

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No.353/2005

GOVT. OF NCT OF DELHI. Petitioner
Through: Mr. Sachin Chopra with
Mr. Shashi Mohan, Advocates.

Versus

M/S. NAV NIRMAN CONSTRUCTION COMPANY
& ANR. Respondents
Through: Mr. Sandeep Sharma and Mr. Shrey
Chathly, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
06.03.2012

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by the Irrigation and Flood Control Department ('IFCD') of the Government of National Capital Territory of Delhi aggrieved by an Award dated 16th June 2005 passed by the sole Arbitrator.

2. The work of construction of outfall structure of DDA storm water drain at RD 12418 mtrs. of Supplementary Drain (L/B) was awarded to the Respondent No.1 M/s. Nav Nirman Construction Company by the Petitioner

by a letter dated 27th May 1992. Although the estimated cost for the tender was Rs.5,49,271, the tendered amount was Rs.9,19,369. The stipulated date of start of work was 2nd June 1992 and date of completion was 2nd October 1992. However, the work was actually completed on 23rd March 1996.

3. The case of the Respondent No.1 in the arbitration proceedings was that the tender put out by the Petitioner failed to account for the presence of a High Tension Tower ('HTT') at the site as well as a proposal to construct a bridge across the supplementary drain for the proposed outfall structure. It was the case of the Respondent No.1 that when, after making all arrangements for labour, material, equipments, etc, it commenced the work of excavation on the basis of tender drawings and completed the construction of coffer dam in the supplementary drain, the Engineer-in-charge of the work on behalf of the Petitioner ordered the Respondent No.1 to stop the work on the ground that the alignment of the constructed work was faulty and required to be changed completely to avoid the existing HTT as well as the proposed main road bridge on the drain.

4. It is the case of the Respondent No.1 that thereafter during the stipulated contract period, the decision on the revised alignment was not taken. On 12th October 1992, the Petitioner supplied to the Respondent No.1 only a part drawing of the revised alignment of the structure. Subsequently, according to the Respondent No.1, the Petitioner decided to raise the chambers of the outfall structure. It was stated that the complete drawings of the work were supplied by the Petitioner to the Respondent No.1 only in the middle of 1995. A decision for additional work of construction of road, main manhole covers for chambers and pitching work was taken in the first week of March 1996. The Respondent No.1 claimed that the Petitioner had built the coffer dams across the Supplementary Drain at RD 11000 and 15000 mtrs. i.e. on the upstream of Delhi Tail Distributary and started diverting DDA storm drain water in the supplementary drain by installing heavy duty pumps at RD 12370 to save the adjoining areas of Rohini and Pitampura from flooding. This resulted in further ponding of water in the supplementary drain to a level of 214 mtrs. whereas at the time of tender the supplementary drain was not carrying any storm water. Since this entire action of diversion of storm water was not on account of the Respondent No.1, it prevented the Respondent No.1 from completing the work on time

and was a major hindrance. The Respondent No.1, therefore, explained that its non-completion of the work within the stipulated time was entirely on account of the Petitioner and further that the Respondent No.1 had unnecessarily incurred heavy expenditure. This lead to the Petitioner raising several claims.

5. The case of the Petitioner before the learned Arbitrator was that when the site was inspected on 29th and 30th June and 30th July 1992, no labour or arrangements were found to have been initiated by the Respondent No.1. By a letter dated 15th July 1992, the Respondent No.1 was asked to submit the detailed programme of the work but the Respondent No.1 failed to do so. It is denied that any coffer dam had been constructed by the Respondent No.1. However, in para 5 of the reply it was admitted that pumps had been deployed by the Petitioner for pumping out water in the Rohini area into the supplementary drain but it was denied that any damage to the machinery or otherwise had been caused since the Respondent No.1 had already removed all their machinery, material and labour from the working area from within the supplementary drain portion. It was contended that the statement of the Respondent No.1 that the standing water in the drain was higher than 214 m.

was “absolutely misleading and vague since the Respondent No.1 was supposed to give the actual levels that was existing at that time duly authenticated.” Referring to General Condition No.12 and Specification No.3 of the Special Conditions of the Contract (SCC), it was submitted that the Respondent No.1 was supposed to take care of site conditions including the diversion of the storm water into the supplementary drain by the DDA. The responsibility for ensuring that the work was completed despite the above conditions was entirely on the Respondent No.1 and no extra payment was to be made on that account. A perusal of the hindrance register showed that hindrances at Sl.No.823 related to rains and discharge from the DDA pipelines. In any event, under General Condition No.12, as Specification No.3, it was for the Respondent No.1 to take precautions against damage by floor or rains or from accidents and no compensation was to be allowed to the Respondent No.1 on this score. Under Specification No.3, in case of accumulation of rain water “on any account” it was the Respondent No.1 who had to dewater the area, rectify the defects so caused and clean the area “for which nothing extra will be payable to the contractor.” It was maintained that the Respondent No.1 was not serious about the completion of the work in time and in case it violated the instructions of the GC dated

15th March 1993 and submitted a detailed programme to complete the work, then there would have been no occasion for the subsequent developments including release of the storm water in addition to supplementary drain. The Petitioner contended that on account of delay caused by the Respondent No.1, show cause notices were issued to it under Clause 3 of the Agreement on 13th May 1994 and 31st January 1995 and 18th March 1993. It was, accordingly, denied that anything extra was liable to be paid to the Respondent No.1.

6. A reply was given to the 47 individual items of claim stating that nothing was payable. Two significant items of claim were Claim No.9 relating to contractor's profit at 20% of the contract value of Rs.9,19,000 which worked out to Rs.1,83,800. This was denied by the Petitioner stating that the work of four months got extended to three years only because of the fault of the Respondent No.1 and that the Respondent No.1 could not ask for profit/reward on account of its own fault. The other was Claim No.10 which was for a sum of Rs.3,19,200 on account of increase in rates due to the orders of the Supreme Court closing down quarries at Badarpur. Here again, the Petitioner denied any liability. According to the Petitioner "even

otherwise, the closure of quarries were ordered by the Hon'ble Court even before the claimants quoted the rates.”

7. A perusal of the impugned Award dated 16th June 2005 reveals that in the first place the appointment of the Arbitrator was challenged on the ground that it was the Chief Engineer, who was the head of the IFCD who had to initially decide the disputes and if that was not successful, the parties could seek reference of the disputes to arbitration. It was contended that only a person appointed by the Chief Engineer could, in terms of Clause 25 of the Contract, act as the Arbitrator. The learned Arbitrator discussed the provisions of Section 11 of the Act and held that any objection to the appointment of an Arbitrator by the Court should have been taken at that stage. However, it was not shown that such an objection was taken before the designate of the Chief Justice. Consequently, the objection raised in that behalf before the learned Arbitrator was rejected.

8. The above conclusion of the learned Arbitrator on the question of the jurisdiction appears to be based on a correct interpretation of both the relevant clauses of the contract as well as the legal position and, therefore, does not call for interference.

9. The learned Arbitrator then noticed that the Petitioner had admitted that the drawings and designs for the outfall structure were not provided till 7th October 1992. The drawings and designs for the item relating to extra intermediate chambers, which was later added to the work, were made available in April 1993. There was an admission regarding the diversion of the storm water from the Rohini area into the supplementary drain. There was also an admission that the Respondent No.1 had constructed two coffer dams to carry out the job of protection work.

10. The learned Arbitrator on analyzing pleadings and documents on record came to the conclusion that General Condition No.12 and Specification No.3 of the SCC would not apply since it was not meant to cover lapses in site investigations and preparation of detailed and correct working drawings which were basic requirements that had to be fulfilled by the Petitioner before inviting tenders for the work contract and the condition was not meant to relieve the Petitioner of all liabilities in respect of all obstructions or hindrances at the site. In other words, the non-fulfillment of the basic requirement of furnishing the complete set of final location and alignment of

the constructed work of outfall structure at the time of inviting the tenders, and subsequently by changing the location and alignment of the outfall had resulted in a breach of the contract by the Petitioner and for no fault of the Respondent No.1. The learned Arbitrator also found that the drawings for the extra chambers were supplied to the Respondent No.1 only in the middle of 1995 and further, the Petitioner took a decision regarding additional work only in March 1996. All this led to the delay in completion and prolongation of the period of construction by 41 months. It was categorically held that the breach of the contract was by the Petitioner. It was observed that the damage in this case was not from flood or rains or accidents but due to the Petitioner diverting water from the additional catchment area. Therefore, the Petitioner was liable for any consequence including extra expenditure incurred and time spent by the Respondent No.1 in meeting such contingencies.

11. The learned Arbitrator allowed Claim No.1 for refund of security deposit and earnest money in the sum of Rs.14,927. Claim No.2, for a sum of Rs.84,500 towards remaking of the coffer dams at a new location, after the change of locations and alignment of the outfall structure by the

Petitioner, was allowed. Claim No.3 for a sum of Rs.20,000 for closing the second chamber in 1993 was also allowed to the extent of Rs.14,652. As against Claim No.4 for dewatering in January 1993, against the claim of Rs.46,800, the learned Arbitrator allowed Rs.30,762. As against Claim No.5 for silt clearing in January 1993 and 1994, the learned Arbitrator held that specification of the SCC would not be applicable and, accordingly, allowed Rs.56,232. The Arbitrator allowed Claim No.6 for dewatering of subsoil water and clearing of silt and cleaning of borings in the sum of Rs.1,05,000. Claim Nos.7, 8 and 9 were rejected.

12. Under Claim No.10 for a sum of Rs.3,19,200 being the extra amount incurred by Respondent No.1 on account of shifting of the quarries from Delhi to Haryana, following orders of the Supreme Court, the learned Arbitrator allowed Rs.3,19,200/-. Claim No.11 was rejected. Claim No.12 in the sum of Rs.5,00,640 for open water dewatering was allowed.

13. As regards, Claim No.13 for salary of staff from April 1993 to January 1994, the learned Arbitrator allowed Rs.1,44,200. In relation to Claim No.14 for clearing of coffer dam, the learned Arbitrator allowed Rs.23,100.

Under Claim No.15 for dewatering for pitching, the learned Arbitrator awarded Rs.30,217. Claim Nos.17 to 22 were rejected. Against Claim Nos.23 to 45, an amount of Rs.54,927 was awarded.

14. Before dealing with the submissions of the learned counsel for the parties, it must be noted that in the present case, the arbitral record got destroyed in a fire and, therefore, was directed to be reconstructed by the counsel for the parties. On 19th January 2012, this Court passed the following order:-

“1. For some reason the arbitral record has not been requisitioned till date.

2. Mr. Sandeep Sharma learned counsel for the Respondent states that he had enquired from the learned Arbitrator, Mr. G.G. Shivdasani who is an Advocate practising in this Court and was informed that the arbitral record was destroyed in a fire.

3. Mr. Sachin Chopra, learned counsel appearing for the Petitioner seeks some time to file a compilation of documents including the statement of claim, the reply thereto, the rejoinder and any other document which

forms part of the arbitral record. He is permitted to do so within two weeks with an advance copy to the counsel for the Respondent.

4. List on 6th February, 2012.”

15. Thereafter, during the course of the submissions, Mr. Sachin Chopra, learned counsel for the Petitioner, filed a compilation of the documents including a copy of the reply stated to have been filed before the learned Arbitrator.

16. The central issue concerns the applicability of General Clause No.12 and Specification No.3 of the SCC which, according to the learned Arbitrator, were not applicable since the delay in execution of the work was due to the diversion of the storm water by the DDA into the supplementary drain. This is a pure finding of fact by the learned Arbitrator. Although, it was sought to be contended by Mr. Sachin Chopra, learned counsel for the Petitioner, that the scheduled date of completion of the work was much prior to the diversion of the storm water, and that, therefore, the work could have been completed well in time by the Respondent No.1, this Court notices that the learned Arbitrator has found as a fact that there was delay in the

Petitioner supplying the drawings to the Respondent No.1 and this contributed to the delays.

17. Consequent to the above finding of the learned Arbitrator as regards non-applicability of General Condition No.12 or Specification No.3, many of the Respondent No.1's claims had to necessarily be allowed. This Court is unable to find any patent illegality in the impugned Award in this regard. It is not possible to ascertain, and even Mr. Chopra has been unable to show, whether the Petitioner led any evidence in this regard. In the absence of the arbitral record, it is not possible for this Court, on the basis of the copies of the documents provided by the Petitioner, to hold that the impugned Award suffers from any patent illegality as regards the above central issue.

18. It was submitted by Mr. Sachin Chopra that as regards the Claim No.10, the learned Arbitrator failed to give any reasons for rejecting the plea of the Petitioner that the closure of the quarries was earlier than the tender itself. Mr. Sandeep Sharma, learned counsel for the Respondent No.1, however, pointed out that the order of the Supreme Court in ***M.C. Mehta v. Union of India*** was made on 15th May 1992.

19. A perusal of the order of the Supreme Court shows that the directions were issued for shifting of the stone crushers from 15th August 1992 onwards. This date was nearly three months after the date of the acceptance of the tender in the present case. It is likely, therefore, that the Respondent No.1 was unaware of the impact of the said order of the Supreme Court at the time the bidding for the contract took place. This was a circumstance which could not have been anticipated by the Petitioner. The full impact of the order of the Supreme Court directing the shifting of the quarries was likely to have been felt only later on. Therefore, the claim of the Respondent No.1 was not an unreasonable one. The learned Arbitrator has correctly appreciated the facts and circumstances of the case while allowing Claim No.10. The decision in this regard, therefore, does not call for any interference.

20. As regards Claim No.12 in the sum of Rs.5,00,640 it was sought to be urged by Mr. Chopra that a specific plea had been raised by the Petitioner that the documents on the basis of which such claim was maintained were fabricated and that the learned Arbitrator completely failed to deal with the

said objection.

21. A perusal of para 21.2 of the impugned Award shows that the learned Arbitrator noted the above contention. After discussion of the evidence and the documents in para 21.3 of the impugned Award the learned Arbitrator returned the finding that “the allegations of the Respondent No.1 regarding the details being not authentic are unsubstantiated.” Therefore, it cannot be said that the said objection of the Petitioner has not been dealt with.

22. With the arbitral record having been destroyed in a fire, it is not possible to determine if the documents now sought to be relied upon by the Petitioner, formed part of the arbitral record and were, in fact, exhibited and proved in accordance with law before the learned Arbitrator. It is not clear that the Petitioner asked for examination of the persons who may have been involved in the preparation of the bills and vouchers which were relied upon by the Respondent No.1. This was a matter of evidence and the Petitioner does not appear to have taken steps to demonstrate that the said documents were not genuine. Since this is a matter for evidence and the learned Arbitrator has on its perusal, given detailed reasons and rejected the plea of

the Petitioner, this Court would not like to sit as a court of appeal and re-appreciate the said evidence. Also, a perusal of the petition under Section 34 of the Act, shows that there is no ground urged therein that despite the Petitioner having sought to examine witnesses to prove its case, the learned Arbitrator declined such permission.

23. In the facts and circumstances of the case, this Court finds no ground having been made out for interference with the impugned Award dated 16th June 2005 of the learned Arbitrator.

24. The petition is, accordingly, dismissed but in the circumstances with no orders as to costs.

S. MURALIDHAR, J

MARCH 06, 2012

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