

(2010) 01 DEL CK 0065
In the Delhi High Court
Case No : O.M.P. No. 27 of 2010

National Highway Authority of India

APPELLANT

Vs

ITD Cementation India Ltd.

RESPONDENT

Date of Decision : 22-01-2010

Acts Referred:

Citation : (2010) 01 DEL CK 0065

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Vikas Goel and Abhey Joshi, for the Appellant;

Judgement

Valmiki J Mehta, J.—By means of this petition u/s 34 of the Arbitration and Conciliation Act, 1996 the petitioner challenges the Award of the three member Arbitral Tribunal consisting of one retired Judge of this Court and two Engineer Members. The challenge is with respect to the award of Claim No. 1, Claim No. 2.2, Claim No. 4 and Claim No. 2.5 for interest.

2. In my opinion, notice can be issued only with regard to Claim No. 2.2 and so far as the challenge to Claim No. 1, Claim No. 4 and Claim No. 2.5 are concerned, the same stands dismissed for the reasons given hereinafter.

3. Claim No. 1 of the contractor/respondent was the claim towards higher taxes paid by it to the Government of Maharashtra for Works Contract Tax. The Arbitration Tribunal has referred to the certificates filed by the tax authorities which establish the payment of the Works Contract Tax by the respondent with respect to this specific project. The Arbitrators have also noted that the report of the Chartered Accountant of the respondent was perused by the Chartered Accountant of the petitioner, who also visited the respondent's/contractor's office and examined all the records and when certain doubts were expressed, these aspects were cross verified by the Arbitration Tribunal and this is reflected from para 5.4.3.16 which reads as under:

5.4.3.16 The Claimant's in-house Accountant appeared before the Tribunal on

12th June 2008 and with help of original challans and certificates showed the AT and the Respondents that separate documents for each instalment of WCT paid by the Claimant were available and clearly identifiable from the records.

4. In view of the aforesaid facts, it is quite clear that the respondent/contractor, in fact, paid the higher/additional Works Contract Tax of 1% and for which not only the necessary certificates of the tax authorities relatable to the subject project were filed, but also the Arbitration Tribunal itself examined the record further with regard to the claim of actual payment of the Works Contract Tax. The Arbitration Tribunal after examining all the documents has arrived at a finding of fact in view of the contractual clauses which entitles the contractor to higher payment of duty which is paid by it during the progress of work. The Arbitration Tribunal has accordingly awarded this claim. In my opinion, in view of the aforesaid, there is absolutely no illegality or perversity of any nature in the Award so as to enable this Court to interfere with the finding of the Arbitration Tribunal. In this view of the matter, objection to this part of the Award relating to Claim No. 1 stands dismissed.

5. The next claim which has been urged to have been wrongly decided by the Arbitration Tribunal is Claim No. 4. This claim was made by the respondent before the Arbitration Tribunal for additional cost and losses caused on account of delay and disruption of the works.

6. It is undisputed that there are Clauses in the contract which entitle the respondent for higher cost/losses caused to the contractor and which Clauses are Clause 6.4, Clause 12.2 and Clause 44.1. In terms of these Clauses, the Arbitrators have arrived at a finding of facts that the respondent duly notified the Engineer and employer of various events causing delay in its correspondences and monthly progress reports. This has been reproduced by the Arbitrators in para 8.3.1.10 of the Award. The Arbitration Tribunal has in view of the facts of the case after detailed examination and reference to various detailed facts arrived at a finding of fact that there has in fact been caused delay to the project on account of the petitioner herein. These conclusions are contained in para 8.3.1.63 of the Award which are as under:

8.3.1.63 From careful examination of all the data, documents, records and rival contentions of the parties the AT has come to following conclusions:

(a) The Works have been delayed due to reasons not attributable to the Claimant for which he was entitled to fair and reasonable Extension of Time and cost compensation in terms of the Contract Provisions.

(b) The Claimant did initially demonstrate his capacity to achieve/exceed the efficiency levels committed in the Contract and that required for completing the Works, as per Bonus Program and did accelerate the progress of work initially to achieve accelerated completion of the Works to avail the Bonus and subsequently to recover the delays which were not attributable to him and for which he was entitled to Extension of Time and additional cost.

(c) It is also observed that additional resources were partly deployed by the Claimant for additional works entrusted to the Contractor. (Approx 14 crores) and partly for the purpose of acceleration of works. It is also noticed that resources from July 2002 were increased though the quantum of earth work executed was much less as compared to the optimum out put of the machinery.

(d) The Respondent's Engineer did not determine the allowable Time for completion in terms of the Contract and insisted upon completing the Works within the original schedule.

(e) The Respondent has benefited from acceleration of the works by the Claimant.

7. After arriving at the aforesaid findings, the Arbitrators have apportioned the claimed amounts on the basis of the material which was filed before the Arbitrators. Mr. Vikas Goel, who very ably argued the case, urged that there is no basis for the Arbitrators to award the claim at the particular percentages i.e. 33%/40% in the chart given in para 8.3.1.64 of the Award. At the first blush, this argument may appear attractive, however, it is settled law, right from the judgment of Supreme Court in Mohd. Salamatullah and Others Vs. Government of Andhra Pradesh, & A.T. Brij Paul Singh and Others Vs. State of Gujarat, that once there are reasonable materials available before the Arbitrators, then, Arbitrators are entitled to make further honest guesswork on the basis of such materials and thereafter arrive at its findings and conclusions more so because now in terms of Section 19 of the Arbitration and Conciliation Act, 1996, the provisions of Code of Civil Procedure, 1908 and the Evidence Act, 1872 do not strict senso apply to arbitration proceedings. During the course of hearing, I put it to the counsel for the petitioner that if the Arbitration Tribunal which comprised of two Engineers and one retired Judge of the Court, who have heard the arguments in detail and considered all the aspects of the matter, including all the evidence filed, have given a particular percentage, then, if this Court gives a different percentage, how would this percentage, which this Court gives, would in any manner be better than the percentage as given by the Arbitrators in para 8.3.1.64 of the Award. Obviously, no convincing answer could be given because once the Arbitrators give a particular basis, after duly considering all the relevant materials, no challenge can be laid to the same. Before this Court interferes with an Award, it is necessary that the Award is illegal or violative of the contractual provisions or perverse. I do not find any perversity or illegality whatsoever in the approach of the Arbitrators who have after examining in detail the entire record made an honest guesstimate, which the Arbitrators were entitled to do. No challenge, therefore, can be laid with respect to this Claim and objections thereto are dismissed.

8. The last issue which was urged was with respect to the Award of interest under Claim No. 2.5. Once again, if we look at the grant of rates of interest, the same may appear prima facie to be very high because interest is granted @ 12% compounded monthly. However, each case has to be seen as per its facts and circumstances. As per Section 31(7) of the Arbitration and Conciliation Act, 1996,

the Arbitration Tribunal shall consider the contract between the parties with regard to the award of interest. It is not disputed that this rate of interest is the contractual rate of interest, and which would have been awarded to the contractor if the Engineer had certified the amount. Merely because the Engineer does not think it fit to certify the amounts, and if the amounts are in fact payable, and which is so held by the Arbitration Tribunal, I do not think any defence can be validly raised to say that such rate of interest should not be paid merely because the Engineer has failed to certify the same. In fact, on the issue of contractual rate of interest, I put it to the counsel for the petitioner that would the petitioner be also not entitled to such contractual rate of interest from the respondent? To that the answer was obvious that the petitioner also with respect to its claims would be entitled to such rate of interest. If that be so, the scales of justice have to be kept even and both the parties have to be governed by the same set of rules. In my opinion, therefore, no challenge can be laid with respect to the Award of interest as per Claim No. 2.5.

9. In view of the above, so far as the objections to Claim Nos. 1, 4 and 2.5, the same are dismissed with costs of Rs. 50,000/-.

10. So far as the challenge to Claim No. 2.2 is concerned, I am of the opinion that the counsel for the petitioner has been able to establish his case for issuing of notice. This is because the claim was for Deemed Exports Benefit for contracts above Rs. 100 crores in terms of the EXIM policy of the Government. The contention of the claimant/respondent was that when it submitted its bid in terms of the EXIM policy, it was entitled to Deemed Exports Benefits and which were subsequently withdrawn by the Government and consequently, benefit of the Deemed Exports Benefits was claimed by the contractor. The Arbitration Tribunal has referred to the provisions of the EXIM policy which allows benefits of Deemed Exports only when the contract is over Rs. 100 crores. The Arbitration Tribunal has given a finding that this contract was of the value of Rs. 5000 crores. I am very surprised with this finding of the Arbitration Tribunal because the admitted value of the contract as awarded to the respondent in the present case is only of Rs. 95.97 crores. The Arbitration Tribunal, in my opinion, has most illegally referred to the figure of Rs. 5000 crores for the entire road project of national highway in Maharashtra but it is not that this entire project has been awarded to the respondent herein so that it could be said that the contract is of Rs. 5,000 crores.

Accordingly, issue notice in this petition limited to the findings of Claim No. 2.2 on filing of process fee, both in the ordinary method as well as by registered AD post, returnable before the Joint Registrar on 25th February, 2010. The Joint Registrar shall after completion of pleadings place the matter in the Court for arguments on 4th May, 2010. The counsel for the petitioner to take dasti notices for being served upon the Arbitration Tribunal so that the arbitration record is filed in this Court. The concerned Arbitrator, who has the arbitration record, is directed to give the record of this case to the counsel for the petitioner in a

sealed cover and who shall thereafter file such records in this Court. The Joint Registrar to ensure compliance of the directions with regard to filing of the record of the Arbitration in this Court so that the matter can be taken up for arguments on the date fixed.

Dasti.