

(2012) 11 DEL CK 0003
In the Delhi High Court
Case No : FAO (OS) No. 47 of 2012

National Highways Authority of India	APPELLANT
Vs	
Hindustan Construction Company Ltd.	RESPONDENT

Date of Decision : 22-11-2012

Acts Referred:

Limitation Act, 1963 — Section 14

Citation : (2013) 1 ARBLR 59

Hon'ble Judges : Vipin Sanghi, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Sandeep Sethi with Ms. Meenakshi Sood, Mr. Mukesh Kumar and Ms. Preeti Gupta, for the Appellant; Sameer Parekh, D.P. Mohanty and Ms. Suman Yadav, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—A contract was awarded by the appellant to the respondent/contractor for construction of Allahabad Bypass Project in U.P. vide an agreement dated 2.6.2004. The project stands completed. Disputes arose inter se the parties which were referred to the Disputes Resolution Board (for short "DRB") consisting of three technical experts from the field, who opined in favour of the appellant. The respondent being dissatisfied with the same sought a reference of disputes to arbitration in view of the arbitration clause. An award was made by the arbitral tribunal of three technical members on 30.3.2010. On certain aspects the award is unanimous, while on certain other aspects the award has been made with a dissenting view of one of the arbitrators. The appellant being aggrieved by the award filed OMP No. 455/2010, which has been dismissed vide impugned order dated 30.11.2011. Learned senior counsel for the appellant submits that there are two aspects, which are required to be examined in the present appeal:

i. The allowing of the claims of the respondent on account of increase in royalty, sales tax and in the forest transit fee, stated to have been imposed by subsequent legislations;

ii. The allowing of the claim for balance amount for construction of embankment which according to the appellant, formed a part of the activity of clearing and grubbing and was not payable as embankment work.

2. We now proceed to deal with the aforesaid two aspects hereinafter.

The allowing of the claims of the respondent on account of increase in royalty, sales tax and in the forest transit fee, stated to have been imposed by subsequent legislations:

3. The imposition of tax or upward revision of an already existing tax or levy through a subsequent legislation is admittedly akin to the issue of levy of additional royalty, which already forms subject matter of adjudication in various pronouncements of this Court. In FAO (OS) No. 48/2012 titled National Highways Authority of India Vs. Hindustan Construction Company Ltd. decided on 8.11.2012, it was observed as under:

5. The imposition of tax through a subsequent legislation is, admittedly, akin to the issue of additional royalty, which already forms subject matter of adjudication in various pronouncements of this Court. This issue was once again examined in a recent pronouncement in FAO (OS) No. 451/2012, titled National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd., decided on 18.09.2012. Thus, while considering appeals on the same issue raised by the appellant in FAO (OS) No. 49/2012 and 433/2012, we considered it appropriate only to extract the reasoning already recorded in Oriental Structural Engineers Pvt. Ltd. (supra) rather than once again pen down the same thought which is already reflected in our aforesaid judgment by this Bench. Thus, for dealing with this issue, we follow the same course of action and reproduce our observations as under:

2. The learned Single Judge has noted that the challenge to the award was primarily made in respect of Claims No. 1 & 3, i.e., the claim for payment of additional cost caused by subsequent notification increasing sales-tax on fuels from 2.5% to 5% and the claim for payment of additional cost caused by subsequent notification increasing royalty on soil, sand and boulders, which were allowed by the Arbitral Tribunal, apart from the grant of interest. The learned Single Judge has observed that these issues are covered by Division Bench judgments of this Court in National Highways Authority of India Vs. ITD Cementation India Limited, (2008) 100 DRJ 431 (DB), and M/s. OSE-GIL J.V. Vs. National Highways Authority of India, FAO (OS) 347/2010 decided on 09.02.2011. The learned Single Judge rejected the appellant's submission that the Court should await the decision of the Supreme Court in Special Leave Petitions preferred by the NHA against the aforesaid decisions of the Division Bench, being SLP (Civil) No. 21466/2011 titled National Highways Authority of India & Another Vs. M/s. OSC-GIL J.V. and SLP (Civil) No. 9799/2010 titled National Highways Authority of India Vs. ITD Cementation Limited, wherein leave has been granted by the Supreme Court.

3. The learned Single Judge has also rejected the submission of the appellant founded upon the Supreme Court decision in Union of India (UOI) and Others Vs. West Coast Paper Mills Ltd. and Another, , to contend that this Court should, in view of the pendency of the Special Leave Petition, defer the hearing of the objection petitions to await the decision in the said Special Leave Petitions by observing that similar request had been declined by the Division Bench of this Court in the appeal of M/s. OSE-GIL J.V.

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6. On merits, the submission of learned counsel for the appellant is that the learned Single Judge should have awaited the decision of the Supreme Court in the two Special Leave Petitions aforesaid and not dismissed the objection petition. Before us as well, reliance is placed by the appellant on the judgment of the Supreme Court in West Coast Paper Mills Limited (supra).

7. Having heard learned counsel for the appellant and considered the decision of the Supreme Court in West Coast Paper Mills Limited (supra), we are of the view that there is no merit in the present appeal and, consequently, we do not consider it necessary to issue notice on the appellant's applications seeking condonation of delay. The question of our entertaining the application for stay of the impugned judgment, therefore, does not arise.

8. It is not in dispute that the Claims No. 1 & 3 allowed by the Arbitral Tribunal in favour of the respondent are totally covered by the judgments of the Division Bench in ITD Cementation Limited (supra) and M/s. OSE-GIL J.V. (supra). In fact, the aforesaid decision in ITD Cementation Limited (supra) has even subsequently been followed in Larsen & Toubro Limited Vs. NHAI, FAO (OS) No. 345/2010 decided on 03.06.2011. In OSE-GIL J.V. (supra), a similar argument was raised before the Division Bench and rejected by it. The Division Bench observed as follows:

At that stage, learned Senior Counsel, appearing for the Appellant had drawn our attention to the fact that notice had been issued in Special Leave to Petition against the Division Bench Judgment in ITD Cementation India Ltd. Nevertheless, on 29.11.2010 we passed the following Order in FAO (OS) 140/2008:-

We have noted that the questions which have arisen in this Appeal had also arisen before a Division Bench in National Highway Authority of India vs.-ITD Cementation India Ltd. in FAO (OS) 216/2007. We are informed that the impugned Order follows this decision of the Division Bench, as the Learned Single Judge was bound to do. The contention is that since a SLP has been preferred against the decision in FAO (OS) 216/2007, this Court ought to adjourn proceedings to await a Judgment of Their Lordships in that Appeal. Mr. Nandrajog, learned Senior Counsel for the Appellant, states that Leave has been granted by the Hon"ble Supreme Court. We cannot subscribe to the submissions made by learned Senior Counsel for the Appellant. In our view the proper course is to decide the present Appeal on the parity of reasoning adopted by the

Division Bench in FAO (OS) 216/2007. Taking any other approach would lead not only to multiplicity of proceedings but also to a legal anathema, which is, the likelihood of different views being expressed by co-ordinate Benches. Needless to state, the Appellant before us will not be precluded from filing a SLP before the Hon'ble Supreme Court. In such a situation, we are in no manner of doubt that both the SLPs will be heard together. That is, however, for Their Lordships to decide. The impugned Judgment is premised on NHA v. ITD Cementation India Ltd., with which we respectfully concur. We also find no error in the impugned Judgment. In these circumstances, the Appeal is dismissed. Pending Application also stands dismissed.

9. Learned counsel for the appellant has not even urged before us that the decision of the Division Bench in ITD Cementation Limited (supra) needs reconsideration by a larger bench of this Court and we find no reason to adopt that course of action. The decision in ITD Cementation Limited (supra) and OSE-GIL J.V. (supra) being judgments of coordinate benches, we are bound by the same. So far as the decision in West Coast Paper Mills Limited (supra) is concerned, the reliance placed on the said decision appears to be wholly misplaced. That was a case dealing with the aspect of applicability of Section 14 of the Limitation Act. In that context, the Supreme Court observed that once an appeal is filed before it and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once the Supreme Court grants special leave and decides to hear the matter on merits. The aforesaid proposition was invoked to hold that the provision contained in Section 14 of the Limitation Act was available to the respondent.

10. In our view, the said principle cannot be invoked by the appellant to require this Court to stay its hands and not to proceed to dispose of the objection petition, or even this appeal, particularly when the issues raised by the appellant have attained finality insofar as this Court is concerned. Accordingly, we dismiss the aforesaid applications as well as the present appeal.

4. We may notice that qua this issue there is unanimity among the three arbitrators while making the award. The increase in royalty, sales tax and forest transit fee would, therefore, be payable to the respondents.

5. However, learned senior counsel for the appellant sought to carve out a distinction in the present case in respect of the sales tax increase, on the basis that there had been no increase of sales tax. In this behalf learned senior counsel invited our attention to a notified circular dated 1.12.2004. We, however, find from a bare perusal of the said circular that it refers to an addition of 3 per cent in the amount of sales tax as a consequence of the reconciliation scheme. The views of the arbitral tribunal are based on the contention of the respondent recorded in para 9.11.2 that there is a clear revision of percentage of sales tax applicable for sales tax charges from 22 per cent to 25 per cent. The finding of

the arbitral tribunal qua this aspect is recorded in para 9.15.1 as under:

9.15 Point (I)-Has the Claimant incurred any additional costs and if so, has he submitted any proof for the same?

9.15.1 As analysed in Point (b), it is apparent from the gazette notifications that the royalty charges, which existed prior to 28 days for submission of Tender i.e., Rs. 15.00/Cum for Sand, Rs. 30.00/Cum for Dala Aggregates, Rs. 23.00/cum for Meja aggregates and Rs. 4.0/cum for sand were revised to Rs. 17.00/Cum for Sand, Rs. 45.00/Cum for Dala Aggregates, Rs. 32.00/cum for Meja aggregates and Rs. 6.0/cum for sand. In respect of sales tax, 22% of royalty charges which existed prior to 28 days of submission of tender was revised to 25%. Thus, it is clear that the above increase in royalty and associated sales tax has caused additional costs to the Claimant.

(emphasis supplied)

6. In view of the aforesaid the challenge qua this aspect is rejected.

The allowing of the claim for balance amount for construction of embankment, which according to the appellant, formed a part of the activity of clearing and grubbing and was not payable as embankment work

7. The main issue on which elaborate submissions were made is as set out hereinabove. Learned senior counsel for the appellant drew our attention to Section 200 of the technical specifications where the relevant items read as under:

8. It is the submission of the learned senior counsel for the appellant that this clause is slightly different from the clause dealing with clearing and grubbing as prescribed in the specifications for Road and Bridge Works by the Ministry of Road Transport and Highways (for short "MoRT&H"). The distinction is stated to be that while the expression in the clause in MoRT&H is "back filling of pits resulting from uprooting of trees and stumps", there is no such qualification to "back filling" in the clause in the contract. It is the submission of the learned counsel that, thus, this amendment was made consciously, whereunder the contractor was obliged to not only remove up to 150 mm thick top soil, but was also obliged to back fill the same as part of the work which was defined as clearing and grubbing and was to be paid under this clause, as distinct from the clause in the MoRT&H, where the work was defined to include only back filling of pits resulting from uprooting of trees and stumps. Learned counsel, thus, submitted that the majority view under the award had mistakenly assumed as if the technical specification clause was the same as under the MoRT&H and that had resulted in award of the claim to the respondent.

9. On the other hand learned counsel for the respondent points out that this is a misinterpretation of the reasons as to why the amount had been awarded under the award. It is his submission that the respondent did not claim the amount towards back filling of the top soil which had been removed to the extent of 150

mm. He points out that there was no question of back filling, as the quality of the soil was very good and, thus, as part of an Environmental Management Plan (for short "EMP"), the soil had to be utilized in other areas for purposes of cultivation. He submitted that, in fact, the level of the road was lower by the height of the soil removed, i.e., by 150 mm, and it was not as if the soil removed was refilled. The embankment was constructed from the level achieved after the soil was excavated, and was not constructed after refilling with soil. He, thus, submits that insofar as the embankment is concerned, the specifications are different and the payment for the same is made also under a different clause of the BOQ, i.e., clause 2.02. It is his submission that what the appellant endeavoured to plead before the arbitral tribunal was that a part of the embankment work should be treated as being covered by the work of clearing and grubbing and, therefore, no payment should be made qua the embankment made for the initial level of 150 mm.

10. We find from a perusal of record that there is force in the contention of the respondent. It is, in fact, correct that there is no clause requiring the level of the road to be raised to the Original Ground Level (for short "OGL") by back filling of soil as a part of the clearing and grubbing work, as no such clause exists. This aspect is also clear from the findings of the arbitral tribunal qua this aspect arrived at while dealing with point (f) in para 9.24, which reads as under:

9.24 Point f: After clearing and grubbing and removal of top soil, it is necessary to bring the level of the ground to original level before start of embankment construction in terms of contract?

9.24.1 It is necessary to review the clause 201.1 to ascertain the intention of the drafter of the specifications after clearing & grubbing.

9.24.2 The relevant portion of the clause is

...It shall include necessary excavation by suitable equipment, backfilling and making the surface cleared and in proper grade by suitable equipment such as motor grader or any other suitable equipment and compacted by power roller to required compaction as per clause 300.

The Tribunal finds that the clause only states that surface of the ground should be cleared and there is nothing mentioned in the clause that the ground should be brought back to original ground level by backfilling for the 150 mm top soil removed.

9.24.3 The Tribunal perused the Clause 201.6.1 of technical specifications, wherein it is mentioned, "backfilling, where necessary," and not "backfilling the surface cleared to bring it to original ground position". Thus it is clear that the rate of Clearing & grubbing does not cater for backfilling the complete surface cleared to bring it back to the original ground level. Had it been the intention of the agreement, the same would have found specific mention in the contract by way of Additional technical specification or amendment to Clause 201.6.1. The

Tribunal also perused other provisions of technical specifications and could not find such a condition in any of the provisions of the contract.

The catch word is "where necessary" which puts the controversy beyond any doubt that it is not intended for the backfilling of the total area of the surface cleared or the top soil removed.

9.24.4 Therefore, the Tribunal finds that there is nothing in the contract which states specifically or gives an indication that the ground after clearing and grubbing and removal of top soil shall be brought back to original level before start of embankment construction.

11. In our view the real issue, thus, is not whether the work of back filling after removal of top soil forms part of clearing and grubbing activity as, admittedly, there was no back filling carried out. The real controversy is as to whether if back filling had been done, that work is liable to be excluded from the work of embankment construction by the respondent. There is nothing shown to us whereby the construction of embankment can be said to have been done in the manner where, effectively, the lower part of the embankment is made only by carrying out the activity of back filling. The embankment being a separate item, it has to be fully paid for. Had there been any force in the appellant's submission, the appellant would have placed before the arbitral tribunal evidence to show that the engineer had required the contractor to carry out back filling with soil up to a particular level (i.e., up to 150 mm or less), and that the design of the embankment was such as to be constructed over such back filled soil surface. No such material was placed before the arbitral tribunal. The appellant sought to make deductions, after having initially paid the amounts for making of embankment, by claiming that the initial 150 mm of the embankment work should be considered/deemed as work covered by the activity of clearing and grubbing. This, obviously, was impermissible.

12. We may also note that in view of there being a majority opinion of technical persons, really, we were not called upon to have a relook on the issue especially as the learned Single Judge had also agreed with the view taken by the arbitral tribunal. We have, however, gone into a little more detail on this aspect as there was complete divergence of the view expressed by the two counsels qua the nature of controversy.

13. We are, thus, of the view that there is no merit in this appeal and accordingly dismiss the same leaving the parties to bear their own costs.

14. At this stage learned counsel for the appellant states that they deposited extra amount as they had not deducted certain statutory dues. Learned counsel for the respondent assures that if the exact details are pointed out to them this issue can be amicably sorted out. We may also note that there is some interest, on the amount deposited by the appellant, still lying in the Registry which is to be released to the respondent. Needless to say that the bank guarantee should also be discharged and released to the respondent.