
(2013) 04 DEL CK 0237
In the Delhi High Court
Case No : OMP No. 155 of 2011

M/s. National Highways Authority of India	APPELLANT
Vs	
M/s. Progressive-MVR(JV)	RESPONDENT

Date of Decision : 12-04-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Environment (Protection) Act, 1986 — Section 3(1), 3(2)(v), 5

Citation : (2013) 04 DEL CK 0237

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Arun Kumar Varma, Ms. Mansi Wadhwa and Mr. Ashish Bansal, for the Appellant; Amit George, for the Respondent

Final Decision : Allowed

Judgement

Manmohan Singh, J.—The instant petition has been filed by the petitioner u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") challenging the award dated 25th October, 2010. Brief facts of the case are that the petitioner awarded contract for execution of works of four laning from kms. 480+00 to Kms. 520+00 of Gopalganj - Muzaffarpur Section of NH-28 in the state of Bihar vide letter dated 8th July, 2005.

2. A formal contract agreement was signed on 24th August, 2005.

3. It is stated by the petitioner that the entire work under the said contract was divided into various items forming part of the Bills of Quantities (BOQ). Under Bill No. 2 of the BOQ forming part of the contract relating to earth work, the respondent was required to construct embankments. Under this part of the BOQ, item number 2.02 related to construction of embankment with approved borrow soil. This item was to be executed in accordance with Technical Specifications Clause 305 (MoRTH specifications, Part-1 of the Technical Specifications). Item number 2.03 of the BOQ related to construction of embankment with suitable material obtained from roadway, cutting an excavation from the drains etc. This

item was also to be executed in accordance with Technical Specifications Clause 305 (MoRTH specifications, Part-1 of the Technical Specifications). Item number 2.08 in the BOQ was related to construction of embankment with fly ash obtained from coal or lignite burning thermal power station as waste material, spread and compacted in layers. This item was to be executed in accordance with Additional Technical Specifications clause A-8.

4. During the course of execution of the works a dispute arose between the parties in respect of meaning and interpretation of BOQ item 2.08 and the scope and application of the applicable Technical Specifications. According to the respondent, the fly ash embankment was a composite construction of fly ash with earthen covers and intermediate layers depending on the height of the embankment.

5. The respondent demanded payment for this entire structure under item number 2.08. The price quoted for item number 2.08 in the BOQ was Rs. 234/- per cubic meter whereas for construction involving only earth was Rs. 108/- per cubic meter. The respondent demanded payment for construction with the Earth, which is a much cheaper material, at the rates quoted for fly ash, which is a much more expensive material.

6. The disputes between the parties were referred to arbitration and vide award dated 25th October, 2010 the Arbitral Tribunal decided this dispute along-with the consequential claims related to escalation and interest in favour of the respondent herein by holding that even the earthen side covers constructed by the respondent were to be measured alongwith the fly ash and paid under item 2.08 of the BOQ. Consequent escalation under the price adjustment formula forming part of the contract was also awarded in favour of the respondent alongwith pre suit and pendent lite interest.

7. Thus, the present petition has been filed by the petitioner challenging these findings of the Arbitral Tribunal in the impugned award.

8. Mr. Arun Kumar Verma, learned counsel appearing on behalf of petitioner stated that other arbitral award passed by another tribunal having identical issue was decided in favour of the contractor and against the NHAI and the said award was challenged by NHAI in OMP No. 456/2010 and the learned Judge upheld the award in respect of this claim in favour of the contractor by an order dated 30th November, 2011. Similarly, in two other matters viz. OMP No. 585/2012 and OMP 786/2011 this identical issue was decided in favour of the contractor.

9. All these judgments of the Single Judge were challenged by the present appellant in FAO(OS) No. 48/2012, FAO(OS) No. 381/2012 and FAO(OS) No. 416/2012 respectively.

10. After hearing the parties, the Division Bench of this Court set aside the judgments of the Single Judge in all the three cases and was consequently pleased to set aside the arbitral awards in respect of the issue of fly ash/pond

ash embankment. Petitioner has filed copies of these three judgments which have dealt with the same issues and decided the point which goes in favour of the petitioner. Reference particularly of following two decisions in this regard has been made:

a) FAO (OS) No. 48/2012 - para 12 to 37

"The extra amount awarded for the embankment

11. The first issue raised is really the contentious one inter se the parties over which elaborate submissions have been advanced. Ms. Padma Priya, learned counsel for the appellant has succinctly explained to us how the different kinds of embankments are constructed and the clauses in respect thereof. She submits that the embankment can be made exclusively of soil which is obtained from adjoining areas on payment of royalty, or there may be a combination of soil and pond ash which is used. It is pointed out that pond ash is available free of cost and its use is mandated vide Notification dated 14.09.1999 issued by the Ministry of Environment and Forests u/s 3(1), 3(2)(v) and section 5 of the Environment Protection Act, 1986, wherever possible, as an endeavour of the Government to avoid pollution which such ash causes. However, there is significant cost incurred in bringing such pond ash to site from distances upto 100 Kms. Where both soil and pond ash is used, there are different layers which may be laid of soil and pond ash. The top and bottom layer and the sides comprise of soil. There is, thus, almost a casing of soil created around the embankment of ash, with different layers of soil and pond ash being used within that casing. It is submitted that an embankment cannot be made only using ash as it would fly away when dry.

12. There is, undisputedly, a different method of calculation employed for computation of payment to be made for embankment which may be made exclusively of soil, and of both soil and pond ash. It is also pointed out to us that the cost of pond ash is much higher (being more costly to bring it to the site) than the soil. The relevant clause in this behalf is clause 2.02 of the Bill of Quantity (BOQ) dealing with Bill No. 2-Earth Work, which reads as under:

(Table)

13. The controversy which has arisen for adjudication is that while on behalf of the appellant it is contended that the rate per cubic meter has to be paid dependant on the quantum of soil or pond ash used, on behalf of the respondent it is submitted that the two rates operate in different situations. According to the respondent, if only soil is used then sub clause (a) would apply and if pond ash is used alongwith soil then sub clause (b) would apply. The respondent submits that in case sub clause (b) applies, irrespective of the quantum of pond ash or soil used, the per cubic meter rate quoted against item (b) has to be paid for the total quantity.

14. Insofar as the aforesaid aspect is concerned, it is pointed to us that the DRB,

qua this issue, opined in favour of the appellant, but the respondent was not satisfied with the same. There is also a divergence of view in the arbitral tribunal as the finding has been reached in favour of the respondent by a majority of 2:1.

15. It is submitted on behalf of the appellant that if the majority opinion of the award is perused, even the manner setting out the relevant clause is not correct. Out attention has been drawn to para 11.3.1 of the majority award which reads as under:

11.3.1 The scope of the works to be executed under BOQ items 2.02(a) and (b) provide as follows:

Item No.

Description of item

Unit

Quantity

2.02(a)

Construction of soil embankment with approved material complete as per Technical specifications Clause 305 with all leads and lifts

Cum

1198000

2.02(b)

Construction of pond ash embankment with approved material complete as per Technical specifications Clause 305 with all leads and lifts

Cum

3252000

16. It is thus submitted that if this is compared to the clause at it exists and extracted aforesaid, the BoQ item is only one, i.e. embankment, and there are two sub paragraphs dealing with the rate per cubic meter for soil and pond ash. It is not that the BoQ items are two, which are referred to aforesaid as "soil embankment" and "pond ash embankment" by the arbitral tribunal. It is thus his submission that the clause itself has been wrongly reproduced and incorrectly read, and does not brook of two possible interpretations, where the view of the arbitrators ought to prevail.

17. It is submitted before us that there could be different ratios of pond ash and soil used while making the embankment for different stretches. Thus, some areas may have a ratio of 9:1, while the others may have a ratio of soil as high as 3:1 qua pond ash vis-?-vis the soil. The other aspect emphasized is as to the manner in which the contract was understood by the parties themselves

inasmuch as it is the respondent who submitted the Interim Payment Certificates (IPC) for a period of 30 months on the basis of the understanding of the clause propounded by the appellant, and payments were accordingly received by them. Such IPCs were submitted after joint measurements were made, making separate quantification of the soil and pond ash used. It is thus submitted that it does not lie in the mouth of the respondent to contend that it is not possible to separately quantify the amount of soil and pond ash used in carrying out the works.

18. It is pointed out to us that reliance was placed by the respondent before the arbitrator on clause 60.9 to canvass that the IPC was not final but was only provisional. The said clause reads as under:

The Engineer may by any Interim Payment Certificate make any correction or modification in any previous Interim Payment Certificate which has been issued by him, and shall have authority, if any work is not being carried out to his satisfaction, to omit or reduce the value of such work in any Interim Payment Certificate.

19. It is however submitted that a reading of the aforesaid clause would show that the power lies only with the engineer and in the present case, the engineer himself ultimately had opined in favour of the appellant.

20. Learned senior counsel for the appellant submits that it was not open for the majority arbitrators to accept the plea of the respondent that it was only an inadvertent error which was sought to be corrected subsequently.

21. Learned senior counsel for the respondent on the other hand seeks to contend that the aforesaid submission of learned counsel for the appellant, at best, can be styled as one possible view of the clause. Since the arbitral tribunal, albeit by a majority, has taken a particular view, it is not for this Court to substitute its mind with another view which may be taken as if it was the arbitral tribunal. Interference is called for only if the view is absurd or de hors the terms of the contract, as the arbitral tribunal is always bound by the terms of the contract, being a creature of the contract.

22. Learned senior counsel for the respondent also submits that the appellant is seeking to read the clause in a manner different from how it has been framed. He submits that there are only two eventualities provided, i.e. soil alone is used, and where ash and soil has been used. To accept the contention of the appellant would amount to creating three categories, i.e. only soil being used, only pond ash being used and soil and pond ash being used. He submits that it is undisputed that an embankment cannot be made only of pond ash.

23. Learned senior counsel for the respondent has also drawn our attention to the majority view of the arbitrators to contend that the measurement had to be made by a concept of volumes, and not the cross section of volumes. In this behalf, he has referred to the relevant clauses which have, in fact, been

reproduced in the majority view. These clauses are clause 305.8 of the technical specifications - which is relevant for measurements and payment for item No. 2.02(a). The same reads as under:

Earth embankment/subgrade construction shall be measured separately by taking cross sections at intervals in the original position before the work starts and after its completion and computing the volumes of earthworks in cubic meters by the method of average end areas....

24. Clause 305.2.2.3.3 relatable to Item No. 2.02(b) reads as under:

Measurement for payment: Same as Clause 305.8 of MoRTH specifications.

25. Learned counsel thus submits that the methodology of measurement provides that the same be done by taking the cross sections at intervals in the original position and after its completion and, thus, whether the embankment made is only of soil, or soil and pond ash, identical methodology has to be adopted. This cross section cannot be further bifurcated into parts by measuring volumes of soil and pond ash separately.

26. Learned senior counsel for the appellant has also emphasized that the respondent realized their mistake albeit after more than two years when the issue of cash flow arose as they were receiving less amount than due to them under the contract, and the delay in raising the issue would not make a difference, as the parties should be bound by the terms of the contract.

27. If we peruse the majority view of the arbitral tribunal, we find that the findings are as under:

(a) BoQ Item 2.02 (a) and 2.02(b) for embankment construction is for finished items of works mentioned for each of the items in all respects and not for the type of materials to be used in the respective items;

(b) The manner of measurement is same for both the nature of embankment, whether the embankment is covered by clause 2.02 (a) or clause 2.02(b), by taking a composite cross section as a whole of the embankment and determining the volume by average end area method;

(c) There is no scope to separate out different cross sections of embankment being taken by measuring the area occupied by soil and pond ash separately, for determination of the quantum;

(d) The methodology adopted by the engineer to make measurement is contrary to the provisions of the contract;

(e) It cannot be said that there was consensus ad idem between the parties with regard to the method of measurement of pond ash embankment in view of the plea of the respondent that there was an inadvertent error which could be corrected. The principle would apply where the contract conditions are not very clear, which is not so in the present case.

28. On the other hand, the minority view would show the following salient features:

(a) Different materials are to be measured separately and this is what the respondent has been doing itself and, thus, what the engineer was doing was as per the contract;

(b) The consensus ad idem is apparent from the fact that for 2 1/2 years the measurements were jointly carried out in a particular manner;

(c) Clause 60.9 of CoPA conferred the power only on the engineer by making him the final authority and the engineer has not agreed with the respondent for revision of the IPC;

(d) The conduct of the parties is a relevant factor in interpreting the terms and conditions of the contract if the parties have been acting in a particular manner for a long time. In this behalf the observations of the Supreme Court in Transmission Corporation of India Vs. Lanco Kondapalli Power Pvt. Ltd., were relied upon wherein it is observed:

Conduct of the parties is also a relevant factor. If the parties had been acting in a particular manner for a long time upon interpreting the terms and conditions of the contract, if pending determination of the lis, an order is passed that the parties would continue to do so, the same would not render the decision as an arbitrary one.

29. We now turn to the opinion of the learned Single Judge. We find that there is only a limited discussion in para 26 on this aspect which reads as under:

26. As regards non-payment for executed work of embankment which forms the subject matter of Disputes 2 and 4, this is purely a question of fact based on the measurement. There is no dispute in relation to the construction of the embankment that is covered under item 2.02 (a) of the BOQ. In fact NHAI has already paid HCC for the said construction. Clause 305.8 of the MoRTH TS provides for measurement of the cross section of the embankment as one whole composite section and paid under item No. 2.02 (b). The decision of the majority members of the Arbitral Tribunal based on an analysis of the material before them was a possible view to take. Merely because another view as evidenced by the dissenting opinion is possible interference by this Court u/s 34 of the Act is not warranted.

30. We have examined the aforesaid submissions. There is no doubt in our mind that insofar as the principle of law is concerned, it is well settled that it is not for this Court to substitute its mind as that of an arbitral tribunal if there are different possible views qua the interpretation of clauses of the contract. Interference would be called for only if the terms of the contract are lucid and clear, and a completely different version is accepted by the arbitral tribunal which borders on absurdity. Thus, it cannot be that if the contract says "A", the arbitrator can say "B", and the Court is devoid of jurisdiction to interfere with

that aspect.

31. We find from a perusal of the impugned order of the learned Single Judge that there has been no discussion on this crucial issue. This is the reason we have been called upon to pen down a more detailed order appreciating the rival contentions of the parties. In our view, the first fallacy in the majority view of the arbitral tribunal is the manner of extraction of the terms of the contract itself. Para 11.3.11 of the Majority award where BoQ Item 2.02(a) and (b) have been extracted seeks to suggest as if there are two item numbers - one dealing with the construction of soil embankment, while the other dealing with the construction of pond ash embankment. The fact is that the original contract provides only for one BoQ Item for construction of embankment. However, the said construction of embankment can take place in two manners. The first is where only soil is used and the other is where soil and pond ash is used. The technical specification clause is the same, i.e., clause 305. It is not in dispute that the costing is quite different for soil and pond ash, largely on account of the transportation cost. The expression used in clause 2.02 (a) is "with soil" and in clause 2.02(b) is "with pond ash". This is not as if in the second situation only pond ash is used. Both soil and pond ash is used. If we were to accept the contention as sought to be propounded in the majority view of the arbitral tribunal as also of learned counsel for the respondent, it would mean that "with pond ash" in sub clause (b) is used to mean "with soil and pond ash". It is nobody's case that any embankment can be completely constructed and finished with only pond ash. When sub clause (b) uses "with pond ash" it means, and can only mean - that part of the embankment which is made of pond ash alone. The opening words of clause 2.02 of the BOQ which use the expression ".....complete as per Technical specification clause 305 with all leads and lifts" only connote that the payment for this BOQ item would be due only after completion of the work of making the embankment in a given section or stretch, i.e. upon the finishing of the soil embankment (if it is only of soil) or of soil and pond ash embankment (if it is of both the substances) with all layers of soil and pond ash in place as per the technical specification.

32. It is obvious to us how clause 2.02 - which deals with the sole item of construction of embankment, has dealt with two eventualities, i.e., where only one material is used or two different kinds of materials are used. Insofar as the content/volume of soil is used, it has to be paid at a particular rate, while the quantity of pond ash has to be paid at another rate. It has also been rightly pointed out to us that the ratio of the soil and pond ash can vary and the percentage of pond ash can be high or low as the ratio varies from 9:1 to 3:1 (pond ash: soil). It would hardly be expected that irrespective of the ratio of pond ash used (which is determined by the engineer), one rate for embankment would have to be paid and that too the higher rate, where the price differential is almost 2 1/2 times. Adoption of such a mechanism for payment would lead to absurd results.

33. In our view, the terms of the contract can brook of no two views at all and the terms are clear. The learned Single Judge has, in fact, only observed that the view taken by a technical team being one possible view, he would not like to examine the same any further. He has, however, not examined the submission of the appellant as set out above. This, to us, appears to be a clear error in the impugned judgment. On a conjoint reading of BOQ item No. 2.02 and clause 305.8 of the technical specification, to us, it is clear that the cross sections have to be taken in respect of the different materials used, i.e. soil and pond ash. Pertinently, it is not the case of the respondents that the two are mixed into a mixture and then used. Soil and pond ash are used separately. Thus, the cross sections are to be taken at intervals. We cannot permit the respondent to contend that it is not possible to compute the volumes of the two materials in the cross section, when for 30 months both the appellant and the respondent were actually making measurements accordingly. The respondent itself made the IPCs and submitted for payments which were duly paid by the appellant. Such measurements were made on the basis of actual utilization of the two materials. We fail to appreciate how the arbitral tribunal could have come to a conclusion that the mode of measurement of the two items separately was not in accordance with the contract. The majority view, after having noticed the principles of consensus ad idem, seems to have failed to appreciate this vital issue. This is not a mere mistake, but for about 30 months the parties acted in a particular manner and completed 70% of the work. This could hardly be categorized as an "inadvertent error", which was utilized by the respondent as an escape route to contend that a mistake can always be corrected. It is also not in dispute that clause 60.9 of the CoPA vests the authority only with the engineer who has opined against the respondent. He alone could have changed the IPCs. It was not for the arbitral tribunal to do so.

34. We are unable to accept the stand that merely because some element of pond ash is used, the rates for the entire work would go up by about 2 1/2 times even where only soil is primarily used, irrespective of quantum of pond ash. This could never be the intent of the drafters of the contract and the parties also understood the contract in a particular manner till the respondent started having a second thought of realising extra money from the appellant.

35. We are thus of the unequivocal view that the interpretation put forth by the majority view of the arbitral tribunal, which has received the imprimatur of the learned Single Judge, is not a plausible view of the terms of the contract which are crystal clear and brook of no two views. Such a view, we feel would border on absurdity. We are conscious of the fact that it is an arbitral tribunal manned of three technical people. But then there is also a minority view of one technical person, apart from the fact that the DRB of three technical people also opined otherwise, apart from the engineer concerned.

36. We, thus, set aside the award insofar as it has granted Dispute No. 4 in favour of the respondent while upholding the award in all other respects. No

other issue is pressed before us. The appeal is allowed to the limited extent aforesaid, leaving the parties to bear their own costs."

b) FAO (OS) No. 381/2012- para 5

5. Turning to the award made on dispute No. 1, once again we have today examined the issue and rendered our decision in the same appeal i.e. FAO(OS) No. 48/2012 whereby we have set aside the majority arbitral award since, according to us, the contractual clauses were capable of only one plausible interpretation and the majority award is contrary thereto.

The various paras of order passed in FAO(OS) No. 48/2012 were referred.

c) FAO (OS) No. 416/2012

The appellant awarded a contract to the respondent for execution of the works for rehabilitation and upgradation of four lane configuration of NH-76 in the State of Rajasthan in terms of an agreement dated 11.08.2005. In view of certain disputes, the matter was referred to the Dispute Resolution Board (DRB). The DRB opined in favour of the appellant by a majority of 2:1. The respondent being aggrieved sought arbitration and a three member technical board has made and published the award dated 28.06.2011 by a majority of 2:1.

The appellant, aggrieved by the award, filed objections u/s 34 of the Arbitration and Conciliation Act, 1996 (the Act), which have been dismissed by the impugned order dated 23.05.2012.

We may note that the only dispute pertains to the extra amount awarded for the embankment. This resolution of this dispute is dependent on the reading of clause 2.02 of the Bill of Quantity (BOQ). The impugned order has noticed this submission of the learned counsel for the respondent in para 10, that the judgment of the learned Single Judge in O.M.P. No. 456/2010 (wrongly typed as O.M.P. No. 455/2010), titled National Highways Authority of India v. Hindustan Construction Company Ltd. decided on 30.11.2011 fully covers the dispute in question in favour of the respondent.

We have examined the challenge laid by the appellant to the judgment in the said O.M.P. No. 456/2010 in FAO (OS) No. 48/2012 decided on 08.11.2012. Unfortunately for the respondent, the said decision has been rendered in favour of the appellant.

Learned counsel for the respondent, despite this, made a valiant effort to distinguish our opinion in that case based on a submission that in the facts of the present case, the nature of soil used, where both fly ash and soil is used, is quite different from that used where only soil is used for making the embankment. It is his submission that the specifications for the soil in the two cases are different. On this basis, the respondent claims that it is entitled to be paid for the entire quantity of work of embankment which is made by use of soil and fly ash at the rates quoted in the BoQ for fly ash. We may note that the rates quoted for

embankments made of soil are much less when compared to the rates quoted for embankments made of fly ash.

We cannot accept this submission of Mr. Amit George, learned counsel for the respondent because the fact remains that whatever be the specifications or the difference qua the kind or quality of soil used in the two cases, the relevant clause prescribing the rate to be paid makes no such distinction and only refers to a single rate for soil. The rate for fly ash is prescribed separately.

We have already opined in FAO (OS) No. 48/2012 that where both pond ash and soil are used, the rates payable would be dependent on the quantum of the two materials used which are to be measured separately.

The same principle has to apply even in the case of fly ash. There is no dispute that the relevant measurements of the quantum of work done using soil and fly ash separately are available.

We are thus of the view that this case is fully covered by our judgment in FAO (OS) No. 48/2012, as a consequence of which the present appeal is allowed leaving the parties to bear their costs.

As a result of the aforesaid, the decretal amount lying in the Court be released to the appellant alongwith accrued interest thereon.

In view of the aforesaid judgments passed by the Division Bench of this Court on the same aspect of the matter, the said decisions are covered in the dispute in hand and the same are also binding upon this Court. Thus, the present petition deserves to be allowed. The impugned arbitral award dated 25th October, 2010 hence set aside. No costs.

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