

(2013) 10 DEL CK 0352
In the Delhi High Court
Case No : O.M.P. No. 1043 of 2013

National Highways Authority of India	Vs	APPELLANT
M/s. KMC-RK-SD (JV)		RESPONDENT

Date of Decision : 22-10-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2013) 10 DEL CK 0352

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Rajiv Kapur and Mr. Anil Kumar, for the Appellant;

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.—This is a petition filed u/s 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) whereby challenge is laid to an award passed by a three-member arbitral tribunal dated 11.06.2013.

1.1 It may be noticed at the outset that each of the parties herein appointed their nominee arbitrators, and that, the two nominees thereafter, jointly decided on the appointment of the presiding arbitrator. It is in this manner that the arbitral tribunal came to be constituted.

The dispute in the present petition is admittedly related to one singular issue. The issue being: whether the respondent is entitled to payment towards price adjustment on all items of work referred to in the Bill of Quantities (in short BOQ). In other words, was the respondent rightly awarded price adjustment in respect of value of permanent works by the arbitral tribunal. It is the respondent's stand that the price adjustment in terms of clause 70.3 of the Conditions of Particular Application (in short COPA) would apply only to "variations" and "day works".

1.2 The arbitral tribunal, after a detailed analysis of the material placed on record and perusal of the terms and conditions of the contract obtaining between

the parties, came to the conclusion that when clause 70.3 of COPA is read along with clauses of tender and bid data documents, and other relevant clauses of COPA, the price adjustment is applicable to the entire work comprising of all BOQ items, including variations and day work except where such variations and day work are otherwise not subject to price adjustment.

2. The brief facts which are required to be noticed for the disposal of the present petition are as follows:

2.1 In 2005, the petitioner invited bids for execution of balance works which involved the following:

Widening to 4/6 lanes and strengthening of existing 2-Lane Carriageway of NH-5 in the State of Orissa from Km 233.00 to Km 284.00 (Ichapuram-Ganjam) Project Chainage starts from Km, 233.200 to 284.000 of Contract Package OR-VIII (in short the works in issue).

2.2 A pre-bid meeting was held on 12.12.2005, wherein, amongst other things, it was conveyed to the respondent that since the bid in issue had been invited for works in issue, at the risk and cost of the rescinded contract, the contract clause and other conditions contained in the bid document would be the same which obtained in the rescinded contract. The relevant part of the minutes of the pre-bid meeting dated 12.12.2005 reads as follows: "...The Contract Clause and other conditions in the Bid Document have been kept exactly the same as of the rescinded contract..."

2.3 It appears that at the pre-bid meeting the respondent raised a query as regards the applicability of price escalation in respect of all BOQ items. The relevant part of the query raised by the respondent reads as follows:

...Applicability of Price Escalation: Clause 70.3-Adjustment Formulae-pn is a price adjustment factor to be applied to the amount for payment of the work carried out in the subject month determined in accordance with sub clause 60.1(d) where such variations and day work are not otherwise subject to adjustment. This means the price adjustment is only available on variations and day works and not to entire works. This is contradictory to Bid Data which states that Contract is subject to Price Adjustment. The Price Adjustment should be on Total Work done and certified as per clause 60.1(c) and not only on (d) alone. This clause should be corrected...

2.4 There is no dispute that the petitioner responded to the query. The relevant part of the petitioner's reply reads as follows:

...the Price adjustment provision as stipulated under clause 70 of the Contract (COPA) shall remain unchanged. No Change in Contract clauses is acceptable...

2.5 The respondent, in these circumstances, submitted its bid on 27.12.2005, keeping in mind the base price prevailing 28 days prior to the submission of the bid. The total price quoted by the petitioner in respect of the works in issue was

a sum of Rs. 242,76,43,770/-, as against an estimated price of Rs. 263,27,37,964/-, exclusive of the effect of price adjustment.

2.6 It is in this background that parties entered into an agreement dated 05.07.2006. The work, in terms of agreement, commenced as per the averment of the petitioner, on 13.07.2006.

2.7 During the course of the execution of the works in issue, the respondent submitted five (5) Interim Payment Certificates (IPCs). Amounts against the said five (5) IPCs were collected. It is when the respondent sought to file the sixth (6th) IPC, that it submitted its price escalation not only for the previous five (5) IPCs, but also for the sixth (6th) IPC. This submission was made by the respondent with the engineer on 21.01.2008. The engineer, vide his order dated 22.01.2008, rejected the respondent's claim for price adjustment, on the ground that, there was no provision for payment towards price adjustment in the contract. In this behalf reference was made to clause 70 of the COPA.

2.8 In terms of the contract obtaining between the parties, the respondent escalated the issue by making a grievance with the Dispute Resolution Board (in short DRB). The DRB, by a majority of 2:1 decided in favour of the petitioner.

3. It is in this background, that the respondent invoked the provisions of the modified clause 67 of the FIDIC to have the matter referred to the arbitral tribunal.

3.1 The arbitral tribunal was constituted in the manner indicated hereinabove. The arbitral tribunal passed a unanimous award, allowing the claim of the respondent by declaring that it was entitled to price adjustment on all items of work, involved in the execution of the works in issue. Interest at the rate of 10% was also awarded in favour of the respondent, which was to kick-in, one month after the date of the award and was to run till the date of the actual payment.

4. Mr. Kapur, who argued in support of the petition, assailed the award on the following grounds:

(i) That the award was beyond the terms of the contract since no price adjustment could have been ordered to be paid on all items of the BOQ.

(ii) There was no ambiguity in the contract as was the case in the original contract, since the respondent had raised a pre-bid query which was squarely answered by the petitioner. The petitioner had in its response, in no uncertain terms, stated that price adjustment provision, as stipulated in clause 70 of COPA, shall remain unchanged.

(iii) The arbitral tribunal was thus not right in applying the ratio of the judgment of the Single Judge of this court dated 08.03.2010 in respect of the very same contract involving the petitioner passed in OMP No. 362/2008, titled National Highways Authority of India vs. M/s. Unitech-NCC Joint Venture.

(iv) The respondent had accepted payments against five (5) IPCs without seeking

price adjustment. In other words, respondent was all along aware that it will not be allowed price adjustments on all items of the BOQ, as demanded. For this purpose, reliance was also placed on the averments made in the statement of claims. It was sought to be demonstrated that the respondent chose the route of going through the engineer in the first instance, then the DRB, and finally, the arbitral route as it was aware that the petitioner would not concede to its demand.

REASONS

5. I have heard the learned counsel for the petitioner. I am of the view that principally the matter in issue before the arbitral tribunal was one which related to the interpretation of the provisions of the contract having regard to the background circumstances, the tender documents and the provisions of the contract. This exercise, in the instant case, had to be carried out by the arbitral tribunal given the ambiguity in the terms and conditions of the contract obtaining between the parties, in particular, clause 70.3 of the COPA. The arbitral tribunal inter alia took into account clause 14.4 of the ITB and clause 14.4 of the bidding data and held that the price adjustment was available with regard to all items of the BOQ and not restricted to variations and day work. With the help of other provisions of COPA, it concluded that price adjustment under clause 70.3 of the COPA was not restricted to variations and day work, but took into account all items of the BOQ. The reasoning given by the arbitral tribunal is contained in paragraphs 6.3 to 6.19 of the impugned award. To avoid prolixity, I propose to extract only the conclusion of the arbitral tribunal which reads as follows:

...6.19 We, the Arbitrators unanimously hold on a conjoint reading of ITB Clause 14.4 read with corresponding provision in Bid Data and 31.4 of ITB, Sub-Clauses 70.1, 70.2, 70.5, 70.7, 60.1 and 60.2 of COPA, and other relevant provisions in Conditions of Contract that all these clauses/provisions are consistent and provide that price adjustment is payable on the entire work comprising of all BOQ items including Variations and Day work except where such Variations and Day Work are otherwise not subject to adjustment. All these Sub-Clauses corroborate one another and are in complete harmony except for Sub-Clause 70.3 for its restrictive provision which has ambiguity and errors as explained in foregoing paras. A mere inconsistent entry in sub-Clause 70.3 cannot override and ignore other qualifying clauses in the contract. On the other hand, this appears to be against the genuine intention of the Employer of allowing price adjustment on permanent works (BOQ) in all contracts as a policy...

6. There was decidedly an ambiguity in clause 70.3 of the COPA, in particular, that which related to the application of the price adjustment factor qua the amount crystallized for the payment of work carried out in the subject month which, in terms of the said clause had to be determined, if read literally, in accordance with, sub-clause 60.1(d). However, as correctly reasoned by the arbitral tribunal; "day work" was required to be valued separately under clause 60.1(e) of COPA and not under sub-clause 60.1(d). In these circumstances, in

my view, there arose definitely a case for interpretation. It is pertinent to note that this is only one of the many other reasons cited by the arbitral tribunal, as why, it chose the interpretative route as against literal application of the provisions of clause 70.3 of COPA.

7. Having regard to the aforesaid position, according to me, no interference is called for in the impugned award. Interpretation of the provisions of the contract, which is a plausible interpretation, is clearly within the remit of the arbitrator. Error, if any, which is relatable to the interpretation of a contract, is not an error which is amenable to correction by courts as these are not errors apparent on the face of the record. [See Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd., in paragraph 18(ii) at page 79; Judgment dated 23.12.2011 passed in FAO(OS) No. 294/2001 titled Indian Farmers Fertiliser Cooperative Ltd. vs. Duggal Construction (India) Ltd. at paragraph 28 and judgment dated 05.09.2013 passed in OMP No. 855/2013 titled M/s. JSC Centrodorstroy vs. National Highways Authority of India].

8. Apart from the above, in respect of the provisions of the very same contract, a Single Judge of this court in the case of National Highways Authority of India vs. Unitech-NCC Joint Venture has repelled this very contention advanced by the petitioner. Pertinently, the matter was carried in appeal to the Division Bench. The Division Bench vide judgment dated 30.08.2010 passed in FAO(OS) No. 338/2010 has sustained the view taken by the Single Judge.

9. The submission of Mr. Kapur that the present case on facts was distinguishable from facts which arose in the case referred to above, is according to me untenable, for the following reasons:

(i) First, the respondent had been awarded contract to execute the balance works in respect of a rescinded contract qua which this court has already rendered its ruling.

(ii) Second, the response to the query raised by the respondent, simply conveyed that the terms and conditions of the contract qua price adjustment would remain unchanged. Since an ambiguity prevailed, according to the respondent, in terms of clause 5.2.1 of the contract, it was entitled to seek a clarification which it did by taking recourse to the route provided under the contract.

10. The other contention of Mr. Kapur that the respondent did not raise an issue with regard to price adjustment till it filed the sixth (6th) IPC, is also misconceived, in my opinion, for the reason that the respondent was entitled, under the terms of the contract, to raise the issue with the engineer, which it did, and thereafter, if necessary, escalate the issue with the DRB and, if not satisfied, by invoking the arbitration agreement obtaining between the parties. As a matter of fact, as noted by the arbitral tribunal as well, the respondent was entitled to, as a matter of fact, wait till the conclusion of the contract to raise the issue of price adjustment vis-?-vis all items of the BOQ. In view of the foregoing discussion, I find no merit in the petition and it is, accordingly, dismissed.