(2022) 03 DEL CK 0139

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 432 Of 2020, I. A. No. 4684 Of 2020

Union Of India Through Pwd (GNCTD) APPELLANT

Vs

M/S Continental Engineering Corporation RESPONDENT

Date of Decision : 22-03-2022

Acts Referred:
Arbitration And Conciliation Act, 1996 — Section 11, 34
Finance Act, 1994 — Section 65(105)

Citation : (2022) 03 DEL CK 0139

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Kritika Gupta, Anil Kher, Kunal Kher, Sandeep Thukral

Final Decision : Partly Allowed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the A&C Act') impugning an arbitral award dated 10.12.2019 (hereinafter 'the impugned award') delivered by the Arbitral Tribunal comprising of a Sole Arbitrator.

2. The impugned award was rendered in the context of the disputes that have arisen between the parties in connection with an agreement dated 14.05.2013 (hereinafter 'the Agreement'). The dispute before the Arbitral Tribunal related to the respondent?s claim for reimbursement of Service Tax and Environmental Compensation Cess (Claim no. 1 and Claim no. 2). The Arbitral Tribunal partly accepted the claim for reimbursement of Service Tax in respect of certain services availed by the respondent (hereinafter 'CEC') and entered an award for a sum of Rs. 1,38,58,095/- in respect of Claim no. 1. The Arbitral Tribunal also accepted CEC's claim for reimbursement of Environmental Compensation Cess (hereinafter 'ECC') and awarded a sum of Rs. 3,14,06,709/-, in its favour. In addition, the Arbitral Tribunal awarded interest at the rate of 10% per annum on

the aforesaid awarded amounts. The Arbitral Tribunal also awarded costs for arbitral proceedings quantified at Rs. 15,00,000/-.

3. At the outset, it is material to note that the petitioner has accepted the impugned award in respect of CEC's claim for reimbursement of ECC (Claim no. 2) and has confined its challenge to the award relating to reimbursement of Service Tax (Claim no. 1) and interest (Claim no.3)

4. The controversy in the present case arises in the following context:

5. On 06.03.2013, the petitioner issued an electronic Notice Inviting Tender (NIT) for the works regarding "Comprehensive Development of Corridor (Outer Ring Road) between Mukarba Chowk to Wazirabad Chowk, SH: C/o Flyovers, Loops, Bridges across supplementary drain, FOBs, Footpath, Cycle track, Widening of Road on embankment, Rain Water Harvesting scheme, Electrical works and other allied works" (hereinafter 'the Project'), on the terms and conditions stipulated therein.

6. Pursuant to the said NIT, CEC submitted its bid for executing the Project works on 22.03.2013. CEC's bid was accepted by the petitioner and by a Letter of Acceptance dated 29.04.2013 (hereinafter 'the LoA'), the contract for implementation of the Project was awarded to CEC for an amount of Rs. 442,95,68,517/-.

7. The petitioner called upon CEC to furnish a Performance Guarantee in accordance with Clause 1 of the General Conditions of Contract for the CPWD works (hereinafter 'the GCC') for an amount equivalent to Rs. 22,14,78,426/-, within fifteen days after receipt of the LoA. In terms of the LoA, CEC was required to complete the Project within a period of twenty-four months to be reckoned from twenty-two days after the issuance of the LoA. Thus, the stipulated date of commencement of the Project was 21.05.2013 and the stipulated date of completion of the Project was 20.05.2015.

8. On 13.05.2013, CEC furnished the Performance Security as required. Thereafter, on 14.05.2013, the petitioner issued the Letter of Commencement of Work to CEC. Thereafter, in terms of Clause 9 of the Conditions of Contract, the parties entered into the formal agreement (the Agreement).

9. During the course of executing the Project, CEC submitted various requests for Extension of Time for completion of the Project and the petitioner, from time to time, granted such extensions. The last extension of time till 31.08.2018 was granted by the petitioner by a letter dated 30.06.2018. However, CEC could complete the Project works only by 27.08.2018, that is, after a delay of three years and three months.

10. Thereafter, on 27.09.2018, the petitioner issued a Final Completion Certificate.

11. The dispute between the parties arose in respect of CEC's claim regarding

reimbursement of Service Tax from the petitioner for the period between October, 2013 to June, 2017 and reimbursement of ECC.

12. By a communication dated 23.10.2013 addressed to the petitioner, CEC claimed that in terms of Clause 37 of the GCC, it was entitled for reimbursement of Service Tax. CEC also requested the petitioner to inform it regarding the proper guidelines and process flow for obtaining reimbursement of Service Tax. The petitioner responded by a letter dated 04.01.2014 informing CEC that if the contractor (CEC) has already paid the Service Tax to the concerned Service Tax Department on demand, then the Service Tax is deemed to be reimbursed to the contractor and therefore, no Service Tax is payable to the contractor in the instant case. Thereafter, CEC sent a letter dated 12.03.2014, claiming a sum of Rs. 3,97,244/- on account of reimbursement of Service Tax and requested the petitioner to process its bill for release of payment at the earliest.

13. Further, by a letter dated 01.06.2015, CEC also requested the petitioner to refund a sum of Rs. 15,05,524/- deposited as Service Tax from the period October, 2013 till March, 2015, in accordance with Clause 37(i) of the GCC and Clause 14 of the Instructions to Bidders. The petitioner responded by a letter dated 27.07.2015 rejecting CEC's claim by relying on a circular [Circular no. 147/16/2011 dated 21.10.2011] issued by Department of Revenue, Ministry of Finance, Government of India. The petitioner claimed that the services provided by the sub-contractors for the infrastructure project were also exempted from Service Tax.

14. Thereafter, by a letter dated 13.08.2015, CEC, once again, sought reimbursement of a sum of Rs. 15,05,524/- deposited as Service Tax till March, 2015. Further, CEC also submitted an independent opinion obtained from a firm of Chartered Accountants - R.R. Lingsur and Associates.

15. The Chartered Accountants appointed by CEC negated the petitioner's stand in respect of the aforesaid Circular dated 21.10.2011 issued by the Department of Revenue, Ministry of Finance, Government of India and opined that in the instant case, the tax paid on the services by the sub-contractors are classifiable under Goods Transport Agency (GTA) Services not under Work Contract Service (WCS) and therefore, such services were not exempt from payment of Service Tax under Section 65 (105) of the Finance Act, 1994. It was further opined that CEC was right in depositing the Service Tax on such services even though the same were in relation to exempt infrastructure projects. Consequently, CEC was entitled to reimbursement of the Service Tax paid by it as it had duly complied with the conditions stipulated under Clause 37(i) of the GCC.

16. By several communications thereafter, CEC requested the petitioner to reimburse the Service Tax paid by it and the petitioner rejected CEC's claim of reimbursement of Service Tax by relying on the Circulars issued by the Government of India and held the claim to be untenable.

17. On 04.01.2016, CEC had informed the petitioner regarding the applicability

of the ECC pursuant to the notification issued by the Government of NCT of Delhi and the petitioner's liability to reimburse such additional charges in terms of Clause 38 of the GCC. Thereafter, by several communications, CEC had reminded the petitioner to reimburse the said charges. However, the petitioner declined to reimburse the amounts claimed as reimbursement of ECC.

18. Thereafter, by a letter dated 22.05.2017, CEC requested that the matter be placed before the Engineer-in-Chief of the petitioner in order to resolve the disputes amicably. However, the Engineer-in-Chief failed to respond to the aforesaid letter of CEC.

19. Aggrieved by the lack of response from the Engineer in Chief, CEC, by a letter dated 27.06.2017, referred the dispute to the Superintending Engineer in terms of Clause 25 of the GCC. By a letter dated 01.08.2017, the Superintending Engineer rejected the claims of CEC on the ground that Clause 37(i) of the GCC and Clause 14 of Instructions to Bidders provide for reimbursement of Service Tax levied on the services provided by the main contractor and it had nothing to do with the levy of Service Tax on the input services received by the main contractor – that is, CEC – from its various sub-contractors/service providers.

20. Thereafter, CEC, by a letter dated 10.08.2017, filed an appeal as contemplated under Clause 25 of the GCC, with the Principal Chief Engineer (Projects) for pursuing its claim. In terms of Clause 25 of the GCC, the Chief Engineer was under an obligation to communicate its decision within a period of thirty days, however, no such decision was rendered by the Chief Engineer within the stipulated period. By a letter dated 14.09.2017, CEC, once again, requested the Chief Engineer to expedite the process and communicate its decision. But, the Chief Engineer failed to do so.

21. Dissatisfied with the decision of the aforesaid authorities, CEC by a letter dated 31.10.2017, preferred an appeal before the Disputes Redressal Committee (hereinafter 'DRC'). However, the DRC failed to take a decision in respect of the aforementioned claim within the period stipulated under the Agreement.

22. In view of the disputes between the parties, CEC, by a letter dated 27.04.2018, invoked the agreement to refer the disputes to arbitration in terms of Clause 25 of the GCC, and requested the petitioner to appoint an arbitrator for adjudication of the disputes.

23. In the meanwhile, the Minutes of the Meeting of the DRC, which was held on 23.03.2018, were communicated to CEC. This indicated that the DRC had rejected all the claims preferred by CEC.

24. On 10.05.2018, the Project Chief Engineer appointed Shri K.K. Peshin (Retd.) ADG, CPWD as the sole arbitrator. However, by a letter dated 17.05.2018, Shri K.K. Peshin communicated his inability to accept his appointment on the ground that he had been engaged as an arbitrator by the petitioner in five other cases.

25. Thereafter, CEC approached this Court by way of a petition under Section 11

of the A&C Act for the appointment of an arbitrator and by an order dated 16.11.2018, this Court appointed a former Judge of this Court as the Sole Arbitrator.

26. CEC filed its Statement of Claims before the Arbitral Tribunal. The claims made by CEC are tabulated below:

Claim no.1

Reimbursement of Service Tax

Rs. 5,02,47,953/-

Claim no.2

Reimbursement of Environmental Compensation Charge

3,14,06,709/-

Claim no.3

Interest on Claim No. 1 and Claim No. 2 above @ 10% from the date of submission to PWD till date of submission of the Statement of

Claim by the Respondent i.e. 10.01.2019

Rs. 1,57,44,558/-

Claim no.4

Costs of arbitration including GST

As per actuals

27. The petitioner filed its Statement of Defence, however, it did not raise any counter claims.

The Impugned Award

28. By the impugned award, the learned Arbitrator partly allowed Claim No. 1 regarding reimbursement of Service Tax paid by CEC. The Arbitral Tribunal held that under Clause 37(i) of the GCC and Clause 14 of Instruction to Bidders, CEC was required to satisfy three conditions to claim reimbursement from the petitioner; first, that it had paid Service Tax to the concerned department; second, that the Department had raised demand for payment of the Service Tax from CEC and; third, that the payment made by CEC was to the complete satisfaction of the Engineer-In-Charge. The Arbitral Tribunal found that the petitioner had not raised any dispute with regard to the payment of Rs. 5,02,47,953 by CEC. Out of the said amount, an amount of Rs. 1,38,58,095/- was directly deposited with the Department of Service Tax and the remaining balance, that is, Rs. 3,63,89,858/-, was deposited with the Department through CEC's sub-contractors and vendors. The Arbitral Tribunal found that CEC had duly satisfied the above three conditions in respect of the sum of Rs. 1,38,58,095/-

paid by it to the Department of Service Tax and therefore, awarded reimbursement of the aforesaid amount in respect of Claim No.1. However, the claim for the remaining amount of Rs. 3,63,89,858/- was rejected.

29. The Arbitral Tribunal also allowed Claim nos. 2 and 3 of CEC and held that that the burden to pay the ECC arose pursuant to a Notification dated 20.10.2015 issued by the Department of Environment, Government of NCT of Delhi in compliance with an order dated 09.10.2015 passed by the Supreme Court in I.A. no 345 and 365 of 2015 in W.P. (Civil) 13029 of 1985 captioned as MC Mehta v Union of India and Ors. The Arbitral Tribunal further referred to Clause 38 of the GCC, which specifically dealt with the statutory liability of the petitioner, in terms of any taxes/levies/cess imposed by any statute after the last stipulated date for the receipt of tender. The Arbitral Tribunal held that the petitioner could not deny the said claim of reimbursement of ECC, in view of the said clause. Accordingly, the Arbitral Tribunal allowed Claim no. 2 and awarded a sum of Rs. 3,14,06,709/-, in favour of CEC.

30. The Arbitral Tribunal allowed CEC's claim for interest and awarded interest at the rate of 10% per annum on the aforesaid claims. Additionally, a sum of Rs. 15,00,000/- was awarded in favour of CEC as costs of arbitration in respect of Claim no. 4.

31. Aggrieved by the impugned award, the petitioner has filed the present petition.

Reasons & Conclusions

32. The petitioner has assailed the impugned award, inter alia, on the ground that it is contrary to the plain terms of the Agreement. It does not dispute that CEC is entitled to reimbursement of Service Tax in respect of the Agreement in question. However, it disputes that CEC is entitled to claim reimbursement of any Service Tax paid in respect of other contracts entered into by it for availing services from third party service providers.

33. The petitioner had also contested CEC's claim for reimbursement of ECC before the Arbitral Tribunal. However, the petitioner has accepted the impugned award in this regard. The learned counsel for the petitioner has confined her challenge to the impugned award only to the extent the Arbitral Tribunal has partly allowed the respondent's claim for reimbursement of Service Tax and interest.

34. At this stage, it would be relevant to refer to the relevant clauses of the Agreement concerning the reimbursement of Service Tax: Clause 15 of the General Rules and Directions; Clause 37(i) of GCC; and Clause 14 of the Instructions to Bidders. The said clauses are set out below:

"Clause 15 of the General Rules and Directions.

Sales-tax and VAT (except service tax), purchase tax, turnover tax or any other tax applicable In respect of the Contract be payable by the Contractor and Government will not entertain any claim whatsoever in respect of the same. However, in respect of service tax, same shall be paid by - the contractor to the concerned department on demand and it will be reimbursed to him by the Engineer in Charge after satisfying that it has been actually and genuine1y paid by the contractor.

Clause 37(i) of GCC:

Sales Tax/ VAT (except Service Tax), Building and other Construction Workers Welfare Cess or any other tax or Cess in respect of this contract shall be payable by the contractor and Government shall not entertain any claim whatsoever in this respect. However, in respect of service tax, same shall be paid by the contractor to the concerned department on demand and it will be reimbursed to him by the Engineer-in-Charge after satisfying that it has been actually and genuinely paid by the contractor.

Clause 14 of the Instructions to Bidders:

Sales Tax, Excise-Duty as applicable shall be paid by the contractor himself Whereas Contract Tax, DVAT, Labour Cess and Income Tax etc. as applicable shall be deducted by the department from the WA bills. The contractor shall quote his rates considering all such Taxes. However regarding the Service Tax, the same shall be reimbursed by the department on production of proof of actual payment of Service Tax in the concerned department made on demand."

35. It is important to note that the Agreement was, essentially, an Item Rate Contract, whereby CEC had submitted all inclusive rates for various BOQ items. CEC claimed that during the course of execution of the works in question, it had paid Service Tax amounting to Rs. 5,02,47,953/- in respect of various input services and was thus, entitled to reimbursement of the same.

36. The said amount comprises of two distinct components. The first component is in respect of certain input services availed by CEC on which Service Tax was payable under the Reverse Charge Mechanism. In terms of the Reverse Charge Mechanism, Service Tax on certain services is chargeable from the service recipient and not the service provider. CEC claimed that it had paid Service Tax aggregating to Rs. 1,38,58,095/- in respect of such input services. The said amount was paid directly to the Service Tax Authorities in respect of (a) legal consultancy services; (b) manpower recruitment / supply agency service; (c) rent a cab scheme operator service; (d) works contract service; (e) transport of goods by road; and, (f) security detective agency.

37. The second component comprises of Service Tax included by the service providers in their invoices for services rendered to CEC. The said tax is assessed in the hands of the third-party service providers and deposited by them with the concerned department. CEC claimed a sum of Rs. 3,63,89,858/- in respect of such services availed by it. These services include (a) hiring charges of

machinery; (b) annual maintenance charges; (c) soil investigation; (d) testing charges; (e) internet charges; (f) security charges; (g) video shoot site charges; (h) professional charges; and, (i) repair work.

38. In respect of the aforementioned services, the Service Tax was included in the tax invoices raised by the service providers to CEC. CEC had made payment of the said invoices and sought reimbursement of the Service Tax charged by the service provider.

39. The Arbitral Tribunal held that on a conjoint reading of Clause 37(i) of the GCC and Clause no. 14 of the Instructions to Bidders, CEC is entitled to reimbursement of the Service Tax, provided it satisfies the three conditions viz. (i) CEC had paid the Service Tax to the concerned department; (ii) that the demand had been raised by the Department for payment of Service Tax to CEC; and, (iii) that the payment was made in complete satisfaction of the Engineer-in-Charge. The Arbitral Tribunal held that the said three conditions were duly satisfied in respect of payment of Rs. 1,38,58,095/- being the Service Tax paid by CEC as a recipient of certain input services, in respect of which the Service Tax was payable on a Reverse Charge Mechanism. In respect of claim for reimbursement of Service Tax in respect of other input services – where the Service Tax was assessed and levied on the service provider and not CEC – the Arbitral Tribunal denied the claim on the ground that no demand was raised by the Service Tax Authorities on CEC. Concededly, CEC was not an Assessee in respect for such services as the Service Tax was assessed in the hands of the service provider that had provided the services to CEC.

40. CEC was registered as a service provider "in respect of commercial or industrial buildings and civil structure". It is important to note that there was no Service Tax payable in respect of the works executed by CEC under the Agreement as such works were specifically exempted from the levy of Service Tax. By a Notification dated 20.06.2020 issued by the Government of India, Ministry of Finance (Notification No.25/2012 – Service Tax), inter alia, following services were exempted from levy of service tax:

"12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of·

(a) a civil structure or any other original works meant predominantly for use other than for commerce, Industry, or any other business or profession;…"

41. In terms of a Notification dated 01.03.2016, the services pertaining to construction of flyovers was also exempted from Service Tax.

42. Concededly, CEC was exempted from payment of any tax in respect of any service rendered by it for execution of the Agreement in question. As mentioned above, the Agreement was essentially an Item Rate Contract and CEC was not assessed to Service Tax in respect of any of the items executed by it for

performance of its obligations under the Agreement.

43. Undisputedly, CEC's claim is for reimbursement of Service Tax included in the services availed by it and not the services rendered by it. The Arbitral Tribunal had proceeded on the basis that since CEC was assessed to Service Tax, albeit, on a Reverse Charge Mechanism, in respect of certain services, it was entitled to reimbursement in terms of Clause 37(i) of GCC read with Clause 14 of the Instructions to Bidders.

44. The said conclusion is, ex facie, erroneous. Clause 37(i) of the GCC expressly provided that Sales Tax / VAT (except Service Tax), Building and other Construction Workers Welfare Cess or any other tax or cess "in respect of this contract" shall be payable by the Contractor. However, in respect of Service Tax, the same would be paid by the Contractor to the concerned department on demand and would be reimbursed to it by the Engineer-in-Charge. There is no ambiguity that Clause 37(i) of the GCC refers to the Service Tax levied "in respect of this Contract"; that is, the Agreement entered into by CEC on item rate basis. As noticed above, there is no dispute that execution of the Agreement was exempt from levy of any Service Tax. Accordingly, there is no question of CEC claiming reimbursement of any Service Tax.

45. CEC is not claiming reimbursement of Service Tax in respect of the Agreement executed by it or the works performed by it; CEC claims the Service Tax levied in respect of the services availed by it from third party service providers. This is, obviously, the Service Tax chargeable in respect of contracts between the third-party service providers and CEC. Clearly, this is outside the scope of Clause 37(i) of GCC.

46. The Arbitral Tribunal has ignored the nature of the Agreement between the petitioner and CEC. As noticed above, the Agreement was on item rate basis and not a back to back service procurement contract. There was no stipulation in the Agreement in question that CEC would avail services on behalf of the petitioner.

47. In view of the above, there is merit in the petitioner's contention that the award of reimbursement of Service Tax is contrary to the express terms of Clause 37(i) of the GCC.

48. Although, it is well settled that matter regarding interpretation of a contract falls within the jurisdiction of Arbitral Tribunal and the Courts would not normally interfere with such interpretation. However, in the present case, this Court is of the view that Arbitral Tribunal's interpretation of Clause 37(i) of the GCC to the extent it includes reimbursement of Service Tax levied in connection with contracts / arrangements between CEC and third parties, is fundamentally flawed and vitiates the impugned award by patent illegality.

49. Insofar as CEC's Claim no.2 is concerned (reimbursement of ECC), CEC had placed a Certificate issued by its Statutory Auditor certifying that it had a paid sum of Rs. 3,14,06,709/- for additional expenses on account of ECC during the

period November, 2015 to August, 2018. The Arbitral Tribunal found that the said amount was payable by the petitioner, in view of Clause 38 of the GCC. The petitioner has accepted the award in regard to the claim of reimbursement of ECC.

50. The learned counsel for the petitioner had contended that the award of interest is contrary to the terms of the Agreement; however, the petitioner is unable to show any clause in the Agreement that proscribes award of interest.

51. In view of the above, the petition is partly allowed. The impugned award to the extent of a sum of Rs. 1,38,58,095/- awarded in favour of CEC in respect of Claim no. 1, is set aside. Consequently, no interest is also payable on the said amount.

52. The parties to bear their own costs.

53. The pending application is also disposed of.