

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: 21st September, 2015
Judgment Delivered on: 17th February, 2016

+ FAO(OS) 502/2015

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

versus

M/S HINDUSTAN CONSTRUCTION CO LTD. Respondent

Advocates who appeared in this case:

For the Appellant : Mr Ramesh Kumar
For the Respondent: Mr Dayan Krishnan, Senior Advocate with Ms Malavika Lal.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. The appellant impugns order dated 29.06.2015 whereby the petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") impugning award dated 30.12.2014 passed by the Arbitral Tribunal by a majority of 2:1 in dispute Nos.6,7,8 & 9 has been dismissed.

2. The appellant/NHAI had entered into a contract dated 26.02.2005 with the respondent/Hindustan Construction Company

Limited for construction of Chennai Bypass Phase-II (connecting NH-4 and NH-5) and widening of Chennai Bypass I (connecting NH-45 and NH-4) and widening of Chennai Bypass I (connecting NH-45 and NH-4). The work was to be carried out in thirty months. The entire work was divided into various items forming part of the Bill of Quantities (BoQ). The payment of work done was to be released by the appellant to the respondent based on measurement of Bill of Quantities (BoQ) items, as certified by Engineer/Supervisory Consultant. The disputes that arose between the parties were referred to arbitration. The present case relates to dispute Nos.6,7,8 & 9. The arbitral tribunal by a majority of 2:1 pronounced their award on 30.12.2014. The third Arbitrator sent a dissent note through an e-mail attachment on 29.12.2014.

3. The first ground on which the appellant had impugned the majority Award was on account of the non-participation of Mr. Pawan Kumar, in the internal meeting of the Arbitral Tribunal at Chennai on 30th December, 2014 at which the majority Award was published.

4. The learned single judge has noted in the impugned order that in terms of the Contract Agreement, the arbitration was to take place in Delhi. Eighteen hearings took place in Delhi. Three internal meetings of the Arbitral Tribunal took place in Chennai on 21st November, 2014, 8th December, 2014 and 9th December, 2014 at the

GRT Hotel. These internal meetings were attended by all three members of the Arbitral Tribunal i.e. the Presiding Arbitrator Mr. Sree Rama Murthy, the nominee Arbitrator of HCC Mr. Sridharan, and the nominee Arbitrator of NHAH Mr. Pawan Kumar. A decision was taken at the meeting on 9th December 2014 that the Award would be pronounced at New Delhi on 30th December 2014.

5. Further, it is noted that on 19th December, 2014 the Presiding Arbitrator Mr. Sree Rama Murthy informed Mr. Pawan Kumar over phone about the serious illness that Mr. Sridharan was suffering from. He requested that the venue be shifted from Delhi to Chennai on 29th and 30th December, 2014 as the doctor had advised Mr. Sridharan complete bed rest and had permitted him to attend the meeting for only about an hour. Mr. Rama Murthy with the consent of Mr. Sridharan notified the parties by letter dated 22nd December, 2014 about the shifting of the venue for meeting of Arbitral Tribunal on 29th and 30th December, 2014 from Delhi to Chennai.

6. It is noted that Mr. Pawan Kumar however claimed subsequently that he never received a copy of the above letter and came to know about the change of venue only from HCC's letter dated 24th December 2014 informing about the arrangements made for the arbitration meeting on 29th and 30th December, 2014 at the GRT Hotel in Chennai. Mr. Pawan Kumar stated that he informed Mr.

Rama Murthy about his inability to attend the meeting at Chennai on the said dates due to prior commitments at Delhi. He however confirmed his availability for meetings on those dates at Delhi. He further stated that on 23rd December, 2014 he suggested to Mr. Sree Rama Murthy to postpone the date of the meetings by two to three weeks so that Mr. Sridharan may recover from his illness. He stated that he was prepared to attend meetings at Chennai on dates other than 29th and 30th December, 2014.

7. On 24th December, 2014, it is noted that, Mr. Sree Rama Murthy informed Mr. Pawan Kumar that Mr. Sridharan was now fine and would be attending the meetings at Chennai on the proposed dates. He was against any postponement as the parties had already been notified of the changed venue and date. Mr. Pawan Kumar protested in an e-mail dated 27th December, 2014 [sent at the e-mail id of the Project Director (PD), NHAI] that the majority Award was being declared and published on 29th and 30th December, 2014 at Chennai “with unnecessary haste without valid reasons” and without giving him an adequate opportunity to include his dissenting opinion. Mr. Pawan Kumar termed it a “serious procedural lapse devoid of principles of natural justice”. On 29th December 2014, Mr. Pawan Kumar forwarded to the PD, NHAI an email enclosing his dissent note and stating that the same should be handed over to Mr. Sree

Rama Murthy and Mr. Sridharan. He further requested that “they should be prevailed upon not to conclude the award in my absence as third member of Arbitral Tribunal .”

8. The Learned Single Judge has further noted that the majority finalized their Award in respect of Dispute Nos. 6, 7, 8 and 9 and pronounced it on 30th December, 2014 at Chennai. After a copy thereof was seen by Mr. Pawan Kumar, he on 3rd January, 2015 addressed an e-mail to the Presiding Arbitrator (sent at the e-mail id of a relative of the Presiding Arbitrator with a copy sent to the email id of the PD, NHAI) protesting that the Award written by two members, preventing the dissent by the third member, was null and void and not an Award enforceable by law. He also protested that a few select SMSs exchanged between the Arbitrators had been reproduced loosely along with the majority Award “for convenience to support unjustified stand taken by you”. He referred to the SMSs that had been left out which found no mention in the Presiding Arbitrator's note. He suggested that the majority Award be withdrawn and an appropriate Award be issued as per provisions of the Act.

9. The procedure followed by the majority of the Arbitral Tribunal in publishing the majority award was under challenge before the learned Single Judge as also before us. Reliance has been placed on section 20 (3) of the Act to contend that the terms and conditions

of the Contract Agreement regarding the place of arbitration could not be ignored by the two Arbitrators comprising the majority.

10. The Learned Single Judge referring to sections 20, 29 and 31 of the Act held that the major premise on which the above provisions proceed appears to be the possibility of lack of unanimity among the members of an Arbitral Tribunal on both substantive and procedural issues, which could even include a decision on the place of arbitration. Unless the parties have agreed that the Arbitral Tribunal should meet only at one place, the Arbitral Tribunal can decide where it should sit, even for an internal meeting of the Arbitral Tribunal. The learned Single Judge has held that to overcome the situation where all members may not sign the Award, Section 31 (2) provides that it would be sufficient if the majority members sign the Award, “so long as the reason for any omitted signature is stated.” He has held that on a difference of opinion as to the award itself, the fact that the majority members (and not the dissenting Member) sign the Award will not make it invalid as long as the reason for the omitted signature of the dissenting member is stated. On issues as to where the Arbitral Tribunal should sit or hold its internal meetings, there may be a difference of views between Arbitrators and in such event, the decision of the majority will prevail.

11. The Learned Single Judge has found in the facts of the present case that though the place of arbitration is Delhi, the Arbitral Tribunal may meet at other places to hold the hearings. Hearings in respect of Dispute Nos. 6, 7, 8 and 9 took place in Delhi, internal meetings of the Arbitrators took place on 21st November, 2014 and 8th, 9th, 29th and 30th December 2014. The reason given by the majority is that since Mr. Sridharan was advised on health grounds not to travel to Delhi, a request was made to Mr. Pawan Kumar for shifting of venue from Delhi to Chennai for the internal meetings on 29th and 30th December, 2015 and the publication of the Award. There were discussions and consultations between the presiding Arbitrator and Mr. Pawan Kumar through mobile and emails. The majority noted that Mr. Pawan Kumar did not agree that the Award should be published at Chennai. However, since the parties had already been informed of the date of publication of the Award, the majority decided to go ahead and publish their Award at Chennai. The majority noted that since Mr. Pawan Kumar was not present at the meetings on 29th and 30th December, 2014, the Award was signed only by the majority.

12. The learned Single Judge has held that the none of the parties expressed reservations about the majority Award being published at

Chennai and that the Contract Agreement did not bar holding of internal meetings of the Arbitral Tribunal at a place of their choice.

13. The Learned Single Judge thus held and, in our view rightly so, that there was no illegality attached to the decision of the majority to shift the venue of publication of the majority Award to Chennai. The opposition to that decision expressed by Mr. Pawan Sharma, the third Arbitrator, has been duly noted by the majority in its Award. The award has been signed by the majority in consonance with Section 31 (2) of the Act. The reasons for omission of signatures of Mr. Pawan Kumar, third Member of the Arbitral Tribunal have also been set out.

14. We do not find any infirmity with the view taken by the learned single judge on this count and the impugned order does not call for any interference on this ground.

15. The second ground of challenge by the appellants to the impugned majority Award is on merits of the decision on the claims forming subject matter of Dispute Nos. 6 to 9.

16. Dispute No. 6 relates to BoQ Item No. 7.04 (f) and (g) i.e. M25 Concrete, Item No. 7.04 (f) @ Rs.5,501.00 per Cum and varied works of HYSD steel, Item No. 7.04(g) for Retaining Wall/Toe Wall. The case of the respondent HCC was that the quantity of work executed in respect of two BoQ item Nos. 7.04 (f), and (g) (M-25 Concrete and

the reinforcement for retaining wall / toe wall) had exceeded the quantity set out in the BoQ by more than 25% and the cost of additional quantity at the BoQ rate exceeded by 1% of the Contract Value. Therefore, in terms of Clause 52 of GCC/CoPA of the contract, the rates for these items were to be revised.

17. Learned Single Judge has noted that the majority had analyzed Clauses 51.1, 52.1, 52.2 of GCC/CoPA and concluded that only in the event of disagreement between the Contractor and the Engineer, the Engineer shall fix appropriate rate based on his opinion and notify Contractor with a copy to the NHAI. Till the process is completed, the Engineer shall adopt a provisional rate. Once the rate is determined and agreed with the Contractor, the Engineer is bound to certify based on the rates agreed with the Contractor and the provisional rates would lose its significance thereafter. The Engineer was not bound to take prior permission and specific approval of the NHAI before issuing the variation order beyond 25% of the value of the individual BoQ item or 1% of the contract value. Clause 52.2 envisaged the Engineer fixing new rates since the quantities were in excess of the BoQ quantity of more than 125%. Even the Engineer had not accepted this stand of the NHAI.

18. The learned single judge has further held that the arbitral tribunal has duly complied with the procedure for valuation prescribed

by the various clauses and the Arbitral Tribunal has analyzed the relevant clauses of the Contract Agreement in great detail and has correctly arrived at the conclusion that the procedure followed initially by the Engineer i.e., in consultation with HCC, for fixing the rates was correct. The Arbitral Tribunal rightly found that the mechanism stipulated in the Contract Agreement was followed by the Engineer till IPC-55. However, from IPC 56 to IPC 72 he reverted to the BoQ rates for which there was no agreement of consultation with HCC.

19. The learned Single Judge upheld the view taken by the majority that the approval stipulated in Clause 2.1 of the CoPA was distinct and different from the approval as regards the rates. There was no requirement of approval from the NHAI as far as the rates are concerned. Further, it has been held that the view taken by the majority is a possible view to take.

20. With regard to Dispute No. 7, learned single judge has held that the rates determined by the Engineer in relation to variation orders 2, 3, 7 and 15 were initially the ones agreed to by HCC but were subsequently reversed by the Engineer. There was no dispute as to the works so instructed on variation and that HCC was entitled to a new rate. The majority of the Arbitral Tribunal has considered each variation order and examined what would be the appropriate rate.

21. The learned single judge held that under Clause 67 of CoPA in case of a dispute between NHAI and HCC regarding valuation the matter was to be first placed before the DRB, and only thereafter could it be referred to the Arbitral Tribunal. The DRB's determination of the new rates for the varied works was not accepted and this gave rise to a dispute that was referred to arbitration. Consequently, the Arbitral Tribunal was justified in coming to the conclusion that the Dispute no. 7 was arbitrable.

22. Dispute No. 8 pertained to canal crossing at suitable locations of project area at the request of PWD, (Irrigation Department) of Tamil Nadu. The issue was whether the rates were to be the ones determined by the Engineer or the ones claimed by HCC. The learned single judge has held that the Arbitral Tribunal has analyzed the various provisions of the contract and determined the correctness of the rates as claimed by the HCC.

23. Dispute No. 9 pertained to the method of calculation of the price adjustment, which involved analysis of Clause 70.3 of the Contract Agreement relating to "Price Adjustment". Detailed analysis had been undertaken by the majority of the relevant clauses of the contract. The learned single judge held that the interpretation placed by the majority of the Arbitral Tribunal on Clauses 60.1 to 70.1 of the CoPA was a plausible one.

24. There is no gainsaying that the arbitral tribunal is the master of the factual arena and even it goes wrong while deciding the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice, no interference by the court is called for.¹

25. Where the Arbitral Tribunal assesses the material and evidence placed before it in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitral Tribunal cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitral Tribunal is a plausible view on the facts, pleadings and evidence before it. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant

¹ *Food Corporation of India v. Shanti Cereals Pvt. Ltd., 2010 (3) ARB. LR 296 (Del.) (DB)*

to interfere. The court is not to substitute its view with the view of the Arbitral Tribunal if the view taken by the Arbitral Tribunal is reasonable and plausible.²

26. We find that the majority has assessed material and evidence placed before it and has analysed the relevant clauses of the contract and taken a view which is plausible. The learned single judge has also examined the same and found the view taken by the majority to be a plausible view not calling for any interference. We find no infirmity in the view taken by the learned single judge. The appeal is accordingly dismissed, leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

February 17, 2016/‘sn’

² *Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited:* 202(2013) DLT 218.