

(2019) 10 DEL CK 0433

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 276 Of 2019, Civil
Miscellaneous Application No. 44016, 44019 Of 2019

M/S National Highways Authority Of India

APPELLANT

Vs

M/S PCL Suncon (JV)

RESPONDENT

Date of Decision : 11-10-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 34, 37

Citation : (2019) 10 AD(Delhi) 250

Hon'ble Judges : Hima Kohli, J;Asha Menon, J

Bench : Division Bench

Advocate : Padma Priya, Dhruv Nayar, Dr. Amit George, Rishabh Dheer, Amol Acharya, Rayadurgam Bharat

Final Decision : Dismissed

Judgement

1. The present appeal has arisen from a judgment dated 17.07.2019, dismissing OMP No.1232/2012 filed by the appellant/NHAI under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'A&C Act') and upholding the Arbitral Award dated 23.08.2012, passed by the Majority of the Arbitral Tribunal.

2. Brief relevant facts of the case are that the appellant/NHAI had awarded the work for Four laning and Strengthening of Existing two lane Highways Section from Km 317+000 to Km 65+000 on NH-2 (Package IV-A) in the State of U.P. and Bihar - Construction Package IV-A, to the respondent/contractor. The parties entered into a contract agreement dated 28.03.2002. The contract price was Rs.396,47,78,901.00. The contract was an item rate contract. Disputes arose between the parties relating to the claim of the respondent/contractor for refund of the amount recovered by the NHAI for the work done for redevelopment of Borrow areas paid under BOQ item 8.26, including escalation. Disputes also arose regarding payment of the balance portion of the said work.

3. The aforesaid disputes were referred by the respondent/contractor to the Disputes Review Board ('DRB') that gave its recommendations on 10.10.2006. Aggrieved by the said recommendations, the respondent/contractor referred the disputes for adjudication to a Three Member Arbitral Tribunal. The Majority of the Arbitral Tribunal allowed the claims of the respondent/contractor for refund of the amount recovered by the appellant/NHAI for the work done for redevelopment of Borrow areas, paid under BOQ item 8.26 alongwith escalation. Further, interest has been awarded in favour of the respondent/contractor on the principal amount of Rs.12,48,44,664.00, @12% per annum compounded monthly w.e.f. 01.02.2006, till the date of the Award. Aggrieved by the said Award, the appellant/ NHAI preferred a petition under Section 34 of the A&C Act (OMP No.1232/2012), which has been dismissed by the impugned judgment.

4. Ms. Padma Priya, learned counsel for the appellant/NHAI contends that the learned Single Judge and the learned Arbitral Tribunal have allowed an unjustified claim of the respondent/contractor even though it had failed to demonstrate the nature of additional activities, which were required to be carried out by it for the redevelopment of Borrow areas, to become eligible for payment under BOQ item 8.26. She states that the respondent/contractor had only stripped the top soil of uncultivable Borrow areas and re-laid the same after obtaining earth from Borrow areas, to satisfy the land owners and that cannot be treated as an activity, for entitlement to payment under BOQ item 8.26. She further submits that both, the Arbitral Award and impugned judgment have overlooked Clause 1.2 of the EMP according to which the top soil from Borrow areas on productive land was required to be stripped, stock piled and preserved for laying the same back in the same Borrow areas, whereas the respondent/contractor got the top soil of all the barren and uncultivated Borrow areas stripped, in violation of the provisions of the EMP and used/re-laid the same stripped top soil back on to the Borrow areas for levelling the same.

5. The appellant/NHAI has also assailed the impugned judgment on the ground that the learned Single Judge as also the majority view expressed in the Arbitral Award have erred in failing to consider that the measurement for BOQ 2.02 and 2.03(a) are in cum., whereas the methodology submitted by the respondent/contractor, as approved by the Engineer, is for BOQ 8.6 for which the measurement is in sqm. for the construction of embankment. Learned counsel submits that since the respondent/contractor did not carry out the work as contemplated in the contract under BOQ item 8.26, he is not entitled for the refund of the amount recovered including price escalation for the work done under BOQ item 8.26.

6. At the outset, the scope of interference by the court while exercising jurisdiction under Section 37 of the A&C Act needs to be highlighted. In a recent decision in the case of NHAI vs. PNC-BEL (JV) reported as 2019 SCC OnLine Del. 9461, this Bench had delineated the limited scope of interference under Section 37 of the A&C Act as follows:-

7. To start with, a quick glance at the scope of interference by the Court in exercising the jurisdiction under Section 37 of the A&C Act. The structure of dispute resolution contemplated under the A&C Act is pyramidal in nature. At the first tier is the Arbitral Tribunal that has been held to be the master of the qualitative and quantitative evidence led before it. At the second tier is a Court that exercises powers vested in it under Section 34 of the Act. The said Court is not expected to sit in appeal over the Award of an Arbitral Tribunal and reassess or reappreciate the evidence to find out as to whether a different conclusion could be arrived at and if so, substitute its view with that of the Arbitral Tribunal. The focus of the scrutiny at this stage is to examine whether the decision of the Arbitral Tribunal is based on a legitimate process, regardless of the errors on the application of law or on the determination of facts. (Refer: *Kwality Manufacturing Corporation vs. Central Warehousing Corporation* (2009) 5 SCC 142, *Sumitomo Heavy Industries Limited vs. Oil & Natural Gas Commission of India* (2010) 11 SCC 296, *P.R. Shah, Shares and Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd. & Ors.* (2012) 1 SCC 594 and *Sutlej Construction vs. Union Territory of Chandigarh* 2018 (1) SCC 718).

8. The provisions of Section 37 of the A&C Act entails a second round of scrutiny of the Arbitral Award, which is more in the nature of a judicial review, since the first round of scrutiny has already been undertaken by a Court under Section 34. At the third tier, while exercising jurisdiction under Section 37 of the A&C Act, the Superior Court is not to act as an Appellate Court and proceed to independently assess the relative merits/demerits of the Award. The limited scope of determination under the said provision is to assess as to whether the views expressed by the learned Single Judge falls within the parameters laid down under Section 34 of the Act. Only when the Court has taken a glaringly preposterous view or has overlooked a patent error in the Award, is interference called for under Section 37 of the Act. Another note of caution may be added here. In circumstances where the Arbitral Award has been upheld under Section 34 of the Act, while considering an appeal preferred under Section 37 of the Act against the decision taken, the Court should show circumspection and be slow to disturb the concurrent findings. In a nutshell, higher the tier of scrutiny under the Act, narrower becomes the scope of interference. [Refer *Associate Builders vs. Delhi Development Authority* AIR 2015 SC 620, *M/s. CWHEC-HCIL (JV) vs. M/s. CHPRCL* 2017 SCC OnLine Del 9074, *M/s. Telecommunication Consultants India Limited v. M/s. Catvision Ltd.* 2017 SCC OnLine Del 9235 and *Container Corporation of India Ltd. through its Regional General Manager and Anr. vs. Kandla Cargo Handlers, through its Partner Shri B.L. Agrawal* 2019 SCC OnLine Bom 1245].

7. In the instant case, the learned Single Judge has duly considered the submissions of the learned counsel for the appellant/NHAI that the work of redevelopment of Borrow areas is covered under BOQ item 2.02 and 2.03(a) and the plea that Clauses 305.2.2.2 and 305.9 of the Technical Specifications were relevant and that redevelopment of the Borrow areas was a part of the work of

construction of an embankment and sub-grade for which the respondent/contractor was not entitled to claim any amount. But the said submission was turned down on examining the following conclusion arrived at by the Majority of the Arbitral Tribunal on the said aspect:-

"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."

The aforesaid view of the Arbitral Tribunal is premised on a detailed discussion of the relevant clauses of the Environment Management Plan (EMP) of the Contract Agreement and the environmental budget. It was observed that the object of

redevelopment of Borrow pits (BOQ 8.26) was to mitigate soil pollution, which may be created by degradation of those very Borrow pits.

8. We are not persuaded by the submission made by the learned counsel for the appellant/NHAI that would entail a reinterpretation of the terms of the contract to arrive at a different conclusion than the one given in the Award, particularly when concurrent findings on this aspect have been returned by both, the Majority of the Arbitral Tribunal as also the learned Single Judge. The submission of the learned counsel for the appellant/NHAI that the work of redevelopment of Borrow areas is not covered under BOQ item 8.6, clearly involves a construction of the terms of the contract, which falls within the exclusive domain of the Arbitral Tribunal. This is all the more so when admittedly, the appellant/NHAI had paid the respondent/contractor amounts for work carried out by it under BOQ item 8.26 between August, 2003 to May, 2005 and it was much later, on an audit objection being raised that the newly appointed Engineer had raised an objection to the payment made.

9. It needs to be emphasised that it is not for the courts exercising jurisdiction under Section 34 or under Section 37 of the A&C Act to sit in appeal over the interpretation of the terms of the contract, as arrived at by the Arbitral Tribunal unless and until the aggrieved party is able to demonstrate that the contract has been construed in such a preposterous manner that no fair-minded or reasonable person could have taken such a view. [Refer: Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI) reported as 2019 SCC OnLine 677].

10. The next submission made by learned counsel for the appellant/NHAI that the work executed by the respondent/contractor was not in consonance with Clause 1.5 of the EMP for the reason that the contractor did not fill the Borrow lands with the spoil from the construction activity and did not follow the methodology for execution of the BOQ item 8.26 for redevelopment of the Borrow areas is also based on an interpretation of the terms and conditions of the contract which need not detain us for the reasons noticed above. All the same, we have considered the findings returned in the impugned judgment which shows that the learned Single Judge has considered the submission made by learned counsel for the appellant/NHAI and concurred with the view expressed by the Majority of the Arbitral Tribunal that the entire purpose of development of Borrow areas was not meant only for disposal of contaminated soil, but to mitigate the soil pollution that may have been created on degradation of the Borrow pits.

11. The Majority view in para 5.7 of the Arbitral Award was that for disposal of the contaminated soil generated during the construction, as contemplated in Clauses 1.7 and 1.8 of the EMP (Table-3) read with Clauses 1.4 and 5.1 of Annexure-A to Clause 501 of the Technical Specifications, the respondent/contractor was required to dispose of all such waste without any additional cost. Even the residual spoils referred to in Clause 1.1 of EMP (Table-3) was required

to be disposed of by the respondent/contractor in terms of Clause 301.3.11 of Technical Specifications. Noting that disposal of all types of unsuitable soil, whether contaminated soil or residual spoils, was to be done by the respondent/contractor under the Technical Specifications and that no provision for such a disposal had been made in the contract, the Majority of the Arbitral Tribunal held that no provision had been made for the disposal of contaminated soil in the Environmental Budget and nor had any such BOQ item been provided in the contract, as an environmental item. It was further held that the entire purpose of development of the Borrow areas was to mitigate soil that may be created upon degradation of Borrow pits and not just for disposal of contaminated soil.

12. In para 5.8 of the Award, after discussing Clause 1.5 of the EMP that deals with degradation of Borrow areas, the Majority of the Arbitral Tribunal went on to hold in para 5.9 that dumping of spoils in Borrow pits is only an option available with the respondent/contractor for disposal of contaminated soil/spoils and that the spoils can either be disposed of by filling up the borrow pits or by dumping such spoils at pre-designated dumping locations. For purposes of ready reference, we may extract below, para 5.9 of the Arbitral Award:-

"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.

13. Noting from the evidence on record that preserved stock piles were not available in the project since the Borrow areas chosen for the project were barren/uncultivable land, the Majority of the Arbitral Tribunal held that the respondent/contractor cannot be expected to borrow productive land for stripping soil for such stock piles and resultantly, the respondent/contractor had filled up the Borrow areas and treated the top soil by adding soil manure and micro-nutrients followed by ploughing activity, which had converted the uncultivable land into agricultural land.

14. The aforesaid findings returned under the Arbitral Award are based purely on an appreciation of the evidence brought on record. It is not for this Court under Section 37 of the A&C Act or for that matter, the learned Single Judge under Section 34 of the A&C Act to re-appreciate the said evidence, more so when there does not appear any patent perversity or fundamental error in the conclusion drawn that flies in the face of the public policy of India, warranting interference in these proceedings.

15. In view of the aforesaid discussion, we are of the opinion that the impugned judgment does not deserve any interference and is accordingly, upheld. The present appeal is dismissed in limine alongwith the pending applications.