

(2015) 01 DEL CK 0312
In the Delhi High Court
Case No : O.M.P. 206 of 2013

National Highways Authority of India	APPELLANT
Vs	
Afcons Infrastructure Ltd. and Afcons Pauling (India) Ltd.	RESPONDENT

Date of Decision : 28-01-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 33, 34

Citation : (2015) 3 AD 787 : (2015) 3 ARBLR 484

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Ayushi Kiran, for the Appellant; Sandeep Sethi, Senior Advocate, Manu Seshadri, Tanmay Nand and Ashish Tiwari, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, J.

1. The National Highways Authority of India ("NHAI") is aggrieved by the Arbitral Award dated 31st October 2012 and a subsequent order dated 16th December 2012 of the Arbitral Tribunal ("AT") allowing the claim of the Respondent Afcons Infrastructure Ltd. ("Claimant") and directing the NHAI ("Employer") to pay the Claimant a sum of Rs. 1,91,53,304 deducted from the Interim Payment Certificates (IPCs) towards increase in royalty charges on "rock, sand and murum" along with simple interest at a rate of 12% per annum ("pa") from the respective dates of deductions from the IPCs till the date of the Award. Additionally, the NHAI was asked to pay the Claimant Rs. 4,45,425 towards the payment of bank charges on bank guarantees furnished by the Claimant with simple interest at 12% pa from the date of payment till the date of the Award. By the subsequent order dated 16th December 2012, the Arbitral Tribunal ("AT") rejected an application filed by the Petitioner under Section 33 of the Arbitration and Conciliation Act, 1996 ("Act") on the ground that it was not maintainable.

Background facts

The work of construction of four-laning of Km 340 to Km 404 Kaveri to Hubli Section of NH-4 in the State of Karnataka was awarded by NHA to the Respondent under a letter of acceptance dated 28th March 2001. It was an item rate contract. The indicative value of the work as per the bill of quantities (BOQs) enclosed with the tender was Rs. 183,65,82,676. After the award of the contract an agreement dated 22nd May 2001 was executed by the parties.

2. The clauses of the said agreement, relevant to the present petition are as under:

"(A) Instructions to Bidder:

i. Clause 13.3: All duties, taxes, and other levies payable by the Contractor under the Contract, or for any other cause shall be included in the rates, prices and total Bid price submitted by the Bidder.

ii. Clause 13.4: The rates and prices quoted by the Bidder are subject to adjustment during the performance of the contract in accordance with the provisions of Clause 47 of the Conditions of Contract.

iii. Clause 29.4: The estimated effect of the price adjustment conditions under Clause 47 of the Conditions of Contract, during the period of implementation of the Contract, will not be taken into account in Bid evaluation.

B) Conditions of Contract:

1. Clause 1.1

i. The Contract Price is the price stated in the Letter of Acceptance and thereafter as adjusted in accordance with the provisions of the Contract.

ii. The Initial Contract Price is the Contract Price listed in the Employer's Letter of Acceptance.

Clause 32.1: The Contractor is to warn the Engineer at the earliest opportunity of specific likely future events or circumstances that may adversely affect the quality of the work, increase the Contract Price or delay the execution of the Works. The Engineer may require the Contractor to provide an estimate of the expected effect of the future event or circumstances on the Contract Price and Completion Date. The estimate is to be provided by the Contractor as soon as reasonably possible.

Clause 44.1: The following are Compensation Events unless they are caused by the Contractor.

i. The Employer does not give access to a part of the site by the site possession date stated in the contract data.

In case the Employer or service provided organisation is restrained by a Court Order from cutting of trees/shifting of utilities/removal of encroachment etc., it shall be compensation event.

- ii. The Employer modifies the schedule of other Contractors in a way which affects the work of the Contractor under the Contract.
- iii. The Engineer orders a delay or does not issue drawings, specifications or instructions required for execution of works on time.
- iv. The Engineer instructs the Contractor to uncover or to carry out additional tests upon work which is then found to have no Defects.
- v. The Engineer does not approve for a subcontract to be let, within 15 days.
- vi. Ground conditions are substantially more adverse than could reasonably have been assumed before issuance of Letter of Acceptance from the information issued to Bidders (including the Site Investigation Reports), from information available publicly and from a visual inspection of the site.
- vii. The Engineer gives an instruction for dealing with an unforeseen condition, caused by the Employer, or additional work required for safety or other reasons.
- viii. The advance payment is delayed, beyond 28 days after receipt of application and acceptable bank guarantee.
- ix. The effect on the Contractor of any of the Employer's Risk.
- x. The Employer unreasonably delays issuing a Certificate of Completion.
- xi. Other Compensation Events listed in the Contract Data or mentioned in the Contract.

Clause 45.1: The rates quoted by the Contractor shall be deemed to be inclusive of the sales and other taxes that the Contractor will have to pay for the performance of this contract. The Employer will perform such duties in regard to the deduction of such taxes at source as per applicable law.

Clause 47 Price Adjustment:

This Clause is applicable only for those projects with completion period of more than one year.

Clause 47.1: The Contract Price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures and as per formula given in the Contract Data:

- i. The price adjustment shall apply for the work done from the start date given in the Contract data upto end of the initial intended completion date or extensions granted by the Engineer and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor.
- ii. The price adjustment shall be determined during each month from the formula given in the Contract Data.

Clause 47.2: To the extent that full compensation of any rise or fall in costs to the Contractor is not covered by the provisions of this or other clauses in the Contract, the unit rates and prices included in the Contract shall be deemed to include amounts to cover the contingency of such other rise or fall in costs.

3. The bid of the Joint Venture ("JV") was accepted by the NHAI and the aforesaid work was awarded to it for a contract value of Rs. 183,65,82,676 by the NHAI's letter of acceptance dated 28th March 2001. Pursuant thereto the contract dated 22nd May 2001 was entered into between the parties. Subsequent to the award of the work the JV merged with the Respondent.

4. The work commenced on 30th June 2001 and was to be completed within 30 calendar months i.e. by 29th December 2003. The work ultimately was completed on 29th February 2008.

5. Disputes arose between the parties on account of a claim by the Respondent for reimbursement of the additional cost relating to enhanced royalty charges on materials such as stone, sand and gravel/murram etc. The Government of Karnataka by way of two amendments to the Karnataka Minor Mineral Concession Rules 1994 enhanced the royalty charges on the aforementioned items. This was done first by notification dated 2nd June 2003 made effective from 10th June 2003 and again on 23rd June 2007. In terms of Clause 32.1 of the General Conditions of Contract ("GCC"), the Respondent notified the NHAI of the first increase by letter dated 17th September 2003. However, the claim was rejected by the Engineer by letter dated 27th October 2003.

The decision of the PRE

6. In terms of Clause 45.1 of the GCC the said dispute was referred by the Respondent to the Dispute Review Expert ("DRE") for its recommendations on the said dispute. On 26th May 2005 the DRE made its recommendation in favour of the Respondent holding that the Respondent was entitled to payment on account of enhanced rate of royalty on minerals. The DRE noted Clause 13.4 and held that the rates quoted by the bidder were subject to the price adjustments during the performance of the contract in terms of clause 43 of the conditions of contract. The said price adjustment was for increase or decrease in the rates or price or as a labour materials, fuel and lubricants as per the formula given in the contract. The DRE also referred to the specific query addressed by the NHAI to its Economic Advisor whether "minerals, earth, murram, aggregates, sand, stones etc. were included in the commodity basket of WPI". The DRE then referred to the Economic Advisor's letter dated 27th November 2003 stating that none of those items were included in the commodity basket. The DRE concluded, and in the considered view of the Court rightly, that "royalty charges for minor produce are not included in the WPI Basket".

7. The DRE drew a distinction between a "deemed contingency" in terms of Clause 47.2 which had to be anticipated by the contractor while quoting the price and the situation of increase on account of future events and circumstances in

terms of Clause 32.1. The opinion of the Economic Advisor having been sought by the NHAI on whether the increase in royalty was covered under the WPI Basket, it could not be said that it was in the nature of a contingency in terms of Clause 47.2 since it was a factor "well deliberated and in this case by the Economic Advisor of the Union of India and State Governments." Under Clause 32.1, a warning has been given by the Respondent to the NHAI about the impending increase in the contract price as a result of enhancement of the royalty price requiring the Engineer to take cognizance of the effect of such increase in royalty charges on the contract price and make necessary adjustment. The contractor could not have possibly anticipated, at the time of submitting a bid, such increase in the rates of royalty on minor amendments.

Award of the AT

8. Dissatisfied with the decision of the DRE, the NHAI referred the dispute in terms of the Clause 25.3 of the GCC to a three-member AT. The findings of the AT, in its impugned Award dated 31st October 2012, could be summarised thus:

(i) The Respondent would be responsible for payment of Royalty charges during the stipulated period of 30 months at rates prevailing at the time of tender bidding and also at increased rate published by Government of Karnataka effective from 10th June 2003, up to the end of the contract period of 30 months. The reason was that in terms of Clause 45.1 of the GCC, the Respondent was responsible for "all levies, including all additional ones imposed during the stipulated period the Contract". However, for the period beyond the stipulated period i.e., beyond 29th December 2003, the royalty charges at enhanced rates shall be borne by the NHAI.

(ii) Accordingly, the enhanced royalty charges recovered by the NHAI from the extended period i.e., beyond 29th December 2003 up to 29th February 2008 should be reimbursed to the Respondent in full together with the interest thereon. NHAI was further directed to pay Rs. 4,45,425 towards the payment of bank charges on bank guarantees furnished by the Respondent together with the simple interest at a rate of 12% pa from the date of the payment of the bank guarantee charges till the date of the Award. Future simple interest at the rate of 15% pa was directed to be paid on the principal sum awarded in the event the NHAI did not pay the amounts within 90 days from the date of the publishing of the Award.

Submissions of Counsel for NHAI

9. Ms. Ayushi Kiran, learned counsel for the Petitioner first submitted that the finding of the learned AT was contrary to the clauses of the contract. According to her while AT on interpreting Clauses 45 and 47.2 of the contract correctly held that the Respondent would be responsible for all levies including all additional ones up to the stipulated date of completion, the AT erred in holding the Respondent to be entitled to reimbursement of enhanced royalty for the extended period of the contract i.e. beyond 30th December 2003. According to

her, the AT failed to appreciate that the price adjustment formula in the contract made no distinction between the original stipulated period and the extended period. The AT erred in restricting the applicability of Clause 45.1 only up to the stipulated date of completion. Further it erred in reading Clause 47.2 in isolation of Clause 47.1. She pointed out that the Respondent has not challenged that portion of the Award which denied it the claim for reimbursement of enhanced royalty rates up to the stipulated date of completion.

10. Secondly, Ms. Kiran submitted that the AT erred in holding that the delay in completion of the contract beyond the stipulated period was attributable to NHAI when in fact that question was, at the relevant time, pending determination before a different Tribunal. It was, therefore, beyond the scope of the present reference. She pointed out that the Respondent had in fact not made any claim before the AT on the basis of the alleged delay i.e. idling of machinery and manpower. Those claims were being considered by another Tribunal. A separate Award dated 5th March 2013 between the same parties regarding the same stretch of NH-4 dealing with the issue of compensation for delay in terms of Clause 44.1 of the contract. Further, that Award was subject to challenge in OMP No. 629 of 2013.

11. Thirdly, Ms. Kiran pointed out that the basic premise of accrual of royalty charges due to the alleged delay caused by the Petitioner was not addressed before either the DRE or the AT by the Respondent. Even the statement of claim of the Respondent made no reference to reference to Clause 44 which dealt with the compensation on account of delay. In particular she referred to para 1.8 of the statement of claims where the Respondent made a statement to the effect that it was not necessary to deal with specifics of the various delays except to state "the above stated delays on the part of the Petitioner/Employer entitled the Respondent/Contractor inter alia to seek extension of time to complete the contract work."

12. Ms. Kiran submitted that the finding of the AT in para 12.4 of the Award regarding non imposition of the liquidated damages ("LD") by NHAI for extension of time granted to the Respondent was contrary to the factual position. NHAI granted the Respondent time up to 29th February 2008 subject to imposition of LD of 10% of the initial contract. The application filed by NHAI before the AT under Section 33 of the Act seeking clarification in this regard was dismissed by the AT by order dated 16th December 2012 only on the ground that the said letter was fresh evidence.

Submissions of Senior Counsel for the Respondent

13. Mr. Sandeep Sethi, learned senior counsel appearing for the Respondent, at the outset submitted that the question of the applicability of Clauses 32.1 and 45.1 of the contract in the context of revision of royalty/levies of tax subsequent to the award of the contract was no longer res integra as far as this Court is concerned. He referred to the decision dated 2nd July 2008 of the learned Single

Judge in OMP No. 123 of 2007 (NHAI v. Afcons Infrastructure Ltd.) and the affirming decision dated 17th August 2009 of the Division Bench ("DB") of this Court in FAO No. 455 of 2008 (NHAI Vs. Afcons Infrastructure Ltd.) affirming the said judgment, and the subsequent judgment dated 27th April 2012 in OMP No. 497 of 2006 (NHAI Vs. Afcons Infrastructure Ltd.). He submitted that the Court consistently held that the burden arising out of the enhanced royalty charges, where such increase occurred subsequent to the submission of the bid by the contractor, had to be borne by NHAI. It cannot be asked to be borne by the contractor. He submitted that NHAI was itself a party to the aforementioned decisions which were binding on it. Although the decision dated 27th April 2012 of the DB was pending challenge in the Supreme Court, there was no stay of its operation. Therefore, the legal position as of date as far as this Court is concerned is governed by the decision dated 17th August 2008 of the DB. Mr. Sethi pointed out that the aforementioned decisions made no distinction between increases that occurred imposition occurred during the "original stipulated period" or during "extended period".

14. Mr. Sethi submitted that extensions of time were granted by NHAI to the Respondent up to 29th February 2008 without levy of LD. Additionally, NHAI also paid the price adjustment to the Respondent during the extended period of the contract. This was because there was no dispute that the reasons for delay were attributable to NHAI and not the Respondent. Narrating the sequence of events he pointed out that the first revision in royalty took place, after the award of the contract to the Respondent, on 2nd June 2003 when a notification was issued by the Government of Karnataka. In terms of Clause 32.1 of the contract, the Respondent notified NHAI of the said increase and this was "early warning" in terms of Clause 32.1. In response thereto, the engineer of the NHAI reply stated that under Clause 45.1 the rates quoted would be deemed to be inclusive of the sales tax and the contractor would have to pay the enhanced royalty. The Engineer recovered the royalty charges based on the old royalty rates but not the increased royalty based on the revised rates. However, after the second notification dated 22nd June 2007 of the Government of Karnataka enhancing the royalty rates for a second time, the Engineer started to recover the enhanced royalty charges as per the revised rates through IPCs.

No estoppel against the Respondent

15. In the first instance, the Court would like to deal with the plea that the Respondent not having challenged that portion of the Award of the AT denying it the relief of reimbursement of the enhanced royalty recovered from the IPCs for the period up to the scheduled date of completion, cannot be now heard to defect a decision of the AT granting relief for the extended period. The explanation given by Mr. Sethi that the Respondent took a conscious business decision not to challenge the impugned Award of the AT to the extent that relief was denied to it as it wanted to end litigation is plausible. At the same time, having given up its claim to that extent, the Respondent cannot now seek to

renew its demand for reimbursement of enhanced royalty charges deducted from IPCs up to the date of completion of the contract.

Previous decisions of this Court

16. The central question for consideration is whether, as contended by NHAI, the AT erred in granting relief to the Respondent in respect of reimbursement of enhanced royalty charges during period beyond the stipulated date of completion. In order to appreciate this plea, it is necessary to examine Clause 45.1 of the GCC.

17. The above clause was interpreted first in the decision of the learned Single Judge of this Court on 2nd July 2008 in OMP No. 123 of 2007 between the same parties. The Court held that the contractor was responsible for all levies up to the date of submitting of the bid and not for any enhancement in rates subsequent thereto. The Court made no distinction if such enhancement in the levy was prior to the scheduled date of completion or thereafter. This order was upheld in toto by the DB by its decision dated 17th August 2009. It was categorically held that the new levies "could not have been in the contemplation of the contractors when they submitted their bids. Therefore, there was no question of them including any amount towards such cess in their bids". The DB categorically held as under:

"The learned Single Judge was right in concluding that though the effect of taxes and increase in any such taxes had to be factored into the bids submitted by the contractors, they related only to existing taxes and not to levies which were not even in contemplation of either party. The Arbitral Tribunal had also held that Clause 45.1 has to be read along with Clause 32.1 and it does not supersede Clause 32.1. The Arbitral Tribunal further held that introduction of cess by Karnataka Government was made subsequent to date of start of this contract and is covered under future events under Clause 32.1. The view of the Arbitral Tribunal which was upheld by the learned Single Judge was definitely a plausible view and thus, warrants no interference."

18. This Court subsequently in an order dated 27th April 2012 in OMP 497 of 2006 (NHAH Vs. Ircon International Ltd.) while deciding a similar issue followed the above decisions. A reference was made to an earlier decision in NHAI Vs. ITD Cementation (2008) DRJ 431 (DB). As far as this Court is concerned, the consistent view has been that the contractor would be entitled to reimbursement on account of the increase in the rate of royalty brought about by change in the rules or legislation after the contract came into existence.

Interpretation of Clause 45.1

19. Clause 45.1 states that "The rates quoted by the Contractor shall be deemed to be inclusive of the sales and other taxes that the Contractor will have to pay for the performance of this Contract." The "sales and other taxes" obviously are those that are payable on the date of submission of the bid. It cannot possibly

include increase in rates of taxes, levies and royalties that take place subsequent to the submission of the bid. No doubt, Clause 47.1 is meant to take care of contingent increases "in rates and price of labour, materials, fuels and lubricants" but as clarified by the Economic Advisor to the Union of India in his letter dated 27th November 2003 to NHAI, the commodity basket of WPI did not include "minerals, earth, murrum, aggregates, sand, stones etc." In other words the increase in royalty rates was not covered by the price adjustment Clause 47.1. NHAI's Engineer proceeded on this understanding as is evident from the fact that up to 22nd June 2007 (i.e. IPC 21 to 67) he continued to recover royalty at the rates prevalent on the date of bidding. It is only thereafter that the Engineer unilaterally started to recover royalty charges as per the revised rate and this is what led to the dispute which came to be referred to the DRE.

20. From a reading of the clauses in the contract, it is not possible to draw a distinction between the increases in royalty that take place in the period subsequent to the date of the contract and up to the stipulated date of completion and those that take place in the period beyond the stipulated date of completion. In other words, there is nothing to suggest that the increases in royalty that take place up to the stipulated date of completion would have to be borne by the contractor and those beyond that date by the Employer. The contractor could not have anticipated, on the date of submission of the bid, what changes in rates of royalty might be brought about legislatively by a state government. Consequently, the price quoted could not have accounted for such increases. As long as the increase took place after the submission of the bid, the burden as a result of such increase cannot be expected to be borne by the contractor. Where extensions have been granted by NHAI for completion of the work, in terms of the clauses in the contract, then all such increases in royalty rates during the extended period, again brought about through legislation or notification of a state government cannot also be expected to be borne by the contractor. In that sense this is not a "contingency" in respect of which the price adjustment Clause 47.1 can be invoked.

21. Consequently the Court is unable to concur with the conclusion of the AT in para 12.3 of the Award that "in terms of Clause 45.1 the rates quoted by the contractor could hold good till the stipulated date of the completion of the contract and that the expression "inclusive of sales and other taxes should be treated as such taxes both "at the existing and enhanced rates" till the date of the completion of the contract. It is on this erroneous reasoning that the AT came to the conclusion that for increase in royalty charges up to the stipulated date of completion there was "no question of reimbursement". Therefore, notwithstanding the fact that the Respondent may not have challenged the impugned Award of the AT to the extent of denial of the enhancement of the royalty charges up to the stipulated date of completion, the Court is of the view that the AT was wrong in its conclusion that the increases in royalty rates beyond the date of contract and up to the stipulated date of completion need not be reimbursed to the contractor.

Recovery of enhanced royalty rates beyond stipulated date of completion

22. Coming to the period beyond the stipulated date of completion, the AT appears to have erred in linking up the question of the reimbursement of the enhanced royalty rates to the question whether the delay was attributable to the Respondent or NHAI. The AT proceeded to list out in para 12.5 of the Award the reasons for the delay in completion of the contract by 50 calendar months and the entitlement of the Respondent to compensation under Clauses 21.1 and 44.1 of the contract. The AT also noted that as for extensions were granted without levy of LD "but the full payment to escalation at indices prevailing at the time of monthly payments". This led to the inference that the extension of time was for reasons attributable to NHAI.

23. The possibility of there being delay at different stages of the work attributable to acts or omissions of the Employer is anticipated by Clause 44 which talks of "compensation events". There could be delays for e.g., in handing over the site, in approving drawings, in releasing advance payment, in issuing a certificate of completion. Whether such a "compensation event" has occurred was certainly not the subject matter of the reference before the AT in the present case. As rightly pointed out by learned counsel for NHAI, the question whether the delay was on account of NHAI, and whether the Respondent was entitled to compensation for such delay, was pending adjudication in another Tribunal.

24. Learned counsel for NHAI referred to documents filed along with NHAI's application under Section 33 before the AT to urge that NHAI granted the Respondent extension of time for completion of the work only after imposing LD. On the other hand, Mr. Sethi referred to other documents which showed that many extensions granted were without imposing LD. He pointed out that till date NHAI had not filed any claim against the contractor for LD. However, the Court is of the view that this question was not required to be examined in these proceedings. Consequently, the Court is of the view that no error was committed by the AT in rejecting NHAI's application under Section 33 of the Act by the order dated 16th December 2012.

25. A copy of the Award dated 5th March 2013 passed by the other Tribunal in the dispute between NHAI and Respondent has been placed on record. Claim No. 1 was for a sum of Rs. 19,21,47,284 "on account of compensation for repair of distress pavement", and claim No. 2 was for sum of Rs. 18,87,08,518 "on account of compensation for differing ground conditions in respect of quarries". Para 3 of the said Award notes that "the issue relating to causes and parties responsible for delay is not subject matter of the disputes covered by the present arbitration and is the subject matter of another arbitration proceedings" between the Claimant and the Respondent pending before another Tribunal. Therefore, the question as to who is responsible for the delay was not the subject matter of the Award dated 5th March 2013 as well. As far as the other arbitration proceedings are concerned, it is clear that the claim of the Respondent for reimbursement of enhanced royalty charges was not the subject matter of the

claim there.

26. In the considered view of the Court, it was not necessary for the AT in the present case to have gone into the question whether the delays were occasioned by the NHAI or by the Respondent. That was not the subject matter of the Respondent's claim before it. The Respondent's claim for reimbursement of enhanced royalty charges could have been decided by the AT with reference to Clauses 32.1 and 45.1. There was no dispute that extensions were granted by NHAI up to the actual date of completion i.e. 29th February 2008. The claim was for reimbursement of enhanced royalty charges up to that period. Irrespective of who was the responsible for the delay, claim for enhancement of royalty charges would have been admissible since such enhancement could not have been anticipated by the contractor at the time of the submission of the bid.

Conclusion

27. The decision of the AT by the impugned Award dated 31st October 2012 to allow the claim of the Respondent for reimbursement of enhanced royalty charges for the period between the stipulated date of completion and the actual date of completion of the work was perfectly valid. No legal error has been committed by the AT which requires interference by the Court under Section 34 of the Act. The petition is dismissed with costs of Rs. 10,000 which will be paid by NHAI to the Respondent within four weeks from today.