

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 710/2013

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

**Through: Mr. Rajiv Kapoor with
Mr. Anil Kumar, Advocates.**

versus

PROGRESSIVE CONSTRUCTIONS LTD Respondent

Through: Mr. Amit George, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
04.03.2015

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') seeking to challenge a unanimous Award dated 12th March 2013, passed by a three Member Arbitral Tribunal ('AT') partly allowing the claims of the Respondent.
2. A contract dated 12th August 1999 was entered into between the Petitioner, National Highways Authority of India ('NHAI'), and the Respondent, Progressive Constructions Limited, for the work of contract package No. EW-4 regarding four laning of Km 410 to Km 419 and Km 470 to Km 476 of the Purnea-Gayakota Section of NH-31 in the State of Bihar.
3. One of the first issues raised before the AT was whether the claims of the Respondent were barred by limitation. In terms of the contract if the Respondent had any dispute over the settlement of any of the bills, it had to first approach the Engineer and within 14 days of the notification of the

Engineer's decision refer the dispute to the resolution process before the Dispute Review Expert ('DRE').

4. It was submitted by Mr. Rajiv Kapoor, learned counsel for the Petitioner, that the disputes raised by the Respondent were time barred in terms of Sections 21 and 43 (3) of the Act read with Article 137 of the Limitation Act since they were not referred within three years of the cause of action arising in respect of such claims. Further, they were not referred to the DRE within 14 days of the notification of the Engineer's decision under Clause 24 of the General Conditions of Contract ('GCC'). The impugned Award was, in terms of Section 28 (3) of Act, contrary to the Indian law of limitation and, therefore, deserved to be set aside under Section 34 (2) (iv) of the Act. In particular, it was submitted that under Section 21 of the Act, the arbitration proceedings commenced "on the date on which a request for that dispute to be referred to arbitration is received by the Respondent."

5. Mr. Kapoor points out that of the five claims raised by the Respondent, Claim No. 2 was raised before the Engineer on 30th November 2002 and was rejected by him on 24th December 2002. Claim No. 4 was raised before the Engineer on 27th December 2002. Claim Nos. 1 and 3 were raised on 9th November 2002 and Claim No. 5 was raised on 18th July 2002. The arbitration clause was invoked on 19th March 2007. It is pointed out that the DRE gave his decision on Claim Nos. 1, 2, 3 and 4 on 13th April 2007. It is submitted that if the Respondent could have invoked the arbitration clause even before the decision of the DRE, there was no reason for the Respondent not to invoke it within three years of first raising the dispute. It was submitted that the AT had erred in observing in para 6.4.5 of the impugned

Award that the Petitioner had acquiesced in referring the disputes to the DRE. The mere extension granted for the decision by the DRE did not extend the period of limitation, which had already begun to run with the decision of the Engineer. The decision of the DRE did not give rise to a fresh cause of action to the Respondent. Mr. Kapoor submitted that by returning a finding that the cause of action arose on 31st December 2006, the AT appears to have laid down a new law of limitation. Mr. Kapoor referred to the decision of this Court in *Oil & National Gas Corporation Limited v. Amtek Geophysical Pvt. Ltd. 2004 (115) DLT 624* to urge that the limitation cannot be said to have ceased to run only because the Claimant was awaiting the decision of the Respondent.

6. On the other hand, it was submitted by Mr. Amit George, learned counsel for the Respondent, that the DRE was supposed to give his decision within 28 days of the receipt of the notification of the disputes to him in terms of the agreement. However, enormous delay was caused and both parties agreed to extension of time for the DRE to give his decision up to 31st December 2006. The DRE ultimately gave his decision on one claim on 13th March 2007, which was against the Respondent. This led to the Respondent invoking the arbitration clause on 19th March 2007. The decision of the DRE on the remaining claims was given on 13th April 2007. It could not therefore be said that the claims were time barred, on the date their reference to arbitration was sought.

7. The above submissions have been considered. In the present case, the

disputes raised by the Respondent before the earlier DRE were as under:

- (1) dispute regarding dewatering by well joint method by letter dated 27th January 2003;
- (2) dispute regarding supply and erection of structural steel for R.O.B. rate for sub-structure and super-structure by letter dated 4th June 2003;
- (3) dispute pertaining to compensation for interest charges for premature/untimely recovery of mobilization and machinery advance by letter dated 19th April 2003;
- (4) dispute pertaining to compensation for use of Pakur aggregate by letter dated 19th April 2003;
- (5) dispute pertaining to cost compensation for excessive cost in embankment and sub-grade construction by letter dated 19th April 2003 and
- (6) dispute pertaining to cost compensation for idling of machinery and resources by letter dated 19th April 2003.

8. The first DRE appointed by NHAI was Mr. A.D. Narain. After he resigned one Mr. L.R. Gupta, Director General, CPWD (Retired) was appointed as DRE with effect from 1st May 2004. Disputes at 1, 2, 3 and 4 above were referred to the new DRE by letter dated 29th September 2004 and dispute Nos. 5 and 6 were referred under letter dated 30th December 2004.

9. By letter dated 19th March 2007, the Respondent invoked the arbitration clause, i.e. Clause 25.1 of the Special Conditions of Contract ('SCC') and nominated its Arbitrator. Thereafter, the NHAI nominated its arbitrator by

letter dated 7th May 2007. The two arbitrators appointed the third Presiding arbitrator on 21st June 2007, thus completing the AT.

10. The contract between the parties itself envisages that the disputes have to first be referred to the Engineer for his decision, and if either no decision is taken or a decision adverse to the Claimant is given, disputes can be referred to the DRE. It cannot be said that simultaneous with the reference of the disputes to the DRE, the limitation in respect of such claims begins to run. In other words it cannot be said that for the purpose of Section 21 of the Act, along with the reference of the dispute either to the Engineer or to the DRE, the dispute should have been referred to arbitration. It is possible that the DRE gives a recommendation which is acceptable both to the Respondent and the Petitioner. In such a case, there will be no surviving dispute. Therefore, till such time the DRE does not give his decision, it will not be possible for the parties to know if there is any dispute to be referred to arbitration. In that sense, the question whether there is an arbitrable dispute has to necessarily depend on the decision of the DRE. With both the parties having extended time to the DRE to give his decision by 31st December 2006, the limitation for the claims referred to him certainly did not arise prior to that date. The DRE ultimately gave his decision on one claim on 13th March 2007 and the remaining four on 13th April 2007. These decisions were not acceptable to the Respondent. Meanwhile on 19th March 2007 the Respondent invoked the arbitration clause.

11. The decision in *Oil & National Gas Corporation Limited v. Amtek Geophysical Pvt. Ltd.* (supra) relied upon by Mr. Kapoor was given in the

context of repeated claims made by the Claimant to which there was no response at all by the Respondent. It was in those circumstances that the Court observed that repeated representations would not extend the limitation for preferring the claim. The situation here is very different. Both the parties agreed to extend the time for the decision of the DRE. The said decision is, therefore, of no assistance to the Petitioner.

12. In the circumstances, the Court concurs with the view expressed by the AT that the three years' limitation period in terms of Article 137 of the Limitation Act, 1963 could be said to have begun to run from 31st December 2006, by which time the DRE was expected to give his decision, but failed to do so. The invocation of the arbitration clause by the Respondent on 19th March 2007, cannot therefore, be said to be beyond the period of limitation.

13. As far as the merits of the impugned Award are concerned, of the 7 claims filed by the Respondent, Claim Nos. 1, 4 and 7 were dismissed by the AT, and the Award to that extent has not been challenged by the Respondent. However, the Claim Nos. 2, 3, 5 and 6 were partly allowed by the impugned Award dated 12th March 2013. The Award to that extent has been challenged by the Petitioner. These claims are:

- (a) cost compensation for well point system of dewatering;
- (b) cost compensation for excessive cost of embankment and subgrade construction;
- (c) cost compensation for idling of resources; and
- (d) interest towards past, pendent lite and further.

14. At the outset, the Court would like to observe that in terms of the settled law explained by the Supreme Court in several decisions including *ONGC Limited v. Western Geco International Limited* (2014) 9 SCC 263 and *Associate Builders v. Delhi Development Authority* 215 (2014) DLT 204 (SC), the scope of interference by the Court in exercise of its powers under Section 34 of the Act is limited. For interfering with an Award, the Court has to be satisfied that it is either perverse or irrational or contrary to the governing law or any of the provisions of the Act or shocks the judicial conscience. The mere possibility of another view being taken on the evidence produced before the AT does not by itself furnish a ground for the Court to interfere. The Court does not sit in appeal over the impugned Award and is not required to re-appreciate the evidence.

15. On the aspect of the claim for compensation for the well point system of dewatering, the AT was satisfied that in terms of Technical Specification Nos. 304, 309 and 2903 for the work [i.e Bill of Quantity ('BOQ') Item No. 5.01 (a)] and Clause 44.1 (f) of the GCC, the adverse soil condition encountered by the Respondent at the site when work began could not have been anticipated by it earlier at the time of tendering for the contract. The relevant geological soil data that was available at the time of tendering did not anticipate the actual conditions encountered by the Respondent.

16. On appreciation of the relevant clauses of the contract and the evidence placed before it, the AT held that the Respondent was entitled to be compensated for the dewatering that it had to carry out using the well point system. The said finding cannot be said to be perverse or contrary to the provisions of the contract, or contrary to the evidence placed on record. The

Court is not persuaded to hold that any error has been committed by the AT in this regard.

17. Likewise the cost compensation for excessive cost of embankment also became necessary due to the absence of soil investigation data because the AT was satisfied on the basis of the evidence produced before it that the Respondent could not have anticipated the additional work for embankment regarding the soil foundation. Technical Specification No. 305 contemplated drying unusually wet soil by aeration and exposure to the sun and not for the kind of work, which had to be undertaken by the Respondent at huge additional expense, i.e. spreading, turning and drying on the road side. In similar circumstances, in *National Highways Authority of India v. M/s. Somdutt Builders – NCC-NEC (JV)* (decision dated 28th February 2012 in OMP No. 744 of 2010) this Court rejected the challenge by the NHAI and upheld the arbitral award in that case which allowed a similar claim for compensation for excessive cost of embankment. The appeal filed by the NHAI against the said decision, FAO (OS) No. 195 of 2012, was dismissed by the Division Bench on 7th May 2012 with costs of Rs. 20,000. Consequently, this Court is unable to be persuaded to hold that any error has been committed by the AT in allowing the above claim.

18. As regards the compensation for idling of resources, there was a requirement under the contract for the Petitioner to hand over the required land to the Respondent free of all encumbrances. Under Clause 44.2 of the GCC, failure to give access to a part of the site was a compensation event as described in Clause 44.1 (a). This would result in the contract price being increased and/or the intended completion date being extended. The learned

AT referred to Section 73 of the Contract Act, 1872, which envisages adequate compensation being awarded to remedy the loss and damages suffered due to the breach of contract. The learned AT has correctly followed the applicable law in this regard and concluded that the overheads incurred by the Respondent for idling resources required to be compensated.

19. It was submitted by Mr. Kapoor that the AT proceeded on equity and surmises in calculating the “approximate cost” for overhead charges and therefore, committed a patent illegality.

20. The Court notes that claim for overheads was not allowed *in toto* by the AT. It referred to the Standard Data Book for Analysis of Rates (First Revision) 2003 of MORTH in calculating the overhead charges for 12 months’ delay. It also referred to the Hudson formula. This was on the basis of the basic foundational facts having been established by the Respondent regarding the delay in the construction activity as far as handing over of the site to it by the Petitioner was concerned. The failure to hand over the required site to the Respondent by the Petitioner is a finding of fact. The view taken by the AT was reasonable in the circumstances.

21. Likewise, the claim for compensation for the idling of plants and machinery caused by the obstruction and encumbrances on the site for over 18 months was also based on evidence. The AT has explained the basis on which it awarded Rs. 2,98,80,000 as compensation for idling of the plant and machinery. The interest awarded by the AT cannot also be termed as excessive.

22. This Court is unable to find any error in the impugned Award of the AT. It is consistent with the evidence on record as well as with the relevant clauses of the contract.

23. No ground has, therefore, been made out for interference with the impugned Award under Section 34 of the Act. The petition is dismissed, but in the facts and circumstances, with no order as to costs.

S. MURALIDHAR, J.

MARCH 04, 2015

Rk/mg

