

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **OMP (COMM) 10/2018**

Reserved on: **23th January, 2018**

Date of decision: **31st January, 2018**

THE NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Ms.Pinky Anand, ASG with
Mr.Rohit Jain, Mr.Sumit,
Ms.Madhu, Ms.S.Mehra, Advs.

versus

AFCONS-APIL JOINT VENTURE

..... Respondent

Through: Mr.Sandeep Sethi, Sr. Adv. with
Mr.Manu Seshadri, Mr.Ishan
Bisht, Mr.Tanmay Nandi, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 14.08.2017 passed by the Arbitral Tribunal. The challenge is confined to the grant of claim no. 1 and claim no. 3.

2. As far as claim no. 1 is concerned, it is submitted by the learned Additional Solicitor General (hereinafter referred to as the 'ASG') that the Engineer while recommending the grant of extension of time for completion of work, had opined that the slow rate of progress achieved was due to respondent's own inefficiency, poor standard of equipments

and weak project management. It was further recommended that the respondent is not entitled to any additional financial compensation or costs as the respondent's plant and equipment had never been idle as areas were also available for the respondent to work. It is submitted that in terms of Clause 44.2 of the Conditions of Contract, it was the Engineer who was to decide whether and by how much the contract price is to be increased due to 'Compensation Events' and whether and by how much the 'Intended Completion Date' is to be extended; the Engineer having recommended that the respondent is not entitled to any increase in the contract price, the Arbitral Tribunal has erred in granting the same under claim no. 1 in favour of the respondent.

3. It is further contended by the learned ASG that in any case, the Arbitral Tribunal having awarded additional costs on account of Site and H.O. Overheads due to delay in completion of project in favour of the respondent, further amount on account of loss suffered due to lost opportunity to earn profit out of resources owing to delay in completion of works could not have been granted in favour of the respondent by the Arbitral Tribunal.

4. It is further submitted by the learned ASG that the Minority Award has rejected such claim, in her submissions rightly so, on the ground that Clause 44.1 of the Conditions of Contract indicates that there can be a possibility that the project can get extended due to various 'Compensation Events' listed in the said Clause; the Claimant/Respondent herein having quoted for the work knowing fully well that there is a provision in the Contract by which extension of Contract period was a possibility, cannot claim loss of profit due to such

extension. The Minority Award further held that there was no evidence led by the respondent to prove that the loss suffered by it was due to extension of time for completion of work and respondent's reliance on the NH 24 tender in this regard cannot be sustained. The learned ASG submits that the Minority Award takes the correct view on the dispute and should be accepted by this Court while setting aside the Award passed by the Majority.

5. As far as claim no. 3 is concerned, the same relates to award of interest at the rate of 12% per annum with effect from 10.12.2009. Relying upon Clause 43.1 of the Conditions of Contract, the learned ASG submits that the award of interest for the date prior to the Award, could not have been granted by the Arbitral Tribunal. It is submitted that it is only with the passing of the Award that the amounts awarded in the Impugned Award would get certified and, therefore, no interest can be awarded from the date prior to such certification.

6. I have considered the submissions made by the learned ASG on behalf of the petitioner. As far as the cause of delay in execution of the work is concerned, I may only note that the stipulated date of completion of work was 29.12.2003, while the actual date of completion of work was 29.02.2008 i.e. almost more than four years after the stipulated date. The Arbitral Tribunal in its Award passed by the Majority (on this aspect there is no dissent by the Minority in the Arbitral Award) has held that in the letters recommending extension of time by the Engineer, various causes of delay as 'Compensation Events', not attributable to the Claimant/Respondent, herein were considered. The Arbitral Tribunal further analyzed numerous correspondences on record relating to delays,

Engineer's MPRs, delay in FRL revisions, delay in issuance of drawings, delay in land acquisition, delay in construction of service road due to delay in land acquisition, utility shifting, issue of drawings etc., that had resulted in prolongation of the work and held that such delays continued not only till 06.12.2006 but up till 29.02.2008 and that the Claimant had adequate management team, manpower, sub-contractors, plant and equipment at site to complete the work within stipulated period. The Arbitral Tribunal further held that it was only after the filing of the Statement of Claim that the petitioner herein sought to impose liquidated damages without filing any counter claim. As far as the recommendation of the Engineer to extend the 'Intended Completion Date' without additional financial compensation of costs to the respondent is concerned, the Arbitral Tribunal holds that if 'Compensation Events' occur and the work cannot be completed within the 'Intended Completion Date', additional cost is an impact of the extension of 'Intended Completion Date' and the contractor/respondent herein is entitled to additional cost in terms of contract and the Engineer unilaterally and arbitrarily cannot rewrite the terms of the Contract.

7. With regard to the cause of delay and the effect of the letters of recommendation from the Engineer, the Arbitral Tribunal has held as under:-

"41. The Tribunal further endeavored to critically analyze numerous correspondence on record relating to various delays such as all EOT applications and the Engineer's observations, analysis and recommendations on all such EOT applications, Engineer's MPRs from November 2001 to February 2008 except April 2002 (in 8 volumes) filed by the Respondent, contemporary communications on various delay events in the Rejoinder, delay in

FRL revisions, delay in issuance of drawings, delay in land Acquisition, delay in construction of service road due to delay in land, utility shifting, decisions, issue of drawings etc., Claimant's delay analysis in Rejoinder and the Strip Charts on various delay events as presented by the Claimant and other submissions made by the parties during their arguments, The observations and findings of the Tribunal in this regard are as under:

a) The work prolonged on account of various delays due to (i) Revisions of FRLs, (ii) Revision of alignment, (iii) delayed Land acquisition, (iv) delayed availability of site for tree cutting/ removal, (v) on account of non-handing over of site for Utilities removal, (vi) delayed issue of drawings, (vii) Delayed quarry operation owing to adverse ground condition, (viii) additional time required to execute additional structures, (ix) delayed instruction for reconstruction of the Existing carriageway, (x) delay in service road work etc. and the Claimant applied for extension of time (EOT-1, EOT-2, EOT-3, EOT-4, EOT-5, EOT-5A, EOT-6 and EOT-7) considering the delay events up to 29.02.2008, even though the Respondent was not contractually required to grant, but granted extension of time for the period from 30.12.2003 to 06.12.2006 (EOT-1 to EOT-4). There is no dispute between the parties relating to granted extension of time for the period from 30.12.2003 to 06.12.2006 (EOT-1 to EOT-4).

b) The Tribunal observed that the Engineer's MPRs submitted to the Respondent show that, during the subsequent period from 07.12.2006 to 29.02.2008 also, there were continuing delays in land acquisitions at various locations, issuance of numerous drawings for structures, service road and junctions etc. delay in taking decisions relating to length of service roads, delay due to non-availability of additional quantity of GI strips required due to substantial increase in reinforced earth work quantity etc. MPRs were internal documents between the Engineer and the Respondent and the Claimant was not a party to it.

c) The Tribunal observed from the delay analysis and strip charts submitted by the Claimant for the period from 07.12.2006 to 29.02.2008 considering delay events beyond 31.03.2006 and from various correspondence exchanged between the parties, that there were land acquisition problems at Km 390.600 to 390.300 RHS (right hand side), Km 390.650 to Km 390.800 (RHS), Km 392.180 to Km 392.800, Km 358.325 to Km 358.500, Km 362.800 to 364.500 and various other locations of service road work, various locations of main carriageway, at Siggaon and Kundgol reinforced earth wall locations. There were delayed instructions for service road work, culvert work, masonry drain work. There were delays on account of closure of quarry operation. The completion certificate dated 01.03.2008 was issued considering the Claimant's undertaking to complete minor outstanding work during defect liability period.

d) The Tribunal observed that against EOT-5 application of the Claimant, both the Engineer and the General Manager (Tech), PIU recommended extension of time up to 30.06.2007 with detailed delay analysis vide letter dated 27.11.2006(CD-131) and 05.12.2006(CD-132) respectively. Further, against EOT -5A application of the Claimant, both the Engineer and the General Manager (Tech), PIU recommended extension of time up to 30.08.2007 with detailed delay analysis vide letter dated 28.07.2007 (CD-146) and 03.09.2007 (CD-150) respectively. Furthermore, against EOT-6 application of the Claimant, both the Engineer and the Deputy General Manager (Tech), PIU recommended extension of time up to 20.12.2007 with detailed delay analysis vide letter dated 07.09.2007 (CD-46) and 16.10.2007 (CD-154) respectively. Lastly, against EOT-7 application of the Claimant, once again both the Engineer and the Deputy General Manager (Tech) and the Project Director, PIU recommended extension of time up to 29.02.2008 with detailed delay analysis vide letter dated 20.02.2007(CD-163) and 19.06.2008 (CD-47) respectively.

e) The Respondent contended that the work was delayed due to deficiency of Claimant's managerial resources, failure in project management, poor planning, poor mobilization of manpower, plant and equipment, inadequate transport resources, inadequate arrangements of shuttering and centering materials, inadequate resources of piece rate contractors. The Respondent vide letter dated 11.11.2003 (RD-16/2) issued a notice of non-performance and vide letter dated 01.07.2004 (RD-16/3) the Claimant was declared non-performer considering the poor performance of the Claimant and slow progress of work. The Tribunal observed that considering the ground realities of non-availability of hindrance free land, delay in issuance of required drawings/decisions, repeated FRL revisions in piecemeal manner, quarry problems preventing the performance of the Claimant, the Engineer and the site representatives of the Respondent both realizing that the Claimant was not at all responsible for slow progress of work, had recommended to the competent authority of the Respondent to exclude the Claimant from the list of non-performing Contractors and the claimant was removed from the list of alleged nonperforming contractors vide letter dated 15.09.2008 (CD-166). Further, the detailed list of Claimant's management team, deployed manpower, deployed plant and equipment including details of mobilization dates, installation dates, details of day-wise working, idling and break down status, date of removal etc. for individual plant and equipment were recorded in the MPRs by the Engineer. From the available resources details as per MPRs, and the compilation of the same and the presentation during the proceedings reveals that the Claimant had adequate management team, manpower, sub-contractors, plant and equipment at site to complete the work within stipulated period.

f) The Tribunal observed that the Engineer thereafter issued completion certificate vide letter dated 01.03.2008 (CD-53)

and also issued Defect Liability Certificate vide letter dated 09.04.2009 (CD-54) in terms of the contract. The Claimant submitted final bill vide letter dated 28.02.2009 (CD-SA) which was certified by the Engineer vide letter dated 10.12.2009 (CD-9). The Tribunal noticed that while certifying the Final Bill, the Engineer certified the payment for price adjustment till 29.02.2008 i.e. up to actual date of completion. Regarding payment for price adjustment Clause 47.1 of the conditions of contract reads as under:

Clause 4 7.1:

Contract Price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures and as per formula given in the Contract Data:

(a) The price adjustment shall apply for the work done from the start date given in the Contract data upto end of the initial intended completion date or extensions granted by the Engineer and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor.

Clause 47.1 provides that the extension to be granted by the Engineer and the price adjustment shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor. Independent of any other reasons, certification of payment for price adjustment till actual date of completion unequivocally proves that the Claimant was not at all responsible for any portion of delay in completion of work.

g) During arbitration proceedings, the Tribunal further observed that almost two years after certification of Final Bill, the Respondent, vide letter dated 18.10.2011(CD-169), communication to the Claimant the decision of Variation Committee of NHAI on Final EOT and provided relevant extract of the decision as under:

"The Committee considered the Agenda and approved the EOT up to 29.02.2008 with liquidated damages of 10% of the initial contract price i.e. Rs.18,36,58,000/- due to default of the contractor"

The 'Variation Committee' of the Respondent is not at all authorized to take any decision relating to grant of Extension of Time in terms of the contract. The decision of the Variation Committee after lapse of three years and eight months was taken in vacuum. More so, the decision was taken after becoming aware of the Claimant's case, since the Claimant submitted its Statement of Claim on 30.04.2011, in order to create evidence to exculpate the Respondent's liability to compensate the Claimant for all its losses and injuries and the aforesaid position is supported from the Respondent's letter dated 21.09.2011(RD-54), relevant portion of which reads as under:

"The committee observed that the value of the contract is Rs. 183.65 Crores and the work was started. on 30.06.2001 with the completion date as 29.12.2003. Time extension has already been granted up to 06.12.2006 i.e. for a period about 3 years. It was also noted by the Committee that the Contractor had gone for arbitration claims amounting to Rs. 303.22 crores whereas the contract price is only Rs. 183.65 Crores. So the Committee desired that the case be examined/seen strictly as per conditions of the contract. The reasons considered for the same extension already granted be seen and justification for further time extension, if any, be given when claims of the contractor are pending before the Arbitrator.'

h) The Tribunal observed that even after communicating imposition of liquidated damages the Respondent did not act accordingly. The Claimant vide letter dated 04.11.2011(CD-170) in reply to the letter of the Respondent's dated 18.10.2011 (CD-169), denying the payment of the liquidated damages and stating that the imposition of liquidated damages as subjudice, wrongful, bad in law and contrary to terms of the contract. The Respondent deemed to have accepted the stands of the Claimant by remaining silent

against the reply of the Claimant vide letter dated 04.11.2011. Further, there is nothing on record to establish that the Respondent made any effort to recover the liquidated damages amount. Furthermore, the Respondent did neither make any Counter Claim before this Tribunal for payment of liquidated damages amount nor for recovery of certified price adjustment amount for the period from 07.12.2006 to 29.02.2008. In terms of the contract, the Price Adjustment payment and Liquidated Damages cannot be implemented simultaneously. Price Adjustment payment up to actual date of completion i.e. 29.02.2008 is already certified in the final bill and as such no liquidated damages can be imposed.

42. The Tribunal does not agree with the Respondent's contention that no payment for compensation is admissible to the Claimant as the Engineer recommended Extension of Time with a disclaimer vide letter dated 04.05.2004 (CD-40 of Vol. 6) and through other letters that "The Contractor is not entitled to any additional financial compensation or costs as the Contractor's plant and equipment has never been idle as areas have always been available for the Contractor to work. The slow rate of progress achieved has been due to the Contractor's own inefficiencies, poor standard of equipment and weak project management. Minor disruption has been caused by trees and utilities, but as per Paragraph 18 of the Contract Data, the contractor is not entitled to any additional compensation due to disruption by trees, utilities or other obstructions. "The Tribunal is of fair and reasonable view that according to Clause 28.1 of Condition of Contract, 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 intended completion date without Contractor taking steps to accelerate the remaining work and which would cause the Contractor to incur additional cost. Therefore, as additional cost is an impact of the extension of Intended Completion of work, whenever a compensation event occurs and the Engineer grants extension of time, the Contractor is

entitled to additional cost in terms of Contract. The Engineer unilaterally and arbitrarily cannot rewrite the terms of Contract.”

The above quotation would show that the Arbitral Tribunal, after examining the evidence led before it, has come to the conclusion that the delay in completion of work was caused due to reasons attributable to the petitioner and not to the respondent. The Arbitral Tribunal has further held that once such delay is held to be attributable to the petitioner, the respondent herein, as a necessary corollary, is entitled to claim additional cost/ compensation for the extended period of time for completing the work beyond the stipulated date.

8. In ***Associates Builders v. DDA*** (2015) 3 SCC 49, the Supreme Court, while laying down the parameters within which the Court may exercise its jurisdiction under Section 34 of the Act held as under:-

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594, this Court held:

“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.”

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.”

9. As far as the submission of the learned ASG that in view of the Clause 44.2 of the Conditions of Contract it was for the Engineer to decide whether and by how much the Contract price has to be increased due to the delay in ‘Intended Completion Date’ and the Arbitrator could not have substituted its view for that of the Engineer in this regard, no Clause in the Conditions of Contract could be shown by the learned ASG making the decision of the Engineer “Final” or incapable of being considered by the Arbitral Tribunal i.e. excluding the arbitrator from adjudicating the disputes that have arisen between the parties on the issue of cause of delay or whether the contractor is entitled to the increase in

the Contract price. The decision of the Engineer itself being subject to Arbitration, cannot bind the Arbitral Tribunal considering the validity of the same and in case of disagreement with the same, award increase in contract price.

10. The learned ASG further submitted that in terms of Clause 18 of the Conditions of Contract the respondent was not entitled to any additional compensation for delay in cutting of trees and/or shifting of utilities. She submits that the Arbitrator has therefore, erred in considering such delays while awarding claim no. 1 in favour of the respondent.

11. I find no merit in the above submission of the learned ASG. Firstly, I find that no such ground has been raised by the petitioner in the Objection Petition. Further, as quoted from the Award above, these were only two of the many grounds that are noted by the Arbitral Tribunal as resulting in delay in completion of work within the Intended Completion Date. There is no specific amount awarded by the Arbitral Tribunal as compensation for delay in cutting of trees and/or shifting of utilities.

12. It is further submitted by the learned ASG that the Arbitral Tribunal has erred in holding that there were land acquisition problems even beyond 07.12.2006.

13. I again find that this is not a ground taken in the petition to challenge the Award. The Arbitral Tribunal, while reaching at the above conclusion, records that it has arrived at the same after perusing the delay analyses and strip charts submitted by the respondent for the period 07.12.2006 to 29.02.2008. It has further given the exact location where there were land acquisition problems. Therefore, it was for the petitioner

to have shown from the record how this finding of the Arbitral Tribunal can be said to be in any manner perverse.

14. The learned ASG further submitted that the Arbitral Tribunal having granted the claim of the respondent for additional cost on account of Site and H.O. Overheads due to delay in completion of project, could not have awarded further amounts as loss on account of lost opportunity to earn profit out of resources owing to delay in completion of works. She submits that this would amount to double amount being awarded to the respondent for the same reasons. It is further submitted that, in any case, there was no evidence led before the Arbitral Tribunal to seek loss on account of lost opportunity to earn profit.

15. I find no merits in the said submissions. The Arbitral Tribunal, relying upon the judgment of Supreme Court in ***Bharat Coking Coal Ltd. v. L.K. Ahuja*** (2004) 5 SCC 109 and ***Hudson's Building and Engineering Contracts***, Tenth Edition, Chapter 9, page 956 and 957 held that a claim of loss of profit capacity due to it's being retained longer on the Contract in question is maintainable. The Tribunal further held that the resources employed by the respondent in the project in question could have been utilized by the respondent for the work that was covered in another tender. The Tribunal thereafter determined 10% as reasonable profit on the turnover per month and on this basis has awarded a sum of Rs. 17,39,18,800/- as loss of profit during the extended period. In fact, the Tribunal deducted the amount of profit recovered from additional works i.e. Rs. 5,00,98,061/- and thereafter awarded only a sum of Rs. 12,38,20,739/- as loss of profit during the extended period in favour of the respondent. This, therefore, cannot be said to be award of double

amount in favour of the respondent arising out of the same default. As noted above, the Arbitral Tribunal has first awarded only the cost on account of Site and H.O. Overheads due to delay in completion of work.

16. In *Associates Builders (Supra)* the Supreme Court had held that if the employer is at fault and the Contract is prolonged for an inordinate period of time, it cannot be said that the contractor cannot be compensated for the same. It was further held that the Clause pertaining to increase in price of material incorporated in work or wages or labour increase will not be applicable to a claim for damages.

17. In *Assam State Electricity Board and Others v. Buildworth Private Limited* (2017) 8 SCC 146, the Supreme Court while dealing with the claim of escalation and idling charges, held that once there was a delay in execution of Contract due to employer, the employer was liable for consequences of the delay, namely, an increase in price and the other party would be entitled to a Claim for damages.

18. It is settled law that where a party is liable for breach of contract, either express or implied, the plaintiff is in general, entitled to nominal damages, although, no actual damages is proved. In *Dwaraka Das v. State of M.P. and Anr.*, (1999) 3 SCC 500, relying upon the case of *A.T.Brij Paul Singh v. State of Gujarat*, (1984) 4 SCC 59, Supreme Court held that damages can be claimed by a contractor where the Government is proved to have committed breach for improperly rescinding the contract and for estimating the amount of damages, the Court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is

entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profit is legally admissible on proof of the breach of contract by the erring party. In the said case the Supreme Court held that grant of damages @10% of the contract price shall be reasonable and permissible.

19. In view of the above I find no merits in the objections raised by the learned ASG to the award of the above amount in favour of the respondent.

20. The learned ASG further challenged the award of interest under claim no. 3 with effect from 10.12.2009, the Arbitral Tribunal has relied upon Clause 43.2 of the Conditions of Contract for awarding such interest from 10.12.2009, when certain revisions in bills raised by the Respondent were certified by the petitioner. The Arbitral Tribunal has further relied upon Clause 43.1 read with serial no. 25 of Contract Data for awarding interest at the rate of 12% p.a. Therefore, the Arbitral Tribunal has awarded interest in terms of the Contract between the parties and the same cannot be said to be perverse or unreasonable in any manner. I, therefore, find no merit in the said objection.

21. In view of the above, the present Objection Petition is dismissed, however, with no order as to cost.

NAVIN CHAWLA, J

JANUARY 31, 2018/rv