(2020) 02 DEL CK 0158

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 273, 280 Of 2019, Civil Miscellaneous Application No. 44443, 44986 Of 2019

National Building Construction Corporation Ltd [Presently NBCC (India) Limited] APPELLANT

Vs

M/S J R Construction RESPONDENT

Date of Decision : 13-02-2020

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 18, 31A, 31A(2), 34, 34(2)(a)(iii), 37, 48, 48(2)(b)(ii)

Citation : (2020) 02 DEL CK 0158

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

Bench : Division Bench

Advocate : Manoj K. Das, Geeta Das, Shailesh Kumar Singh, Mayank Goel, Monamshel Masing

Final Decision : Dismissed

Judgement

,,,

Hima Kohli, J",,,

1. The appellant/National Building Construction Corporation (in short â??NBCCâ??) has filed FAO(OS)(COMM) 273/2019 against the judgment dated,,,

30.07.2019, passed by the learned Single Judge in OMP(COMM) 157/2017 whereby a petition filed by it under Section 34 of the Arbitration and",,,

Conciliation Act, 1996 (in short â??A&C Actâ??) directed against the Arbitral Award dated 06.12.2016, has been dismissed.",,,

2. FAO(OS)(COMM) 280/2019 has been filed by the appellant/NBCC, being aggrieved by an order dated 08.08.2019, passed by the learned Single",,,

Judge partly allowing OMP(COMM) 171/2017 against the Arbitral Award dated 06.12.2016, on the aspect of pendente lite interest awarded in",,, respect of Claim No.17 and holding that only post-award simple interest @ 12% could have been granted to the respondent. At the same time, the",,,

Award was sustained on the remaining aspects on the ground that the judgment dated 30.07.2019, passed by the same Bench in OMP(COMM)",,,

157/2017, subject matter of FAO (OS) (COMM) 273/2019, would cover the present case as well. As the pleas taken to assail the impugned judgment",,,

are similar, both the appeals are being taken up together for a decision. For the sake of convenience, we propose to refer to the facts narrated in FAO",,,

(OS) (COMM) 273/2019.,,,

3. On 24.10.2005, the appellant/NBCC issued a Letter of Award (LoA) in favour of the respondent/contractor for construction of a Link Road in",,,

Mizoram, abutting the Indo-Bangladesh Border. The length of the road was 17.81 kms. The contract value was for a sum of Rs.881.61 lakhs. The",,,

contract was to commence on 03.11.2005 and conclude on 03.06.2006. On 01.11.2007, in a joint meeting conducted by the appellant/NBCC, the",,,

respondent/contractor and BT Construction, it was agreed that a 10 kms. stretch of the road initially awarded to the respondent/contractor, would be",,,

handed over to BT Construction. The respondent/contractor took a stand that the work in respect of this stretch of road having been awarded to BT,,,

Construction, it was excluded from the subject contract. Between the years 2007 to 2009, the respondent/contractor continued executing parts of the",,,

subject contract. Difficulties in completion of the work finally led to a foreclosure of the subject contract. On 30.11.2010, joint measurement of the",,,

work executed was carried out by the respondent/contractor and BT Construction.,,,

4. As per the appellant/NBCC, the respondent/contractor was paid an excess amount of Rs.154.27 lakhs whereas work worth Rs.749.18 lakhs had",,,

been completed by it. On deducting Rs.749.18 lakhs from Rs.883.45 lakhs, the respondent/contractor was paid an excess amount of Rs.154.27 lakhs.",,,

On the date the joint measurement took place, the respondent/contractor had submitted its 12th RA Bill and/or final bill wherein it claimed a sum of",,,

Rs.17,41,985/- from the NBCC. It is the version of the appellant/NBCC that the 12th RA Bill and/or final bill was finalised for a gross amount of",,,

Rs.94,489/- and on deductions made towards tax and other recoveries, nothing was found due and payable to the respondent/contractor, which",,, position was accepted by it.,,,

5. Further, the appellant/NBCC claimed that an excess amount of Rs.154.27 lakhs had been paid to the respondent/contractor, which was not a part",,,

of the final bill pertaining to the contract and the said amount was adjusted by it from the security deposit, earnest money deposit and other dues",,,

payable to the respondent/contractor qua other works executed by it for the NBCC relating to three separate Letters of Award dated 04.07.2006,",,,

08.11.2006 and 30.01.2008. Though the respondent/contractor was granted extension of time to execute the subject contract and the scheduled date,,,

of completion was extended to 30.11.2011, the contract was foreclosed 10 months earlier, on 14.01.2011.",,,

6. The respondent/contractor raised claims against the appellant/NBCC in respect of the subject contract. The CMD, NBCC appointed a Committee",,,

known as the Verma Committee to look into the grievances raised by the respondent/contractor. On 15.04.2013, the Verma Committee gave a report",,,

wherein it concluded that no amounts were payable to the respondent/contractor as it had executed the Foreclosure Agreement on 14.01.2011.,,,

Aggrieved by the said decision, the respondent/contractor again approached the CMD, NBCC. This resulted in the parties executing a Supplementary",,,

Agreement on 22.08.2013, agreeing inter alia to refer all their inter se disputes, subject matter of the contract, for adjudication to an Arbitral Tribunal.",,,

7. Before the Arbitral Tribunal, the respondent/contractor raised 24 Claims for a total value of Rs.5.44 crores, including interest. The said claims were",,,

contested by the appellant/NBCC, who not only challenged the jurisdiction of the Arbitral Tribunal to adjudicate upon the disputes on merits on the",,,

ground that the parties had executed a Foreclosure Agreement dated 14.01.2011 and therefore, the disputes were not arbitrable, it also contested the",,,

claims on merits and filed counter claims.,,,

8. Under the Award dated 06.12.2016, the learned Arbitral Tribunal partly allowed the claims of the respondent/contractor and against a total demand",,,

of Rs.5.44 crores, awarded a sum of Rs.1,13,25,985/- including interest @ 12% per annum towards pre-reference and pendente lite interest. The",,,

interest component of the awarded amount comes to Rs.39,44,403/.",,,

9. Aggrieved by the aforesaid Award, the appellant/NBCC filed a Section 34 petition on five grounds, i.e., that the Arbitral Tribunal lacked the",,,

jurisdiction to adjudicate the claims in view of the Foreclosure Agreement dated 14.01.2011 executed by the parties and the invocation of arbitration,,,

was an afterthought; that Claims No.2, 3, 4, 5, 7, 8, 9, 10, 11 and 12 related to recoveries and adjustments from RA Bills No.1 to 12 and since the",,,

respondent/contractor had accepted RA Bills No.1 to 12, it could not have raised the said claims. It was next canvassed that claims raised on account",,,

of workforce facilities given by the NBCC fall under the category of â??excepted mattersâ? and were not arbitrable under Clause 28.3 of the,,,

contract; that Claims No.17 and 18 were wrongly awarded in favour of the respondent/contractor though no such claims were lodged by it; that costs,,,

of Rs.8 lakhs were wrongly awarded to the respondent/contractor when it had not even raised a claim in this regard. Lastly, it was urged that the",,,

Arbitral Tribunal had erred in granting pre-reference and pendente lite interest though the same was impermissible under Clause 73.3 of the contract.,,,

It is noteworthy that similar pleas were taken by the appellant/NBCC to lay a challenge to a separate Arbitral Award dated 6.12.2016, subject matter",,,

of OMP (COMM) 171/2017 [assailed in FAO (OS) (COMM) 280/2019], that has also been repelled by the learned Single judge for the very same",,,

reasons as spelt out in the impugned judgment dated 30.7.2019, except for correcting a typographical error regarding grant of pendente lite interest",,,

awarded under Claim No.17.,,,

10. The learned Single Judge rejected all the aforesaid grounds taken by the appellant/NBCC to assail the Award and dismissed its Section 34 petition,,,

by holding that the reasoning given by the Arbitral Tribunal is based on the material placed before it and does not deserve any interference. Aggrieved,,,

by the said decision, the appellant/NBCC has filed the present appeals under Section 37 of the A&C Act.",,,

11. When FAO(OS)(COMM) 273/2019 was listed for admission on 09.10.2019, Mr. Manoj K. Das, learned counsel for the appellant/NBCC had",,,

submitted before us that the impugned judgment has been assailed primarily on two counts. Firstly, against the findings returned by the learned Single",,,

Judge regarding the observations made by the Arbitral Tribunal relating to Claim No.18 raised by the respondent/contractor (on refund/non-payment,,,

against 12th RA Bill), wherein it was held entitled to refund of Rs.37,87,029/-. Secondly, a grievance was raised that Claims No.1 to 12 lodged by the",,, respondent/contractor fell under the category of â??excepted mattersâ?, as contemplated under Clause 28.3 read with Clause 27.3 of the contract",,,

governing the parties.,,,

(i),Recovery made at B.T.C. rate,=,"Rs.2,53,95,370/-

(ii),"The value of above [the] work at [the] scheduled

rate = Rs.25395370 x 100/114",=,"Rs.2,22,76,640/-

(iii),"The value of [the] above work at the JRC rate =

Rs.22276640 x 97/100",=,"Rs.2,16,08,341/-

(iv),"Extra recovery made by Respondent on account of

work carried out by BTC",=,"Rs.37,87,029/-

of evidence returned by the Arbitral Tribunal do not deserve interference by courts either under Section 34 or under Section 37 of the A&C Act.,,,

18. The aforesaid position was reiterated by us in a recent decision in the case of Ministry of Youth Affairs & Sports vs. Swiss Timing Ltd. reported,,,

as 2019 SCC Online Del. 10934, that has been upheld by the Supreme Court. For ease of reference, paras 19 and 20 of the said judgment are",,,

extracted hereinbelow:-,,,

â??19. We are also mindful of the law on interference by the courts in respect of findings of facts based on appreciation of evidence,",,,

returned by the Arbitral Tribunal. In Sutlej Construction Limited Vs. Union Territory of Chandigarh reported as (2018) 1 SCC 718 the,,,

Supreme Court has held as follows:-,,,

â??11. It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that",,,

the award should shock the conscience of the Court and would not include what the Court thinks is unjust on the facts of the case seeking,,,

to substitute its view for that of the arbitrator to do what it considers to be â??justiceâ??. Associate Builders v. DDA, (2015) 3 SCC 49.",,,

12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of",,,

reappreciating the evidence as the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on,,,

limited parameters can the award be interfered with. (Sudarsan Trading Co. v. State of Kerala [Sudarsan Trading Co. v. State of Kerala,",,,

(1989) 2 SCC 38; Harish Chandra & Co. v. State of U.P., (2016) 9 SCC 478 and Swan Gold Mining Ltd. v. Hindustan Copper Ltd., (2015)",,,

5 SCC 739.,,,

13. The learned Single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a,,,

second appellate court. In fact, even in second appeals, only questions of law are to be determined while the first appellate court is the final",,,

court on facts. In the present case, the learned Single Judge has, thus, acted in the first appeal against objections dismissed as if it was the",,,

first appellate court against a decree passed by the trial court.â??,,,

20. In Ssangyong Engineering Construction Co. Ltd. vs. National Highways Authority of India reported as 2019 SCCOnline SC 67, 7the",,,

Supreme Court has reiterated the aforesaid view in the following words:-,,,

35. What is clear, therefore, is that the expression â??public policy of Indiaâ?, whether contained in Section 34 or in Section 48, would",,,

now mean the â??fundamental policy of Indian lawâ? as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the",,,

fundamental policy of Indian law would be relegated to the â??Renusagarâ? understanding of this expression. This would necessarily,,,

mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28",,,

and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the",,,

arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted",,,

post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996",,,

Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).",,,

36. It is important to notice that the ground for interference insofar as it concerns â??interest of Indiaâ? has since been deleted, and",,,

therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to",,,

be understood as a conflict with the â??most basic notions of morality or justiceâ?. This again would be in line with paragraphs 36 to 39 of,,, Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.",,,

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy",,,

of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions",,,

of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and,,,

Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate",,,

Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.",,,

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the",,,

Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality",,,

as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within",,,

â??the fundamental policy of Indian lawâ?, namely, the contravention of a statute not linked to public policy or public interest, cannot be",,,

brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.â??,,,

19. Coming to the second contention of the learned counsel for the appellant/ NBCC that Claims No.2, 3, 4, 5, 7 to 12 relating to recoveries and",,,

adjustments from RA Bills No.1 to 12, lodged by the respondent/contractor fall under the category of â??excepted mattersâ?? and could not have been",,,

adjudicated upon by the Arbitral Tribunal, we had specifically posed a query to learned counsel as to whether any such plea was taken or urged",,,

before the Arbitral Tribunal. He conceded that no such plea was raised during the arbitration proceedings but states that it was taken in the Section 34,,,

petition. Learned counsel sought to urge that the plea that the learned Arbitrator was not vested with the jurisdiction to go into the said claims being a,,,

legal plea, can be taken at any stage of the proceedings including at the appellate stage.",,,

20. We are afraid the said argument is not persuasive. In a recent decision of this court in UBV Infrastructure Ltd. vs. National Highways Authority,,,

of India reported as 2020 SCC OnLine Del. 60, where counsel for the appellant therein had taken a plea regarding set-off in the Section 37 petition,",,,

which had not been urged before the learned Single Judge, we had opined that the appellant could not be permitted to take the said ground for the very",,,

first time at the appellate stage and had declined to examine the same. For taking the said view, strength was drawn from the decision in Sutlej",,,

Construction Limited Vs. Union Territory of Chandigarh reported as (2018) 1 SCC 718, where the Supreme Court had accepted the submission made",,,

in opposition to the appeal that when the appellant therein had not raised or urged a particular point before the Arbitral Tribunal or the Single Judge,,,

and the Division Bench of the High Court, it could not be permitted to raise the same for the first time at the appellate stage. A similar view has been",,,

taken by the Supreme Court in Union of India Vs. Susaka Private Limited and Ors. reported as (2018) 2 SCC 18,2 cited by learned counsel for the",,,

respondent.,,,

21. In the instant case, the appellant/NBCC had admittedly not taken a ground in respect of â??excepted mattersâ? before the Arbitral Tribunal. The",,,

inevitable inference is that after weighing all the pros and cons of the case, the appellant/NBCC took a conscious decision to drop the plea regarding",,,

â??excepted mattersâ? and decided not to challenge the said aspect before the Arbitral Tribunal. Having resorted to such a course of action, we are",,,

in agreement with the view expressed by the learned Single Judge that the appellant/NBCC is precluded from raising the said issue in the Section 34,,,

petition. The assumption is that the appellant/NBCC waived its right in this regard and is thus barred from going that way now. Even otherwise, this is",,,

not a purely legal issue as sought to be urged before us. For arriving at any conclusion as to whether recoveries and adjustments could have been,,,

made by the appellant/NBCC from R.A. Bills No.1 to 12, on account of NBCC having provided several facilities to the respondent, would entail",,,

appreciation of the evidence, which exercise cannot be undertaken either in the proceedings under Section 34 or Section 37 of the Act. We therefore",,,

decline to interfere with the findings returned on this aspect in the impugned judgment.,,,

22. As for the contention of the learned counsel for the appellant/NBCC that the learned Single Judge has erred in upholding the Arbitral Award on,,,

the aspect of costs of arbitration to the tune of Rs.8 lakhs imposed on the NBCC, it was argued before the learned Single Judge that though the",,,

statement of claim filed by the respondent/contractor did not specify a claim towards cost of arbitration yet, the Arbitral Tribunal has proceeded to",,,

award substantial costs in its favour.,,,

23. The aforesaid submission did not find favour with the learned Single Judge on noticing the factual context of the case, which reveals that the",,,

respondent/contractor had submitted a letter dated 13.10.2013 to the Arbitral Tribunal stating inter alia that due to inadvertence, it had not claimed",,,

costs of arbitration. This position was brought out in the in the proceedings held before the Arbitral Tribunal on 21.03.2016, on which date, both sides",,,

were directed to file the details towards bill of costs. The observation made in the impugned judgment on this aspect is pertinent and is extracted,,,

below:-,,,

â??22.1 The aforesaid procedural order, which the arbitral tribunal passed, however, had a background, which is, JRCâ??s letter dated",,,

13.10.2013. In this letter, JRC had indicated to the arbitral tribunal that it had inadvertently not claimed costs of arbitration. It is not",,,

NBCCâ??s case that it did not know of the letter dated 13.10.2013. A perusal of procedural order dated 21.03.2016 would show clearly,,,

that the arbitral tribunal had even handedly called upon both sides to file their bill of costs. Furthermore, a closer examination of the",,,

procedural order dated 21.03.2016 would show that details of expenditure incurred towards arbitration were furnished to the arbitral,,,

tribunal during a hearing held on 19.03.2016 pertaining to another LOA dated 30.01.2008. As noted in paragraph 7.2 above, NBCC had",,,

referred to common named-arbitrator disputes arising between the parties pertaining not only to the LOA in issue but also other LOAs,,,

including LOA dated 30.01.2008. Therefore, at the hearing held before the arbitral tribunal pertaining to LOA dated 30.01.2008, JRC had",,,

handed over a bill of costs in the sum of Rs.11,69,105/- which included the fee of the arbitrator, travelling expenses and money paid to",,,

counsel and advocate-on-record. Though opportunity was given, NBCC did not respond to the claim made in this behalf by JRC. The",,,

arbitral tribunal while allowing the claim, gave the following reasoning:",,, â??Claim No. 23A: Claim for Cost of Arbitration,,,

11.23A.â?¦. From the awards given by me on most of the claims of the Claimant and counter claims of the Respondent, it is evident that",,,

generally the Respondent has been found as lacking in the proper administration of the contract. Many of the claims made by the Claimant,,,

have been allowed by me, though partly, which goes to show that the arbitration could have been avoided on many of the issues/claims",,,

raised by the Claimant. In the overall analysis, I assess that it would be fair and reasonable to award a sum of Rupees Eight Lacs only",,,

towards the cost of arbitration in favor of Claimant. The above award is after taking into the consideration the share of expanses to be,,,

borne by the Claimant out of the expenses made by the Respondent during the conduct of arbitration hearing.â??,,,

23. To my mind, the fact that it did not form part of the SOC ought not to have made much difference as long as costs under this head were",,,

incurred by JRC. This was not a claim on merits but pertained to expenses incurred by JRC in prosecuting its claims.,,,

24. It is not NBCCâ??s stand that these expenses were not incurred. Therefore, in my opinion, this objection is not sustainable and hence",,,

rejected.â?? (emphasis added),,,

24. We are in complete agreement with the view taken above. In our view not much would turn on the respondent/contractor not including costs as a,,,

separate claim in the Statement of Claim for the reason that the same was not a claim on the merits of the disputes between the parties, but related to",,,

the expenses actually incurred by the respondent/contractor in pursuing its claims before the Arbitral Tribunal, which included the fee of the",,,

Arbitrator, travelling expenses incurred by the counsel and the Advocate on Record etc. In any event, Section 31A of the A&C Act inserted in the",,,

Statute vide Notification dated 23.10.2015, lays down a regime of costs pertaining to arbitration and vests the discretion in the court or the Arbitral",,,

Tribunal, as the case may be, as to whether costs would be payable by one party to the other, the amount of such costs and when are such costs to be",,,

paid. Section 31A(2) prescribes that the general rule while making an order on payment of costs is that the unsuccessful party shall be ordered to pay,,,

costs to the successful party. In the instant case, the learned Arbitrator has granted costs in favour of the respondent/contractor, who is the successful",,,

party. For the aforesaid reason, we see no reason to interfere with the view expressed by the learned Single Judge above.",,,

25. Lastly, a ground has been sought to be urged by learned counsel for the appellant/NBCC on the pre-reference and pendente lite interest awarded",,,

under Claim No.24 by the Arbitral Tribunal, which he submitted is contrary to the terms of Clause 73.3 of the contract. As against interest claimed",,,

@18% by the respondent/contractor for the period commencing from 14.01.2011, till the date of the Award, the Arbitral Tribunal has awarded interest",,,

@12% per annum from the date of the Award, till the date of payment. In other words, pre-reference interest has been completely excluded while",,,

calculating future interest. The Award also states that if the appellant/NBCC would pay the amount awarded to the respondent/contractor within 90,,,

days from the date of making the Award, no future interest would be payable.",,,

26. Reliance placed by the appellant/NBCC on Clause 73.3 of the contract to urge that interest awarded under Claim No.24 was liable to be,,,

interfered with, is found to be meritless in the light of the fact that the said Clause could have been invoked by NBCC only in certain circumstances,",,,

subject to the contractor being notified in that regard. It is not in dispute that the appellant/NBCC did not notify the respondent/contractor while,,,

withholding or retaining amounts towards security deposit etc. As a result, Clause 73.3 could not come to its aid. The view taken by the learned",,,

Arbitral Tribunal for awarding interest, is therefore found to be plausible. In any case, this Court is of the view that interpretation of the terms and",,,

conditions of the contract governing the parties, falls strictly within the domain of the learned Arbitrator and the learned Single Judge in exercise of",,,

powers under Section 34 and the Division Bench in exercise of powers under Section 37 of the A&C, ought not to step into the shoes of the learned",,,

Arbitrator to give a different interpretation to the terms and conditions of the contract governing the parties, unless and until the interpretation given by",,,

the Arbitrator is so perverse, arbitrary or contrary to the terms of the agreement that it cannot withstand judicial scrutiny. That is not the case here.",,,

[Refer: National Highways Authority of India vs. ITD Cementation India Ltd. reported as (2015) 14 SCC 21],,,

27. In view of the foregoing discussion, we are of the opinion that both the appeals are meritless and are accordingly dismissed alongwith the pending",,,

applications with costs of Rs.25,000/- awarded in favour of the respondent/ contractor in each appeal.",,,

