(2014) 10 DEL CK 0065

Delhi High Court

Case No: OMP 48/2013

National Highways Authority of India		APPELLANT
	Vs	
PCL Suncon (JV)		RESPONDENT

Date of Decision: Oct. 14, 2014

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 17, 31(7)(a), 34
- Civil Procedure Code, 1908 (CPC) - Section 34
- Contract Act, 1872 - Section 73
- Interest Act, 1978 - Section 3

Citation: (2014) 4 ARBLR 407

Hon'ble Judges: Rajiv Shakdher, J

Bench: Single Bench

Advocate: Meenakshi Sood and Mukesh Kumar, Advocate for the Appellant; Amit George, Advocate for the Respondent

Judgement

Rajiv Shakdher, J

1. Shorn of verbiage and technical claptrap; much of which has been examined closely by a three member arbitral tribunal by an unanimous award, the core issue, which has been raised before me is, as follows :-

1.1 Whether (notwithstanding the fact that the contract obtaining between the parties did not provide for the source from which Crushed Rubber Modified Bitumen (in short CRMB) had to be obtained to execute the work entrusted to the respondent), the petitioner could insist that CRMB had to be sourced from a refinery?

1.2. The aforesaid issue (which has been answered by the arbitral tribunal in favour of the respondent), has led to the following claims being awarded in favour of the

respondent :

(i). The difference in costs between CRMB of Grade 60/70, being blended at site; and that, which was sourced from the refinery.

(ii). The transportation cost in ferrying the CRMB from the refinery to the site.

(iii). Overhead expenses and profit.

(iv). Interest for the periods : between the date when the cause of action arose and the date of institution of the claim, pendente lite, and for the period post the award till the date of payment. Qua interest for the post award period, a leeway of 90 days was incorporated.

2. In order to adjudicate upon the petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act), in my view, the following broad facts need to be noticed :-

2.1 The petitioner, issued tenders in February, 2001 for the following work : "Four Laning and Strengthening of the Existing Two Lanes Highway Section from km 320.00 and Km 398.75 on NH-2 (Construction Package V- C)(hereinafter referred to as the work in issue).

2.2 This work had to be executed in the State of Jharkhand (TandHP-8).

2.3 The respondent, which is the original claimant submitted its bid on 14.05.2001, for a sum of Rs. 2,99,71,11,101.78. The respondent, was declared successful and its bid was accepted for the aforementioned amount, excluding the sum of Rs. 0.78 paisa. A letter of intent was issued on 31.07.2001, followed by execution of a formal contract dated 20.09.2001.

2.4 The contract, was apparently, divided into three sections. Each of these section had a common commencement date, i.e., 20.09.2001. The stipulated completion period qua each of the sections was different. Section I, was required to be completed by 19.03.2004. Section II, was to be completed by 19.09.2004, and Section III, was to be completed by 19.03.2005.

2.5 Admittedly, in so far as the physical progress of the work in issue is concerned, it stood completed on 26.07.2010. Extensions for completion of work vis-a-vis Section I and II were granted by the Engineer upto 30.04.2007 and 23.10.2008, which are the actual dates of completion qua these two Sections. In so far as Section III was concerned, extension was granted by the Engineer, till 31.03.2009. The respondent''s request for extension till 26.07.2010, was pending, it appears, when the matter was being deliberated by the arbitral tribunal.

2.6 The balance of quantities (BOQ) incorporated in the contract provides for use of CRMB in Dense Bitumen Macadam (DBM) and Bituminous Concrete (BC). As per BOQ Item 4.03, the respondent was to provide DBM for service roads and internal

roads, in rest areas, as per technical specifications provided in clause 5.7. Similarly, as per BOQ Item 4.04, the respondent was to provide and lay BC wearing course, as per technical specification clause 5.12 excluding tack coat. The quantities were prescribed in the BOQs. Admittedly, CRMB was to be used in the aforesaid works as indicated above. Importantly, "Most" specifications which were applicable to the contract, provided in clause 101 that those IRCs specifications would apply, which are latest and standard till 30 days before the final date of submission of the tender.

2.7 In this context, it would have to be borne in mind that at the time of bidding, the latest edition of IRC specification which was available was : SP 53-99. The said specification was contained in clause 10.1. This clause, admittedly, gave the liberty to the contractor i.e., the respondent herein, to blend the bitumen at site. The clause reads as follows :-

"..It is extremely important that the modifier is thoroughly blended with bitumen before the preparation of the mix so that the modified bitumen retains its premium properties. Different types of modifiers require different techniques of blending. The storage stability of modified bitumen is very important. The modified bitumen shall preferably be blended at or near a hot mix plant or supplied hot in tankers or if supplied in drums shall be agitated in melted condition with suitable device for 10-15 minutes before use. Test for penetration, softening point, separation and elastic recovery shall be conducted at site for a lot of 5 tonne polymer modified bitumen.."

(emphasis is mine)

2.8 While, considering the effect of aforesaid IRC specification, one would also have to bear in mind the technical specification 117, on which much reliance, has been placed by the petitioner, which provides that the material used in the execution of the work would require the approval of the Engineer. The petitioner relying on this clause has argued both before the tribunal as well as before me that, the Engineer / independent consultant was within its rights under the contract to direct procurement of CRMB, to be used in the execution of the work in issue, from a refinery.

2.9 As per the terms of the contract, SMEC was appointed as the independent consultant / Engineer. In accordance with the terms of the contract, the respondent approached the team leader of the said consultant, on 03.01.2003, for blending CRMB -60 Grade, at site, with the bitumen procured. This proposal of the respondent envisaged, having a separate independent entity collaborate with one, Samy Pty. Ltd., an Australian entity, to put up a plant at site, for CRMB blended modified bitumen, to be used in the execution of the work. The team leader, it appears, while approving the proposal of the respondent in-principle, sought clarification vide its communication dated 11.01.2003. The respondent supplied the clarification sought, and also, the relevant manuals vide its letter dated 28.01.2003.

3. Evidently, on 10.02.2003, the respondent communicated to the team leader that only refinery produced CRMB could be used in the execution of the work. The team leader, thus, vide letter dated 14.02.2003 forwarded the copy of this letter to the respondent.

3.1 The respondent, however, vide letter dated 22.04.2003, lodged its protest qua the aforesaid direction of the petitioner. In the said communication, the respondent, inter alia, indicated that the contract did not contain any specific stipulation, which would oblige it to use refinery produced CRMB. The stand taken was that under the contract, the respondent could use CRMB which was blended at site or, source it from the refinery, as long as, it fulfilled the requirements contained in the technical specification clauses. Since, the work was at the stage of laying the DBM, respondent indicated to the petitioner that the nearest refinery from which CRMB-60 could be sourced was located at Panipat, and that, procurement from that source would involve an additional expenditure of Rs. 438 per cum. The respondent also gave an alternate offer, which was that if, it was permitted use of bitumen-60/70 grade in laying of DBM instead of CRMB 60, it could give the petitioner a rebate of Rs. 63 per cum.

3.2 The team leader vide communication dated 09.06.2003 accepted the alternate offer of the respondent. Accordingly, thereafter the work involving laying of DBM was executed using bitumen grade 60/70. However, before this alternate offer could be accepted, a certain portion of the DBM work had already been executed using CRMB 60 from Panipat. The respondent keeping in mind, its alternate offer lodged its claim for additional expenditure at the rate of Rs. 68.71 per cum for having to procure CRMB 60 from the Panipat refinery for both DBM and BC works. For BC work between 08.02.2005 till February 2007, CRMB 60 was sourced from Panipat refinery. Since, IOCL''s refinery started producing CRMB at Haldia w.e.f. 10.02.2007, thereafter, CRMB was brought from Haldia.

3.3 It appears that the Dispute Resolution Board (DRB) of the petitioner in respect of a similar case involving package IV-A had recommended payment of transportation cost in respect of CRMB 60 procured from Panipat as against a mobile plant installed near Kanpur.

3.4 Bearing in mind the request of the respondent, perhaps of the DRB, the team leader issued a variation order dated 17.12.2007. This variation order issued by the team leader in-principle, allowed the respondent, to seek recovery of the additional cost incurred by it, in procuring CRMB 60 from the refinery in lieu of the option it sought to exercise, which was for site blending. This variation order was issued by the team leader in consonance with the provisions of clause 52.1 of the GCC. As per this variation order, the respondent was entitled to a sum of Rs. 5,73,43,226/-.

3.5 Nearly eight (8) months after the issuance of the variation order by the team leader, on 21.08.2008, the Project Director of the petitioner, shot down the variation

proposal of the team leader, on the ground, that it was not in line with the approval granted by the petitioner. The Project Director in this communication emphasised that only transportation cost would be paid to the respondent.

3.6 The Project Director''s delay in sending his aforementioned communication resulted in a sum of Rs. 2,82,36,548/- being released to the respondent, in the interregnum. Consequent to the aforesaid decision of the petitioner, recoveries were made, and till the matter was placed before the arbitral tribunal, an amount of Rs. 1,05,36,148/-, stood recovered. The respondent lodged its protest against recoveries vide their letter dated 29.03.2009, followed by notices dated 18.06.2009 and 01.07.2009.

3.7 Since, the recommendations of the DRB were not received within the specified time frame, the respondent invoked the arbitration clause contained in the contract.

3.8 It is in this context that the disputes were referred to the arbitral tribunal, which held its first meeting on 11.06.2010. It may not be out of place to mention that in order to prevent the petitioner from making further recoveries, the respondent had moved an application under Section 17 of the Act before the arbitral tribunal. This application was disposed of with a direction that proposed recoveries by the petitioner will be kept in abeyance pending the pronouncement of the award subject to the respondent submitting a suitable bank guarantee from a bank approved by the petitioner, for an amount equivalent to the proposed recovery.

3.9 It is in this background that the arbitral tribunal has awarded a sum of Rs. 4,49,88,565.12 to the respondent towards extra cost incurred by it in sourcing CRMB 60 from a refinery in lieu of site blending. This amount includes the cost of material as also the balance cost towards additional transportation. Since, a sum of Rs. 96 lakhs was already available with the respondent, due adjustment was ordered against the aforementioned amount. In sum, respondents were awarded an amount of Rs. 3,53,88,565, post the aforementioned adjustment.

4. As regards interest, for the past and the pendente period, the arbitral tribunal directed payment of interest on the amounts detailed out in paragraph 16 of its award at the rate of 12% p.a., compounded monthly, in terms of the clause 60.8 of the Conditions Of Particular Application (in short COPA). In respect of future interest, the arbitral tribunal directed that in case payments as per the award were made within a period of 90 days from the date of award, no interest would be leviable, though failure to pay would result in interest being triggered at the rate of 12% (simple) p.a. from day 1 after the date of award till realization. The arbitral tribunal quantified the fee and expenses at Rs. 10 Lakhs, the burden qua which, is required to be shared equally by the parties.

5. In this context, Ms. Sood, who appears for the petitioner advanced the following submissions :-

(i). That though the contract did not provide the source from which CRMB 60 was to be procured, under the contract, the choice of the material to be used in the execution of the work had to have the approval of the Engineer / independent consultant. In this behalf, reliance was placed on technical specification 117.

(ii). The Engineer /team leader vide his letter dated 14.02.2003 had communicated that he had not received a response to his earlier letter dated 11.01.2003. It was thus, contended that letter dated 28.01.2003 of the respondent was not received by the Engineer. (iii). It was submitted that the Engineer / Team leader vide letter dated 14.02.2003 had clearly indicated to the respondent that it could use only refinery sourced CRMB.

(iv). The DRB, in respect of a similar dispute qua package IV-A had recommended payment of only transportation cost and not the difference in the procurement cost. The petitioner had not made any illegal recoveries. The DRB in this case had recommended on 15.09.2009; albeit after some delay, payment of only transportation cost to the respondent. The respondent''s claim for additional procurement cost was rejected.

(v) The arbitral tribunal erred in relying upon the variation order of the Engineer / team leader dated 17.12.2007 as this was only a provisional order which required approval of the employer i.e., the petitioner.

(vi). In calculating the difference in cost of procurement, the arbitral tribunal did not have any material before it to enable crystallization of cost of bitumen, which would have accrued had CRMB been blended at site. Therefore, the difference calculated towards cost of procurement is, flawed. (vii). The arbitral tribunal ought not to have granted amounts pertaining to overhead expenses and profit since, these would have already been factored in when, the respondent decided to blend the bitumen at site. (viii). Assuming without admitting that additional cost towards procurement ought to have been paid to the respondent, the arbitral tribunal should not have granted interest for the past and pendente lite period as the difference in cost directed to be paid to the respondent was in the form of damages, in respect of which, interest ought not to have been paid for the aforesaid period. In other words, interest, if at all, could have been directed to be paid to the respondent by the arbitral tribunal only for the period post the award till the realization of the sums awarded.

6. Mr. George who appeared on behalf of the respondent refuted the submissions.

(i). In support of his submissions, he largely relied upon the findings returned in the award by the arbitral tribunal. The learned counsel emphasised the fact that the contract admittedly contained no provision from where the material could be sourced and, therefore, the direction of the petitioner to source the material from a refinery could, only be carried out against compensation for extra cost incurred by the respondent, in that behalf.

(ii). Since, the Engineer was an independent consultant under the contract, his decision in the matter had to be adhered to by both parties, which included the petitioner. As a matter of fact, vide communication dated 11.01.2003, the Engineer had in-principle, approved the blending of bitumen at site. The discretion employed by the Engineer was overridden by the employer, that is, the petitioner vide its communication dated 10.02.2003; which was only communicated by the petitioner by its subsequent communication dated 14.02.2003. It was similarly contended the variation order dated 17.12.2007, ought not to have been overridden by the petitioner. As a matter of fact by the time communication dated 21.08.2008 was issued by the Project Director, a substantial amount towards extra cost, in line with the variation order, had already been released in favour of the respondent. It was thus contended that, there was no error of law and fact in the award which, could call for interference by the court.

7. Having heard the learned counsel for the parties and perused the record, what has emerged is as follows :-

(i). The contract obtaining between the parties clearly, did not oblige the respondent to source CRMB Grade 60, from a refinery. The IRC specification (which was applicable and was admittedly the latest specification in vogue, having been issued within 30 days of the bid being accepted), provided in clause 10.1 that : "preferably", the bitumen should be blended at site. Therefore, the respondent was well within its right to blend the bitumen at site, for which it had submitted a proposal to the Engineer / team leader, on 03.01.2003. While, the Engineer / team leader raised certain queries, it clearly indicated in its communication dated 11.01.2003 that, in - principle, it was in agreement for use of site produced rubberised bitumen i.e., CRMB though the activity as proposed could not be approved till it had all relevant information regarding its production.

(ii). The respondent vide its returned communication dated 28.01.2003, apparently, despatched the information required by the Engineer / team leader. The said communication bears a stamp of receipt, which is dated 19.02.2003. In the interregnum, apparently, the petitioner shot off a general communication dated 10.02.2003, to all its Project Directors / team leaders, dealing with contract packages TNHP/GTRIP, on NH-2; directing thereby that only refinery produced CRMB could be used for execution of the works in issue, irrespective of the contracts entered into vis-a-vis contract packages TNHP and GTRIP, on NH-2. It is this communication which was relayed by the Engineer / independent consultant vide letter dated 14.02.2003. In this communication, the Engineer / independent consultant did refer to the fact that it had not received a response to its earlier letter dated 11.01.2003.

(iii). The respondent, however, stood its ground and lodged its protest vide communication dated 22.04.2003. In this communication, the respondent also indicated as to what would be the additional expenditure per cubic metre both without and with rebate, in case, it was permitted to use bitumen of grade 60/70.

(iv). Admittedly, the Engineer/independent consultant did issue a variation order dated 17.12.2007, with respect to the extra cost incurred in procuring CRMB 60 from the refinery, which included the cost of transport. This was disapproved by the employer, that is, the petitioner vide its communication dated 21.08.2008, to the extent, it was not in line with the DRB''s recommendations dated 06.05.2006, in respect of contract package IV-A. It may be noted that the instant case concerns contract package V-C. Therefore, according to the petitioner, only the transport cost for procurement of CRMB from refinery could be paid.

8. In my opinion, there is neither any rational nor logic in confining the compensation to be paid to the respondent only to the cost incurred by it towards transport. The explanation offered by Ms. Sood, on behalf of the petitioner that the approval of the Engineer/ independent consultant for sourcing the material had to be taken in terms of technical specification 117, in my view, cannot be accepted. The reason for this, is that, though technical specification 117, did require the respondent to secure approval of the Engineer/independent consultant and for which necessary process was initiated on 03.01.2003, the Engineer/independent consultant could only decline approval if, an ingredient proposed to be used in the execution of the work was not in line with the provisions of the contract.

8.1 IRC 53-59, which was the latest specification in vogue, having been issued 30 days period prior to the acceptance of bids, clearly provided that the respondent had a discretion in the matter.

8.2 Assuming for a moment, that the Engineer/independent consultant could direct a contractor to source material from any particular supplier including a refinery then, if, it led to a difference in costs between what the product (i.e. CRMB) would cost, when blended at site, as against it being sourced from the refinery; the difference would have to be paid by the employer i.e., the petitioner. Confining the compensation to transport cost, which Ms. Sood also confessed, the petitioner would have to pay, does not appear to be either rational or logical. The respondent, while submitting its bid would have made use of IRC specification 53.99 to arrive at the most optimum cost. The arbitral tribunal has returned a finding of fact that the cost of procuring CRMB 60 from Panipat was higher and, has thus, accordingly, awarded the difference in cost.

9. Ms. Sood''s argument, in this connection, that there was no evidence produced before the arbitral tribunal with regard to the cost of CRMB if blended at site and, therefore, by a logical corollary there being no base figure available for calculating the difference in cost is, in my view, categorically answered in paragraph 16(e) of the award; which reads as follows :-

"..Regarding the blending cost taken by the Claimants for determining the difference of the cost of blending CRMB at site and cost of acquiring CRMB from refinery, the PD on behalf of the respondents stated that it was not supported by

any documentary evidence which was produced before the AT. When AT asked a specific question as to if the conversion rate is unreasonable then what is the reasonable rate in his opinion? The respondents expressed inability to offer any comments on this issue..?

(emphasis is mine)

9.1 In the absence of contrary material produced by the petitioner, arbitral tribunal legitimately delved into its vast experience in the relevant field to arrive at a conclusion with regard to the reasonability as to costs of product if it were blended at site. [See Municipal Corporation of Delhi vs Jagan Nath Ashok Kumar and Anr. AIR 1986 SC 2316]. An arbitral tribunal is not, in this behalf bound by strict rules of evidence as found in the Indian Evidence Act, 1872.

9.2 The other argument of Ms. Sood, that the variation order passed by the Engineer/independent consultant was provisional, is also answered by the arbitral tribunal in the same vein, which is that, while the Engineer/ independent consultant under clause 51.1 of the contract conditions can make variations of form, quality and quantity of the work, the same can be ordered only in the form of a variation indicating therein the financial effect of the same. [See findings of the arbitral award in paragraph 16(c) of the award.] The provisional nature of the variation order, as alluded by the learned counsel, could not have come in the way of the arbitral tribunal examining its veracity and adopting the same. The arbitral tribunal, in this case, has clearly adopted this methodology.

9.3 In so far as the argument with regard to award of sum towards overheads and profits are concerned, Ms. Sood clearly conceded before me that submissions with regard to this aspect were not raised before the arbitral tribunal. This argument, however, was raised on the basis that the respondent would have factored in overhead expenses and profits while submitting its bid.

9.4 Similarly, argument with regard to payment of interest for the past and pendente lite period, was, even according to Ms. Sood, not raised before the arbitral tribunal.

9.5 Nevertheless, there is no dispute raised before me that the rate at which overhead expenses and profits have been awarded, is not in line with the rates ordinarily awarded in these cases by arbitral tribunals. Whether it ought to have been awarded in the facts of this case was an aspect which, according to me ought to have been raised before the arbitral tribunal. These issues cannot be raised for the first time in a petition, under Section 34 of the Act, by the petitioner, before court, because in one sense, they are mixed questions of fact and law.

9.6 As regards Ms. Sood''s contention that interest ought not to be awarded for the past and pendente lite period as this would amount in effect, to awarding interest on damages, in my view, is misconceived for the reason that while interest may or

may not be awarded where damages are awarded, in case of breach of contract, it is not as if interest is never awarded where a direction is issued in substance to reimburse additional expenditure incurred by an aggrieved party towards material used in the execution of the work in issue. The claim is essentially in the nature of an indemnity which is conceptually different from damages though the measure adopted to quantify the claim is perhaps the same.

9.7 The power of the arbitrator to award interest can, inter alia, be traced to the provisions of Section 3 of the Interest Act, 1978 (in short the 1978 Act). Under Section 3 of the 1978 Act, the arbitrator can award interest qua proceedings for recovery of any debt, or damages, or even, in respect of, any proceedings in which a claim for interest is raised, where the debt or damages stand already paid.

9.8 Whether interest can be paid in the form of damages, found a reference in the judgement of the Supreme Court in the case of Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, . Though the 1978 Act accorded the arbitrator power to award interest only vis-a-vis the pre-reference period, the Constitution Bench of the Supreme Court in the aforementioned case extended the power even to the pendente lite period by sourcing the power of the arbitrator in the principles analogous to Section 34 of the Code of Civil Procedure, 1908. The court opined that when, a person is deprived of use of money to which he/she is legitimately entitled to, he/she has a right to be compensated for the deprivation caused which, may take any form such as, "interest ", "compensation " or "damages ". The precise observations of the court were as follows:-

"47. (i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34 C.PC., and there is no reason or principle to hold otherwise in the case of arbitrator.. "

9.9 This principle was, as a matter of fact, applied by a majority of 3:2 in the case of Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, Vs. N.C. Budharaj (Dead) by Lrs. etc. etc., qua the power of the arbitrator to award interest for pre-reference period even with respect to cases governed by the Interest Act, 1839 (in short 1839 Act).

9.10 The proposition, which Ms. Sood has propounded perhaps would apply in a case where there is a breach of contract and damages are awarded, and consequently quantified. Cases of such kind would ordinarily be covered by Section 73 of the Indian Contract Act, 1872. The principle usually followed in such like cases would be that till such time damages are crystallized no interest would be payable prior to their quantification. (See AIR 1938 67 (Privy Council) and Union of India (UOI) Vs. West Punjab Factories Ltd., . In the instant case, there was no breach of contract.

The respondent, admittedly, has fulfilled its obligations under the contract. The respondent is only seeking a reimbursement qua additional cost incurred by it towards material and transportation; which ought to have been paid at the appropriate stage and time. The claim in effect was, for a sum due and payable. Since, reimbursement of costs incurred was withheld, its release was sought along with interest. Therefore, according to me, the arbitral tribunal has rightly, in terms of the contract, awarded interest, at the rate prescribed therein for the past and the pendente lite period. This is also in line with the provisions of Section 31(7)(a) of the Arbitration and Conciliation Act, 1996. In terms of the said provision an arbitrator is empowered to grant interest for pre reference, pendente lite and post award period. The contrary argument advanced in this behalf by Ms. Sood, in my opinion, not being tenable, will have to be rejected.

10. In these circumstances, I am clearly of the opinion that the award in issue need not be interfered with. The award is based on a cogent reasoning and material placed before the arbitral tribunal. Resultantly, the petition would have to be dismissed. It is ordered accordingly. There shall, however, be no orders as to costs.