

(2015) 04 DEL CK 0051
In the Delhi High Court
Case No : O.M.P. 51 of 2014

National Highways Authority of India	APPELLANT
Vs	
KNR-Patel (JV)	RESPONDENT

Date of Decision : 27-04-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2015) 04 DEL CK 0051

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Rajiv Kapoor, Anil Kapoor and Rahul Ranjan, for the Appellant; Amit George and Rajsree Ajay, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, J.—The Petitioner, National Highways Authority of India ("NHAI"), is by this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act"), challenging the impugned Award dated 8th August 2013 passed by the majority award of the Arbitral Tribunal ("AT").

2. The contract entered into between the NHAI and the Respondent, M/s. KNR-Patel (JV) was regarding the rehabilitation and upgradation of existing 2 lane road to 4/6 lane divided carriageway configuration of NH-5 in the State of Andhra Pradesh from km 178 to km. 220 (Nellore to Kavali). The contract being a unit rate contract, the bidding documents contained a detailed document "Bill of Quantities" ("BOQ"). The parties adopted the terms and conditions of contract as contained in the General Conditions of Contract ("GCC") and Special Conditions of Contract modifying/amending the GCC clauses. The date of commencement for the work was 17th May 2001 and the intended date of completion for the first milestone from km 189.5 to km. 198 was 22 months from the date of commencement; for second milestone from km. 178.2 to km. 189.5 was 27 months; and the third milestone from km 198 to km 222 was 33 months from the start date. The overall intended date for completion of the project was 16th

February 2004. The work was finally concluded on 31st May 2005, i.e., after a delay of about 15.5 months. The extension of time was granted for the said period without imposition of any liquidated damages on the Respondent. On the completion of the work, the Engineer issued the taking over certificate on 31st May 2005 and the defect liability period ended on 31st May 2006.

3. The disputes that arose between the parties were referred to the AT. The Respondent placed six claims before the AT. Claim No. 1 was for reimbursement of additional costs incurred due to idling, under-utilization of inputs to work on account of alleged delays and alleged breach of contract. A sum of Rs. 34,16,77,036 was claimed under various heads under Claim 1. The breakup of the aforesaid amount under sub-heads like overheads, plant and machinery, construction materials, general road maintenance, denial of bonus was claimed. Claim Nos. 2 and 3 related to idle charges of specialized machinery and labour. Claim No. 5 was for refund of terminal excise duty paid by the Respondent by adjustment of contract price consequent to withdrawal of deemed export benefits for Road Projects.

4. As far as Claim Nos. 1.1, 1.2, 2 and 3 are concerned, the AT by unanimous award partially allowed the claims of the Respondent. Claim Nos. 1.3, 1.4 and 1.5 as well as Claim No. 4 were rejected by the AT. There was a dissenting award in respect of Claim Nos. 5 and 6.

5. The AT noted that voluminous exhibits had been filed by both the parties and oral evidence has also been led by the Respondent. The monthly progress reports ("MPR") were discussed by the AT. It was factually found that the NHAI had granted EOT without taking into account the losses sustained by the claimant and "factually no fault could be attributed at all to the Claimant". Secondly, the payment of additional cost to the contractor under Clauses 6.4, 12.2 and 42.2 is inescapable particularly since EOT was granted for any reason not attributable to the claimant. It was factually found that the Respondent was compelled to keep the machines idle because of the Engineer's decision in not permitting the Respondent to remove the machines in spite of the Respondent's letter dated 3rd July 2004 requesting the same. It was held that the Respondent was "obviously entitled to damages as there is no fault on the part of the Claimant." The plea that the Respondent had not passed through the Dispute Review Board ("DRB") route was also rejected by highlighting Claim Nos. 21 to 24 raised by the Respondent before the DRB which were identical to Claim Nos. 1 to 4 before the AT. It was after an elaborate analysis of the entire evidence including the oral evidence before the AT that the aforementioned claims were partially allowed by the AT.

6. Mr. Rajiv Kapoor, learned counsel appearing for the NHAI submitted that there was no reasonable/intelligible nexus between what was pleaded in the statement of claims and what was claimed in the amount shown against the claim before the AT. Mr. Kapoor referred to the evidence on record and submitted that what was claimed before the DRB was different from what was claimed before the AT.

It is also submitted that the Respondent had not proved how the unavailability of newly acquired land had impeded the progress or execution, resulting in the delay. As far as the utility shifting was concerned he submitted that this was squarely the responsibility of the Respondent under Technical Specification 110 and that risk of any delay associated with shifting was already accounted for by the Respondent in his bid. He again referred to the depositions of the witnesses and submitted that the said evidence on behalf of the Respondent did not inspire confidence and in any event could not be relied upon by the AT.

7. The above submissions have been considered. Mr. Kapoor invited the Court to re-appreciate the evidence which has already been thoroughly examined by the AT. This Court is unable to be persuaded to undertake such an exercise, particularly given the limited scope of the powers under Section 34 of the Act. The Court is not persuaded to hold that the analysis of evidence and the reasoning of the AT is so erroneous, perverse or irrational so as to interfere with it. Indeed there is a detailed discussion on the evidence in the impugned Award with regard to the Claim allowed by the AT. The Court is not persuaded to come to a different conclusion. Once it was determined factually that delays for the completion of the work are attributable to the NHAI in terms of Clauses 6.4, 12.2 and 42.2, the awarded amounts was liable to be paid to the Respondent. In similar circumstances in *National Highways Authority of India Vs. Oriental Structural Engineers Pvt. Ltd.-Gammon India Ltd. (JV)*, (2013) 2 AD 450 : (2013) 2 ARBLR 264 : (2013) 2 PLR 38 the Court declined to interfere with the Award of the AT. This order was upheld by the Supreme Court with the dismissal on 8th July 2013 of SLP (Civil) No. 19536 of 2013. Consequently, the Court is not persuaded to interfere with the impugned Award in relation to Claim Nos. 1.1, 1.2, 2 and 3.

8. Claim No. 5 was regarding the refund of excise duty paid by the Complainant consequent upon withdrawal of deemed export benefits for road projects. In para 5.59 of the impugned Award the AT gave its conclusions on the Deemed Export Benefit ("DEB") under EXIM Policy and inter alia held that simply because the procedure for refund of terminal excise duty under DEB has not been set out in the Hand Book of Procedures, it will not mean that the Respondent is not entitled to secure reimbursement of extra cost incurred by it by way of payment of excise duty paid while purchasing excisable commodities utilized in the project. The AT then proceeded to discuss the voluminous evidence produced by the Respondent in the form of invoices in 12 volumes which were marked as C-1 to C-12 with suitable index documents. Besides, in Volume No. 13 the Respondent Claimant had also filed additional invoices for purchase of steel for verification by the Respondent. The AT noted that the NHAI "did not come forward to verify the truth or genuineness of the vouchers/receipts produced by the Claimant in proof of the claim but kept silence (sic)." Clearly no objections were raised by NHAI before the AT about non-production of the originals of the invoices/vouchers for verification. As pointed out by the AT, the NHAI's Engineers could easily have undertaken a detailed assessment by checking up item by item, and could have

challenged quantity and price if it so desired.

9. The cross-examination of CW-1, C Ramaniah by the Petitioner has also been discussed by the AT. His testimony was found acceptable. Even as the legal issue involved in a similar claim, the decision of this Court in National Highways Authority of India Vs. ITD Cementation India Ltd., (2013) 1 AD 29 : (2013) 197 DLT 650 is relevant. There the Court upheld the claim towards Deemed Export Benefits. The said order was upheld by the Division Bench in its order dated 6th March 2013 in FAO (OS) No. 137 of 2013.

10. Another point made by Mr. Kapoor was that claim for DEB was not raised as and when the expenditure was incurred and that the Respondent is raising the final bill to make such a claim. In NHAI v. ITD Cementation India Limited (supra) a similar argument was rejected by the Court by observing as under:

"10.. As far as the present case is concerned, the quantification of the claim relating to DEB could not have been possible without the completion of the contract. Considering that there must have been supplies at different stages during the execution of the contract, which attracted the payment of excise duty, it was impractical to expect that at every such instance the Respondent should make a DEB claim. If the Respondent waited till the completion of the work to formulate its claims it can hardly be stated that the claims were barred by limitation."

11. The Court is, therefore, not persuaded to interfere with the impugned award as far as Claim No. 5 is concerned.

12. Claim No. 6 was for a sum of Rs. 5,17,58,339 under Clause 60.11 of the Conditions of Particular Application ("CoPA"). In para 6.1 it is noted by the AT that initially the AT had claimed an amount Rs. 98,76,759 with the statement of claim filed on 22nd October 2008. By a subsequent application filed on 24th November 2009, the claimant sought an amendment on the quantification of the claim by increasing the claim from Rs. 98,76,759 to Rs. 2,57,37,184. The reply to the amended claim was filed on 27th March 2011 by the NHAI.

13. The AT discussed in para 6.2 onwards the justifications for the enhancement of the claims. Again the voluminous evidences have been discussed. It appears that the Engineer applied a certain method of computation of measurement (project-area method) upto the 35th IPC and then suddenly changed the method in 36th IPC by adopting 10 metre grid point unit method. The explanation by the Respondent that there was no occasion for it to raise any protest till the payment of the 35th IPC was withheld appears plausible. The method for measurement as suggested by the Respondent was in fact adopted. The method adopted by the Engineer has also been discussed by the AT in a great detail. Finally a sum of Rs. 2,57,37,184 was awarded to the Respondent. The price adjustment to be paid to the Respondent worked out to 23.68%, i.e. Rs. 60,94,565. The total amount awarded to the Respondent under Claim 6 came to Rs. 3,18,31,749.

14. The Court is unable to be persuaded to interfere with the above determination since the reasons given by the AT for its conclusions are found to be cogent and consistent with the evidence on record. The fact that it was not concurred with by the dissented member makes no difference to this conclusion.

15. For all the aforementioned reasons, the Court finds that there is no ground made out for interference with the impugned Award.

16. The petition is dismissed.