

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

Decided on: 12.05.2017

+ **FAO(OS)(COMM) 63/2017, C.M. APPL.10138-10139/2017**

COMMISSIONER TRANSPORT

..... Appellant

Through : Sh. Sanjay Jain, ASG with Sh. Gautam Narayan, ASC (Civil), Sh. R.A. Iyer, Ms. Rhea Verma and Ms. Natasha Thakur, Advocates.
Sh. Vijender Kumar, Deputy Commissioner (Transport)

versus

BSC-C&C JV

..... Respondent

Through : Sh. Navin Kumar, Ms. Rashmeet Kaur and Ms. Arpana Majumdar, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

MR. JUSTICE S. RAVINDRA BHAT

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1. Complaining that a learned single judge erred in refusing to interfere with the award of an arbitral tribunal, the Commissioner, Transport of the Government of NCT of Delhi (hereafter “Commissioner”) preferred this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (“the Act”). The impugned judgment rejected the Commissioner’s objections under Section 34 of the Act to an Award dated 14th December 2015 issued by a sole Arbitrator in its disputes with the respondent (hereafter “BSC-C&C

JV”or “the contractor”), a joint venture between BSCPL Infrastructure Limited and C&C Construction Ltd. The dispute arose from a contract awarded to the claimant concerning *"construction of works related to widening/modification of roads to create multiple lanes of existing carriageway for High Capacity Bus System (HCBS) between Ambedkar Nagar to Delhi Gate covering a distance of 14 kilometres"* (hereafter “the work” or “the contract”).

2. The contractor was the highest and, therefore, was the successful bidder for the work; its bid was accepted on 1st August, 2006. The date of commencement of work under the contract was 5th September, 2006. It was to be completed in fifteen months, i.e. by 7th December, 2007. The actual date of completion was 26th November 2009. The contractor claimed certain amounts; these claims were rejected by the Commissioner’s engineer. It then approached the Dispute Resolution Expert (DRE) whose recommendations were not accepted by the Commissioner. The disputes were, therefore, referred to Arbitration.

3. The contractor claimed, before the arbitrator that the delay in completion of the project was solely attributable to the Commissioner resulting in time overrun and that it incurred consequent additional costs and losses. It claimed breaches of contract by the Commissioner, such as delay in handing over of the complete site on the start date, delay in issuance/approval of drawings and designs; non-clearance of hindrances throughout the worksite; large scale frequent changes in designs, specifications and scope of the work by the Engineer; failure to supply control points; stoppages of work by the Engineer, his instructions to delay

the work and wrongful withholding of rightful dues leading to cash flow problems.

4. The Commissioner's defence in the arbitral proceedings was that despite extension of time (EOT) without levy of liquidated damages (LD), clause 27 of the conditions of contract required the contractor to execute the work in terms of the agreed programme. The Commissioner complained that the contractor deliberately avoided upgrading the programme and resource planning, in spite of the Engineer's reminders. The Commissioner alleged that the campsite was handed over to the contractor on 08.09.2006, not on 08.09.2007 as claimed by the contractor.

5. In the award, the Arbitrator, on the pleadings and materials on record, concluded that (a) the pre-bid documents and minutes of meeting showed that the full site was not with the Commissioner at the start of work; (b) that the Commissioner did not mention the date on which the entire site was handed over to the contractor. (c) The Commissioner's argument that the contractor was responsible for clearing encroachments and hindrances and for shifting of the public utilities by coordination with other government departments was misplaced; (d) the Commissioner's submission with regard to discharge of its obligation on payment of the item of work pertaining to site clearance was incorrect; (e) there was an implied term that work drawings would be submitted in a timely manner and changes would be indicated within reasonable time, because time was the governing factor and there was a stipulated period on which the contractor's rates were based. The Commissioner did not make the full site available to the contractor at the start of the work; also it made frequent change in drawings leading to time wastage; (f) the contractor tried to rid the site of encroachment and

hindrances; however the primary onus to do so lay with the Commissioner. The correspondence also showed that there had been major deviations in the design specifications and scope as a result of which the delay occurred. (g) Precious time was lost due to the Engineer's instructions regarding stoppage of work as a result of which the contractor's money got blocked and its cash flows, seriously affected. The evidence before the Arbitrator disclosed a delay between 20 and 157 days in handing over the stretches of the work. Thus, the Commissioner was primarily responsible for the delay in completion of the work.

6. The Commissioner challenged the findings in the award; particularly that it was primarily responsible for the delay in completion of the work. It was argued that the Arbitrator proceeded on a misreading of Clauses 21 and 28 of the contract read with Clause 44 and Clauses 110.1 and 110.5 of the General Conditions of Contract. It was argued that the responsibility of clearing the site of trees and ridding it of encroachments lay with the contractor, who was not entitled to claim any amount because of the contractual term that *"additional compensation for delay in cutting of trees, shifting of utilities and removal of encroachments...."* would not be paid for additionally. It was contended that it was entirely up to the Respondent to ensure that the site was free from all encumbrances; he failed to refer to any material on record, which would indicate that the Petitioner did give possession of "all parts of the site" to the contractor. The Commissioner also took exception to the fact that an adverse inference was drawn by the learned Arbitrator merely on account of extension of time (EOTs) granted by the Commissioner, without claiming liquidated damages (LD). Reliance was placed on two letters, of March and November, 2008 both of which clearly

stated that the extension (EOT) would not entitle the contractor to any compensation by way of claim *"towards idle labour, idle supervision, idle deployment of machinery and plant, additional overhead charges or any other similar item."*

7. The Commissioner had also urged that the learned Arbitrator failed to notice that for the period of delay, the benefit of price variation was given to the contractor in terms of Clause 47.1. According to the Commissioner, in that view of the matter, there was no scope for giving the contractor any compensation even in terms of Clause 44.1.

8. The learned single judge rejected the contentions of the Commissioner. On the issue of delay in handing over the site, etc it was held, inter alia that:

"Clauses 110.1 and 110.5 virtually repeat the wording of clause 21 and therefore do not particularly help the case of the Petitioner as regards the factual finding that possession was given of the clear site only in stages and not in one go at the time of entering into the contract. The impugned Award shows that since the Petitioner was not forthcoming with a clear answer as to when exactly the possession of the site had to be given the Arbitrator was constrained to prepare a questionnaire seeking specific answers from counsel for the parties. The fact of the matter was that there was no clear evidence placed before the Arbitrator and even before this Court to substantiate the claim of the Petitioner that the entire site was made available to the Respondent in September 2006 as is claimed by the Petitioner."

18. The Court is, therefore, not persuaded to hold that the learned Arbitrator's finding that it was the Petitioner who was responsible for the delays is perverse or contrary to the evidence on record."

It was also held that:

“As already noticed, the finding in this regard of the learned Arbitrator attributing the delays to the Petitioner has not been shown to be perverse or contrary to the evidence on record. The decision in respect of claim No.4 was therefore, consequential to the above finding. It was urged that the learned Arbitrator failed to notice that for the period of delay, the Petitioner had given the benefit of price variation to the Respondent in terms of Clause 47.1. According to Mr. Krishnakumar, in that view of the matter, there was no scope for giving the Respondent the benefit of compensation events in terms of Clause 44.1.

22. *It is seen that the compensation events under Clause 44.1 include the employer not giving "access to a part of the site by the site possession date stated in the contract data" [clause 44.1(a)] or the Engineer not issuing drawings, specifications or instructions required for execution of works on time [clause 44.1(c)] both of which in the present case have been shown to factually exist by the Respondent and were to be unable to be effectively countered by the Petitioner before the learned Arbitrator. Nothing in Clause 44.1 indicates that the benefit of those compensation events will not be extended if the Contractor is given the benefit of price variation under Clause 47.1. While the concept of price variation/price adjustment takes into account the "increase or decrease in rates and price of labour, materials, fuels and lubricants", etc. the benefit of compensation for the contingency specified in Clause 44.1 need not include those very items and may be for idle machinery, idle work force and so on. Consequently the Court is unable to be persuaded to hold that the decision of the learned Arbitrator in respect of Claim No.4 suffers from any perversity calling for interference by the Court.*

23. *Mr. Krishnakumar took exception to the finding of the learned Arbitrator regarding the records maintained by the Respondent and its reliability. It is submitted that the Arbitrator*

proceeded on conjectures and surmises since sufficient documents were, in fact, not produced by the Respondent.

24. In this regard it is seen that the learned Arbitrator has proceeded on the basis that even if it is presumed that the records maintained by the Respondent were not trustworthy there was no denying of the fact that the delay had occurred and EOTs were granted on 8 occasions without levy of LD by giving a detailed discussion in this regard in the impugned Award."

The appellants' contentions

9. Mr. Sanjay Jain, learned Additional Solicitor General who appears for the Commissioner, argues that the learned single judge erred in law in regard to interpretation of the contractual stipulations. It was emphasized that Clause 21.1 clearly demarcated the responsibilities of the contractor vis-à-vis the Commissioner in that it stipulated that the "*contractor shall be responsible for coordinate with service provider/concerned authorities for cutting of trees, shifting of utilities and removal of encroachments etc. and making the site unencumbered from the project construction area required for completion of work. This will include initial and frequent follow-up meetings/actions/discussions with each involved service provider/concerned authorities. The contractor will not be entitled for any additional compensation for delay in cutting of trees, shifting of utilities and removal of encroachments by the service provider/concerned authorities. Payment for cutting of trees and shifting of utilities as required by the concerned department shall be made by the Employer.*" As the contractor wished to have its obligations spelt out, to suit its claim for damages, the arbitral

tribunal was not competent, in the guise of interpretation, to impose fresh terms.

10. The appellant challenged the findings of the tribunal, saying that it relied on the records maintained by the Claimant whose reliability was untested and not proved. It was argued that the Arbitrator proceeded on conjectures and surmises since sufficient documents were, in fact, not produced by the contractor.

11. It is argued on behalf of the appellant/Commissioner that although clause 21.1 did not impose any obligation upon it to hand over the entire site at one go, free of encroachments on the start date, the arbitral tribunal imputed and added this as a condition to the contract thereby imposing an obligation which was never agreed upon. It is submitted that the contractors' conceded case was that the entire site could not be handed over at one go and in fact had requested that the handing over of certain portions or reaches of the site should be delayed. This according to the appellant/Commissioner resulted in the rewriting of clause 21.1 of the GCC and imposing an obligation (upon the appellant) which did not exist i.e to remove encroachments from the site.

12. It is submitted furthermore that the tribunal ignored and overlooked an express provision, clause 44.3, which stipulated unambiguously that the only compensation that a contractor was entitled was extension of time (EOT) – something that had been concededly given to it. The specific contention of the appellant in this regard was ignored. The learned ASG relied upon *Oil and Natural Gas Commission v. Big Brothers Builders and Engineers Ltd.* 2010 (13) SCC 377 to say that no arbitral tribunal can act arbitrarily or capriciously outside the ambit of the contract. It was highlighted that the

tribunal cannot award an amount that is ruled out or prohibited by the terms of the agreement.

13. Learned ASG argued that since the conditions in the contract, especially clause 44.3 spelt out what could be granted, the possibility of award of compensation on heads of damages that the parties had not envisioned could not have arisen. In other words, since compensation events were defined exhaustively, the question of the Tribunal granting anything other than that or traveling outside of it, amounted to both patent illegality on the face of the record of the award, as well as the arbitrator failing to adhere to the terms of the contract.

14. Furthermore, argued the learned ASG, since the appellant acted in terms of clause 44.3 and granted extension of time (EOT), without imposing any liquidated damages, the contractor could not claim any damages or compensation in the light of the stipulations contained in the letters granting the extension of the time. This was another aspect of the matter which was overlooked by the tribunal.

15. Highlighting that whilst the interpretation of terms of a contract are within the domain of the arbitral tribunal, nevertheless, it cannot ignore express terms and read in terms of the contract which did not exist or were not agreed upon. In these circumstances submitted learned ASG, the learned single judge should have exercised jurisdiction under section 34, and corrected the award by setting it aside. In failing to do so, the impugned judgment is in clear error of law.

16. Counsel for the BSC-C&C JV argued that the impugned judgment of the learned single judge is sound and ought to be sustained. It was urged that the Commissioner's submissions with respect to the combined reading of

clauses 21.1 and 44.3 of the GCC are not correct. Highlighting that though the latter condition stipulated what were compensation events, what it did not say was that any damages or costs incurred over and above what was contemplated, of a serious kind, in regard to matters not provided, were barred. Furthermore, it was contended that the findings with respect to delay in handing over the site and the appellants' role in that regard, could not be challenged, because they were not contrary to the evidence, nor unreasonable. It was argued that the terms of Clause 44.1 nowhere indicate that the benefit of those compensation events will not be extended if the contractor is given the benefit of price variation under Clause 47.1. The concept of price variation/price adjustment takes into account increase or decrease in rates and the price of labour, materials, fuels and lubricants. Other items may be for idle machinery, idle work force and so on, are not covered. Counsel argued that the express provision of some did not mean that damages for other heads were ruled out.

Analysis and Findings

17. The relevant stipulations in the contract between the parties read as follows:

"21. Possession of the Site

21.1 The Employer shall give possession of all parts of the Site to the Contractor. If possession of a part is not given by the date stated in the Contract Data the Employer is deemed to have delayed the start of the relevant activities and this will be Compensation Event. The contractor shall be responsible for coordinate with service provider/concerned authorities for cutting of trees, shifting of utilities and removal of encroachments etc. And making the site unencumbered from the project construction area required for completion of work. This

will include initial and frequent follow-up meetings/actions/discussions with each involved service provider/concerned authorities. The contractor will not be entitled for any additional compensation for delay in cutting of trees, shifting of utilities and removal of encroachments by the service provider/concerned authorities. Payment for cutting of trees and shifting of utilities as required by the concerned department shall be made by the Employer."

Clause 28.1 provided that:

"The Engineer shall extend the Intended Completion Date if a compensation event occurs or a Variation is issued which makes it impossible for completion to be achieved by the Intended Completion date without the Contractor taking steps to accelerate the remaining work and which would cause the Contractor to incur additional cost."

Clause 44.3 provided that

"Occurrence of a compensation event will only entitle the contractor to a suitable extension of time for either the schedule of activities or for the whole contract. Judgment of the suitability of extension will be the responsibility of the Engineer."

18. The arbitral tribunals ascribe delays to the Commissioner. These are pure findings of fact, which have not been proved to be so unreasonable as to call for interference under Section 34. The award, in respect of Claim No. 4 is, therefore, followed. The Commissioner's argument in appeal is that price variation benefit or advantage was given to the contractor under Clause 47.1; this precluded anything else on account of the benefit of compensation events in terms of Clause 44.1.

19. Compensation events under Clause 44.1 extend to the employer (i.e. the Commissioner) not giving, under Clause 44.1 (a) *"access to a part of the*

site by the site possession date stated in the contract data" or- under clause 44.1(c), the Engineer failing to issue specifications, drawings, instructions etc. required for execution of works on time. The contractor proved both these omissions. The Commissioner could not establish compliance of those conditions by the Engineer. Therefore, in the opinion of this court, the learned single judge correctly held that

"Nothing in Clause 44.1 indicates that the benefit of those compensation events will not be extended if the Contractor is given the benefit of price variation under Clause 47.1. While the concept of price variation/price adjustment takes into account the "increase or decrease in rates and price of labour, materials, fuels and lubricants", etc. the benefit of compensation for the contingency specified in Clause 44.1 need not include those very items and may be for idle machinery, idle work force and so on. Consequently the Court is unable to be persuaded to hold that the decision of the learned Arbitrator in respect of Claim No.4 suffers from any perversity calling for interference by the Court."

20. So far as the issue of accuracy of records or data of the contractor being questionable, the tribunal noticed that no less than eight extensions were given by the Commissioner - without claiming liquidated damages. The learned single judge highlighted this finding in the award:

"Even if it is presumed that the records maintained by the contractor regarding idle man power and, idle machinery are not trust worthy, there is no denying the fact that the delay, occurred in the completion of the work and the contract period was extended on 8 occasions without levy of compensation. It is pertinent to mention that the extension of time granted under clause 28 in conjunction with clause 32 and clause 44 entitled the claimant to financial compensation as per clause 45 (a), (c), (g) and (i). It is seen from the record that the first claim was submitted for the period 08.12.2007 to 30.09.2008 and the

second claim was submitted from 01.10.2008 to 26.11.2009. The amount of the claim has been worked out by the claimant on page 38, Volume C-1 of S.O.C. The methodology of explanations on cost calculations in the Annexure for both the extension of time is indicated at page 39 at page 40 of the S.O.C. Volume-1. The contract data lays down that the whole site shall be handed over to the contractor on the start date. This requirement is indicated at serial no.17 of the agreement. There is no doubt that the whole site free from encumbrances was not available on the date of start of the work. In so far as the deployment of the machinery is concerned, the agreement vide page 05 lays down the no. of machines of different kinds. The Claimant has divided the claim into 4 components which are dealt as under."

21. This court further notes that the arbitral tribunal did not blindly or uncritically accept the contractor's claims with respect to Claim No. 4; rather it characterized the salary and wage bills to be "inflated". After a realistic appraisal of the various elements (number of staff and employees deployed, their average salaries or wages, the kinds and number of machinery needed, depreciation, etc) the tribunal noted a rate of @8% of overhead charges, upon the tendered amount for the prolongation period (23 Months) @ $\text{₹}1290760782 \times 8 / 15 \times 100$) to arrive at the amount of ₹ 15, 83, 33, 334/-. The award, however limited the claim granted to ₹ 8,68,23,504/- based on detailed working out of the various elements. This calculation and the principle behind it cannot be called arbitrary or so unreasonable as to warrant interference under Section 34.

22. Having considered the arbitration records as well as the record of proceedings before the learned single judge, this court is of opinion that the grounds urged to set aside the award that it is patently illegal, or contrary to the express terms of the contract, or that the arbitral tribunal's findings are

manifestly unreasonable, have not been established. The impugned judgment does not call for interference; this appeal is, therefore, dismissed.

S. RAVINDRA BHAT
(JUDGE)

YOGESH KHANNA
(JUDGE)

MAY 12, 2017

