

(2018) 12 DEL CK 0172

In the Delhi High Court

Case No : First Appeal from Order (OS) (COMM) 154 Of 2017, Civil
Miscellaneous No. 27595 Of 2017

National Highways Authority Of India

APPELLANT

Vs

Hindustan Construction Co Ltd

RESPONDENT

Date of Decision : 07-12-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2)(b)(ii), 37

Citation : (2018) 12 DEL CK 0172

Hon'ble Judges : Rajendra Menon, CJ;V. Kameswar Rao, J

Bench : Division Bench

Advocate : Adarsh B. Dial, Shubham Shanker Saxena, Ankur, Dayan Krishna,
Rishi Agarwal, Shruti Arora, Sannjeev

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J

1. This appeal has been filed by the appellant challenging the order dated April 20, 2018 passed by the learned Single Judge in OMP (COMM) No.156/2016, whereby the learned Single Judge, vide a common judgment, has also decided O.M.P. Nos. 1165/2014 and 1556/2014.

2. Mr. Adarsh B. Dial, learned Senior Counsel appearing for the appellant has made a submission that the appeal against the O.M.P.No.1556/2014, being FAO(OS) 192/2017 has been dismissed by this Court. He also states that out of four claims in the present appeal, three claims being claim Nos.1, 2 and 3 are common to claim Nos.1, 3 and 4 in OMP (COMM) 1556/2014 (FAO (OS) 192/2017). According to him, the Division Bench of this Court having dismissed the FAO (OS) 192/2017, this appeal should also follow the same outcome.

3. We may state that while deciding the OM(COMM) 156/2016, the learned Single Judge has on claim No.1, which is with regard to fixing of claim number of new / appropriate rate for varied works of construction of the embankment at

Ramsnehighat Bypass with borrow earth obtained from the contractor's borrow areas, in place of flyash embankment as provide for in the contract, which is similar to claim No.1 in FAO (OS) 192/2017 which claim states as under:

"Re. Claim No.1- "Non-Approval of appropriate rates for the varied works of construction of embankment o Faizabad bypass with earth obtained from Contractor's own borrow pit".

4. On this claim, the learned Single Judge has held as under:

"11. In this context, the Court would like to refer to the following findings of the impugned majority Award:

a. The substitution of earth embankment in place of flyash embankment was a change in the scope of work. This change was required to be regularised by a variation order.

b. The Engineer was not correct in certifying the quantities of embankment at Ramsnehighat Bypass with earth obtained from the Contractor"s borrow area at the rates agreed against Item No. 2.02 of the BOQ.

c. The action of the Engineer in directing the use of borrow earth instead of flyash to complete the construction of the Ramsnehighat bypass embankment was driven by economic considerations in the interest of NHAI. It was a change in the scope of work and called for the fixation of a new rate.

12. After accounting for the payment made in Interim Payment Certificates ("IPCs"), a sum of Rs. 3,43,77,450 was found by the majority Award to be payable by NHAI to HCCL. In addition, HCCL was held entitled to interest at 12% per annum compounded monthly on all the amounts due from the date of cause of action till the date of payment in terms of Sub-Clause 60.8 of the COPA read with Appendix to Bid.

13. It must be noted at the outset that the settled legal position is that the scope of interference by the Court with an arbitral Award under Section 34 of the Act is extremely limited. In NHAI v. ITD Cementation (2015) 14 SCC 21, the Supreme Court explained:

"25. It is thus well settled that construction of the terms of a Contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the Contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the Contract in such a way that no fair minded or reasonable person could do."

14. The majority Award came to a definite conclusion that the decision of the Engineer by his letter dated 20th March, 2007 instructing HCCL to use borrow earth instead of flyash would result in a saving of additional cost of Rs. 6 crore by NHAI. It was for this reason that the majority concluded that this decision was

for the commercial and economic benefit of NHAI. Indeed, the original scope of the work envisaged the embankment at the Ramsnehighat Bypass being constructed entirely of flyash. Therefore, the above instruction of the Engineer could not be considered as a mere variation in the quantity of work.

15. The submission that the total cost of the item executed was only 1.696% of the contract price, which was less than 2% of the contract price and, therefore, no revision in the rate was called for overlooks the fact that this was not a mere change in the quantity and, correspondingly, a change in the price but a change in the scope of the work itself. The view taken by the majority AT was an entirely plausible one and cannot be said to be perverse warranting interference under Section 34(2)(b)(ii) of the Act."

5. The Division Bench in FAO (OS) 192/2017 has in Paras 9.1, 9.14 and 9.15 held as under:

9.1 This claim related to construction of the embankment of the Faizabad bypass. The BOQ contemplated construction of the said embankment using fly-ash. Contending that the quantity of fly-ash stipulated in the contract was insufficient to construct the embankment, the respondent addressed a communication, dated 11th February 2006, to the Engineer-in-charge of the contract, requesting for revision of the rates mentioned in Item No. 2.08 of the BOQ (supra).

xxx xxx xxx xxx

"9.14 Having perused the Award and the judgment of the learned Single Judge, we express our entire concurrence with the decision, of the learned Single Judge, not to interfere with the findings of the Arbitral Tribunal. On the face of it, it is clear that the contractual clauses contemplated construction of the Faizabad bypass embankment using fly-ash, and that the quantity of fly-ash stipulated in BOQ Item 2.08 was insufficient for construction of the embankment. The respondent appropriately requested for sanctioning of additional quantity of fly-ash to construct the embankment but, in order to minimise its own cost, the appellant directed the respondent to use earth from its own borrow area, instead of fly-ash, to construct the remainder of the embankment. There can be no manner of doubt that such alteration was not contemplated by the contract and had, in fact been directed in contravention of the existing Governmental instructions on the subject. While accepting the said request made by the appellant, the respondent made it unambiguously clear that it would be entitled to a new rate to carry out the said work, as it involved huge additional costs on its part, inter alia for procuring the said borrow earth and transporting to the site of the embankment. The attempt, of the appellant, to apply the rates contained in BOQ Item 2.02, to make payment against the work thus done, was obviously totally misguided, as BOQ Item 2.02 dealt with construction of roads of low height and not of the Faizabad embankment. There was, as the Tribunal correctly noted, a clear distinction between the two items of work. Equally ill conceived was the reliance, by the appellant, on Clause 52.2 of the GCC, which covered

only changes in quantities of the material used in carrying out a particular item of work and not where the scope of the work itself was fundamentally altered by substituting one material by another.

9.15 Our jurisdiction, under Section 37 of the 1996 Act, is even more circumscribed than the jurisdiction of the learned Single Judge under Section 34 thereof. In view of the principles governing such jurisdiction, as set out in our earlier judgment in *M.T.N.L. v. Finolex Cables Ltd* (supra), as also in *NHAI v. ITD Cementation India Limited* (supra), on which the learned Single Judge has rightly relied, we see no reason to adopt a view different from that adopted by the learned Single Judge."

6. Similarly, with regard to claim No.2 which is in *pari materia* to claim No.3 in FAO (OS) 192/2017, the learned Single Judge has held as under:

"16. Claim No. 2 concerned reimbursement of additional cost incurred by the Respondent/Claimant on account of subsequent legislation in respect of imposition of levy of cess in the State of U.P. with effect from 4th February, 2009. This aspect of the impugned Award stands covered entirely in favour of the HCCL and against the NHAI by the decision of the Supreme Court in *NHAI v. ITD Cementation* (supra). Mr. Dial very fairly did not press this part of the challenge to the impugned Award.

7. The Division Bench in FAO (OS) 192/2017 has in Paras 11.5 to 11.7 held as under:

11.5 Having examined the decisions of *NHAI v. ITD Cementation India Limited* (supra) and *NHAI v. Gammon-Atlanta* (supra), we find substance in the submission of Ms. Gunjan Sinha Jain, to the extent that, on facts, the dispute indeed appears to be covered against her client, on merits, by the Division Bench judgment of this Court in *NHAI v. Gammon-Atlanta* (supra). A reading of *NHAI v. ITD Cementation India Limited* (supra) reveals that the controversy before the Supreme Court therein did not deal with an issue where the statute had been enacted prior to the cut off date, and became capable of implementation and enforcement thereafter. The Supreme Court, in that case, was concerned with the question of whether additional cost, owing to change of seigniorage fee had, or had not, been taken into account in the indexing of inputs while providing for price adjustments in the contract. The contention of NHAI, in that case, was that the said levy having already been factored into the indexing price formula, no further payment to the contractor was justified. As against this, we find that the decision of this Court in *NHAI v. Gammon-Atlanta* (supra) directly dealt with a controversy parallelizing that involved in the present case.

11.6 As regards the specific grievance urged by Ms. Jain at the Bar, we note that the learned Single Judge has not specifically stated that, on facts, the present claim is covered by the decision in *NHAI v. ITD Cementation India Limited* (supra). It appears that the impugned judgement has upheld the award of the Arbitral Tribunal on merits, and the reference, to *NHAI v. ITD Cementation India*

Limited (supra) was probably intended to underscore the position that no case for interference existed, given the limited playing field that Section 34 of the 1996 Act provides, with which proposition there can possibly be no cavil.

11.7 Be that as it may, we agree with Ms. Gunjan Sinha Jain, learned counsel for the appellant that, on facts as well as in law, the issue in controversy in Claim No. 3 stands covered by the judgment of the Division Bench of this Court in *NHAI v. Gammon-Atlanta* (supra). At the same time, we hasten to add that even de hors the said judgment, applying the principles regarding the scope of interference, by this Court with arbitral awards, under Sections 34 and 37 of the 1996 Act, as laid down in inter alia, *NHAI v. ITD Cementation India Limited* (supra), we find no reason to differ with the findings of the Arbitral Tribunal, regarding this claim of the respondent.

8. Insofar as the claim No.3 which is in para materia to claim No.4 of FAO (OS) 192/2017, the learned Single Judge has, in the impugned order, held as under:

"17. Dispute/Claim No. 3 concerned withholding of part payment due towards price adjustment on foreign currency portion from IPC. As per Clause 72.2 of the GCC, the payments were to be made in proportion of 87.5% in Indian Rupees and 12.5% in Euros. Clause 70.3(c)(viii) provided for the total value of the work to be expressed as the total value of work in Indian Rupees and value of work in Euro. The Contract stipulated with 15% of the foreign currency portion is fixed and not liable for price adjustment. Accordingly, the adjustable portion towards salaries of expatriate staff and labour, and plant machinery and spares was adjustable being 85% of the foreign currency payment.

18. HCCL submitted its bills after accounting for the 15% non-adjustable portion which was certified by the Engineer till IPC-20. However from IPC 21 onwards, the Engineer revised the certification after applying a factor of 85% over and above the adjustable portion of foreign currency payment corresponding to only 72% of Euro component being adjustable as compared to 85% as permitted by the contract. The AT, on the analysis of the above clauses, held that since both parties had agreed that HCCL would receive payments both in Indian Rupees and in Euros, HCCL was entitled for payment of price adjustment on 85% of foreign currency component and the balance 15% of the foreign currency component was non-adjustable. This non-adjustable foreign currency part has no relation with the reduction factor of 0.85 applicable in the formula for working out the price. It is pointed out that even the Engineer had accepted HCCL's case up to IPC 20 and thereafter unilaterally changed without any basis.

19. According to NHAI, the factor 0.85 was common to all the formula for price adjustment. In other words, it is submitted that the provisions of the Contract are very clear that whatsoever be the value/amount of the price adjustment on the basis of other inputs in the formula, it is to be multiplied by a constant factor of 0.85 to arrive at the net amount payable for the price adjustment in any currency.

20. The view taken by the majority AT that the non-adjustable foreign currency has no relation with the reduction factor of 0.85 applicable in the formula for working out the price adjustment appears to be an entirely plausible view. In fact, the Engineer himself had agreed with this view till IPC 20. NHAI is unable to show on what basis it can be said that the above view of the majority AT is perverse or shocking to the judicial conscience. Going by the settled legal position as explained in *NHAI v. ITD Cementation* (supra) and *Associate Builders v. DDA* (2015) 3 SCC 49, the Court is not inclined to hold that the above determination of the majority attracts any of the grounds set out under Section 34(2)(b)(ii) of the Act. Consequently, there is no merit in the challenge to the impugned majority Award as far as Claim No. 3 is concerned."

9. The Division Bench in FAO (OS) 192/2017 has drawn the following conclusion:

"12.5 The learned Single Judge has opined, in the impugned judgment, that the view of the Arbitral Tribunal is an entirely plausible view and that, in fact, in the contract between the parties, the same view had been adopted by the Engineer, in respect of earlier bills. It is observed, in the impugned judgment, that the appellant was unable to show any basis on which the finding of the learned Arbitral Tribunal, on this issue, could be characterized as perverse or shocking to the judicial conscience.

12.6 We entirely agree with the said finding, and find no reason to interfere with the decision of the Arbitral Tribunal on this claim of the respondent, in exercise of our limited jurisdiction under Section 37 of 1996 Act. The reference to the "0.85" factor, in the formula provided in the contract, does appear to be on account of the stipulation, therein, that 15% of the foreign currency component would be non-adjustable. No other reason, for incorporation of the said factor, in the formula, is forthcoming from the record, neither could any such reason be elucidated, at the Bar, by learned counsel for the appellant. We are unable, therefore to discern any infirmity in the reasoning of the Arbitral Tribunal in this regard, or in the impugned decision of the learned Single Judge to uphold the same."

10. Having noted the similarity between the issues with regard to claim Nos.1, 2 and 3 herein, with claim Nos.1, 3 and 4 in FAO (OS) 192/2017 and the fact that Mr. Adarsh B. Dial has stated that this appeal should also follow the FAO (OS) 192/2017 to that extent, we dismiss the challenge of the appellant to the conclusion drawn by the learned Single Judge in the impugned order, with regard to claim Nos.1, 2 and 3.

11. Insofar as the claim No.4 is concerned, the same is with regard to fixation of appropriate rates for additional work of construction. The learned Single Judge against the claim No.4 has held as under:

"21. Claim No. 4 was for fixation of appropriate rate for additional work of construction of viaduct at KM 83.275. As against the amount of Rs. 21,81,16,732 claimed by HCCL, the AT has awarded Rs. 18,07,21,000. It is pointed out by

NHAI that the construction of the viaduct in place of retaining wall and underpass with a total length of 937 metres was a variation order and instructions for this variation were issued by NHAI and the Engineer. The case of HCCL was that since no rates were available in the Contract, suitable new rates had to be fixed. The case of NHAI and the Engineer was that the rate of construction of viaduct was available in the Contract Agreement. In terms of Clause 52.1 of the GCC, HCCL was entitled to BOQ rates.

22. The question before the AT was whether HCCL would be entitled to BOQ rates as adopted by the Engineer or rates derived on the basis of actual cost of input or price as claimed by HCCL. The case of HCCL was that it was also entitled to new rates of the viaduct on account of change in the physical conditions referred to in Clause 12.2 of the GCC. NHAI submitted that the change in structural arrangement of the work from KM 82.6 to KM 84.13 was on account of technical requirement due to low bearing capacity of soil. This, according to NHAI, was a known phenomenon. A contractor as experienced as HCCL could not be held to be unaware of such situations. Consequently, treating it as a variation under Clause 12.2 and asking for new rates to be fixed was not tenable.

23. The majority accepted the plea of HCCL that in the category of works referred to in Bill No. 6 of BOQ, there was no nomenclature of viaduct. The majority did not accept the plea of NHAI that a viaduct "is a bridge like structure" or was "similar to road over bridge (ROB)" so far as the nature of work, methodology of design and construction, technical specifications and other activities were concerned. What has been found by the majority of the AT is that due to poor ground conditions at site, which were found unsuitable for construction of retaining walls beyond 7 metres, NHAI decided to adopt a viaduct in place of high embankment. The Contract did not envisage such change in construction. The Engineer by letters dated 23rd August, 2008 and 8th September, 2008 directed HCCL to carry out the construction of viaduct in place of retaining walls. Thus, the original scope of work allotted to HCCL was totally modified. In order to demonstrate that viaduct and embankment are different types of constructions, reliance was placed on the decision in *Union of India v. Tania Constructions Private Limited* (decision dated 18th April, 2011).

24. Further, the majority has referred to the Engineer's letter dated 24th May, 2010 where he admitted that the viaduct work was a variation and change in the scope of work. The majority accepted the plea of HCCL that:

"The viaduct structure compared to Bridge/Underpass structure involves intricate construction. In that it comprises RCC/PSC girders totaling 56 spans. Also the nature, construction and input requirements are different. In case the Claimant had known before hand he would have planned execution differently. In that case such huge number of PSC girders, he would have precast the same instead of cast-insitu. This would have been economical. Also the shuttering and temporary structures required including the method of launching would have been less time consuming and different."

25. It is for this reason that the majority rejected NHAI's contentions. It was the responsibility of the HCCL to ensure sufficiency of physical conditions. However, this was limited to the extent of designs provided and the scope of work indicated in the tender. HCCL was neither the designer nor was it assigned the work of soil exploration. An entirely different situation arose during the course of construction. The inappropriateness of the soil for the construction of the retaining wall was unforeseen. This would fall for consideration under Sub-Clause 12.2 of the GCC and was independent of Sub-Clause 51.1 and other sub-clauses. The view taken by the majority AT again appears to be on the basis of the correct interpretation of the various clauses and it was a plausible view to take. It has not been shown to be perverse or shocking to judicial conscience. The majority's views are reasonable and based on contemporaneous evidence. Consequently, no ground has been made out under Section 34(2)(b)(ii) of the Act to persuade the Court to interfere with the impugned majority Award in relation to Claim No. 4.

12. From the perusal of the finding of the learned Single Judge on claim No.4, it is clear that the learned Single Judge has agreed with the majority decision of the Arbitral Tribunal, which according to him, is on the correct interpretation of various clauses, which is a plausible view to take and has consequently rejected the objections with regard to the said claim.

13. Having noted the conclusion as arrived at by the learned Single Judge, and the fact that this Court is considering objections under Section 34 of the Arbitration & Conciliation Act, 1996 and keeping in mind the legal position as explained by the Supreme Court in the case of Associated Builders vs. DDA (2015) 3 SCC 49, we are not inclined to interfere with the said conclusion against this claim.

14. In view of our above discussion, we do not see any merit in the appeal. The same is dismissed. No costs.

CM No. 27595/2017

Dismissed as infructuous.