

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 249/2013

Reserved on: March 3, 2015

Decision on: March 25 2015

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Petitioner

Through: Mr. Rajiv Kapoor with
Mr. Anil Kumar and Mr. Rahul
Ranjan, Advocates.

versus

BUMI HIWAY (M) SDN BHD

..... Respondent

Through: Mr. D. Moitra, Advocate.

AND

O.M.P. 274/2013

BUMI HIWAY (M) SDN BHD

..... Petitioner

Through: Mr. D. Moitra, Advocate.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Respondent

Through: Mr. Rajiv Kapoor with
Mr. Anil Kumar and Mr. Rahul
Ranjan, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

25.03.2015

1. Both these petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') raise limited challenge to an Award dated 4th December 2012 passed by the Arbitral Tribunal ('AT') in the disputes between the parties i.e. the National Highways Authority of

India (NHAI) and Bhumi Hiway (M) SDN BHD ('BHSB') arising out of a contract agreement dated 14th June 2001 for the Four-Laning of Km 4.23 to 26.00 of Jalandhar Pathankot Section of NH-1A in the State of Punjab.

2. The start date was 30th August 2001. The scheduled date of completion was 29th August 2003. The date up to which the extension was granted was 30th September 2004. In terms of the report of the Engineer the date of substantial completion was 1st October 2004 and the date of completion was 16th October 2004.

3. The disputes between the parties were referred to a three-Member AT. The following claims of BHSB were rejected by the AT:

(ii) Claim No.1 in for a sum of Rs.48,46,316.40 for recoupment of premium paid on additional insurance covers apart from the stipulation of the contract agreement.

(ii) Claim No. 2 for a sum of Rs.1,37,71,418 for breach in compliance with the provisions of construction methodology as per contract agreement and the consequential loss suffered by the claimant.

(iii) Claim No.3 for sum of Rs.30,46,496 on account of the loss caused to the contractor for preparation of construction drawings for permanent works which was primarily the obligation of the Engineer/employer.

(iv) Claim No. 4 for a sum of Rs.58,47,103 for laying DBM in two layers instead of a single layer.

(v) Claim No.5 for a sum of Rs.1.19 crores for loss of estimated profit in respect of abnormal reduction in the scope of work.

4. Claim No. 6 was for a sum of Rs.8.64 crores for losses on account of overheads and for loss by way of profit. The AT applied the MOST Data Book and also the Hudson's formula and determined that BHSB would be entitled to Rs.1,88,70,000.

5. Claim No. 7 was for interest on the above claims @ 12% per annum *pendente lite*. The AT determined that no pre-suit or *pendente lite* interest was payable since Claims 1 to 5 had already been rejected. However, under Claim No. 8 i.e. future interest @ 12% per annum on the awarded amount against Claim No. 6 from the date of the Award till the receipt of payment was granted.

6. OMP No. 249/2013 has been filed by the NHAI challenging the above Award primarily on the ground that no material was placed by BHSB on record to prove that it had incurred any overheads or suffered any losses. Having acknowledged this, the AT could not have applied the formula and estimated the overhead charges and loss of profit.

7. On its part BHSB has filed OMP No. 274/2013 to the limited extent that in the impugned Award the AT declined to grant it *pendente lite* interest.

8. It was submitted by Mr. Rajiv Kapoor, learned counsel for NHAI, that the AT erred in holding that NHAI was responsible for the delay of 38 weeks of the total delay of 59 weeks because liquidated

damages ('LD') were levied only for 16 days. Secondly, it was submitted that in assessing the loss of the overheads to be 4%, the AT proceeded on surmises and conjectures. No amount towards overheads or the loss of profit could have been awarded unless BHSB proved that there was some actual loss and that it had done all that was required to mitigate the loss. NHAI had already paid BHSB escalation up to 30th September 2004 by which time the work had been substantially completed. Therefore, awarding 6% on account of loss of profit had no reasonable basis. Mr. Kapoor accordingly submitted that the impugned Award was against public policy and wholly unsustainable.

9. Mr. D. Moitra, learned counsel appearing for BHSB, submitted that the scope of interference by the Court in the impugned Award was extremely limited. The AT had only applied Hudson's formula which had been approved by the Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181*. The AT had taken into consideration the MOST Data Book as per which the overhead charges were considered as 8% of the total cost of the work. The figure of 4% of the total cost of charges determined by the AT was, therefore, reasonable. Likewise, after taking into account the doctrine of mitigation of expenses, the AT considered that 6% of the costs would be a fair and reasonable amount as per the loss of profit is concerned and that finding also was not liable to be challenged. He placed reliance on the decision in *National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd. – Gammon India Ltd. (JV) 2013(2) AD(Delhi) 450*.

10. As far as the petition by BHSB was concerned, Mr. Moitra

submitted that there was no basis for the AT to decline to grant *pendente lite* interest only because Claims 1 to 5 were rejected. He submitted that non-Award of interest was against public policy and law of the land and contrary to Clause 43.2 read with 43.1 and 57.1 in terms of which BHSB was entitled to interest @ 12% per annum with effect from 3rd October 2005.

11. As regards Claim No.6, the AT noted that extension of time had been granted up to 30th September 2014 i.e. for 57 weeks without levying compensation. Compensation was levied only for a period of 16 days from 1st to 16th October 2014. In the Award, in respect of reference 1, the AT had held that the levy of LD was not justified. The AT had concluded that out of the total delay of 59 weeks, NHAI had been responsible for delay of 38 weeks. The AT discussed two components of the claim. One was loss by way of overheads, the other was loss by way of profits. The AT itself noted that “regarding the loss of overheads, claimant has not supported its claim by any documents.” In the absence of any such document, the AT resorted to MOST Data Book and after noting that overhead charges in terms of the said Data Book were considered to be 8% of the total cost of the work, applied the doctrine of mitigation of damages and considered that a figure of 4% of the total cost of the work “would be a fair and reasonable assessment of the overhead charges by way of damages.”

12. As regards loss of profit, the AT again noted that “the claimant has not substantiated this part of the claim based on any documentary evidence.” It noted that “to avail loss of profit, claimant should have put forth convincing evidence to suggest it was geared in terms of financial capacity and other resources to tender for other works during

the period of delay to be able to earn profit. This exercise has not been done by the claimant.” The AT also noted that the claimant had been paid escalation up to 30th September 2004 by which time the work had substantially been completed. Consequently, the claimant had earned profit from the work as originally planned by them with the only difference that this profit had been earned over a longer period of time than intended. After noticing the absence of the details, the AT resorted again to the MOST Data Book as per which the profit was taken as 10% of the total work. Again after mitigation of expenses, the AT considered that a figure of 6% of the cost of the work “would be a fair and reasonable compensation towards loss of profit.”

13. The principal question that arises therefore is whether in the absence of BHSB placing any material before the AT to prove any loss of profit or damages having been incurred, the AT was justified in proceeding to award BHSB any amount in respect of the said two claims.

14. The Court is conscious of the scope of the interference with an Award in terms of Section 34 of the Act. In *Associate Builders v. Delhi Development Authority 215 (2014) DLT 204*, after referring to the decision in *ONGC Limited v. Western Geco International Limited 2014 (9) SCC 263* the Supreme Court held that where a finding is based on no evidence or the AT takes into account something irrelevant to the decision which it arrives at, such decision would necessarily be perverse. The AT was expected not to give an Award which was contrary to the settled legal position.

15. In *McDermott International Inc. v. Burn Standard Co. Ltd.*

(*supra*), the Court specifically dealt with the method for computation of damages. The Court prefaced its discussion with the remarks that “In the assessment of damages, the Court must consider only strict legal obligations, and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.” The Court then explained each of the formulae commonly adopted. The Court noted the criticisms of the Hudson’s formula observing that “it adopts the head office overhead percentage from the contract as the factor for calculating the costs and this may bear little or no relation to the actual head office costs of the contractor.” The Emden formula which has received judicial support in a number of cases has the advantage of using the “contractor’s actual head office and profit percentage rather than those contained in the contract.” The Eichleay formula is used “where it is not possible to prove loss of opportunity and the claim is based on actual cost.” The Court did not endorse any one particular formula since “it is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.” What is significant as far as the above discussion is concerned is that it is only concerned with the application of formulae and not whether the formulae would apply notwithstanding there is no proof of the contractor having suffered overhead charges or loss of profit.

16. In ***McDermott International Inc*** it was argued that MII could not prove the actual loss suffered by it as required by Sections 55 and 73 of the Contract Act despite which the Arbitrator had applied Hudson’s

formula for calculating the amount of damages “having regard to the books of accounts and other documents maintained by MII.” The Court noted that “the learned Arbitrator did insist that sufferance of actual damages must be proved by bringing on record the books of accounts and other relevant documents.” Consequently, the question in *McDermott International Inc* was whether despite there being no material whatsoever produced to prove the suffering of losses by the claimant, it would still be entitled to compensation only by applying one of the formulae. In para 115 (SCC) the Court held: "only because the Arbitrator adopted a certain formula by itself does not lead to the conclusion that there is a breach of Sections 55 and 73 of the Indian Contract Act."

17. The net result of the discussion is that nowhere in the decision in *McDermott International Inc (supra)* did the Supreme Court hold that even without producing any material to show loss of overheads or profit, the Arbitrator could apply one of the formulae to award the claims.

18. On the other hand, the Court finds that it has been repeatedly stressed in the decisions of the Court that some basic material has to be placed on record by the contractor to demonstrate loss of profits. It is one thing to say that on account of the premature termination of a contract, losses would be suffered and such in such instances it will be possible to demonstrate loss of profit. However, that is not the case here. Extension of time was given by NHAI up to 30th September 2004 without levy of LD. As the AT itself noted, BHSB did earn profits but over an extended period of time. Secondly, as the AT itself noted, BHSB did not produce any material to show that it had

suffered any overhead costs or loss of profit. Therefore, the question of the AT simply applying the formulae did not arise. The Award appears to have proceeded on guess work.

19. Even *Associate Builders* (supra) was not a case of a contractor not producing any material to show that it had suffered losses. On the other hand, the evidence produced by the contractor was discussed in great detail in para 18 (SCC) of the judgment. In particular it was observed as under:

“Further, he has pointed out from the statement of claims before the Arbitrator that there was evidence for claims 9, 10 and 11 laid before the Arbitrator which the Arbitrator has in fact accepted. Also establishment expenses were set out in great detail before the Arbitrator and it is only on this evidence that the Arbitrator ultimately has awarded these claims.”

20. In *Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited JT 2009 (12) SC 135*, the Court analysed Section 74 of the Contract Act which contemplated a party aggrieved by a breach of contract receiving compensation whether or not actual damages or loss were proved to have been caused by the breach. The Court explained that the section merely

"dispenses with proof of 'actual loss or damage'; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.”

21. In *State of Rajasthan v. Ferro Concrete Construction Private Limited (2009) 12 SCC 1* the Court observed in para 55 as under:

“While the quantum of evidence required to accept a claim, may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable.”

22. In *Shah Jagshi Jethabhai v. J.N. Construction 2012 (3) Bom CR 546*, it was observed that in case of a contract containing an LD clause, evidence of actual loss/damage is necessary and the burden to prove the same lies on the claimant. It was held:

“The quantum of damages cannot be awarded only on the basis of presumption and assumption and/or expectations. The doctrine of mitigation of loss, burden of proof, onus of proof and shift of burden, just cannot be overlooked by the Arbitrator while awarding the damages.”

23. For the aforementioned reasons, the Court is unable to sustain the impugned Award of the Arbitrator as it has proceeded merely on surmises and conjectures in awarding BHSB's claim for overheads and loss of profits without there being any evidence whatsoever produced to even *prima facie* show that it had suffered overhead charges and incurred losses. This is not a case of inadequacy of evidence but there being no evidence whatsoever to justify the impugned Award. In such circumstances, merely applying formulae to the total cost of the project to calculate the compensation was impermissible in law. The award of the amount under Claim No. 7 is therefore set aside. Consequently, the question of awarding any interest on the said amount also does not arise.

24. For the aforementioned reasons, OMP No. 249/2013 is allowed with costs of Rs.10,000 which will be paid by the contractor NHAI within four weeks. OMP No. 274/2013 is dismissed.

S. MURALIDHAR, J.

MARCH 25, 2015

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