

\$~32

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 140/2018 & IA Nos. 4344-4345/2018**

INDO NABIN PROJECTS LTD. Petitioner
Through: Mr Sudhir Nandrajog, Sr.
Advocate with Mr Anand
Kumar Jha, Advocate.

versus

POWERGRID CORPORATION OF
INDIA LTD. Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

04.04.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 13.10.2017 (hereafter 'the impugned award') delivered by an Arbitral Tribunal constituted of three Arbitrators – Justice Sh. S.R. Singh (Retired), Presiding Arbitrator Justice Sh. C.S. Rajan (Retired) and Sh. J. Kumar, Advocate (hereafter 'the Arbitral Tribunal'). The impugned award was delivered in the context of the disputes that had arisen between the parties in relation to two Contract Agreements entered into between the parties on 27.10.2010, *inter alia*, entailing execution of works relating to WR Pooling Substation work at Bilaspur. The execution of the said works has been inordinately delayed.

2. The petitioner claimed that the delay has been caused due to reasons attributable to the respondent. This was accepted by the Arbitral Tribunal.

3. In view of the delay caused, the petitioner made a claim, *inter alia*, on account of overheads and loss of profits with respect to the period beyond the initial term of the contract. The petitioner's grievance is that although the Arbitral Tribunal has accepted that the respondent was in breach of the Contract Agreement and the delay in execution of the works was attributable to the respondent, the aforesaid claim has been rejected.

4. The Arbitral Tribunal had rejected the claim on the ground that the petitioner was unable to establish the same by any cogent evidence. According to the petitioner, the said conclusion is erroneous as no evidence was necessary to establish the aforesaid claim made by the petitioner. It is contended that once the petitioner had established that the delay was not attributable to the petitioner, it was entitled to the overheads and loss of profits, which were estimated at 10% and 5% of the contract value, respectively.

5. Briefly stated, the aforesaid controversy arises in the following context:

5.1 In May 2009, the respondent invited bids from qualified and experienced contractors for 400 kV Sub-station extension works at (a) Sasaram Substation for evacuation of power from Nabinagar TPS of BRBCL, and (b) Bilaspur WR Pooling Substation under Consultancy

services to M/s. Essar Power Transmission Company Limited. The scope of works stipulated in the two contracts; one relating to supply of equipment and material on ex-works basis, termed as “Ex-works Supply Contract” and the second, relating to installation and erection charges including civil works, inland transportation, insurance and training charges termed as “Service Contract”.

5.2 The petitioner (then known as Indo Power Projects Limited) submitted its bids for the aforesaid contracts, which were accepted by the respondent. The respondent issued two Notifications of Award (hereafter ‘NOA’) on 17.02.2010. Thereafter, on 27.10.2010, the parties entered into two Contract Agreements; one being Ex-works Supply Contract and the other being Service Contract. The stipulated time for completion of work of extension of 400 kV WR Pooling substation at Bilaspur was agreed as 16 months from the Effective Date of the contract. This was subsequently amended to 20 months from the Effective Date; that is, 17.02.2010, being the date of issuance of the NOA.

5.3 The works relating to Sasaram Substation were completed. However, the works relating to WR Pooling substation work at Bilaspur were inordinately delayed.

5.4 On 19.10.2015, the petitioner sent a letter to the Project Manager and Additional GM of the respondent requesting for settlement of its dues including issuance of the final Taking Over Certificate (TOC) for the project; release of bank guarantees; for

making arrangement to close the contract as per the agreements; and to release a total amount of ₹9,41,87,522/-. According to the petitioner, the said amount of ₹9,41,87,522/- was due on several counts including ₹5,07,75,500/- on account of additional cost towards establishment and overhead costs for extended period and ₹1,69,25,166/- due to the loss of profits during the extended period.

5.5 Since the above claims could not be settled, the same were referred to the Arbitral Tribunal constituted by the parties.

6. Before the Arbitral Tribunal, the petitioner raised several claims including claim of ₹1,50,13,698/- (Claim No. 3) as compensation for extra expenditure incurred for onsite and offsite establishment due to prolongation of the stipulated completion period and the equivalent amount towards loss of profit / reduced profitability during the extended period (Claim No. 4). The said claims were computed by applying a normative formula assuming the site and head office expenses to be 10% of the contract value and the same was extrapolated for the extended period beyond the initial period of completion, which was computed at 140 weeks. The petitioner subsequently reduced its claim for loss of profits to 5% of the contract value instead of 10% as claimed initially.

7. At a meeting held on 20.10.2016, the Arbitral Tribunal framed the issues to be decided, which included the issue “*whether the respondent had failed to perform its contractual obligations. If so to what effect?*”; and “*whether the claimant (the petitioner) is entitled to*

the amount claimed no. 1, 2, 3, 4, 5A and 5B? ”.

8. The Arbitral Tribunal awarded claims in the sum of ₹47,08,040/- against the aggregate claim of ₹2,72,18,638/- preferred by the petitioner. However, the Arbitral Tribunal did not award any amount towards overhead charges or loss of profits due to prolongation of the contract. In addition, the Arbitral Tribunal also awarded cost to the extent of ₹15 lacs in favour of the petitioner as well as the post award interest at the rate of 8.5% per annum on the awarded sum.

Submissions

9. Mr Nandrajog, learned Senior Counsel appearing for the petitioner contended that although the Arbitral Tribunal had decided the issue (Issue No.2) – whether the respondent was in breach of the contract – in favour of the petitioner, it had not awarded any sum on account of overhead charges and loss of profit during the extended period. He submitted that the decision of the Arbitral Tribunal to reject the same on account of lack of evidence was unsustainable. He submitted that it is now well established that such claims can be awarded on the basis of standard formulae and the petitioner had applied the Hudson’s formula for computing its aforesaid claim. He further submitted that the Courts have accepted the use of standard formulas for awarding such damages and referred to the decisions of the Supreme Court in *M/s. A.T. Brij Paul Singh and Bros. v. State of Gujarat : (1984) 4 SCC 59* and *McDermott International Inc v. Burn*

Standard Co. Ltd. : (2006) 11 SCC 181 in support of his contention. He stated that both the said decisions had also been cited before the Arbitral Tribunal but the Tribunal had ignored the same.

Reasons and Conclusion

10. Admittedly, the petitioner had not furnished any evidence or material to establish that it had incurred additional expenditure on account of overheads during the extended period. The petitioner had also not produced any material to establish the quantum of profit that it expected to earn during the said period. The Arbitral Tribunal had not accepted the aforesaid claim on account of charges and loss of profits solely on the ground that the petitioner had not produced any material and evidence to establish the same. The contention that such damages could be awarded on the basis of standard formulae was also not accepted by the Arbitral Tribunal. The relevant extract of the impugned award is set out below:-

“(8). It is our view that in order to make any claim under Section 55 read with Section 73 towards the overhead expenses during the extended period , the claimants should have led some evidence by oral or documentary to prove that certain expenses were actually required and made in order to keep the site establishment running throughout the extended period. It is ~n.other matter for the arbitrators to either adopt Hudson or any other formula as may be considered appropriate by them.

(9). The claimants further state that they had actually submitted the audited Balance Sheets for eight years to support their claim for overheads. It is to be noted that the

above was sought by the Arbitration Tribunal to understand the computation and adoption of rate of 10% for the overheads and 5% for computing the loss and was submitted by way of proof of their incurring the overhead expenses. Even otherwise the evidence required to prove overhead costs would have to be related to the project under question and not the overall company particulars.

(10). Hence we are of the opinion that the claimants are not entitled to any compensation for loss on account of additional overheads incurred in keeping their establishment up and running during the extended period and hence the claim for **Rs.1,50,13,698 towards site and head office overheads is rejected.**”

11. Similarly, the petitioner’s claim for loss of profits was also rejected on the ground that the petitioner had been unable to produce any material to establish the same. In arriving at its conclusion, the Arbitral Tribunal noticed the decision of the Bombay High Court in *Essar Procurement Services Ltd. v. Paramount Constructions: Manu/MH/2511/2016*, wherein the Bombay High Court had after referring to various decisions, observed that a claim based on Hudson formulae and not based on any evidence deserves to be set aside. The Arbitral Tribunal also referred to the decision of the Bombay High Court in *Edifice Developers and Project Engineers Ltd. v. M/s. Essar Projects (India) Ltd.: Appeal No. 11 of 2012, decided on 03.01.2013* and the decision of this Court in *Ahluwalia Contracts (India) Ltd. v. The Union of India, Ministry of Health & Family Welfare : O.M.P. (COMM) 283/2016, decided on 08.05.2017*, wherein courts had

rejected the challenge to an arbitral award whereby the claim of loss of profits based on standard formulae had been rejected by the arbitral tribunal.

12. Standard formulae adopted for computing loss of profits or overheads are essentially tools used for computing the extent of overheads in profits. Undoubtedly, in a given set of facts, the said formula may be effectively used for computing the amounts of overheads/profits. However, that cannot lead to the conclusion that in all cases, the Arbitral Tribunal would be bound to accept computation of overheads/loss of profits based on standard formulae and the claimant is absolved from producing any other material to establish its claims of loss on account of overheads/loss of profits. Whether it is apposite to use the standard formulae in a given case is also required to be established by the contractor. This would necessarily require the claimant to produce some material to justify norms as adopted in the standard formula relied upon by him. A claimant is also required to establish as a matter of fact that it had incurred expenditure on overheads attributable to the works executed during the extended period.

13. It is well settled that an arbitrator is a final adjudicator of the sufficiency and the extent of evidence and his decision on the same is not amenable to judicial review under Section 34 of the Act unless any of the grounds specified there are established. In ***P.R. Shah, Shares & Stock Broker (P.) Ltd. v. M/s. B.H.H. Securities (P.) Ltd. & Ors. (2012) 1 SCC 594***, the Supreme Court had held as under:-

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

14. Although, Mr Nandrajog had referred to the decision of the Supreme Court in *M/s. A.T. Brij Paul Singh and Bros. (supra)* in support of his contention. He is unable to dispute that there are several decisions where the courts have disallowed claim of damages, which are based only on standard formulae without adducing any further evidence to establish the expenditure / loss. The Arbitral Tribunal had taken note of a view of those decisions as well. It is also clear that the impugned award cannot be assailed to be perverse or contrary to the public policy.

15. As explained above, the scope of judicial review in these proceedings is limited and an arbitral award cannot be set aside except on the grounds as stated in Section 34 of the Act. Plainly, the impugned award cannot be accepted as perverse or in conflict with the fundamental policy of Indian law.

16. In view of the above, this Court finds no reason to interfere with the impugned award.

17. The petition is, accordingly, dismissed. The pending applications are also disposed of.

APRIL 04, 2018
RK

VIBHU BAKHRU, J