

(2018) 02 DEL CK 0674

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 391 Of 2017,
Miscellaneous Application No. 12843 Of 2017

National Highway Authority Of India

APPELLANT

Vs

M/S Progressive-MVR Joint Venture

RESPONDENT

Date of Decision : 28-02-2018

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 34
Building And Other Constructions Workers (Regulation Of Employment And Conditions Of Service) Act, 1996 — Section 62

Citation : (2018) 02 DEL CK 0674

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Anukul Raj, Nikita Raj, Varun Amar, Swaroop George

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner (hereafter "NHAI") has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter

"the Act"), inter alia, impugning an Arbitral Award dated 29.06.2017 (hereafter "the impugned award"). The impugned award was rendered

in the context of disputes that had arisen in respect of an agreement dated 20.10.2005 (hereafter "the Agreement") entered into between the

concerned parties for the works pertaining to "Four Lanning from Km 402.00 to Km 440.00 of Gopalganj-Muzaffarpur Section of NH-28 in Bihar,

Contract Package No. LMNHP-EW-II-(WB)-10".

2. The controversy involved in the present petition relates to the award of `2,79,36,333/-, which was awarded to the petitioner in respect of the amount

of 1% cess deducted by the NHAI on account of contributions made under the Building and Other Construction Workers' Welfare Cess Act, 1996

(hereafter "the Cess Act"). The Arbitral Tribunal accepted the respondent's claim that the said legislation was not operative at the time of

submission of the tender and, therefore, ought to be considered as a subsequent legislation. The NHAI disputes the same. According to the NHAI, the

Cess Act was enacted in 1996 and was specifically mentioned in Clause 34.2 of the Conditions of Particular Application (COPA), which formed an

integral part of the contract between the parties; thus, the same could not be considered as a subsequent legislation.

3. The learned counsel appearing for the NHAI also earnestly canvassed that the costs awarded by the Arbitral Tribunal in favour of the respondent

(claimant before the Tribunal) was unsustainable as the NHAI had already paid its share of costs as per its schedule of fees.

4. Briefly stated, the relevant facts are that the tenders for the aforementioned works were invited sometime in July, 2005. Pursuant to the said

invitation, the respondent submitted its bid on 25.07.2005.

5. There is no dispute that in terms of the Agreement, the respondent would not be liable to bear additional costs on account of any subsequent

legislation enacted after 28 days prior to the date of submission of the tender (that is after 27.06.2005).

6. Although, the Cess Act was enacted earlier in 1996, it is admitted that the same was not being implemented as the requisite rules had not been

framed. These rules "Bihar Building and Other Construction Workers Welfare Rules, 2005 (hereafter "BOCW Rules")" were notified by

the State Government by a Gazette Notification dated 03.09.2005. Pursuant to the said notification, the Welfare Board was constituted on 18.02.2008

and a circular dated 04.09.2008 was issued by the State Government (Labour Department) calling upon various departments to deposit the cess levied

under the Cess Act.

7. The NHAI awarded the contract to the respondent on 20.10.2005.

8. The petitioner commenced deducting the cess from the Interim Payments Certificates (IPC) issued to the respondent from 2007 onwards.

9. Before proceeding further, it would be relevant to refer to the relevant clause of COPA, which is set out below:-

â??Clause 34.2 â?? Compliance with Labour Regulations

During continuance of the contract, the Contractor and his sub-Contractors shall abide at all times by all existing labour enactments and rules made

thereunder, regulations, notifications and bye laws of State or Central Government or local authority and any other labour law (including rules),

regulations bye laws that may be passed or notification that may be issued under any labour law in future either by the State or the Central

Government or the local authority. Salient features of some of the major labour laws that are applicable to construction industry are given below. The

Contractor shall keep the Employer indemnified in case any action is taken against the Employer by the competent authority on account of

contravention of any provisions of any Act or rules made thereunder, regulations or notifications including amendments. If the Employer is caused to

pay or reimburse, such amounts as may be necessary to cause or observe, or for non-observance of the provisions stipulated in the notifications/bye

laws/acts/rules/regulations including amendments, if any, on the part of the Contractor, the Engineer/ Employer shall also have right to recover from

the contractor any sum required or estimated to be required for making good the loss or damage suffered by the Employer.

The employees of the contractor and the sub-contractor in no case shall be treated as the employees of the Employer at any point of time.

SALIENT FEATURES OF SOME MAJOR LABOUR LAWS APPLICABLE TO ESTABLISHMENTS ENGAGED IN BUILDING AND

OTHER CONSTRUCTION WORK

i) Workmen Compensation Act 1923

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ii) Payment of Gratuity Act 1972

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iii) Employees PF and Miscellaneous Provision Act 1952

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iv) Maternity Benefit Act 1951

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v) Contract Labour (Regulation and Abolition) Act 1970

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vi) Minimum Wages Act 1948

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(vii) Payment of Wages Act 1936

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(viii) Equal Remuneration Act 1979

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(ix) Payment of Bonus Act 1965

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(x) Industrial Disputes Act 1947

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(xi) Industrial Employment (Standing Orders) Act 1946

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(xii) Trade Unions Act 1926

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(xiii) Child Labour (Prohibition and Regulation) Act 1986

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(xiv) Inter-State Migrant Workmen's (Regulation of Employment and Conditions of Service) Act 1979

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(xv) The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996 and the Cess Act of 1996

All the establishments who carry on any building or other construction work and employs 10 or more workers are covered under this Act. All such

establishments are required to pay cess at rate not exceeding 2% of the cost of construction as may be notified by the Government. The employer of

the establishment is required to provide safety measures at the Building or Construction work and other welfare measures, such as Canteens, First-aid

facilities, Ambulance, Housing accommodation for Workers near the workplace etc. The employer to whom the Act applies has to obtain a

registration certificate from the Registering Officer appointed by the Government.

10. It is apparent from the above that the Cess Act was in contemplation of the parties at the time of entering into the Agreement and there is no

dispute that the same had been enacted much prior to the NHAI inviting tenders for the project in question. However, notwithstanding the same, the

respondent raised a dispute as to the deductions made under the Cess Act on the ground that the Cess Act was not operative at the material time â?

that is, 28 days prior to the submission of the tenders â?" and, therefore, ought to be construed as a subsequent legislation.

11. The Arbitral Tribunal accepted the respondent's contention and relying on the decision of the Division Bench of this Court in National Highways

Authority of India v. Gammon-Atlanta (JV): 2013 (4) Arb. L.R. 61 (Delhi) (DB) rendered the impugned award.

12. The learned counsel appearing for the NHAI contends that the impugned award is patently illegal and also contrary to the express terms of the

Agreement. He emphasized that Clause 34.2 of the COPA had expressly included the Cess Act as one of the legislation and, therefore, the question

of considering it as subsequent legislation did not arise.

13. The contentions advanced on behalf of NHAI appear to be persuasive; however, this Court is not inclined to examine this aspect as concededly,

this issue is squarely covered by the earlier decisions of this Court, which were rendered in the light of the decision of the Supreme Court in Dewan

Chand Builders & Contractors v. Union of India & Ors.: (2012) 1 SCC 101.

14. In Dewan Chand Builders & Contractors v. Union of India & Ors. the Supreme Court had observed as under:-

â??18. Although both the statues were enacted in 1996, the Central Government in exercise of its powers under Section 62 of the BOCW Act

notified the Delhi Building and Other Construction Workersâ? (Regulation of Employment and Conditions of Service) Rules, 2002 (for short â??the

Delhi Rulesâ?) vide Notification No.DLC/CLA/BCW/01/19 dated 10.01.2002. Accordingly, the Government of NCT of Delhi constituted the Delhi

Building and Other Construction Workersâ? Welfare Board vide Notification No.DLC/CLA/BCW/02/596 dated .9.2002. Thus, the Cess Act and the

Cess Rules are operative in the whole of NCT of Delhi w.e.f. January, 2002.â??

15. In view of the aforesaid observations made by the Supreme Court, a Division Bench of this Court in National Highways Authority of India v.

Gammon-Atlanta (JV) (supra) held that since the Cess Act became operative only when the BOCW Rules were notified, the appropriate date for

considering whether the Cess Act was a subsequent legislation would be the date on which such Rules were notified.

16. Following the aforesaid decision of the Division Bench, this Court in number of cases refrained from interfering with the Arbitral Award wherein a

similar view had been accepted by the Arbitral Tribunal (See: National Highways Authority of India v. BSCPL Infrastructure Limited: OMP (Comm.)

357/2016, decided on 20.10.2016.

17. A Coordinate Bench of this Court in National Highways Authority of India v. M/s Gayatri Projects Ltd.-ECI Engineering and Construction Co.

Ltd. (JV): OMP No.111/2014, decided on 18.01.2016 had dismissed the challenge to an arbitral award on similar grounds. The said decision was

carried in an appeal before the Division Bench of this Court in FAO (OS) 165/2016 captioned National Highways Authority of India v. M/s Gayatri

Project Ltd.-ECI Engineering & Construction Co. Ltd., which was also dismissed on 27.05.2016.

18. In view of the aforesaid, this Court is unable to accept the petitioner's challenge to the impugned award.

19. The petitioner also impugns the costs awarded by the Arbitral Tribunal. It is admitted that the NHAI did not pay the fees as fixed by the Arbitral

Tribunal. Therefore, the respondent had to pay the entire cost (its share as well as the shortfall in the amount deposited by the NHAI). In the

circumstances, this Court is not persuaded to accept that any interference in the impugned award is warranted.

20. The petition is, accordingly, dismissed. The pending application also stands disposed of.