

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 21.05.2014
Judgment pronounced on: 02.09.2014

FAO(OS) 537/2012 & CM Nos.6001/2014 and 6261/2014

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

versus

ELSAMEX -TWS-SNC-JV Respondent

Advocates who appears in this case:

For the Petitioners : Mr Sandeep Sethi, Sr. Advocate with Ms Meenakshi Sood, Advocate
For the Respondent : Mr P.V. Kapur and Ms Kiran Suri, Sr. Advocates with Mr Purvesh Buttan, Ms
Aparna Mattoo and Ms R. Gambhir, Advocates

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present appeal is filed by NHAI (hereinafter referred to as the “appellant”) under Section 37(1) (b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “said Act”) and assails the order dated 31.08.2012 passed by a learned Single Judge of this Court in OMP No.789

of 2012 whereby the petition filed by the appellant under section 34 of the said Act to set aside the award dated 12.03.2012 was dismissed.

2. The facts of the present case are enunciated as below:-

3. Pursuant to invitation of bids the respondent was awarded the work of construction of road from Km. 136.0500 to Km. 199.141 (Bhadrak - Balasore) Project Contract Package- OR III vide Letter of Acceptance dated 03.05.2001, for a contract price of ₹1,95,18,58,171/-.

4. During the course of execution of the work, certain disputes arose between the parties which were referred to arbitration.

5. Ten claims totaling to ₹1,86,00,04,331/- were filed before the Arbitral Tribunal by Elsamex (hereinafter referred to as the “respondent”) on 18.08.2006. NHAI filed its reply on 06.11.2006.

6. The claims which were raised by the respondent before the Arbitral Tribunal by way of its statement of claim were as follows:-

- a) Claim No.1: Financial compensation due to delay in execution in terms of revised rates for the quantities executed after contract period in respect of the BOQ items (amount claimed- ₹84,33,52,141/-).

- b) Claim No.2: Payment of adjustment of the above revised rates from the base date adopted for derivation to the billed date as applicable under Sub-Clause 70.1 of Contract.
- c) Claim No.3: Financial compensation on account of loss on overheads suffered due to reduced turn over (amount claimed- ₹41,69,87,882/-).
- d) Claim No.4: Financial compensation for losses suffered due to underutilization of machinery within the contract period (amount claimed- ₹43,47,27,681/-).
- e) Claim No.5: Financial compensation for losses suffered due to underutilization of manpower within the contract period (amount claimed- ₹2,71,56,621/-)
- f) Claim No.6: Financial compensation for losses suffered due to payment of additional bank guarantee commission during the extended period of completion (amount claimed - ₹2,12,97,170/-).
- g) Claim No.7: Financial compensation for losses suffered due to difference in interest on margin money deposited towards bank guarantee during the extended period of completion. (amount claimed- ₹54,22,450/-).
- h) Claim No.8: Financial compensation for losses suffered due to interest payable to NHAI due to additional advances and deferment of recovery of advances (amount claimed- ₹11,18,00,537/-).
- i) Claim No.9: Financial compensation towards interest from the date of each installment of the amounts became due under each

of the claimed amounts @ 18% per annum on a monthly compounded basis till the date of payment.

j) Claim No.10: Financial compensation on account of the cost incurred towards the Arbitral proceedings.

k) Claim No.11: Any other relief/s that the Arbitral Tribunal may deem fit under the facts and circumstances.

7. Thereafter NHAI terminated the contract between the parties on 20.12.2007. By the order dated 01.07.2008, the Arbitral Tribunal permitted the respondent to file its modified statement of claims, limiting its claims up to the date of termination to ₹1,30,67,56,917/-. Reply to the modified claim was also filed by the NHAI.

8. The Arbitral Tribunal framed the following questions in order to adjudicate the disputes/claims:-

- (a) Question No.1: Whether the delay in the execution of the work was caused due to reasons not attributable to the claimant, and if so to what extent?
- (b) Question No.2: Whether the extension of time granted by the engineer/ respondent covers the entire period of delays as per Question 1. If not, does it require modification?
- (c) Question No.3: If the delays are not attributable to the claimant, whether the “ No Claim Certificate” obtained by the respondent as a precondition for

issuing the letter granting the Extension of Time under the contract would bar the claimant from his entitlement to cost in respect of the claims?

- (d) Question No.4: whether the liquidated damages are leviable by the respondent when the time for completion of work is extended for reasons of delay not attributable to the claimant?
- (e) Question No.5: Whether the Claimant proves his entitlement to the claims?

9. Question No. 1 was answered by the Arbitral Tribunal, holding that the conditions stipulated in the clause 42.1 of the contract were not complied with as possession of the site with free access was not handed over by the appellant to the respondent as per schedule-I.

10. Question No. 2 was answered by holding that the appellant had admittedly given the respondent Extension of Time from 04.02.2004 to 31.12.2006 and the said recommendation by the engineer for the Extension of Time had not been rejected by the appellant and was, therefore, deemed to have been granted. Thereafter, despite the engineer failing to take a decision on the request for further Extension of Time, the Respondent was allowed to continue the work till 20.12.2007. The Arbitral Tribunal considered that date as the deemed extended date of the contract.

11. Question No. 3 was answered by holding that the No Claim Certificate given by the respondent was not voluntary but under undue influence and did not bar it from raising legitimate claims on account of Extension of Time.

12. Question No. 4 was answered by holding that there was no justification for the appellant to recover liquidated damages from the respondent, with a number of obstructions continuing to exist on the work site till 20.12.2007.

13. Claim No. 1 was modified by the respondent to ₹35,70,20,002/-, the Arbitral Tribunal Awarded ₹19,84,94,253/-. This was the difference between the amount based on the original rates paid on the quantities of work done up to Interim Payment Certificates 18 of which were up to the original tender period and the amount at the revised rates for the quantities of work done beyond the contract period in Interim Payment Certificates 19 to 32. The Arbitral Tribunal set up the calculations in a bill-wise exhaustive chart in the impugned Award dated 12.03.2012.

14. Claim No.2 was allowed in respect of the work done beyond 04.02.2004 as per the base indices prevailing as on that date. The price adjustment was asked to be worked out and paid to the respondent.

15. Claim No.3 was in the sum of ₹41,69,87,882/-. The Arbitral Tribunal assessed the loss of overheads due to delays not attributable to the respondent due to prolongation of work based on Hudson/Emden formula and Arbitral Tribunal awarded ₹22,23,93,537/- to the respondent.

16. Against Claim No.4 the Arbitral Tribunal awarded the respondent a sum of ₹27,00,80,160/- against the claim of ₹54,94,84,618/-. Claim no.5 was rejected.

17. Against Claim No.6 the Arbitral tribunal awarded a sum of ₹2,12,97,170/- to the respondent. Claim Nos. 7 and 8 were rejected.

18. Against Claim No. 9 the Arbitral Tribunal awarded Simple Interest @ 15% for the pre-award period and @ 18% per annum for the post-award period.

19. Against Claim 10 the respondent was awarded ₹5,00,000/- as costs.

20. Thereafter OMP No. 789 of 2012 was filed by the appellant under section 34 of the said Act to set aside the award dated 12 March 2012 passed by the Arbitral Tribunal. This petition was dismissed by the learned Single Judge by the order dated 31.08.2012 impugned herein.

21. The learned counsel for the appellant contends that the award is patently illegal and against public policy because the Arbitral Tribunal has travelled beyond its jurisdiction by awarding a high rate of interest @15% for pre award period and @18% for the post award period along with the awarded amount, and in deriving the new Bill of Quantities rate on the basis that since the original contract period of 33 months was extended by 47 months therefore the respondent contractor is entitled to revised rates for the quantities executed after the contract period in respect of Bill of Quantities item.

22. It is further contended by the learned counsel for the appellant that the claim with regard to revised rates for quantities executed after the contract period is not within the purview of the contract and hence not admissible. It is further argued that as clause 70.2 of COPA provides that price adjustment is the only entitlement of the respondent during the currency of the contract, the original contract continues to remain in force during the extended period. Further for price adjustment which is linked with Claim No. 1, if the claim No.1 is allowed for the revision of BOQ rates then price adjustment would have to be computed by taking the revised BOQ rates as the basic rates and not the basic rates prevailing as in February 2004.

23. It is further contended that the Arbitral Tribunal cannot adopt any other methodology in respect of Price Adjustment clause other than the stated clauses in the agreement for the extended period.

24. It is argued that the price escalation ought not to have been awarded on the escalated rates and related damages worked out on that basis. A 'No Claim Certificate' was also obtained from the respondent.

25. The learned counsel for the respondent argues that the delay is attributable to the appellant as the conditions stipulated in clause 42.1 of the contract were not complied with. The possession of the site with free access was not handed over by the appellant to the respondent as per schedule-I.

26. Further it is argued by the learned counsel for the respondent that the No claim Certificate was not given by free consent but under undue influence and did not bar it from raising legitimate claims on account of extension of time.

27. We have heard both sides. In the present case it is rightly held by the Arbitral Tribunal that the delays are not attributable to the claimant/respondent. In fact the delay is attributable to the appellant as the

conditions of the contract were not complied with as possession of the site with free access was not handed over by the appellant to the respondent.

28. The learned single judge is correct in holding that merely because the awarded amount inclusive of interest constituted 66% of the contract price, will not in itself make as one the award opposed to the public policy of India. This argument has been aptly dealt with and explained by the learned Single Judge in para 8 and para 9 of the impugned order as reproduced below:

“8. This court has heard the submissions of Mr. Ravi Gupta, learned Senior Counsel appearing for the petitioner NHAI. It was first urged that the awarded amount, as allowed by the AT together with interest @15% per annum for the pre-award period and at 18% per annum thereafter, effectively meant that against the contract price of Rs. 1,95,18,58,171 a total sum of Rs. 1,27,80,16,415 (constituting 66% of the contract price) was awarded in favour of the respondent. Since the amount awarded was unconscionably high, it should be held to be opposed to the public policy of India.

9. The above submission overlooks the fact that the arbitrator had in fact awarded interest @ 18% per annum for the post-award period and 15% per annum for the pre-award period, although what was claimed was 18% interest compounded monthly. Considering the number of years for which the dispute has been pending it is not surprising that on the basis of the interest awarded due to the respondent the amount for a period of around five years would be substantial. Merely, because the awarded amount, inclusive of interest constitutes 66% of the contract price, will not by itself make the award opposed to the public policy of India.”

29. The simple interest awarded by the Arbitral Tribunal @18% per annum for post award period and @15% per annum for pre award period as against claimed compound interest (monthly) @18% per annum is lawful and correctly upheld by the Learned Single judge in accordance with the reasons as stated by the Arbitral Tribunal in the paras 209 to 212 of the impugned award.

30. The Learned Single Judge has also rightly held that the 'No Claim Certificate' given by the respondent to the appellant on 08.07.2005 was not under free consent as the appellant had withheld the payments till a 'No Claim Certificate' was given. Respondent did not have any option other than to comply with the direction of the Engineer of the appellant. Thus, this circumstance did not bar the respondent from raising legitimate claims on account of extension of time.

31. The learned Single judge has further rightly held, while making a distinction between Claim No.1 and Claim No.2 in paras 11 and 12 of the impugned order, as below:-

“11. The above submissions cover Claim No.2 (payment of price adjustment) as well as Claim No.1 concerning payment of revised rates for the quantities

executed after the contract period. A distinction has to be drawn between these two claims. Claim No.2 for price adjustment is referable to sub-Clause 70.1 of the Conditions of Particular Application ('COPA') of the contract with the base date as applicable for the revised rate in respect of items of work executed beyond the contract period. Claim No.1 was for revision of BOQ rates since the original contract period of 33 months was extended by 47 months due to delays not attributable to the respondent. In dealing with Claim No.1 the AT has referred to a decision of the Supreme Court in **K.N. Sathyapalan v. State of Kerala 2006 Scale 12654** where it was held that even in the absence of clause for escalation of rates, the Contractor should be compensated for the losses suffered by him on account of increase in cost during the extended period."

12. This Court is unable to find any error in the above reasoning of the AT. The claim for price adjustment with reference to sub-Clause 70.1 COPA was indeed a distinct claim and that was quantified using the base date as on 4th February 2004 in respect of the work done and covered by the IPCs 19 to 32."

32. The case law reported as **K.N. Sathyapalan vs State of Kerala: (2007) 13 SCC 43** as considered by the Arbitral Tribunal and also the Learned Single Judge explains that the arbitral tribunal was correct in allowing the above said claims. It clearly states that in absence of escalation clause, the contractor should be compensated for the losses suffered by him on account of increase in cost during the extended period. The relevant portion is as quoted below:

“32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopri Parshad case and also Patel Engg. Case. As was pointed out by Mr. Dave, the said principle was recognized by this court in P.M. Pail where a reference was made to a retired judge of this court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned judge, this court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this court in T.P. George case.”

33. The above principle was reiterated in **State of Karnataka and Anr. Vs. R.N. Shetty and Co., Engineers and Contractors:** AIR 1991 Karnataka 96.

The relevant portion is reproduced below:

“17. The effect of extension of time on damages claimed by the contractors has been exhaustively considered by several authors in several standard text books and a few of them are Halsbury’s Law of England 4th edition, para 1281, Keating on Building Contracts at para 161 and Hudson on Building and Engineering Contracts, 10th edition at page 647, which view is reiterated in Emden on Building Contracts. All these text books are to the effect that when the time

fixed by the contract ceases to be applicable on account of some act or default of the employer, a provision is generally inserted to extend the time. When the power to extend time has been properly exercised, the contractor will be liable to pay liquidated damages. In a true sense and on an examination of the matter in its proper perspective, what comes up for consideration in such a case is the determination of the question as to what are the rates applicable as a result of the extension of time granted and not awarding of damages as such. The enhancement in the rates itself will constitute the damages. When the contract itself does not bar such rates being given and the arbitrators in the case on hand on a consideration of the material on record, have arrived at the rate at which the contractors will be entitled for payment of extension of the contract time because of certain lapse on the part of the appellants and that rate being just and proper one, it cannot be said that the arbitrators have committed any error apparent on the face of the record calling for interference at the hands of this Court.”

34. In view of the above, the learned Single Judge has not committed any error in upholding the award and also the methodology adopted by the arbitral tribunal in awarding the said claims. The learned Single Judge has rightly upheld that the rate analysis submitted by the respondent was based on CWC and MORTH guidelines which are followed for all National Highways work. In paras 143 to 147 of the impugned Award, the Arbitral Tribunal has explained the manner in which it has only partially accepted the

rate analysis submitted by the respondent. In para 149, the Arbitral Tribunal has recomputed the rates for each bill, item wise.

35. We find no error in the decision of the Arbitral Tribunal as well as the learned Single Judge in OMP No.789 of 2012 so as to warrant any interference in appeal. The principle laid down by the Supreme Court in **Wander vs. Antox: 1990 Supp (1) SCC 727** provides for justifiable interference by the appellate court only when the decision appealed against is palpably perverse. In the present appeal there exist no grounds or illegality to interfere with the impugned order.

36. The appeal is dismissed and disposed of accordingly. Pending applications also stand disposed of.

37. There shall be no order as to costs.

SIDDHARTH MRIDUL, J.

BADAR DURREZ AHMED, J.

SEPTEMBER 02, 2014
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