
(2013) 09 DEL CK 0072
In the Delhi High Court
Case No : FAO (OS) 352 of 2012

National Highways Authority of India

APPELLANT

Vs

Italian Thai Development Public Company Ltd. and Somdutt
Builders Ltd.

RESPONDENT

Date of Decision : 24-09-2013

Acts Referred:

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

Citation : (2014) 1 ARBLR 41

Hon'ble Judges : Vibhu Bakhru, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Ravi Gupta and Ms. Tanu Priya Gupta, for the Appellant; Arvind Minocha, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—This appeal has been preferred by the National Highways Authority of India against the judgment dated 23.01.2012 delivered by a learned single Judge in O.M.P. No. 921/2011 which was a petition u/s 34 of Arbitration and Conciliation Act, 1996 assailing the award passed by the Arbitral Tribunal on 06.07.2011. The said award dated 06.07.2011 was pursuant to a remand order passed by a learned single Judge of this court on 14.01.2010 in O.M.P. No. 138/2006. The remand order was very specific and the operative portion of which reads as under:-

10. In view of the aforesaid position emerging from the interpretation of the clauses, and the conclusions/findings in the Award which are clearly inadequate for deciding this issue, the counsel for both the parties have agreed that only so far as this Claim No. 1 is concerned, the same be remanded back to the Arbitrator to pass a fresh Award keeping in view the interpretation of the Clauses as already given by me above and more importantly, firstly for arriving at a factual finding as to whether the soil used for back filling of the pits was extra soil available to the respondent from "the work area was or was in fact such soil

which it could not have used and also as per the observations in para 8 above.

11. Accordingly, this matter is remanded back to the Arbitration Tribunal for deciding afresh, in accordance with law, the Claim No. 1. So far as Claim No. 2 is concerned, objections thereto are dismissed with costs of Rs. 50,000/-

From the above it is apparent that what had to be determined was whether the soil used for back filling of the pits was extra soil available to the contractor from the work area or was this soil of such a nature that it could not have been used by the contractor in terms of the observation made in paragraph 8 of the remand order dated 14.01.2010.

2. Thereafter, on remand, the Arbitral Tribunal considered the matter once again within the four corners of the remand order. Having examined the matter factually on the basis of available evidence which had been led by the parties, the Tribunal came to the conclusion in paragraph 6.2 of the award dated 06.07.2011 that there was no evidence that scraping of the soil to a depth greater than 150 mm from the ground level had been carried out by the contractor at any point along the length of the road. It was also found as a fact that the soil used for the filling of the pits which had resulted from the removal of the tree roots was available from clearing and grubbing operation carried out by the contractor. Based on this, the Arbitral Tribunal concluded that enough suitable soil was available from the work area for filling the pits after removal of the roots and that there was no necessity for the contractor to bring any soil from other areas outside the Right of Way (ROW). Finally, the arbitral Tribunal held as under:-

7.8 With regard to the two issues on which the Award was remanded back to the Arbitral Tribunal by the Hon'ble Delhi High Court, after hearing the parties afresh and on the basis of facts and evidence placed before us, we confirm that:

(a) The Contractor has not unnecessarily scraped the soil up to 150 mm even if it was not required. The scraping and clearing up to 150 mm depth was done only as required and directed and nowhere has it been done to a depth of more than 150 mm below the existing ground level and

(b) The soil used for backfilling of the pits was extra soil as approved by the Engineer and available to the Contractor from the work area, in accordance with specifications governing the contract.

7.9 The amount of claim No. 1 was originally given by the Claimants as Rs. 45,43,842.68 including escalation, as per details given in the claim but the actual amount withheld as intimated by the Engineer and agreed by the Claimants is Rs. 42,92,305 excluding escalation.

8.0 Accordingly, the AT holds that Claim No. 1 is justified and awards to the Claimants an amount of Rs. 42,92,305 plus escalation as admissible and interest, as already awarded in the Award dated 05.12.2005.

From the above extract it is apparent that the Arbitral Tribunal has returned a finding of fact that the contractor had not unnecessarily scraped the soil up to 150 mm. It also concluded that nowhere had the scraping been done to a depth of more than 150 mm below the existing ground level. A finding has also been returned that the soil used for back filling of the pits was extra soil as approved by the engineer and available to the Contractor from the work area, in accordance with specifications governing the contract. In other words the Arbitral Tribunal has returned specific findings on the specific questions contained in the remand order.

3. It is in this backdrop that the learned single Judge by virtue of the impugned judgment dated 23.01.2012 in the subsequent O.M.P. No. 921/2011 has concluded as under:-

14. I have heard counsel for the parties and perused the documents placed on record. The stand taken by the petitioner herein has neither been urged before the arbitral tribunal when the first award dated 05.12.2005 was rendered, nor when the second award dated 06.07.2011 was rendered. The stand of the petitioner cannot be accepted that the contractor had lowered the soil illegally, since the arbitral tribunal has relied on the evidence, which have been recorded and had given a categorical finding that the area was not lowered greater than 150 mm at any point of time.

15. I have carefully perused the award, the documents placed on record as well as the reasoning which has been rendered by the Arbitral Tribunal and I find no infirmity or illegality in the same. Even otherwise, the law with regard to Section 34 of Arbitration and Conciliation Act, 1996, is well settled that the jurisdiction of the Court to interfere with the award made by an arbitrator is very limited and consequently the court while entertaining an objection petition u/s 34 of the said Act cannot sit as a Court of Appeal and that evidence is not to be re-appreciated. The Apex Court in the case of Markfed Vanaspati and Allied Industries Vs. Union of India (UOI), , while relying on Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others, , has observed that "the arbitrator is the sole judge of the quality as well as the quantity of the evidence. It will not be for the court to take upon itself the task of being a judge of the evidence before the arbitrator. The court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal." Further in McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, it has been held by the Apex Court that "the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only like, in case of fraud or bias by the arbitrators, violation of natural justice, etc." Recently, the observations of the Apex Court in para 21 in PR. Shah, Shares and P.R. Shah, Shares and Stock Broker (P) Ltd. Vs. B.H.H. Securities (P) Ltd. and Others, is worth noting in this respect. Para 21 reads as under:-

21. A court does not sit in appeal over the award of an Arbitral Tribunal by

reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. Therefore, in the absence of any ground u/s 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

4. We do not find any error in the reasoning adopted by the learned single Judge or the conclusion arrived by him. The findings of the Tribunal fall within the realm of pure findings of fact. There is nothing on record to establish that the findings were of such a nature as would move the conscience of the court or that there was any error of fact which would result in a monumental miscarriage of justice. We may refer to the decision of a Division Bench of this court in the case of Food Corporation of India Vs. Shanti Cereals (P) Ltd. . In the said decision the Division Bench of this court, in the context of examination of factual pleas raised before the court, observed as under:-

7. Further, the argument of learned senior counsel for the appellant that the rice supplied by FCI to the respondent was not damaged and, in fact, was of a fine quality, cannot be sustained by us. As has been consistently held by this court, as well as the Hon"ble Supreme Court, the forum to raise factual pleas and contentions in an arbitration matter is only the arbitral tribunal. It is against the propriety of the legal regime, as well as the mandate of law set out in Section 34 of the Arbitration and Conciliation Act, 1996 that the courts in objection (and more so in appeal u/s 37) should entertain the arguments that are purely factual in nature. There is no gainsaying that the arbitral tribunal is the master of the factual arena and has the right to even go wrong while deciding the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice.

(underlining added)

5. For the reasons aforesaid, no interference with the impugned judgment is warranted. The appeal has no merit. The same is dismissed but with no orders as to costs. The Bank Guarantee which had been furnished by the respondent pursuant to the order dated 21.01.2013 shall be returned to the respondent for discharge. The extra interest which is lying with the Registrar (General) of this court shall also be returned to the respondent on the respondent making an application within one week.