

(2017) 02 DEL CK 0133
In the Delhi High Court
Case No : FAO(OS) 21 of 2017

National Highways Authority of India

APPELLANT

Vs

Gammon Atlanta (JV)

RESPONDENT

Date of Decision : 20-02-2017

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 13(5), Section 16(6), Section 34, Section 5

Citation : (2017) 2 ADDelhi 565

Hon'ble Judges : Mr Badar Durrez Ahmed and Mr Ashutosh Kumar, JJ.

Bench : Division Bench

Advocate : Mr. Ramesh Kumar, Advocate, for the Appellant; Mr. Sumit Goel with Mr. Akash Jindal and Ms Raveena Rai, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Ashutosh Kumar, J.—CM 2336/2017 (Exemption) Allowed, subject to all just exceptions.

FAO(OS) 21/2017

The appellant, NHAI, has challenged the judgment of the learned single Judge dated 15.11.2016 whereby the two OMPs, one filed by the appellant (OMP No.107/2008) and the other by the respondent (OMP No.99/2008) was disposed of by a common judgment.

2. The appellant had put up a challenge to the award with respect to the claim Nos.1.1, 1.4, 1.5, 1.9, 2.1 and 2.2, all of which have been upheld by the learned single Judge

3. The appellant, in October, 2000 had invited bids on International Competitive bidding basis for a contract package OR-1 for widening of 4/6 lanes and strengthening of existing 2 lane carriageway of NH-5 in the State of Orissa from 387.700 Kms to 414.00 kms (Khurda-Bhubneshwar).

4. The respondent namely Gammon Atlanta JV was held to be successful in its bid and the contract of agreement between the appellant and respondent was signed on 20.12.2000.

5. The contract contained "Conditions for Particular Application (hereinafter called as COPA) and Technical Specifications (TS)" where under some general conditions of the contract were amended. The term of the contract was for 36 months beginning from 15.01.2001 to 14.01.2004. The total contract price was Rs.118,90,10,112/-.

6. Because of certain disputes having arisen between the parties, the arbitration clause was invoked by the respondent; whereupon the disputes were referred to a three member Arbitration Tribunal (AT).

7. We are concerned, in the present appeal, with the award given on claims No.1.1, 1.4, 1.5, 1.9, 2.1 and 2.2.

8. Claim No.1.1 pertained to payments which were made by the respondent as hiring charges for site office for the engineer which, according to the appellant was not reimbursable. The claim of the respondent was based on the fact that Bill of Quantities (BoQ) item Nos.8.15 and 8.16 required the respondent to provide for site office for engineer including furnishing the office as per drawing and technical specifications. Because the land was not made available for such construction, an alternative arrangement was made by the respondent by hiring a building and which arrangement was accepted by the appellant. The respondent, therefore, sought payment for the aforesaid work with price adjustment as also the interest for delayed period for Rs.7,92,670/- by way of declaratory award. Maintenance charges were also claimed for subsequent period till completion of work.

9. The aforesaid claim was contested by the appellant on the ground that such claim was not covered under BoQ items Nos.8.15 and 8.16 and construction and maintenance of field lab at PIU by the respondent was only incidental to the work and therefore, no separate payment was admissible as per general TS and supplementary TS (Clause 121.1).

10. The Arbitral Tribunal directed for filing of a copy of the lease agreement dated 14.02.2001 of the office building which disclosed that a monthly rental of Rs.18,000/- was paid by the respondent along with an interest free deposit of Rs.54,000/-. The lease was renewable on mutually agreed terms. The rent was paid for more than four years. The respondent (claimant) did not place any other document regarding enhancement of the rent. The Arbitral Tribunal accepted and allowed the claim of the respondent with respect to the rent paid for the site office as well as towards maintenance. The learned single Judge did not find any perversity in the decision arrived at by the Arbitral Tribunal. We do not find any fault with the assessment of the learned single Judge.

11. Claim No.1.9 of the respondent related to payment of cost for reinforcement

in crash barrier and friction slab. BoQ item No.8.29 required construction of RCC crash barrier monolithic with friction slab M-30 as per approved drawing and technical specification and included the cost of necessary material, framework and reinforcement. The unit for payment was linear metre. However, the relevant drawing tendered at the time of the pre-bid meeting did not show any reinforcement in the crash barrier but only friction slab was shown without reinforcement. The respondent (claimant) contended that reinforcement in the concrete crash barrier and friction slabs were provided on the instructions of the engineer. Since at the time of tendering, no reinforcement was shown in the relevant drawing for the crash barrier, the same was not included in the quoted rate and it was only imperative for the appellant to have paid for the same. The appellant, had countered before the Arbitral Tribunal that since the wordings of BoQ item No.8.29 and the drawings provided to the respondent did not include any reinforcement or friction slab, therefore, the same was not payable separately. It was also canvassed that technical specifications in clause 809.6 stipulated for minimum reinforcement conforming to IRC-21.

12. The AT directed the parties to furnish rate analysis of BoQ No.8.29 at the time of tendering as also at the time of detailed project report stage. The AT found that sub clause 5.2.2 of COPA, the terms of the bid, appendix to the bid and addenda had a preference over technical specifications, drawings and the priced BoQ. IRC 21 (Clause 305.19) laid down minimum reinforcement to be provided. The AT therefore, was of the view that even though the drawing at the time of tendering did not show any reinforcement in the crash barrier, the claimant was duty bound to include at least minimum reinforcement in the crash barrier and was justified in quoting the rate for the same accordingly. Even with respect to payment, the AT devised a formula of making payments separately in addition to the payment released under BoQ item No.8.29 towards reinforcement used in the crash barrier in excess of 0.8% of all the weight of concrete in crash barrier.

13. The learned single Judge rejected the argument of the appellant that the respondent was wrongly compensated and at best over compensated and upheld the award of the AT. We do not feel inclined to disturb the findings of either the Arbitral Tribunal or the learned single Judge for the reasoning accorded appears to be just and in tune with the requirements of tendered document.

14. The appellant had challenged the award with respect to claim No.1.4 which related to payment of additional cost of GSB (Granular Sub Base) and WMM (Wet Mix Macadam) in Profile Corrective Course. The relevant BoQ item No.4.04 reads as follows:-

"Providing and laying profile corrective course with dense bituminous macadam complete as per drawing and technical specification Clauses 501 & 507."

The appellant had directed the respondent to lay down profile corrective course using GSB and WMM in certain stretches. However, the payments were only

made in terms of rates mentioned in BoQ item Nos.3.01 and 3.02. It was argued by the respondent that the rates for profile corrective work in GSB/WMM could not be the same as the rates in BoQ item Nos.3.01 and 3.02 which was for the work done in normal course. Profile correction required different rates of GSB and WMM. On the contrary the appellant insisted upon the same being covered under BoQ item Nos.3.01 and 3.02. The Arbitral Tribunal rejected the contention of the appellant and held that the work of GSB/WMM in profile correction are not covered under BoQ item Nos.3.01 and 3.02 and required to be paid separately. Considering the nature of work of profile correction in GSB and WMM layers, the Arbitral Tribunal awarded 10% extra over the rates of item Nos.3.01 and 3.02. The learned single Judge rightly rejected the contention of the appellant and upheld the award with respect to the aforesaid claim.

15. The challenge to the award with respect to claim No. 1.5 (payment at revised rates for the construction of additional flyover No.5 at Jaydev Vihar at Km 418) could also not succeed before the learned single Judge. The engineer had recommended for revised rates with detailed rate analysis. The Appellate Tribunal, on going through the contract clause 52 regarding valuation of variations was of the view that it was Engineer's prerogative to fix the rates after consultation with the employer and the contractor. The engineer had actually fixed the rates which was accepted by the appellant. The Arbitral Tribunal found that since the engineer's rate analysis was a detailed one and was not faulty, the same ought to be relied upon.

16. The learned single Judge rightly affirmed the award and we do not wish to interfere on that count as well.

17. Claim Nos.2.1 and 2.2 dealt with compensation for losses incurred on account of overheads and expected profits for reduced productivity of machinery and equipment deployed. The tendered rates included provision for overheads and profits at 27.28% of the tendered cost. It also included a provision for 14.28% towards overheads. The claim of the respondent was not challenged seriously and, therefore, the Arbitral Tribunal, as held by the learned single Judge, rightly accepted the overheads at 14.28%. Thus on the count of overhead, Rs.37 crores was awarded and for delay in handing over the site, Rs.5.28 crores was awarded.

18. With respect to claim for loss of profit, the Arbitral Tribunal rightly observed that even though the details regarding deployment of machinery and equipment showed that machinery and equipment were deployed as per approved programme but the respondents also were responsible, in some measure for under utilization of machinery which was occasioned because of various factors namely repairs, non availability of complementary units, inadequate supply of basic materials etc. In the opinion of the Arbitral Tribunal, work to the extent of Rs.37 crores was not completed due to default of the appellant in handing over the site but the respondent could not be compensated on this account to the extent of 10% as machinery component. The AT, therefore, awarded 5% as

machinery component. The aforementioned award has not been found to be perverse or contrary to record by the learned single Judge. We also do not find any anomaly in the reasonings given by the Arbitral Tribunal and the assessment by the learned single Judge.

19. The argument of the learned counsel for the appellant that the learned single Judge completely overlooked the errors committed by Arbitral Tribunal has only been noted to be rejected. The parameters for interfering with an award of the AT is ingrained in Sections 5 and 34 of the Arbitration and Conciliation Act, 1996. Section 34 clearly stipulates that an arbitral award could be set aside under certain conditions enumerated in the section and no other; those conditions being primarily with respect to process through which the award is delivered and not actually on the merits of the award. As stated earlier Section 5 of the Act which deals with the extent of judicial intervention clearly mandates that no judicial authority shall intervene except where so provided in the Act. The aforesaid provisions of the Act are aimed at ensuring that the AT operates within its jurisdictional limits and provides reasons for the arbitral award. This, in turn, would pave way for minimum judicial intervention. The only area where the merits of an arbitral award could be gone into is Section 2(b)(ii) of Section 34 of the Arbitration and Conciliation Act, 1996 which contemplates assessment of an award for being rescinded if the award is in conflict with the public policy of India. The concept of "Public Policy" includes fundamental policy of Indian Law, interests of India, Justice or morality and the legality of the award. If an award is contrary to the fundamental policy of Indian law or against the interests of India or against morality or if it is patently illegal, it could be challenged under Section 13(5) and Section 16(6) of the Act.

20. A Court of law does not sit in appeal over an award of the Arbitral Tribunal by reassessing or reappraising the evidence. The learned single Judge has gone in detail and has examined each and every claim under challenge and has found the assessment of the Arbitral Tribunal to be fair and just.

21. We have also given our anxious consideration over the issues and did not find any anomaly with either the award or the judgment of the learned single Judge.

22. Thus, finding no merit in the appeal, we dismiss the same.

1. In view of the appeal having been dismissed, the application has become infructuous.

2. The application is disposed of accordingly.