment of borrow area provided in BOQ Item No.8.26 is not

covered by BOQ Item No.2.02 and 2.03(a). It is because of this reason only that even Employer himself has provided BOQ Item 8.26 as an Environmental Item in the Contract when he found that this item is not covered in Engineering Cost, i.e. not covered by Engineering Item No.2.02 and 2.03(a).

ii) That the intention/philosophy of EMP is very clear that as far as possible borrowing of earth shall not be carried out from productive/cultivable land.

iii) That the object of redevelopment of borrow areas is to mitigate the soil pollution so created by degradation of borrow pits. So if the borrow pits are filled and leveled up, then the basic object of mitigation of soil pollution is achieved because when the borrow pits do not exist, soil pollution will not take place.

However, in this process of filling up the borrow pits, value addition is done by converting the barren borrow area land into agricultural land by putting in the top layer preserved stock piles (if available) OR by treating the top layer by addition of manure /nutrients etc.

iv) That if the preserved top soil stock piles from cultivable/productive land is available, then such stock piles would be used to cover the top soil of filled up borrow pits. If such stock piles are not available, then the top soil of filled up borrow pits would be treated by adding soil manure/micro-nutrients so that the borrow area land become agricultural.

v) That contaminated soil/spoils generated during road construction can be disposed of by the Contractor either for filling up of borrow pits created for the project OR at pre-designated dumping locations subject to approval of Engineer. Thus, dumping of spoils in the borrow pits is not a mandatory requirement in the development of borrow areas but only an option available with the Contractor for disposal of the spoils.

vi) That the methodology, approval by the Engineer for redevelopment of borrow areas, was in conformity with the provisions of EMP. Thus for the work so carried out by the Contractor under BOQ Item 8.26 and approved by the Engineer, the Contractor was entitled for payment against BOQ Item 8.26 and the payment made to the Contractor against this item in IPC No.15 to IPC No.36 was in order."

3. As was the case before the Arbitral Tribunal, the counsel for the petitioner submits that the work of re-development of the borrow area is covered under BOQ item 2.02 and 2.03(a). She draws reference to clause 305.2.2.2 and 305.9 of the Technical Specifications to further submit that the work of re-development of the borrow area is part of the work of construction of an embankment and sub-grade.

4. The Majority of Arbitral Tribunal has rejected this argument by observing that the relevant notifications of the Ministry of Environment and Forest, the Environmental Protection Act, 1996, the notifications of Bihar State Pollution Control Board or that of Uttar Pradesh Pollution Control Board do not provide for re-development of borrow areas while carrying out the work of embankment and

sub-grade. They further held that though Clause 305.9.1 of the Technical Specifications gives details of even minor items of operation like cost of watering the borrow area, it does not include within its ambit the item of re-development of borrow areas which involves refilling, levelling and treatment of borrow pits. They further relied upon the Standard Data Book published by the IRC for MORT&H to conclude that even there the rate does not envisage re-filing, levelling and treatment of borrow pits as an activity to be carried out in the execution of the item of embankment/sub-grade.

5. I have no reason to disagree with the finding of the Majority of the Arbitral Tribunal. The interpretation placed by the Majority of Arbitral Tribunal on the Clauses seems to be reasonable and does not warrant any interference from this Court in its limited jurisdiction under Section 34 of the Act.

6. I may also note that the petitioner had paid for the work carried out by the respondent under BOQ item 8.26 between IPC 15 (August 2003) to IPC 36 (May, 2005). Infact, the Engineer had recommended variation by increase in the quantity of the work by his letter dated 23.04.2004. It was only on an audit objection that the new Team Leader/Engineer raised an objection on the payment of the work done under BOQ item 8.26.

7. For the above reasons, I see no merit in the above objection of the petitioner.

8. Counsel for the petitioner further submits that even otherwise, the work done by the respondent was not in conformity with Clause 1.5 of the Environment Management Plan (EMP) inasmuch as, the respondent did not admittedly fill the borrow land with the spoils from the construction activity. She submits that the respondent did not follow the methodology for execution of the BOQ item 8.26 for re-development of borrow area and therefore, was not entitled to any payment under the said item.

9. This submission of the petitioner has also been considered by the Majority of Arbitral Tribunal who have held that for the disposal of the contaminated spoils generated during construction as envisaged in Clause 1.7 and 1.8 of EMP (Table-3), clause 1.4 and 5.1 of Annexure A to Clause 501 of the Technical Specifications require the contractor/respondent herein to dispose off such waste without any additional costs. Even the residual spoils in clause 1.1 of EMP are required to be disposed off by the contractor/respondent in accordance with clause 301.3.11 of the Technical Specifications.

10. The Majority of the Arbitral Tribunal further held that the purpose of development of borrow areas is not meant only for disposal of contaminated soil but to mitigate soil pollution which may be created by degradation of the borrow pits.

11. The Majority of the Arbitral Tribunal further held as under:

"5.9 A question arises that, if whatever stated in foregoing para 5.8 is correct, then why there is a provision in clause-1.5(b) of EMP that spoils shall be dumped

with an overlay of stock piled top soil?

The answer to this question lies in clause-1.1, which says that unsuitable debris shall be disposed off by the Contractor either for the filling-up of the borrow areas created for the project OR at pre-designated dumping location subject to approval of Engineer. This clause further says that when residual spoils are utilized as a borrow area fill material, then the Contractor shall ensure that the filled area is covered with a layer of preserved top soil as envisaged in clause-1.2 of EMP.

So it is evident that dumping of spoils in borrow pits is not mandatory but only an option out of two options available with the Contractor for disposal of unsuitable debris/spoils. If the Contractor opts to use those borrow pits for disposal of spoils, then such fills will not be left uncovered but it would be covered with a layer of preserved top soil so that as a value addition, the borrow area land becomes cultivable.

Thus, dumping of spoils in the borrow pits is only an option available with the Contractor for disposal of contaminated soil/spoils. The Contractor has got the liability to dispose off the spoils suitably and for this purpose, he can dispose off the spoils either by way of filling up the borrow pits or by dumping such spoils at pre-designated dumping locations.

In the case before us, the Contractor has not dumped any residual spoil/contaminated soil in the borrow pits. The reason may be that the Contractor might have dumped such residual spoil/contaminated soil in other designated area and the necessity of using borrow pits for disposal of spoil/contaminated soil might not have arisen."

12. The Arbitral Tribunal has therefore, held that dumping of spoils in borrow pits is not mandatory but only an option available with the contractor for disposal of unsuitable debris / spoils. It is the liability of the respondent /contractor to dispose of the spoils suitably and for this purpose, he can either use the same for filling the borrow pits or dump such spoils at pre-designated dumping locations.

13. It was further found as a fact that the borrow areas chosen for the project were barren/uncultivated land, however, the same became agricultural after the re-development work carried out by the respondent.

14. In view of the above finding of the Arbitral Tribunal, I see no merit in the contention raised by the counsel for the petitioner.

15. It is lastly contended by the counsel for the petitioner that the Arbitral Tribunal has awarded highly excessive rate of interest @12% compounded monthly.

16. I may note that clause 60.8 of the Contract provides for this rate of interest. In National Highways Authority of India vs. ITD Cementation India Ltd. [(2013) 197 DLT 650] and National Highways Authority of India vs. Som Datt Builders-

NCC-NEC(JV) [2014 IV AD (Delhi) 632], the award of interest at the above rate has also been upheld by this Court.

17. In view of the above, I find no merit in this contention as well.

18. I therefore, find no merit in the present petition and the same is dismissed, with no order as to costs.