(2023) 02 DEL CK 0035

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 141 Of 2017

National Highways Authority Of India APPELLANT

Vs

Limak Soma (JV) RESPONDENT

Date of Decision : 01-02-2023

Acts Referred:
Arbitration And Conciliation Act, 1996 — Section 34

Citation : (2023) 02 DEL CK 0035

Hon'ble Judges : Prateek Jalan, J

Bench : Single Bench

Advocate : Rajiv Kapoor, Kant Sharma, Gurkamal Hora Arora, Jaisal Baath

Final Decision : Partly Allowed

Judgement

Prateek Jalan, J

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "the Act"], the petitioner assails an award dated 25.11.2016 rendered by a three-member Arbitral Tribunal [hereinafter referred to as "the Tribunal"], to the extent stated hereinafter.

2. The arbitration proceedings arose out of a contract dated 12.01.2005 [hereinafter referred to as "the Contract"], by which the petitioner- National Highways Authority of India [hereinafter referred to as "the NHAI"] awarded to the respondent a contract for rehabilitation and upgrading of Porbandar- Bhiladi Road, Section of NH-8B in the State of Gujarat.

3. By the order of this Court dated 21.03.2017, limited notice was issued on the correctness of paragraph "c(iii)" of the operative part of the award on claim No. 1, whereby the Tribunal held that both the parties would equally share the responsibility of payment of cess to the Gujarat Government, under the Building and Other Construction Workers (Regulation of Employment & Condition of Service) Act, 1996 [hereinafter referred to as "the BOCW Act"] for the period January, 2006 to 09.05.2007.

4. In the statement of claims filed by the respondent herein before the Tribunal, claim No. 1 related to the respondent's liability for payment of cess under the BOCW Act. The respondent contended that, by virtue of Clause 70.7 of the Contract i.e., Conditions of Particular Application [hereinafter referred to as the "CoPA"], the liability for the cess which was imposed by Gujarat Government after the date of the contract, would not be that of the respondent. The respondent's grievance was that, during the pendency of the Contract, NHAI deducted cess amounts from its bill [interim payment certificate] amounting to ? 2,04,50,480/-. The respondent denied its liability for payment of the cess and the aforesaid amount was ultimately released to the respondent in 2008 against an undertaking.

5. The relevant contents of the statement of claims of the respondent read as follows: -

"21. That the "Date of applicability of the Cess under 'The Building and Other Construction Workers Welfare Cess Act, 1996', is the date on which the 'appropriate Government'. has constituted the 'Building and other Construction Welfare Board' for the purpose of implementing the 'Act', in terms of the Rules under Building and Other Construction Workers (Regulation of Employment & Conditions of Service) Rules and the said Board specifies a date of implementation of cess.

22. That even as per the Board Resolution of the duly constituted authority, Welfare Board the said cess was to be collected from 18.12.2004, as such, the said liability cannot be fastened on a Contractor, whose bid date was firstly, prior to date of implementation of additional cost by way of workers cess i.e. prior to 18.12.2004 and secondly prior to the notification of the 'Board' by the State of Gujarat on 18th December 2004.

23. That moreover the liability of a Contractor under the Building and Other Construction Workers Welfare Cess Act (in respect of works, which were tendered prior to the date of implementation of additional cost by way of workers cess and date of notification of the constitution of the 'Building and other Construction Welfare Board' by the appropriate Government (which in the present case with respect to the State of Gujarat was on 18-12-2004), shall have to be added to the Contract Price, in terms of clause 70.7 of the Conditions of Contract.

24. That it is submitted that in case the language and contents of the clause are plain and unambiguous, then the court must give effect to the words used in the clause and not the heading of the clause. The contents of said clause 70.7 clearly show that the provisions of the Sub Clause 70.7 of COPA acknowledge the contingency of imposition of additional cost on account of introduction of any new Act, law, by-law, Regulation etc. including by any duly constituted authority (and not on account of likelihood of the same in future on account of any introduction of any new Act, Law, Byelaws, Regulation etc.), after the date 28 days prior to the latest date for submission of tenders (hereinafter referred to as

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the 'Base Date'). Further, as per the said Clause 70.7 in the case of imposition of additional cost on account of introduction on account of changes in law/ introduction of State Statute/Regulation subsequent to base date, the contract conditions allow for addition or reduction to be made in the Contract Price to accommodate such introduction. Such addition or reduction in cost would be determined by the Engineer in consultation with Employer and the Contractor, which will be added to or reduced from the Contract Price.

25. That moreover, it is submitted that the bidders are required to quote their unit rates and prices for undertaking the works, duly considering all applicable duties, taxes and other levies payable by the Contractor under the contract or for any other cause as on the date 28 days prior to the deadline for submission of the bids.

26. That as such as per Clause 70.7 of the 'Conditions of Contract', if the event of liability occurs subsequent to 28 days prior to the last date of submission of the contractor's bid, then such contract price cannot be deemed to contain the cost of the said liability in the price bid amount. Moreover, if the event of liability occurs subsequent to 28 days prior to the last date of submission of Contractor's bid, then the same would be covered under Clause 70.7 of the Contract Conditions i.e. the same will be added to the contract price.

27. That in the present case the last date for submission of bids for the execution of the said work was 10.12.2003, and accordingly the date 28 days prior to this last date for submission of bids falls on 11.11.2003 ('Base date').

28. That as such in view of the aforesaid the liability of the claimant (Contractor) under the Building and Other Construction Workers Welfare Cess Act, in respect of works, which were tendered prior to the date of notification of the constitution of the 'Building and other Construction Welfare Board' by the State of Gujarat, shall have to be added to the Contract Price, in terms of clause 70.7 of the Conditions of Contract.

Since the resolution with respect to implementation of Cess Act by the Govt. of Gujarat and notification of constitution of the Board under the said Act came into force much after the last date of submission of the Bid, hence the additional cost "in the offing" cannot be imposed on the contractor.

29. That the claimant is /was not liable to pay any cess amount as claimed by the Respondent. In view of the same the claimant is presenting each of the individual claims as under."

[Emphasis Supplied]

6. In the impugned award, the aforesaid claim has been dealt by the Tribunal in the following manner: -

"CLAIM No.1: REGARDING PAYMENT OF CESS

The claim of the Claimant they are not liable to pay the Cess as per Clause 70.7

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of the contract is not viable and is rejected as

a) The Central Act was made on 19-08-1996 and promulgated by Gujarat Govt. on 18-08-2003 through Gazette notification both dates being prior to 11-11-2003 (i.e. 28 days prior to the bid date), and therefore, no new Act was framed by the statutory authority after the period stipulated in the contract. No relief is therefore, granted to the Claimant on this ground.

b) However, we find that the Gujarat Govt. started collecting the Cess from Jan. 2016 as brought out in the CAG Report for the year ending March 2013, where in it is clearly mentioned that no Cess was collected up to Jan. 2006 in the State of Gujarat. Also it has been confirmed in the RTI report (page 26-27 CD-2). We therefore conclude that the Claimant is obliged to pay Cess to the Gujarat Govt. for the work done w.e.f. Jan. 2006 to 09-05-2007 (date of completion of project.) only.

c) We find from the Rules issued by the Govt. of Gujarat for BOCW Act passed by a resolution dated 30-01-2006 stipulates:-

(i) That the responsibility for registration and payment of Cess lies with the contractor (employer)

(ii) The responsibility for deduction and deposit of collected Cess from the contractor within one month of collection is that of PSU viz. NHAI (Respondent) in this case.

(iii) However, we find that both the parties in this case failed in their responsibilities. The Claimant did not register with the concerned authority of Govt. of Gujarat and the Respondent returned the deducted Cess amount of Rs.20450480/- from IPC"s 23, 24 & 25 for the months of Feb.2007, March 2007 & April 2007, to the Claimant in the final bill on 30-06-2009 instead of depositing the amount with the Govt. of Gujarat within one month of collection, as required under the Act. We find it highly irregular to keep the collected Cess for over two years and then returning the same to the Claimant. Therefore, we conclude that both the parties equally share the responsibility of payment of Cess to Gujarat Govt. from Jan. 2006 to 09-05-2007 as and when the Govt. of Gujarat put up a claim on the Claimant/ Respondent. The Respondent throughout maintained that they have no responsibility with regard to registration or collection of Cess.

(d) It is also concluded that no interest is to be paid by the Claimant in case the payment is made within 3 months of the demand by the Govt. of Gujarat as stipulated hereinbefore.”

[Emphasis Supplied]

7. Mr. Rajiv Kapoor, learned counsel for NHAI, submits that the Tribunal has clearly rejected the respondent’s contention that it was not liable for payment of cess during the relevant period [January, 2006 to 09.05.2007]. Having so held, Mr. Kapoor submits that the Tribunal has exceeded its jurisdiction in rendering

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the finding that both parties must equally share the responsibility for payment of cess to the Gujarat Government. He contends that the ground upon which the aforesaid finding has been reached viz. that NHAI did not deposit the amount withheld from the bills of the respondent, was not the basis of the said claim at all.

8. Ms. Gurkamal Hora Arora, learned counsel for the respondent, on the other hand, submits that the respondent had sought a declaration absolving it from its responsibility to pay the cess altogether. As such, she contends that the relief granted by the Tribunal is a lesser relief than that relief which was sought by the respondent. She submits that, in the event the award of the Tribunal to this extent is set aside, it may be clarified that the respondent would be liable for payment of cess only, as and when the Government of Gujarat makes such a claim/demand.

9. Having heard learned counsel for the parties, I am of the view that the impugned award, to the extent outlined above, is unsustainable. The claim of the respondent herein before the Tribunal was that, on an interpretation of Clause 70.7 of the CoPA, it was not liable for payment of cess to Gujarat Government at all. The said contention of the respondent has been clearly and unequivocally rejected by the Tribunal. The aforesaid reasoning in the award has not been assailed by the respondent.

10. The Tribunal has, however, gone on to analyse the conduct of NHAI in failing to deposit the amount withheld from the invoices of the respondent, and, thus, came to the conclusion that both the parties "equally share the responsibility of payment of Cess to Gujarat Govt. from Jan. 2006 to 09-05-2007". It must first be noticed that this was not the case pleaded by the respondent, nor the basis upon which the claim was raised. In fact, a reading of the statement of claim shows that the respondent denied its liability, and objected to the withholding of the amount from its invoices. Having held that the liability was that of the respondent, it was not open to the Tribunal, within the scope of the reference, to allocate the liability between the two parties based on the conduct of NHAI. The Tribunal has clearly exceeded its jurisdiction in so doing.

11. In this context, I am unable to accept Ms. Arora's contention that the Tribunal acted within jurisdiction as it awarded a lesser amount than the amount claimed. Such an argument cannot come to the aid of the respondent in the face of the Tribunal's finding that the respondent itself was responsible for the payment, contrary to the case set up by it in the Statement of Claims.

12. For the aforesaid reasons, paragraph "c(iii)" and "d" of the operative portion of the impugned award with regard to claim No. 1 are set aside. However, to the extent that the Tribunal records that this liability would arise as and when the Government of Gujarat puts up a claim, Mr. Kapoor accepts that the responsibility of the respondent would arise at that stage.

13. The petition is partly allowed, to the extent aforesaid.

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14. There will be no order as to costs.

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