

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. (COMM) 556/2016

**CALCUTTA-HALDIA PORT ROAD
COMPANY LIMITED**

..... Petitioner

Through: Mr Ramesh Kumar and Ms Udit
Malviya, Advocates.

versus

CWHEC-HCIL (JV)

..... Respondent

Through: Mr Arvind Minocha, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

14.02.2017

VIBHU BAKHRU, J

1. Calcutta Haldia Port Road Company Ltd., a company constituted under Section 3 of the National Highways Authority of India Act, 1988, has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 22.04.2009 (hereafter 'the impugned award') entered by the Arbitral Tribunal.

2. The petitioner had floated a tender for execution of the project of "*Four laning of Km 0/500 to Km 52/700 of Kolaghat-Haldia section of NH-41 in the State of West Bengal -Package WB (Haldia)*" (hereafter 'the works'). The respondent - a joint venture formed between two companies, M/s China National Water Resources & Hydropower Engineering Company of P.R. China (subsequently named as Syno Hydro Power Engineering Corporation) and M/s Harish Chandra (India) Ltd. - bid for the

aforesaid works. The respondent's bid was accepted and by a letter of acceptance dated 22.11.2001, the petitioner awarded the contract for execution of the works at a contract price of ₹2,19,98,91,379/-. Subsequently, the parties also executed an agreement on 24.07.2002 (hereafter 'the Agreement') and the date of commencement of the Agreement was fixed as 10.09.2002. The Agreement was an item rate contract and the respondent had quoted rates for various items as detailed in the Bill of Quantities (BOQ).

3. Certain disputes arose between the parties; the respondent invoked the arbitration clause and the Arbitral Tribunal consisting of three members was constituted. The respondent preferred seven claims before the Arbitral Tribunal. Whilst, the Arbitral Tribunal rejected the first four claims, the Arbitral Tribunal awarded a sum of ₹13,03,690/- against claim no.5 being additional payment on account of sand filling under Box culverts in lieu of earth filling as per BOQ Item No. 5.42; a sum of ₹13,00,495/- (as against ₹19,60,167/- claimed by the respondent) against claim no.6 which related to extra payment, for using Grade-III filter media as directed in place of Grade-I filter media; and ₹1,42,543.90/- for non-payment of epoxy bonding layer. Notice in the present petition was issued limited to the award made by the Arbitral Tribunal against claim nos. 5 and 6 as noted above.

Submissions

4. Mr Ramesh Kumar, the learned counsel appearing for the petitioner contended that the Arbitral Tribunal had erred in awarding extra payment for providing sand filling under the box culverts, since use of sand for filling culverts was included in the specifications. He referred to BOQ item

no.5.42 as well as the Technical Specifications for use of material as noted by the Arbitral Tribunal and contended that Technical Specifications also provided for use of any material as approved by the Engineer. He submitted that in terms of Agreement, the Engineer could approve other material to be used for filling under the box culverts and the Engineer had accordingly, specified the use of sand. This being within the scope of the agreed technical specifications, no additional payment could be awarded to the respondent for use of sand as the filling material. He further submitted that there was no basis for calculating the amount awarded by the Arbitral Tribunal.

5. Insofar as claim no.6 is concerned, Mr Kumar contended that no extra payment for using Grade-III filter media was payable for execution of BOQ Item No.5.03 as admittedly, clause 309.3.2(B) of the General Technical Specifications provided for all three categories of filter media at no additional cost. He submitted that, therefore, no additional payment could be claimed for using Grade-III filter media instead of Grade-I material. He further submitted that there was no material to establish the rates as claimed by the respondent and, therefore, the Arbitral Tribunal had grossly erred in accepting the claim made by the respondent.

6. Mr Arvind Minocha, the learned counsel appearing for respondent countered the submissions made by Mr Kumar. He submitted that the Engineer had specified that sand be used as filter material instead of earth filling and, therefore, the respondent was entitled to additional payment for the same. He further pointed out that the petitioner had approved the rate of ₹399/- per cubic meter for sand filling in water logged areas and, therefore, there could be no dispute as to the rate payable for the said item.

7. Insofar as claim no.6 is concerned, Mr Minocha submitted that in terms of clause 309.3.2(B), Class-I grading material was to be used where fine grain soil was met. He submitted that the material used by the respondent for the sub-grade was fly ash, which is a very fine grain material and, therefore, class-I grading material was required to be used. But, the petitioner had compelled the respondent to use Grade-III material and, therefore, the respondent was entitled to additional payment for the same. He submitted that as far as the amount is concerned, the respondent had submitted its analysis and there was no dispute regarding the same.

8. He further submitted that the Arbitral Tribunal was constituted by experts in the field and their decision could not be challenged in these proceedings. He relied upon the decision of the Supreme Court in Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49 and M/s Harish Chandra and Company v. State of U.P.: (2016) 9 SCC 478 in support of his conclusions.

9. I have heard the learned counsel for the parties.

Claim No.5

10. As stated above, Claim No.5 relates to award of additional amount on account of using sand instead of earthen material for filling under the box culverts etc. BOQ Item No.5.42 which provides for the aforesaid work reads as under:-

"Earth in filling with selected granular material under box culvert as per drawing & Technical Specification Clause 305"

11. Admittedly, clause 305 of the Technical Specifications provided that the material used for filling shall be "*soil, moorum, gravel and a mixture of*

these or any other material approved by the Engineer". Thus, there was no requirement for the respondent to only use sand as backfilling material. It would be at the option of a contractor to use such materials for execution of the works subject to the same complying with the Technical Specifications under the Agreement. Thus, there was no obligation on the part of the respondent to use only sand. The Arbitral Tribunal had considered the same and, accordingly, held that since sand was used at the instance of the Engineer, the respondent would be entitled to additional payment for the same. This Court finds no infirmity with the aforesaid reasoning.

12. Insofar as the objection as to the quantification of the amount awarded is concerned; it is not disputed that the Engineer had approved a rate of ₹399 per cubic meter for sand filling in water logged areas. The Arbitral Tribunal had accepted the rate as approved by the Engineer and, therefore, there was no requirement for the respondent to further establish the rate for sand filling as rate for a similar item had already been approved. This Court finds no infirmity with the reasoning of the Arbitral Tribunal to adopt the rate as already approved by the Engineer for similar works.

13. In view of the above, the petitioner's challenge regarding award against claim no.5, is without merit and is, accordingly, rejected.

Re. Claim No.6

14. Claim No.6 made by the respondent related to use of Grade-III filter media for backfills instead of Grade-I filter media. Admittedly, the said

item of work was covered under BOQ Item No. 5.03, which reads as under:-

"Back filling with filter media behind abutments, wing walls, & return walls, including all material, labour, equipment carriage etc. as completed as per drawing and Technical Specifications Clause 305 & 309."

15. It is the case of the respondent that the said item was covered under clause 309.3.2(B)(i) and, therefore, the respondent was required to use Grade-I material filter media for backfilling. The petitioner's stand before Arbitral Tribunal was that clause 309.3.2(B) of the Technical Specifications was not applicable for the relevant work even though it was covered under the BOQ Item 5.03. The petitioner claimed that clause 309.3.2 applied only for surface and sub-surface drains and not to the work in question. The petitioner relied upon clause 2.2.7 of the General Requirements of Technical Specifications and contended that where no material is specified, the material as approved by the Engineer would be final and binding.

16. It is necessary to observe that the arguments advanced on behalf of the petitioner in this Court are in variance with its stand before the Arbitral Tribunal. Mr Kumar, did not dispute that clause 309.3.2(B) of the Technical Specifications would be applicable. He had, however, submitted that the said clause provided for use of Grade-I as well as Grade-III material and, therefore, no additional payment could be claimed by the respondent.

17. At this stage, it is relevant to refer to clause 309.3.2(B) of Technical Specifications. The relevant extract of which reads as under:-

"309.3.2. Material

(A) xxxx xxxx xxxx xxxx

(B) Backfill material: Backfill material shall consist of sound, tough, hard, durable particles of free draining sand-gravel material or crushed stone and shall be free of organic material, clay balls or other deleterious matter. Unless the Contract specifies any particular grading for the backfill material or requires these to be designed on inverted filter criteria for filtration and permeability to the approval of the Engineer, the backfill material shall be provided on the following lines:

(i) Where the soil met with in the trench is of fine grained type (e.g.. silt, clay or a mixture thereof), the backfill material shall conform to Class I grading set out in-Table 300-3,

(ii) Where the soil met with in the trench is of coarse silt to medium sand or sandy type, the backfill material shall correspond to Class II grading of Table 300-3.

(iii) Where soil met with in the trench is gravelly sand, the backfill material shall correspond to Class III grading of Table 300-3."

18. It is apparent from the above that the question whether material conforming to class-I grading or whether material conforming to class-III grading are required to be used, would depend on the condition of the soil met with in the trench. It is the petitioner's case - which has also been accepted by the Arbitral Tribunal - that the trench was in sub-grade where fly ash had been used and the grain of fly ash is very fine. The Arbitral Tribunal had considered and accepted the above and there does not seem to be any controversy in this regard. Thus, the finding that Grade-I material was to be used is not amenable to review in these proceedings.

19. Thus, the question to be addressed is whether the respondent could demand any additional amount on account of being asked to use material conforming to class-III grading. Additional payment for use of material conforming to class-III grading is not provided under the Agreement as it does not provide any variation in the item rates under BOQ Item 5.03 based on the material used for backfilling. However, the Arbitral Tribunal's view that since the respondent was not obliged to use Grade-III material, it ought to be compensated for the same if it had incurred any additional cost on that count, is a plausible view. This view cannot be interfered with in these proceedings given the limited scope of judicial review under Section 34 of the Act.

20. The only question that remains to be addressed is whether there was any material other than the statement made by the respondent, before the Arbitral Tribunal, to ascertain that the respondent has incurred additional cost or was otherwise entitled to additional amount of ₹13,00,495/-?

21. The relevant findings of the Arbitral Tribunal in this regard read as under:-

"We have analyzed the rate payable to the Contractor as extra expenditure incurred for using the Grade - III filter media in two columns of 300 mm thickness each, using different sizes of materials as per instructions / methodology approved by the Engineer. This analysis has been done, keeping in view the contract provisions.

We find that additional rate, over and above the rate quoted by the Contractor against BOQ Item No.5.03, comes to Rs.345/- per CUM. So the Contractor is entitled to payment of 3769.55 cum x Rs.345/- = Rs. 13,00,495.78, say Rs. 13,00,495/-."

22. The respondent had claimed a rate of ₹520 per cubic meter for the aforesaid works but - as indicated above - the Arbitral Tribunal had determined that the respondent was entitled to additional payment of ₹345 per cubic meter. However, there is no discussion in the impugned award which would even remotely indicate as to how the said rate was determined by the Arbitral Tribunal. Admittedly, there was no material produced by the respondent to establish that the respondent had incurred an additional expenditure of ₹345/- per cubic meter for execution of the item of work in question. In order to establish that respondent was entitled to any additional payment, it was incumbent upon the respondent to produce material to establish the cost for execution of the same work with material conforming to class-I grading as well as class-III grading; the difference in the costs would establish the additional costs incurred by the respondent. The cost so claimed would have to be supported by some cogent material. The Arbitral Tribunal was required to examine the same and take an informed decision as to the additional cost incurred by use of material conforming to grade III instead of grade I.

23. The decisions of the Supreme Court in *Associate Builders* (*supra*) and *M/s Harish Chandra and Company* (*supra*) are of little assistance to the respondent. Indisputably, a court is not required to re-examine the merits of the dispute and re-appreciate the evidence led by the parties. In *M/s Harish Chandra and Company* (*supra*), the Supreme Court had explained that it would not be permissible for the court to examine the factual findings of the arbitrator by appreciating the evidence. Similarly in *Associate Builders* (*supra*), the Supreme Court had held that an arbitrator's finding on facts must pass muster; the exception being if the same are

found to be perverse. However, it is also well settled that a finding which is arrived at without any evidence would not be sustainable. Thus, so long as the findings of the Arbitral Tribunal are based on some material, they would not be subject to review; but findings based on no material would clearly be whimsical, arbitrary and fall foul of the public policy test under section 34(2)(b)(ii) of the Act.

24. In **Kuldip Singh v. Commissioner of Police: (1999) 2 SCC 10**, the Supreme Court had explained as under:-

"10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

25. Mr Minocha's contention that there was no requirement for the respondent to substantiate the cost incurred as the same was not in dispute, is not merited. The petitioner has disputed the claim in its entirety. Even before this Court, the petitioner had specifically pleaded that the impugned award is conspicuously silent as to the basis on which the rate of ₹345 per cubic meter was worked out by the Arbitral Tribunal. Mr Minocha has been unable to draw the attention of this Court to any material which would indicate as to how the Arbitral Tribunal has assessed that the respondent was entitled to additional rate of ₹345 per cubic meter. It is well settled that the arbitral award based on no evidence would fall foul of the fundamental policy of Indian Law. This court is unable to find any

material which would support the decision of the Arbitral Tribunal to award additional costs @ ₹345 per cubic metre. Thus the impugned award to the extent that it awards a sum of ₹13,00,495/- against respondent's claim No.6 is not sustainable. Thus, the impugned award to the aforesaid extent is set aside.

26. The petition is disposed of.

FEBRUARY 14, 2017
RK

VIBHU BAKHRU, J

