(2017) 04 DEL CK 0039

In the Delhi High Court

Case No : 82 of 2016

M/S SSANGYONG ENGINEERING & CONSTRUCTION CO LTD — APPELLANT

Vs

NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI) — RESPONDENT

Date of Decision : 03-04-2017

Acts Referred:

Arbitration and Conciliation Act, 1996, Section 9, Section 34 - Interim measures, etc., by Court - Application for setting aside arbitral award

Citation : (2017) 04 DEL CK 0039

Hon'ble Judges : Indira Banerjee, Anil Kumar Chawla

Bench : DIVISION BENCH

Advocate : Arvind Nigam, Navin Kumar, Rasmeet Kaur, S.Nanda Kumar, Parivesh?Singh, M.S. Saran Kumar

Judgement

1. This Appeal is against a judgment and order dated 09.08.2016 of the Learned Single Judge,dismissing the petition of the appellant under Section 34 of the Arbitration and Conciliation Act, 1996, for setting aside an arbitralAward dated 02.05.2016, made by the majority of the arbitrators constituting the Arbitral Tribunal.

2. The Appellant, a multinational company registered under the laws of the Republic of Korea, is engaged in the field of infrastructure development, including construction of roads, highways, dockyards and various other projects across the world.

3. The Respondent, National Highways Authority of India, hereinafter referred to as NHAI, is a Government of India Undertaking responsible for the construction of National Highways throughout the country.

4. By a letter dated 30.12.2005, Respondent NHAI awarded to the appellant, the contract for the work of construction of the4-Lane Sagar By-pass from Km 297 to Km 351 on National Highway (NH) No.26 in the State of Madhya Pradesh (Contract Package - ADB-II/C-5) for a total contract value of Rs.219,01,16,805/-

(Rupees Two Hundred Nineteen crores, one lac, sixteen thousand eight hundred five only). The Respondent NHAI issued notice to the appellants to commence work on 28.04.2006 and the Appellant commenced work on 28.05.2006.

5. At the time ofsubmission of the bid in the year 2005 and commencement of the work in 2006, escalation was being paid by the respondent to the appellant underSub-Clause 70.3 of the Conditions of Particular Application (COPA) on the basis of the Wholesale Price Index (WPI)of100 with the base year being 1993-1994(hereinafter referred to as the ''Old Series'') which the Ministry of Industrial Development, Govt. of India was publishing at the time. After August, 2010, the Ministry of Industrial Development, Govt. of India introduced the New Series with WPI of 100 and the base year was changed to 2004-2005 (hereinafter referred to as the ''New Series'').

6. After the publication of the New Series, the Appellant started raising the bills on the basis of indices published under the New Series (i.e., 2004-05=100) which had become applicable for calculation of Price Adjustment. However, the Respondent rejected the bills raised by the Appellant upon the application of the New Seriesand made provisional payment to the Appellant towards Price Adjustment.

7. The Respondent, due to the change in WPI Series, issued a Circular dated 15.02.2013 to provide a linking factor between the old and the new Series. A pertinent aspect of the said Circular, which forms the basis of the disputes between the parties, talks about the ''weighted average linking factor andreads as follows: "For payment of price adjustment after August 2010 for contracts based on 1993-94 series, average linking factor for individual items may be derived by taking average of the month-wise linking factor of the item obtained by dividing its index of old series of a month by index of its new series for that month for the year 2009-2010 (April 2009 to March 2010), when both the series are available." "The index for any item for any month in 1993-94 series beyond August, 2010 (when 1993-94 series is not available) may be worked out on the basis of available index of the item for the month in 2004-05 series by multiplying the same by the average linking factor for the item so obtained. Thus, payment on account of price adjustment is acceptable to them and they will not make any claim, whatsoever on this account in future after this payment".

8. Subsequently, the Appellant started raising the bills for payment from September 2010 onwards by applying the base index as well as indices under New Series directly without applying the linking factor.

9. Sub-clause 70.3 of the COPAspecifies a formula for adjustment of the contract price for increase or decrease in rates and price of labour, materials, fuels and lubricants. In terms of item (ii) of Sub-Clause 70.3the price adjustment for increase or decrease in the cost of cement procured is to be computed as per the formula specified therein, which is as follows:-

"ii Adjustment for Central Component

Price adjustment for increase or decrease in the cost of cement procured by the contractor shall be paid in accordance with the following formula:

Vc=0.85 x Pc/100 x Ri x (C1-Co)/Co

Vc= increase or decrease in the cost of work during the month under consideration due to changes in the rates for cement.

Co= the all India average wholesale price index for cement on the day 28 days prior to the closing date of submission of Bids, as published by Ministry of Industrial Development, Government of India, New Delhi.

C1= the all India average wholesale price index for cement on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related, as published by Ministry of Industrial Development, Government of India, New Delhi.

Pc=Percentage of Cement component of the work."

10. The Appellant at firstfiled a Writ Petition in the High Court of Madhya Pradesh, challenging the validity of the said Circular dated 15.02.2013 of the Respondent. However,by an order dated 03.04.2013, the High Court of Madhya Pradesh disposed of the said Writ Petition with the observation that there existed a dispute resolution mechanism through the Dispute Adjudication Board (DAB) and arbitration and as such, the Appellant should have the dispute resolved through the said mechanism under the contract.

11. The Appellant, thereafter, approached this court with an application under Section 9 of the Arbitration and Conciliation Act, 1996 for interim protection against the aforesaid circular dated 15.02.2013. By an order dated 31.05.2013, this Court granted an interim injunction restraining the Respondent from implementing the said impugned circular dated 15.02.2013.

12. Subsequently, the Appellant referred the dispute between the parties to the Arbitral Tribunal,raising a Claim of Rs. 3,02,29,244 in respect of Escalation/ Price Adjustment payable to the Contractor by the Respondent NHAI where upon the Award dated 02.05.2016 came to be passed. The Majority Arbitrators were of the view that, the New Series indices were not available at the time of bid of the project in 2005, the question of using the base indices of the New Series for the price adjustment did not arise.

13. It was also held that the purpose of incorporation of linking factor was to maintain the continuity in the time series data in the WPI index, to convert New Series current indices into equivalent Old Series indices as close as practicable.

14. However, one of the Arbitrators recorded a dissenting note. In his view, the New Series was applicable with effect from September, 2010 and thereafter, only the New Series was to be applied for working the formulae as provided under Sub-clause 70.3(ii) of the COPA. According to him, even though the New Series came into effect from September, 2010, the base index of the New Series (which

was the base year 2004-05) could be used for determination of price variation after September, 2010.

15. The Appellant thereafter, filed an application for setting aside of theArbitral Award dated 02.05.2016 under Section 34 of the Arbitration and Conciliation Act, 1996before the learned Single Judge of this Court.

16. By the impugned Judgment and Order dated 09.08.2016, the learned Single Judge dismissed the application filed by the Appellant/Petitioner under Section 34 of the 1996 Act, inter alia holding that though the views expressed by the majority of the Arbitrators as well as the dissenting Arbitrator were plausible views; each method threw up separate issues. However,the controversy related to interpreting the manner in which the formula specified in the Contract had to be worked, given the change in the WPI Series, which was purely a question in the realm of interpretation of the Contract and was within the jurisdiction of the Arbitral Tribunal.

17. The learned Single Judge rightly held that while considering a challenge to an arbitral award, this Court does not substitute its view over that of the arbitrators and that it is not permissible for a Court to examine the correctness of the findings of the Arbitral Tribunal, as if it were sitting in appeal over the findings.

18. Mr.Nigam, Senior Advocate appearing for the Appellant submitted that the Single Judge erred in dismissing the Application of the Appellant under Section 34 of the Arbitration and Conciliation Act, 1996. He argued that the Single Judge hadfailed to appreciate that the Majority Arbitrators had, in the garb of interpretation and/or construction of the terms of the contract, re-written the terms of the contract between the parties. The question of plausible interpretation did not arise when the Majority Tribunal had inserted new words,which did not exist in the original contract between the parties. He argued that the award of the majority was not in accordance with the contract.

19. Mr. Nigam further argued that the Single Judge failed to appreciate that the Majority Arbitrators had exceeded their jurisdiction. The Majority Tribunal ignored the fact thatthe main dispute referred by the parties was limited to whether NHAI''s Circular dated 15.02.2013, which provided the linking factor of the two Series for calculation of Price Adjustment by working out/calculating the Appellant''s entitlement on Price Adjustment based on some guidelines of the Ministry of Commerce and Industry without recording any reasons, was within the scope of the Contract between the parties.

20. Appearing on behalf of the Respondent Mr.Nanda Kumar submitted that the linking factor has been introduced as per the guidelines issued by the office of the Economic Adviser, Government of India, Ministry of Commerce & Industry, and Departmental of Industrial Policy & Promotion (DIPP). The New Series Indices were not available at the time of bid of the project in 2005therefore,the question of using the base indices of this series for the price adjustment does not arise. As per the guidelines of the Ministry of Commerce and Industry,

establishment of linking factor to connect the old series with the new series is imperative and required.

21. Mr.Kumar, learned counsel for the Respondent further contends that the purpose of incorporation of linking factor is to maintain the continuity in the time series data on the Wholesale Price Index to convert New Series current indices into equivalent old series indices. As per contractual provisions, the WPI published by the Ministry of Commerce and Industry or any linking factor derived as per their guidelines can only be applicable to the contract.Extensive arguments have been made by Mr.NandaKumar on the purpose scope and effect of introduction of the linking factor.

22. The learned Single Judge has very rightly held that the controversy related to interpreting the manner in which the formula specified in the contract had to be worked, given the change in the WPI series. This was a question in the realm of interpretation of the contract and was within the jurisdiction of the Arbitral Tribunal.

23. The question of interpretation of a contract means construing the scope and purport of the different provisions of the contract. Whether a circular is within the scope of the contract or not involves interpretation of the contract.

24. It is a well-established proposition of law that, if a contractual provision or the provision of any documents, related to orforming part of the contract can be interpreted in two ways, it is not open to the Court to interfere with an arbitral award, just because the Court prefers the other view. The learned Judge rightly held that the Court does not substitute its view over that of the Arbitrators. The Learned Single Bench rightly refrained from choosing between the view of the majority and the arbitrator in minority. The Court cannot examine the correctness of the findings of the Arbitral Tribunal or any of its members as if it were sitting in appeal over the findings.

25. In National Highways Authority vs. ITD Cementation India Limited, (2014) 14 SCC 21, the Supreme Court held interpretation of a contract was the matter for the Arbitrator to determine even if it gave rise to determination of a question of law. The Court while considering the challenge to an arbitral award does not sit in appeal over the findings and decisions of the Arbtirator. Each Arbitrator is legitimately entitled to take the view which he holds correct and in the case of dissent, the majority view prevails.

26. In RashtriyaIspat Nigam Ltd. v. Dewan Chand Ram Saran reported in (2012) 5 SCC 306, the Supreme Court held: "43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator."

27. In Sumitomo Heavy Industries Limited v Oil and Natural Gas Commission of India reported in (2010) 11 SCC 296, the Supreme Court held:- ".....The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one''s own view in such a situation, in place of the one taken by the umpire, O.M.P. (COMM) 375/2016 Page 7 of 8 which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central Warehousing Corpn. the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

28. In Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd. reported in (2009) 10 SCC 63, the Supreme Court held that "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". The Court further held that "If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award".

29. The Arbitral Tribunal has considered and interpreted the contract the majority of two Arbitrators have taken a view against the appellant and one of the Arbitrators constituting the minority, has taken another view which is in favour of the appellant. However, both the views are plausible views. The interference of this Court is thus not warranted. The majority view will prevail. The Learned Single Bench rightly refrained from interfering.

30. The appeal is, for the reasons discussed above, dismissed.

