

(2013) 03 DEL CK 0140
In the Delhi High Court
Case No : FAO (OS) No. 291 of 2012

National Highways Authority of India	Vs	APPELLANT
Progressive - MVT (JV)		RESPONDENT

Date of Decision : 04-03-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2013) 2 ARBLR 9

Hon'ble Judges : Sanjay Kishan Kaul, J; Indermeet Kaur, J

Bench : Division Bench

Advocate : Arun Kumar Verma, Mansi Wadhera and Ashish Bansal, for the Appellant; Vinay Gupta and R. Ravi, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The appellant awarded a contract for works of four-laning and strengthening of an existing two-lane carriageway from Gopalganj-Muzaffarpur Section of NH-28 in the State of Bihar to the respondent vide a letter dated 09.09.2005 which resulted in the formal contract agreement dated 20.10.2005. In the process of execution of the contract some disputes arose between the parties which were initially referred to the Dispute Resolution Board (hereinafter referred to as "DRB"). Even the decision of the DRB was not acceptable to the appellant and thereafter the arbitration clause inter se the parties was invoked. The arbitral tribunal of three members having two technical members published the award dated 22.09.2011. The appellant was still aggrieved and filed objections u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act") and in terms of the impugned order of the learned Single Judge dated 16.04.2012, the same have been dismissed.

2. There is only one aspect urged in the present appeal before us by the learned counsel for the appellant. This aspect emerges out of the claim of the respondent towards tack coat. In this behalf, learned counsel has drawn our attention to the bills of quantities. Bill No. 4 having Item No. 4.03 states the rate for providing

and laying tack coat complete as per Technical Specifications Clause 503. Clause 4.09 refers to providing and laying semi-dense bituminous concrete course complete as per drawing and Technical Specifications Clause 508. Thereafter, learned counsel has taken us to Bill No. 11 where Clause 11.14 reads as under:

3. It is the submission of the learned counsel for the appellant that the cost for tack coat forms part of the Clause 11.14. This would be apparent from the reference to the other two clauses where lower rates are provided and thus implicitly by the nature of work to be carried out in Clause 11.14 tack coat rates are calculated in Clause 11.14. It is also a submission that in fact the respondent continued to accept payments as per Clause 11.14 and never charged separately for tack coat rates which aspect has sought to be raised after almost three years.

4. This aspect has been dealt with by the arbitral tribunal in para 6.08 and we reproduce the same as under:

6.08. How do the two rates as quoted by the contractor for SDBC in fresh and renewal coat compare ? What are the reasons for the variations, if any? A perusal of BOQ Item Nos. 4.03(b) and 4.09 when added together would give the rate of Rs. 149.40 per sq. m. for fresh coat of SDBC, whereas the same for renewal coat is quoted as Rs. 162.00 per sq. m. both these rates do not cater for a uniform rebate of 12.6% given by the claimants before the contract agreement was signed. Thus, there is a difference of Rs. 11 per sq. m. in the two rates, the rate of renewal coat is higher. The respondents say even if the item of tack coat element is added to the rate of SDBC as quoted for fresh work the rate quoted for the renewal coat of SDBC is far more, and that suggests that at least the element of tack coat is included in the rate of Item No. 11.14. On the other hand, the claimants when asked specifically, during the course of hearing, to give the reason for this variation, stated that the variation was because the work of renewal coat is to be done in small stretches as and when made available by the department, it involves more efforts by way of shifting the plant and machinery to and from many times. This makes the renewal coat costlier than the fresh coat of SDBC. The AT checked the documents and found that it was not in patches. However, the AT is of the opinion that the rates quoted by the contractor are purely his domain, and once these are accepted by the department, these are not subjected to analysis. The contractor quotes the rates based on his previous experience, present market trend, availability of material, labour and machinery, working environments nature of work and make the tender overall competitive. The AT is of the view that the rates as quoted by the contractor cannot decide the scope of the work.

5. Learned counsel for the appellant submits that in the impugned order there is no discussion on this aspect other than stating that a plausible view has been taken. He further submits that the plea of the respondent that cost has to be calculated by the respondent and since his submission was that the work of renewal is to be done in small stretches as and when available by the department, a higher rate was provided in Clause 11.14 has been rejected by the

arbitral tribunal and yet the arbitral tribunal on its own surmises and conjectures has accepted the claim of the respondent.

6. We are unable to accept the aforesaid plea for the reasons that it is not mere whims and fancies of the arbitral tribunal by which this amount has been so awarded. The arbitral tribunal has noted that he checked the documents and in its opinion the rates quoted by the contractor are purely in his domain and once they are accepted by the department these are not subject to analysis as to why the rate has been fixed in a particular manner. This is so as the contractor's rates are based on his previous experience, present market trends, availability of material, labour and machinery, etc. to make a competitive rate and thus the rates quoted by the contractor cannot be the basis to decide the scope of the work which has been determined by the clauses of the contract.

7. We are of the view that the findings of the arbitral tribunal cannot be faulted in this behalf. The plea urged by the learned counsel for the appellant that amendments to certain other clauses should impact as to how the payment has to be calculated under this clause cannot be accepted as the calculation has to be made as per the clause as to what work which has to be specified in the clause itself. There is also another important aspect, i.e. we are not sitting as a court of appeal. In fact, neither was the learned Single Judge, So long as a plausible view was taken in the matter, the same is not required to be interfered with while considering objections to that award. In matters of interpretation of the terms of the contract and that too, on a technical aspect, the view of the technical experts that form part of the arbitral tribunal must prevail. Leave aside the view of the arbitral tribunal, even the earlier view of the DRB is favouring the contractor.

8. In the end, we must note that the very object of the appointment of DRB appears to be lost. We are saying so in view of the experience we have had while entertaining numerous appeals on the part of the appellant where findings given by the DRB unanimously are still sought to be assailed further before the arbitral tribunal and thereafter before the learned Single Judge and before us making it almost the fourth tier before us. The work of the DRB is in the nature of spot arbitration to assist in the work not being stopped on account of disputes. The difference only is that while this aspect may be conclusive in a spot arbitration, in case of DRB which is the advisory board, the appellant seems to be neither heeding to their advice nor to the legal view thereafter of the arbitral tribunal and continue to litigate the matter to the highest court as in routine.

9. We are unequivocally of the view that there must be a serious meaning given to this aspect by the concerned authorities of the appellant as to the futility of the multiple tier litigation, losing all of them, the result only be to increase their costs.

10. We thus find no merit in this appeal and dismiss the same with costs of Rs. 5,000. The amount deposited in this court be released to the respondent forthwith.