
(2019) 01 BOM CK 0096
In the Bombay High Court
Case No : Arbitration Petition No. 497 Of 2012

Union Of India

APPELLANT

Vs

Vaman Prestressing Co.Ltd. & Anr

RESPONDENT

Date of Decision : 18-01-2019

Acts Referred:

Indian Contract Act, 1872 — Section 73
Arbitration And Conciliation Act, 1996 — Section 34

Citation : (2019) 01 BOM CK 0096

Hon'ble Judges : S.C. Gupte, J

Bench : Single Bench

Advocate : R.B. Desai, Mohinee Chogule, Suresh Kumar, Kishore M. Jawle

Final Decision : Dismissed

Judgement

S.C.Gupte, J.

1. This arbitration petition challenges an award passed by a sole arbitrator in a dispute between the parties arising out of a works contract. The short facts of the case may be stated as follows.

2. By a contract for manufacture and supply of PSC monoblock concrete, dated 13 August 2003, the Respondent herein was engaged by the Petitioner State through General Manager of Railways for manufacture and supply of sleepers of a particular description. The contract was in pursuance of a notice inviting tenders issued by the Petitioner. The Respondent submitted its tender, which was accepted by the Petitioner Railways by their letter of acceptance dated 8 May 2003. The order quantity of sleepers under the contract was 2,40,000 sleepers at the rate of Rs.706 per sleeper. This quantity was to be supplied by the Respondent contractor upto 31 March 2005 maintaining a uniform supply schedule.

The contract had a stipulation, clause 20.1, under which the Railways had reserved their right at their sole discretion to vary the contract quantity by plus

or minus 30% without assigning any reason at the same price, terms and conditions as the contract. Clause 20.2 of the contract provided that in case of any default by any proximate contractor in the form of shortfall in supplies, the Railways, at their sole discretion, might increase the contract quantity at any time on the same price, terms and conditions as the contract during its currency. This increase would be in addition to 30% quantity referred to in clause 20.1, but limited only to 30% of the order quantity. In other words, the Petitioner Railways could increase the quantity of supply by maximum of 60% of the original order quantity during the currency of the contract. It is an admitted position that the Railways, by their letter dated 12 June 2003, advised the Respondent to target the production of 4,80,000 nos. of sleepers for the year 2003-04 and make all efforts to achieve the same. It is also an admitted position that the Petitioner, during the subsistence of the contract, proceeded to issue an amendment to the original contract (Amendment No.1) by their letter dated 30 September 2003. As a consequence of this amendment, the Respondent was required to manufacture an additional quantity of 72,000 sleepers making the total of 3,12,000 sleepers to be supplied. This addition was within the stipulated plus or minus 30% of contract quantity under clause 20.1. It is the Respondent's case that by 24 December 2003, they had already completed the manufacture of 3,12,000 nos. of sleepers. At this juncture, the Petitioner specifically advised the Respondent to continue with the production of sleepers as instructed vide the former's letter dated 12 June 2003 by accepting 90% payment pending the approval of the Railway Board for the proposed variation in quantity beyond 30% enhanced quantity as above. The Respondent accordingly continued to produce sleepers. By their letter dated 2 March 2004, the Petitioner informed the Respondent that since its Board had not approved the proposal of additional sleepers, the Respondent should stop production with immediate effect. Though there was some dispute between the parties as to whether or not the Respondent continued to produce sleepers in their factory till 31 March 2004, the fact remains that from 1 April 2004, the Respondent's factory had completely discontinued production of sleepers in pursuance of the Petitioner's instructions. Finally, by their letter dated 14 January 2005, the Petitioner introduced a further amendment to the contract, 'Amendment No.2', under which an additional order for supply of sleepers was placed by the Petitioner on the Respondent. Though this additional quantity of 2,96,000 sleepers was directed to be supplied within the original delivery date, i.e. 31 March 2005, the Respondent approached the Petitioner seeking an extension of delivery period upto 31 July 2005 with application of price variation clause and without liquidated damages. The Petitioner, in response, by their letter dated 5 May 2005 granted extension of delivery, but did not agree to any price variation. The dispute between the parties pertains to whether the price of the sleepers should be paid as of 31 March 2005, i.e. for the original delivery period under the contract, or should it admit of variation claimed by the Respondent. The price clause, which was part of the contract, is not disputed per se; what is disputed is its applicability for the additional quantity, i.e. quantity over and above the contract quantity plus or minus 60 per cent. In addition,

there were other disputes between the parties as noted below.

3. It is not in dispute that the contract was performed by the Respondent. The disputes between the parties, which formed part of the Respondent's claim before the arbitrator, pertained to (i) delay in payment of the Respondent's bills (Claim No.5) and in payment of price variation (Claim No.1), (ii) price variation payable to the Respondent for the additional quantity ordered beyond the permissible contract quantity (Claim No.2), (iii) freight charges payable for the items of cement and HTS wires (Claim Nos.3 and 4) and (iv) loss of overheads and profits (Claim Nos.6 and 7).

4. The learned arbitrator, by his impugned award (modified award), granted (i) price variation on 1,45,221 sleepers in accordance with the contract formula (claim No.2), (ii) freight reimbursement on cement as well as HTS wires (claim Nos.3 and 4), (iii) compensation for delayed payment being interest on price variation and for abnormal delay in making other payments (claim Nos.1 and 5) and (iv) loss of overheads and profits (Claim Nos.6 and 7).

5. Mr.Desai, learned Senior Counsel appearing for the Petitioner, mainly challenges the award of loss of overheads and profits. Learned Counsel submits that no loss on account of overheads or profits could have been granted due to stoppage of production at the instance of the Petitioner during the period 1 April 2004 to 14 January 2005, since this was part of the original period of contract. Learned Counsel submits that the Respondent could not be heard to say that their factory was idling during the period of a subsisting contract during which they were bound to make a supply. Learned Counsel, secondly, submits that whilst awarding loss of overheads and profits, the learned arbitrator has not considered the substantive provisions of Indian law on the subject and particularly, Section 73 of the Indian Contract Act. Learned Counsel submits that in the present case, the arbitrator should have called upon the Respondent to produce proof of loss or damage. Learned Counsel submits that this was not done and instead, a fixed percentage of loss of overheads and profits was awarded on a notional basis, firstly, by relying on the discussion on the subject in a book known as 'Building and Engineering Contracts' by G.T. Gajria and secondly, on the basis of the Petitioner's own circulars. Learned Counsel submits that this was clearly impermissible under our law.

6. On the subject of loss of overheads and profits, the learned arbitrator had, in the first place, to find out whether there was any breach of contract on the part of the Petitioner employer in issuing stop-work instructions on 2 March 2004. The learned arbitrator held that on 12 June 2003, the Petitioner had given a specific target of 4,80,000 sleepers for which the Respondent had mobilised resources. The learned arbitrator found that this communication was followed by Amendment No.1 to the contract as of 30 September 2003 whereby additional 72,000 sleepers were ordered from the Respondent. The learned arbitrator held that the Petitioner being the only purchaser of sleepers and the entire production of the Respondent's factory being captive production for the consumption of the

Petitioner, the Respondent had to continue the production even after the formally ordered quantity was produced in order to maintain continuity in production and particularly, in anticipation of approval of additional quantity from the Railway Board. After all, even the Petitioner had directed the Respondent to continue with their production in anticipation of such approval. The learned arbitrator held that the Respondent was, thus, not at fault in continuing with the production after 30 January 2004 as per the express directions of the Petitioner and in the light of these facts, the Petitioner's letter of 2 March 2004 ordering immediate stoppage of production was abrupt and created an unstable situation for the Respondent. The Respondent had already procured raw material for further production which was at their factory. The learned arbitrator, in the premises, held that though the Respondent was within its right to continue the production upto 31 March 2004 by which time they exhausted their raw material, stoppage of production from 1 April 2004 resulted in idling of the Respondent's factory for no fault of theirs. The Petitioner's contention that the Respondent was bound to produce and supply only sleepers, which were actually ordered under formal purchase orders and there being no guarantee or undertaking on the part of the Petitioner for ordering any additional quantity, the Respondent could not have expected orders for any further quantities, was not accepted by the learned arbitrator. The learned arbitrator observed that if this argument were to be accepted, then it was incumbent on the Respondent to finalise the contract on 2 March 2004 itself. By that time, the Respondent has already produced and supplied their contractual quantity of 2,40,000 plus additional 72,000 sleepers ordered on them under Amendment No.1. The learned arbitrator observed that the Petitioner did not finalise the contract but simply asked the Respondent to stop production with effect from 2 March 2004. Having thus found that the Respondent had to stop production with effect from 1 April 2004 for no fault of theirs, resulting into idling of their factory, the learned arbitrator had to find the quantum of compensation to be ordered against the Petitioner on account of loss of overheads and profits. The learned arbitrator observed that the Petitioner itself had issued a circular through Government of India, Ministry of Irrigation and Power (Central Water and Power Commission), published in January 1956, the extract whereof was reproduced and quoted in 'Building And Engineering Contracts' by G.T. Gajria, that in works contracts, 10% overheads and 10% profits could be taken as minimum without any actual proof. The circular of Government of India referred to in this behalf was not in dispute. There was no material produced by the Petitioner before the arbitrator that the circular issued was any different from what was produced and quoted in Gajria's book. The learned arbitrator accepted the circular, but on his own, reduced the percentage of loss of overheads and profits from 10% to 7.5% each and, accordingly, awarded an aggregate sum of Rs.1,34,97,005/- to the Respondent. The learned arbitrator has reasonably construed the provisions of the contract between the parties and broadly applied the law of the land on the issue of loss of overheads and profits. The arbitrator's analysis of the issue of loss of overheads and profits and the conclusion arrived at by him on the amount to be awarded in this behalf do not warrant any

interference under Section 34 of the Arbitration and Conciliation Act, 1996.

7. In *A.T. Brij Paul Singh vs. State of Gujarat* AIR 1984 SC 1703, the Supreme Court considered the question of damages payable to a contractor of a works contract upon the employer committing a breach by improper rescission of the contract. The court held that ordinarily, when the contractor submits his tender in response to an invitation to tender for a works contract, a reasonable expectation of profits is implicit in it and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract. The court held that though what would be the measure of profit would always depend upon facts and circumstances of each case, whilst estimating such loss of profit, it would not be necessary to go into minute details; what would be sufficient and expected of the court would be a broad evaluation of the matter. In other words, not only is a claim of loss of profits admissible, but the measure of damages in that case has to be worked out by taking a broad view of the matter. In *A.T. Brij Paul Singh's* case, the Supreme Court considered adoption of a measure of damages by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15% of the value of the remaining work as an acceptable measure even for another contract for assessing damages towards loss of profit.

8. This law was followed by a Division Bench of our court in *Mahanagar Gas Ltd. vs. Babulal Uttamchand & Co.* 2013 (5) Bom.C.R. 756. Our court held as follows:

"16. Thus, it is clear from the dicta of the Apex Court reproduced above that the claim for damages by a party is admissible once it demonstrates that the other party has committed breach of the fundamental terms of the contract. In the Government contracts which are undertaken by the contractor for earning profits, it is implicit that once there is breach, the object of earning profit is nullified. Once such fundamental breach occurs, the party is presumed to have suffered loss of profit. In the case of *MSK Project India* (supra) the Apex Court has categorically laid down that the claim by contractor for damages as expected profit out of contract, cannot be disallowed on the ground that there was no proof that he has suffered actual loss. The Apex Court in the case of *A.T. Brij Paul Singh V/s. State of Gujrat*, held that in case of Government contract where the Government commits breach by improperly rescinding the contract the Court should carry out a broad evaluation regarding the damages instead of going into minute details. In the present case the Respondent had made a claim for loss of profit. The Arbitrator was not expected to go through the minute details to ascertain the exact figure of damages. The Arbitrator applied rough and ready formula to arrive at the damages payable. Once the Arbitrator arrives at a figure, even by guesswork, the Court may not interfere with it, if it is not unreasonable.

17.. The Apex Court in the case of (*Mohd.Salamatullah Vs. Government of AP*) 11 (1977) 3 S.C.C. 590, while dealing with the grant of damages in the case of breach of contract, held that the appellate Court was not justified in interfering with the quantification of damages, even if they were based on guesswork. In

the present case the Arbitrator has granted 10% damages towards the loss of profit. We do not intend to interfere with the award of grant of damages. Not only it appears reasonable to us in facts of the present case, we must also bear in mind the scope of appeal under Section 37 of the Arbitration Act."

9. In the light of this law, if the arbitrator, relying on the circulars of the Petitioners, which term 10% overheads and 10% profits as minimum admissible without any actual proof, holds that 7.5% of overheads and profits should be treated as reasonable measure of damages, no fault can be found with such assessment within the parameters of the law of challenge to an arbitration award under Section 34 of the Act. In *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49, the Supreme Court considered the expressions "conflict with the public policy of India" and "patent illegality appearing on the face of the award". As held by the Supreme Court in that case, if, on a question of fact, the arbitrator arrives at a finding which exhibits a possible view, a view which is supported by some evidence, the challenge court ought not to interfere with the same. If there is some evidence to support a finding of the arbitrator, then without going into sufficiency of such evidence, the challenge court should accept the assessment. In the present case, the arbitrator's assessment of damages exhibits a reasonable approach and it is supported by some evidence. The award does not exhibit any irrelevant or non-germane material considered by the arbitrator or any relevant or germane material or circumstance disregarded by him for arriving at his conclusions. The views expressed by the arbitrator cannot be termed as views, which no fair or judiciously minded person could have taken or views that would shock the conscience of the court. The award on loss of overheads and profits, accordingly, does not merit any interference.

10. Coming now to the award on price variation, it is submitted by learned Counsel for the Petitioner that the additional quantity of sleepers supplied by the Respondent could only be at the price obtaining as of the original delivery period, i.e. at 31 March 2005. Learned Counsel submits that the price variation clause in the contract (clause 14) requires price variation to be worked out by taking into consideration the indices for the month of production. Learned Counsel submits that the additional quantity supplied by the contractor having been produced during the original delivery period, though supplied later, the ruling price for the original delivery period ought to be considered for payment and not price variation. The learned arbitrator, in this behalf, considered the matter in the light of the contract between the parties and evidence produced before him. The learned arbitrator observed that it was a matter of record that the original quantity of sleepers ordered by the Petitioner was 2,40,000; it was this quantity which was to be supplied within the original delivery period, i.e. upto 31 March 2005. Further, under clauses 20.1 and 20.2 of the contract, the Petitioner could order, respectively, 30% plus 30%, i.e. total 60%, of original quantity, that is to say, a further quantity by 1,44,000 sleepers. The arbitrator, accordingly, held that the Petitioner could have ordered a total quantity of 3,84,000 sleepers under

the terms of the contract and it was this quantity which the Respondent would have to produce and supply within the original delivery period and at the contract price and terms. The arbitrator held that anything beyond this quantity could not have been ordered by the Petitioner under the same contract, as the same would be beyond the terms of the contract. The arbitrator then considered that it was not in dispute that 6,08,000 sleepers in all were ordered from the Respondent and it was at this juncture that the Respondent asked for extension of the delivery period beyond the original date of 31 March 2005. This was not a case where, for supply of contractual quantity, extension of delivery period was asked for; the extension was asked for supply of quantities beyond the contractually permissible quantities. The arbitrator held that, in the premises, the Respondent was entitled to extension of delivery period as a matter of course and there was no reason why the price variation clause ought not to apply or the price of additional quantity should be paid as of the date of the original delivery period, i.e. as of 31 March 2005. Once again, no fault can be found with this assessment of the learned arbitrator. This is a perfectly reasonable and possible view of the contract and no interference is warranted under Section 34 of the Act.

11. Coming now to the award of freight for supply of cement and HTS wires, it may be noted that the arbitrator had to construe clause 16 of the contract for this claim. Clause 16 required that irrespective of location or number of sources from where cement or HTS wires had to be procured, Railway freight for wagon load classification during the month of production from the nearest source of SGCI Inserts was to be paid to the contractor if the material was drawn from the nearest source; if it was not drawn from the nearest source, actual freight or average freight of the nearest of the two sources, whichever is lower, should be paid to the contractor. The arbitrator construed this clause and also assessed the evidence before him on the availability of cement and HTS wires. The arbitrator held that it was an admitted fact that M/s.Digvijay Cement, the nearest approved source, had expressed its inability to supply cement on account of major technical reasons and maintenance of plant. The Respondent had produced in this behalf a letter of August 2003 from M/s.Digvijay Cement. The arbitrator also observed that it was an admitted position that since the nearest approved source, namely, Digvijay Cement, was unable to supply cement, the claimants had brought the required cement from M/s.Aditya Cements of Shambhupura. The arbitrator noted that as the basic facts in the present case were not disputed by the Petitioner, such as the fact of nearest approved source being unable to supply the required cement and the Respondent, with prior intimation to the Petitioner, having procured cement from M/s.Aditya Cement, Shambhupura, under the contract conditions, the Petitioner was bound to reimburse freight charges from the actual source from where the cement was procured. So also in the case of HTS wires, the learned arbitrator relied on the correspondence indicating the approved source's inability to supply the required HTS wires. The arbitrator relied on the Respondent's letter bringing this fact to the notice of the Petitioner and the Petitioner's Chief Track Engineer, in turn, placing these facts on record and

seeking permission from the Railway Board. The arbitrator noted that though the Railway board did not communicate any decision in the matter, since, in the meantime, the Respondent had to procure the materials from other available near sources and these materials were used with the knowledge and consent of the Petitioner for the contract work, the Respondent was bound to be paid freight charges for the material procured from actual sources. The conclusion on the claim of freight does not suffer from any infirmity. The arbitrator's interpretation of the contract and assessment of evidence in this behalf meet the standards of reasonable and possible conclusions as explained by the Supreme Court and do not merit interference under Section 34 of the Act.

12. As regards the other claims awarded, these are mainly claims for delayed payment. These being matters of fact, and these being awarded on a possible view of the matter, there is hardly any scope for debate. If at all, there could be some argument on the rate of interest. But, even as regards the rate of interest awarded, there is nothing shocking to the conscience of the court. It is not a rate which no fair or judiciously minded person could have awarded. It does not accordingly call for any interference.

13. The arbitration petition is, accordingly, dismissed.

14. There shall be no order as to costs.