

(2022) 03 DEL CK 0253

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM.) No. 133 Of 2021

M/S Sarada Construction

APPELLANT

Vs

M/S National Highway Authority Of India

RESPONDENT

Date of Decision : 28-03-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 34
Indian Contract Act, 1872 — Section 17

Citation : (2022) 03 DEL CK 0253

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Rajat Arora, Renu Bhandari, Ekansh Bansal, Alok Kumar Jain

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning an Arbitral Award dated 17.12.2020 (hereafter 'the impugned Award') rendered by an Arbitral Tribunal comprising of three members (hereafter 'the Arbitral Tribunal').
2. The petitioner assails the impugned award to the limited extent that its claim for extra work done quantified at ₹3,66,44,746/- and the cost of arbitral proceedings quantified at ₹9,68,000/-, has been denied.
3. The respondent (hereafter 'NHAI') had issued an invitation to tender for work of "Repair & Maintenance work of remaining stretches of NH 34 from Km 51 to Km 115 by BM, SDBC and Mastic Asphalt in the State of West Bengal (Contract Pkg-Maintenance work|Pkg- 1/2016)"
4. The petitioner had submitted its bid pursuant to the aforesaid invitation to tender and by a Letter of Acceptance dated 27.05.2016, the petitioner was awarded the aforesaid contract at a value of ₹5,78,87,054.25/- (Rupees Five

Crores Seventy Eight Lakhs Eighty Seven Thousand Fifty Four and Twenty Five paise). Thereafter, on 20.06.2016, the parties had entered into an agreement (the Contract). In terms of the Contract, the date of commencement of work was 20.06.2016 and the same was required to be completed within a period of three months; that is, on or before 19.09.2016. The Defect Liability Period was stipulated as twenty-four months from the date of the completion of the works. The works were completed on 11.10.2016, therefore, the Defect Liability Period would expire on 10.10.2018.

5. The Arbitral Tribunal accepted NHAI's contention that it had pre-closed the Contract in respect of the stretch of the highway from KM 51.00 to KM 52.400 with effect from 14.03.2017 and had informed the petitioner regarding the same on 04.01.2018. Similarly, the Contract in respect of some stretches of the highway were pre-closed with effect from 27.07.2018 and some were pre-closed with effect from 14.10.2018. However, the petitioner disputes that the Defect Liability Period was foreclosed and claims that the Defect Liability Period Certificate dated 22.10.2018, issued by the Engineer does not mention any pre-closure.

6. NHAI, by a letter dated 16.01.2019, informed the petitioner that the Bank Guarantee furnished by the petitioner for a sum of ₹57,88,710/- was encashed. NHAI appropriated a sum of ₹47,07,951/- and deposited the balance amount of ₹10,80,759/- recovered by encashment of the Bank Guarantee in the petitioner's bank account. The sum of ₹47,07,951/- retained / appropriated by NHAI comprised of ₹71,191/- as penalty for pre-closure of the Defect Liability Period and ₹46,36,760 as amount paid for execution of the balance works at the risk and cost of the petitioner. NHAI claims that it had engaged the Public Works Department for executing the repair work, which the petitioner had failed to do during the Defect Liability Period, and had incurred a cost of ₹46,36,760/-.

7. The petitioner claims that the recovery of the aforesaid amount is illegal as it had not committed any default in performance of its obligation. The petitioner further claims that it had executed certain additional works during the Defect Liability Period and is entitled for payment for the same.

8. In view of the disputes, the petitioner approached the Secretary General, Indian Roads, for appointment of a Dispute Resolution Expert in terms of the Contract. However, no appointment was made. Thereafter, the petitioner nominated its Arbitrator. NHAI also nominated its Arbitrator and both the nominees appointed the Presiding Arbitrator.

9. The petitioner submitted its Statement of Claims before the Arbitral Tribunal claiming: (i) a sum of ₹2,85,96,218/- for extra work executed by it during the Defect Liability Period (Claim No.1); (ii) refund of an amount of ₹47,07,951/- recovered by NHAI by encashment of the petitioner's Bank Guarantee (Claim No.2); (iii) interest at the rate of 18 % per annum (Claim No.3); and (iv) cost of the arbitral proceedings (Claim No.4).

10. It was the petitioner's case that it was compelled to commence work during the monsoon season. The rain had adversely affected the road conditions resulting in the petitioner repeatedly executing the same repair works. The petitioner also claimed that at several places on the Highway, the subgrade had settled down and required extensive reconstruction. The poor condition of the road subgrade required re-sectioning and removal of the subgrade soil upto 2 to 3 metres at certain spots. In addition, there was huge undulation and depression and the same required complete overlaying of BM and substantial corrective work.

11. The petitioner claims that it had carried out extensive work on the oral instructions of the Engineer. However, NHAI did not approve the estimates submitted by the Engineer. Notwithstanding the same, the petitioner claims that it is entitled to payment for the extra work executed by it.

12. In its Statement of Claims, the petitioner also averred that NHAI was aware that the Highway required extensive reconstruction but had concealed the said information from the petitioner. The petitioner stated that the BOQ items did not include execution of certain items for re-construction of the road but merely indicated that only repair work was required to be carried out. The petitioner asserted that NHAI's misrepresentation constituted a fraud under Section 17 of the Indian Contract Act, 1872.

13. NHAI contested the claims made by the petitioner. According to NHAI, the petitioner had defaulted in maintaining the Highway during the Defect Liability Period and despite NHAI repeatedly calling upon the petitioner to repair the Highway, it had failed and neglected to do so. NHAI claimed that it had accordingly, pre-closed the Defect Liability Period and engaged the PWD to execute certain repair works that the petitioner had failed to execute.

Impugned Award

14. The Arbitral Tribunal considered the rival claims and noted that the scope of work under the Contract entailed repairing damaged stretches of the Highway using BM, SDBC and Mastic Asphalt. The repairs were to be carried out on the stretch of Highway in the following locations: (a) Km 51 to Km 60 and (b) Km 96 to Km 115.

15. The Arbitral Tribunal held that NHAI retained the financial control in respect of the Contract. Although, the Engineer could issue oral instructions to carry out extra works, the same required NHAI's approval. Unless the oral instructions were confirmed by instructions in writing, the same were not binding on either parties. Estimates for four Variations were forwarded to NHAI for approval. However, NHAI had approved only the fourth Variation Order and did not approve the first three.

16. The Arbitral Tribunal held that although, recommendations of the Engineer were valuable but the same were not binding on NHAI. Since NHAI had not

approved the variations, it could not be compelled to pay for the extra work done. Next, the Arbitral Tribunal held that since no amounts were payable during the Defect Liability Period, the petitioner could not claim any amount for the work done during the said period.

17. The Arbitral Tribunal found that NHAI had issued instructions to the petitioner to undertake repairs and there was sufficient correspondence on record to establish that the petitioner had failed to execute the repairs of the Highway within a reasonable time. The Arbitral Tribunal accepted that in terms of Clause 26.3 of the General Conditions of the Contract (GCC), NHAI was within its contractual right to get the work executed through another agency.

18. NHAI, had called upon the petitioner to undertake joint measurements for estimating the expenditure required to repair the damaged Highway. However, the petitioner had expressed its limitations. Thereafter, NHAI had issued a notice under Clause 40 of the Contract informing the petitioner that if the repairs were not undertaken, it would terminate the Agreement. Since, the necessary repairs were not undertaken, NHAI pre-closed certain stretches.

19. The Arbitral Tribunal found that NHAI was within its right to engage another agency to execute the works but the expenditure, claimed to have been incurred by NHAI, was not supported by any evidence. In view of the above, the Arbitral Tribunal awarded a sum of ₹47,07,951/-, which was recovered from the petitioner by encashment of the Bank Guarantee, along with interest at the rate of 9% per annum (quantified at ₹7,76,812/-), in favor of the petitioner and against NHAI.

Submissions

20. Mr Arora, learned counsel appearing for the petitioner assailed the impugned award on, essentially, two fronts. First, he submitted that the Arbitral Tribunal had not addressed the disputes raised by the petitioner. He contended that the Arbitral Tribunal had not considered that NHAI was guilty of misrepresentation and had committed fraud by concealing the condition of the Highway. He submitted that the Arbitral Tribunal had found that the Highway was in a very poor condition and the same could not have been discovered by visual inspection. However, the Arbitral Tribunal has not returned any finding in respect of the said contention. He submitted that similarly, the Arbitral Tribunal had not exercised its jurisdiction to determine the value of the extra work executed by the petitioner. He submitted that although, the Arbitral Tribunal had not rejected the petitioner's claim that it had in fact carried out extra work, it had denied the petitioner's claim solely on the ground that the same was not approved by NHAI. He submitted that in terms of Clause 47 of the Contract, the Arbitral Tribunal had full power to "open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute". However, the Arbitral Tribunal had not exercised its jurisdiction. Next, he submitted that the Arbitral Tribunal had completely ignored the correspondence

on record, which established that the petitioner was directed to follow the oral instructions of the Engineer and it had, accordingly, executed the works. Securing approval of NHAH was merely an administrative exercise which was required to be done by the Engineer.

21. He submitted that the Arbitral Tribunal had grossly erred in interpreting Clause 26 of the Contract as disentitling the petitioner for payment of extra work. He submitted that the scope of Clause 26 of the Contract was limited. It merely provided that no payments would be made towards 'repairs'; it did not preclude payment for extra work.

22. Lastly, he submitted that on the principle of quantum meruit, the petitioner was entitled to payment of the work done notwithstanding that it was beyond the terms of the Contract.

23. Mr Jain, learned counsel for NHAH countered the aforesaid submissions. He submitted that the petitioner had not executed any extra work and its claim in this regard was unsustainable. He submitted that the petitioner was required to submit monthly statements for the value of the work executed with detailed measurements but it had not submitted any such periodic statements. Thus, the extra work as claimed by the petitioner was neither inspected nor recorded in the Measurement Book. He submitted that there was no evidence on record that any extra work was done and therefore, the question of the petitioner making a claim for the same did not arise. He submitted that merely because estimates for certain works were submitted, did not imply that the said work was executed.

Reasons and Conclusion

24. The first question to be addressed is whether the Arbitral Tribunal has failed to address the disputes raised before it. As noted above, the petitioner claims that it had raised a claim of damages on account of fraudulent misrepresentation and the said contention was not considered. A plain reading of the Statement of Claims indicates that the petitioner had averred that NHAH had concealed the condition of the Highway. It claimed that NHAH was aware of the inherent defects of the Highway and yet it invited tenders for carrying out superficial repair works, which would not address the damage to the Highway. However, it is clear that the petitioner had not founded any claim of damages on account of fraudulent misrepresentation. Its claim was essentially for extra work done and not that it had suffered a loss on account of misrepresentation, which required to be compensated. The petitioner claimed that during the course of the Contract as well as the Defect Liability Period, it had to "execute numerous extra works due to improper planning of the employer in connection with sub grade failure as well as execution in peak rainy season". The petitioner's Claim no.1 was mainly founded on this averment. The Arbitral Tribunal had considered the aforesaid claim. Thus, this Court is unable to accept that the impugned award is patently illegal as the Arbitral Tribunal had not addressed the dispute raised by the petitioner.

25. The contention that the impugned award is vitiated by patent illegality as the Arbitral Tribunal has not exercised its jurisdiction to re-evaluate the decision regarding extra items, is unpersuasive. The Arbitral Tribunal had examined the contractual provisions and had found that NHAI's written approval was necessary for executing extra items. Clause 28.1 of the Contract is relevant and is set out below:

"28. Variations

28.1 The Engineer shall, having regard to the scope of the Works has power to order Variations he considers necessary or advisable during the progress of the Works. Such Variations shall form part of the Contract and the Contractor shall carry them out. Oral orders of the Engineer for Variations, unless followed by written confirmation, shall not be taken into account."

26. Admittedly, neither NHAI nor the Engineer had issued any formal orders in writing for execution of the extra works claimed to have been executed by the petitioner. The Arbitral Tribunal had held that NHAI had retained control regarding the cost of the works and in the absence of its written approval, the petitioner was not entitled to claim any payment on account of the variation or extra work. Clearly, the said decision cannot be held to be vitiated by patent illegality or one that falls foul of the public policy of India.

27. The Arbitral Tribunal also noted that the extra works claimed to have been executed by the petitioner were during the Defect Liability Period and the petitioner was not entitled to any payment for work done during this period. It is important to note that the Contract in question was for repair of the Highway, which was damaged at various places. The petitioner was required to repair the damage and maintain the stretch of the Highway during the Defect Liability Period. Clauses 26.1, 26.2 and 26.3 of the Agreement are relevant and are set out below:

"26. Correction of Defects noticed during the Defect Liability Period.

26.1 It is the terms of contract that quality of repair and maintenance work shall be of very high standard, requiring no major repairs for at least 24 (Twenty four) months after the date of completion of works.

26.2 If any defects including shrinkage, cracks, other faults appear in the work within 24 (Twenty four) months of "Taking over" certificate, the Engineer shall give notice to the Contractor of any defects before the end of the Defects Liability Period, which begins at Completion, and is for 24 (Twenty four) months thereafter. The Defects Liability shall be extended for as long as defects remain to be corrected.

26.3 Every time notice of a defect is given, the Contractor shall correct the notified defect at his own cost within the length of time specified by the Engineer's notice. If the contractor is in default, the Engineer shall cause the same to be made good by other workmen and deduct the expense from any

sums that may be due to the contractor.”

28. The petitioner’s contention that the afore-mentioned clauses only covered repair work and did not cover ‘extra work’ required to maintain the Highway, is unpersuasive. In any view of the matter, the question as to interpretation of an agreement is one that falls squarely within the jurisdiction of the Arbitral Tribunal. The Arbitral Tribunal’s decision to hold that the petitioner was not entitled for any payment for carrying out any work during the Defect Liability Period cannot by any stretch be held to be perverse or one that no reasonable person could accept. The said view is certainly a plausible view, if not the correct view.

29. This Court finds no infirmity with the impugned award. The petition is unmerited and accordingly, dismissed.