M/s. National Highways Authority of India Vs Somdutt Builders-NCC(JV)

Court: Delhi High Court

Date of Decision: May 10, 2013

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 34, 34(2)

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: Mukesh Kumar, with Ms. Meenakshi Sood and Ms. Padma Priya, for the Appellant; Sanjay Jain, with Mr. Abhijit Mittal, Ms. Ruchi Jain, Ms. Namisha Gupta and Ms. Noor Anand, for the Respondent

Judgement

Manmohan Singh, J.
The petitioner has filed the objection u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as

"the Act") for setting aside the award dated 3rd October, 2009. By the impugned award dated 3rd October, 2009, the Arbitral Tribunal has

rejected the Counter claim No. 1 of the respondent and has awarded Claim No. 1 and Counter Claim No. 2 in favour of the respondent herein.

The petitioner is challenging the impugned award only in respect of Claim No. 1 and Counter Claim No. 2 of the respondent.

2. The respondent (a joint venture of M/s. Som Datt Builders Ltd. and Nagarjuna Construction Co. Pvt. Ltd.) signed a contract bearing No.

GTRIP/6, Construction Package IV-C dated 27th March, 2002 (hereinafter referred to as the "Contract") at the contract price of Rs.

1,979,543,788/- with the petitioner to execute the project of four-laning and strengthening of existing two-lane section between 110 km to 140 km

on NH-2 in the State of Bihar (Contract package IV-C) (hereinafter referred to as the "Project").

3. The afore-mentioned disputes were referred to the "Dispute Review Board" (DRB) by the respondent. The DRB (consisting of persons having

expertise in the field of constructions of roads, highways, bridges etc.), upheld the claim of the respondent with respect to Non-payment for

earthwork in embankment quantity in the 150 mm thick clearing and grubbing portion and held that the respondent is entitled to payment in

earthwork in embankment under BOQ item No. 2.02 but disallowed the second claim.

4. Being aggrieved by the recommendation of the DRB, the petitioner invoked the arbitration. The Arbitral Tribunal was constituted vide letter

dated 27th June, 2005 comprising of members having technical experience and knowledge.

5. The disputes which arose between the parties from the contract and were subject matter of the arbitration, and presently challenged in the

petition, were as follows:

a) Non-payment for earthwork in embankment quantity in the 150 mm thick Clearing and Grubbing Portion; and

b) Non-payment for removal of tree stumps and roots.

6. The learned Arbitral Tribunal has rejected the counter claim of the respondent with respect to the non-payment of cost of confirmatory boring

for each well, but vide the award dated 3rd June, 2009 under challenge (hereinafter referred to as ''Award'') the learned Arbitral Tribunal has

upheld (a) the recommendation of the DRB in the dispute regarding non-payment of earth-work in embankment quantity in the 150 mm thick

Clearing and Grubbing portion; and (b) the counter claim of the respondent regarding the non-payment of removal of tree stumps and roots.

7. The learned Arbitral Tribunal has awarded the following amounts in favour of the respondent:

(a) Rs. 1,16,25,199/- along with the price escalation of Rs. 23,17,599/- in the dispute relating to the non-payment of earthwork in embankment

quantity in the 150 mm clearing and grubbing portion;

(b) Rs. 31,88,812/- in the dispute relating to the non-payment for removal of tree stumps and roots;

(c) Interest @ 12% p.a. on the amount due and unpaid from the date upon which the same should have been paid;

(d) Simple interest @ 10% p.a. is awarded from the date of award till payment/realization.

8. It is the submissions of the petitioner that dispute No. 1 is regarding the non-payment of earth work in embankment quantity in the 150 mm thick

clearing and grubbing portion is not maintainable, inter alia, on the following grounds:

i) The excavation and backfilling works with the 150 mm thick clearing and grubbing portion and part and parcel of the clearing and grubbing

works, and hence, would have to be paid as per the BOQ item pertaining to clearing and grubbing only and that the respondent is not justified in

claiming compensation for the backfilling of 150 mm topsoil which is incidental to and concomitant with clearing and grubbing operations.

ii) The backfill of 150 mm done by the respondent is included in the item of clearing and grubbing (BOQ item No. 101), as per Technical

Specification 201.1 and as such no payment is due under the BOQ Item No. 2.02 for Embankment construction. Further, Technical Specification

201.6.1 clearly states that backfilling is included in the rates for payment of clearing and grubbing.

iii) In Clause 201.013 of TS the word ''etc'' makes it clear that excavation arising out of removal of roots, undergrowth, grass and other deleterious

material unsuitable for incorporation in the work shall be filled with suitable material so that the surface conforms to the surrounding area.

Excavation done under 201 read as whole means cutting removing and disposing of all materials such as trees, bushes, shrubs, stumps, roots,

grass, weeds, top organic soil not exceeding 150 mm in thickness, rubbish etc. The Contract is absolutely clear that removal of top soil of 150 mm

minimum depth means clearing and grubbing and the same has to be filled with suitable material and considered as incidental to the work of

clearing and grubbing.

iv) TS Clause 201.5 which pre cedes TS Clause 201.06 dealing with rates, the activity of clearing and grubbing is to be measured in terms of

hectares and thus, backfilling of excavations to the required density spoken of in TS Clause 201.06 has to be measured in hectares and no in cubic

metres as required in TS Clause 305.8 dealing with measurement of earthworks in the embankment. This also shows that back filling of

excavations is a part of clearing and grubbing and not part of the earthwork in the embankment.

v) TS Clause 305.8 clearly specifies that the volume of earthwork is to be measured in cubic meters by the method of average end areas. It is

submitted that the respondent has been wholly unable to evidence that the average end area method was used to measure earthwork.

vi) TS Clause 305.3.1 further substantiates the stand of the Applicant, the clear need to use batter pegs to mark the limits of earth work would

mean that the depressions (if any) caused by excavations of 150 mm unwanted top soil have to be back filled before the start of earthwork (as part

of clearing and grubbing operations). If the depressions were not required to be backfilled (as contended by the respondent/contractor), there

would be no need to use batter begs as the limits of the excavated depressions would by themselves be sufficient to mark out the limits of

earthwork. Thus, it is clear that the contract provided for backfilling of the pits/excavations before earthwork operations, as part of clearing and

grubbing operations.

vii) Clause 305.8 of TS stipulates that earth embankment shall be measured separately by taking cross sections at intervals in the original position

before the work starts. The original position here means the original ground levels (before the start of clearing and grubbing operations) and,

therefore, the respondent is to be paid for the earthwork in embankment construction, only on the basis of ground levels before the start of clearing

and grubbing operations.

viii) Clause 109.6 of TS, the Contractor shall, in connection with staking out of the centerline, survey the terrain along the road and shall submit to

the Engineer for his approval, a profile along the road centre line and cross sections at intervals as required by the Engineer. Further, according to

clause 109.7, the work on earthwork can commence after obtaining approval from the Engineer and the profile and cross sections shall form the

basis for measurements and payments. Profile and cross sections were submitted by the respondents on the basis of original ground levels which

were approved by the Engineer. This shows that the contractor/respondent understood from the beginning that clearing and grubbing involved

excavation and filling. The respondent has raised the claim quite late and beyond 28 days in contravention to stipulations made in clause 53.1.

9. It is submitted by the respondent that till November, 2003 the Engineer of the project has duly certified the work of the Contractor/respondent

for embankment quantity in the 150 mm thick clearing and grubbing portion and the petitioner as employer released the payment up to Interim

Payment Certificate (IPC)-14.

10. On instructions from the petitioner as contained in its circular letter No. 11016/4/2000/Tech/GM(WB)/313 dated 10th April, 2003, the said

embankment filling up to 150 mm thickness for clearing and grubbing portion was not certified by the Engineer and the payments made earlier were

also recovered arbitrarily in the subsequent IPCs under the pretext that the payment for the filling quantities in the said portion is a part of activity

under clearing and grubbing. It is submitted by the respondent that in any case, the present circular is not applicable to the contract between the

parties, having been notified subsequently.

11. It is further submitted that the refilling of the embankment portion in the void created by removal of top soil of 150 mm which was removed

during the clearing and grubbing operation is required to be considered as a part of Embankment Construction under BOQ Item No. 2.02 and has

to be paid under the said BOQ Item No. 2.02. The BOQ provides that clearing and grubbing operation was to be done as per Technical

Specification 201 of Ministry of Shipping and Transport (MOST TS 201).

12. As per the provisions of TS 201.1, the backfilling of the embankment portion in the void created by excavation of 1560 mm top soil during

clearing and grubbing operation is not incidental to clearing and grubbing in the BOQ Item No. 1.01. It is submitted that TS 201.1 only envisages

back filling of pits resulting from uprooting of trees and stumps as incidental to BOQ Item 1.01. Since the backfilling of 150 mm thick/deep

embankment portion in the void created by the clearing and grubbing operation in borrowed soil in the entire area on which the work was to be

carried on was not incidental to clearing and grubbing, the respondent has claimed the refilling of 150 mm thick/deep portion of embankment from

which the top soil was removed during the clearing and grubbing operation, under BOQ Item No. 2.02, being construction of embankment, which

is required to be undertaken as per Technical Specification 305.

13. The Technical Specification (TS) 305.3.1 provides that clearing and grubbing activity as per TS 201 has to be performed in advance of

earthwork operation. Similarly, TS 301.3.1 provides that work has to be set out and that clearing and grubbing does not form part of earthwork

operation. Further, TS 305.8 provides that earthwork embankment/sub-grade construction shall be measured separately by taking cross-section at

interval in the original position before start of work and after its completion and computing the volume of earthwork by method of average area.

The difference would provide the volume of work of backfilling and construction of embankment undertaken by the respondent.

14. The sequence in which the events were to be undertaken as per the contract terms summarized above is as under:-

(a) Clearing and grubbing by removal of top 150 mm unsuitable soil (TS 201.1);

(b) Taking level of original position after the completion of clearing and grubbing and prior to commencement of earthwork (TS 305.8);

(c) Refilling/construction of embankment and thereafter measurement of the volume of earth used after completion of the same (TS 305.8); and

(d) Measurement after completion of the entire work.

15. It is submitted by the respondent that the difference before (b) and (d) above would provide the volume of work undertaken by the respondent

which will also include the quantity of embankment in the 150 mm thick/deep portion created empty by the clearing and grubbing operation, based

on which the present claim arose and was awarded. In this context, it may be stated that for the work of clearing and grubbing in 1 hectare area as

per BOQ Item 1.01, the respondent would get paid an amount of Rs. 27,000/- whereas the refilling the same area i.e. 1 hectare in 150 mm

thick/deep portion created empty by borrowed soil, the respondent would incur costs of an amount of Rs. 1,57,500/- as per BOQ Item No. 2.02

(10,000 x 0.15 x 105). Thus, an amount of Rs. 1,57,500/- cannot be incidental to work of clearing and grubbing costing an amount of Rs.

27,000/-.

16. The learned Arbitral Tribunal held that the removal of unsuitable 150 mm of topsoil and the refilling of the void created by such removal by

suitable soil brought from borrow area does not form part of the clearing and grubbing operation, rather it is a part of the earthwork and has to be

measured in cubic meter (cum) and paid for as earthwork operation under BOQ Item No. 2.02.

17. Three appeals involving the same point were disposed of by an order dated 15th January, 2013 in FAO(OS) No. 123/2011 (National

Highway Authority of India Vs. Oriental Structure Engineers Ltd.) and another connected appeal FAO No. 136/2012. On that occasion, the court

had relied upon another order passed in FAO(OS) No. 47/2012 (National Highway Authority of India v. Hindustan Constructions Co. Ltd.),

decided on 22nd November, 2012 and FAO (OS) No. 424/2010 (National Highways Authority of India Vs. PCL-SUNCON J.V. decided on

27th April, 2013. In the appeal, the court had observed as follows:

In our view the real issue, thus, is not whether the work of back filling after removal of top soil forms part of clearing and grubbing activity as,

admittedly, there was no back filling carried out. The real controversy is as to whether if back filling had been done, that work is liable to be

excluded from the work of embankment construction by the respondent. There is nothing shown to us whereby the construction of embankment

can be said to have been done in the manner where effectively, the lower part of the embankment is made only by carrying out the activity of back

filling. The embankment being separate item, it has to be fully paid for. Had there been any force in the appellant''s submission, the appellant would

have placed before the arbitral tribunal evidence to show that the engineer had required the contractor to carry out back filling with soil up to a

particular level (i.e., up to 150 mm or less), and that the design of the embankment was such as to be constructed over such back filled soil

surface. No such material was placed before the arbitral tribunal. The appellant sought to make deductions, after having initially paid the amounts

for making of embankment, by claiming that the initial 150 mm of the embankment work should be considered/deemed as work covered by the

activity of clearing and grubbing. This, obviously, was impermissible.

18. The said three decisions are binding upon the Court as there is no merit and in view of submissions of the petitioner with regard to dispute No.

1. Thus, objections on this are rejected.

19. Regarding dispute No. 2, i.e., non-payment of removal of tree stumps and roots, the contentions of the petitioner are that the claim with regard

to dispute No. 2 is not maintainable, on the following grounds:-

(i) DRB''s recommendation that the claim of the respondent is not tenable is in accordance with the express provisions of the contract. The

respondent cannot treat the procedure for cutting of trees to mean entitlement for payment of cutting of trees separately and for removal of stumps

and roots separately. Cutting of trees including the removal of stumps/roots has to be treated as one item and has to be paid accordingly.

(ii) In clause 201.5 (amended) of Technical Specification, the last sentence i.e. ""Removal of stumps left over after the cutting of trees carried out by

the other agency"" has been deleted and clause No. 201.6.2 has been amended wherein, ""the removal of stumps and roots of trees of girth above

300 mm left over after cutting of trees carried out by another agency has become payable and this operation shall include excavation and back

filling to required compaction, handling, salvaging, piling and disposal of the cleared materials with lifts and up to a lead of 1000m."" Thus, nowhere

it is provided in this clause that the removal of stumps and roots in respect of the trees having girth above 300 mm cut by the respondent is payable

separately.

TS Clause 201.5 (Measurement for payments) clearly provides that cutting, including removal of stumps and trees of girth above 300 mm and

back filling to the required compaction, shall be measured in terms of numbers. This provision clearly means that cutting, including removal of

stumps and trees of girth above 300 mm and back filling to required compaction, is a single activity and is payable under BOQ item No. 11.1.

(iii) That there is no doubt about the fact that the trees or stumps of trees with girth up to 300 mm are not to be measured separately but in so far

as the trees with girth more than 300 mm cut by the respondent are concerned, the activity of cutting of trees includes removal of stumps/roots also

and constitutes a composite activity for the purpose of payment. However, in the case of trees cut by another agency, the removal of stumps/roots

is payable separately. The plea taken by the respondent is on the basis of description of BOQ item 11.1 that he was required to cut the tree only

up to ground level under the item of cutting of trees is not at all tenable because of contents of BOQ item and provision contained in the

specification provides procedure for cutting of trees as per local authority rules i.e. cutting of trees up to ground level and thereafter removal of

stumps and roots etc. It is alleged by the petitioner that the respondent cannot treat the procedure for cutting of trees as a contractual sanction for

their misconceived entitlement for the payment of cutting of trees separately and removal of stumps and roots separately. It is submitted by the

petitioner that as per Clause 60.9 of COPA the payment once made by the Engineer is not final and is subject to modification.

(iv) That the cutting of trees having girth more than 300 mm including removal of stamp/roots by the respondent is a single item and accordingly,

the respondent is entitled for a composite payment for cutting of trees and removal of stumps under BOQ item 11.1 Clause 201.5 (Measurement

for payments) of Technical Specifications, clearly provides for cutting and removal of stumps and trees of girth above 300 mm and back filling to

required compaction to be measured in terms of numbers. This provision clearly means that cutting of trees of girth above 300 mm including

removal of stumps and trees and back filling to required compaction is a single item and payable as BOQ item No. 11.1.

20. The case of the respondent is that payments for tree cutting and also for removal of tree stumps and roots were certified separately by the

Engineer and payment made accordingly by the petitioner till IPC-18 under the BOQ item No. 1.02 and 11.01 respectively. However,

subsequently the payment made towards removal of tree stumps and roots was recovered in IPC-19. In Clause 201.5, measurement for payment

for removal of stumps and roots etc. have been divided into two categories, one for trees of girth upto 300 mm and another for trees of girth above

300 mm. The respondent submits that the operations of removal of stumps and roots etc. and that of cutting of trees in so far as these relate to girth

above 300 mm are two distinct and separate operations. The aforesaid operations cannot be clubbed together irrespective of whether the trees are

cut by another agency or by the same agency.

The import of the above provision is that cutting of trees upto 300 mm in girth including removal of stumps and roots etc. even if the trees were cut

by one agency and stumps and roots were removed by another agency, are not to be measured and paid for separately and that the same is

deemed to be incidental to clearing and grubbing operations.

21. The respondent alleged that in respect of trees of girth above 300 mm, cutting of trees and removal of stumps and roots etc. are two distinct

operations. These two operations are to be measured and paid for separately irrespective of whether these operations are performed by the same

or by another agency.

22. In the description of BOQ item No. 11.1 of the Contract Agreement, there is no mention of removal of stumps and roots etc. In the BOQ of

the instant Contract there are separate provisions for the sub-items of work viz. removal of stumps and roots of trees at BOQ item No. 1.02 and

cutting/felling of trees etc. at BOQ item No. 11.01. Both the said items are independent of each other in that the first item i.e. 1.02 dealing with

removal of stumps and roots does not specify that it also includes cutting/felling of trees and similarly item No. 11.01 dealing with removal of

stumps and roots does not specify that it also includes cutting/felling of trees and similarly item No. 11.01 dealing with cutting/felling of trees does

not specify that it also includes removal of stumps and roots. The respondent has quoted for these sub-items separately and independently with the

knowledge that these two sub-items shall be treated separately and paid for accordingly.

23. It is evident that after having correctly interpreted the Technical Specifications of the Contract, the Engineer duly certified the work of removal

of stumps and roots etc. as per rates contained in the BOQ item 1.02 and cutting/felling of trees under item No. 11.01 and the petitioner as

Employers released the payment upto IPC-18. However, subsequently the work was not certified by the Engineer and payments made earlier

were also recovered arbitrarily in subsequent IPCs.

24. As per sub-clause 60.9 of Condition of Particular Application (''COPA'') an Engineer is entitled to omit/reduce the value of executed works

only if the said work is not/has not been carried out to his satisfaction. In the present dispute, the Engineer has never recorded any such

dissatisfaction. The Engineer has appended a certificate in each and every IPCs that the work has been done to his satisfaction and as per extant

specifications.

25. An identical issue involving the same question has been decided by this Court in the case of The National Highways Authority of India Vs.

Agrawal - JMC (JV) in OMP No. 640 and 641/2009 report The National Highways Authority of India Vs. Agrawal - JMC (JV), which has been

discussed in para 21 to 23. The same reads as under:

21. A perusal of Section 201.5 supports the contention of the Respondent that the activity of not only the cutting and removing of trees of girth

more than 300 mm was excluded from the scope of the work detailed in Section 201.1, but even the work of removal of stumps and roots of such

trees and of backfilling to required compaction was not covered by Section 201.1. It is precisely for this reason that the said activity is to be paid

for not on hector age basis, but on the basis of individual cases, depending on the girth of the trees.

22. Even a reading of Section 201.1 does not support the submission of the Petitioner. The said section uses the expression ""....It shall include

excavation....backfilling....resulting from uprooting of trees and stumps....''''. Therefore, the process of excavation, backfilling and compaction is a

process which is to accompany the process of cutting and removal of the trees. Since Section 201.1 talks of cutting and removal of trees of girth

up to 300 mm only, the process of excavation, filling and compaction provided in Section 201.1 would only pertain to those trees and not to trees

having girth more than 300 mm. The process of excavation, filling and compaction in relation to stumps and roots of trees, for it to be covered by

Section 201.1 has to relate to those trees which have girth up to 300 mm and No. more.

23. I also find force in the Respondents submission that Clause (viii) of Clause 2.1 of COPA-II entitles the Engineer, in emergency situations -

which affect the safety of life or of the works, to instruct the contractor to carry out works as may be necessary to reduce or abate the risk. Such

instructions do not require the approval of the employer. The correspondence shows that the Petitioner invoked the said clause while requiring the

Respondent to carry out the work of cutting and removal of trees of girth more than 300 mm. The Respondent accepted the said work while

making it clear that the Respondent would be entitled to be paid extra for carrying out the work of removal of stumps, excavation, backfilling and

compaction. The Petitioner did not question this stand of the Respondent by placing reliance of Section 201.1 of MOST specifications as

applicable. The Respondent was entitled to be paid extra in accordance with Clause 52. The view taken by the arbitral tribunal appears to be a

perfectly plausible view and it cannot be said that its view does not take into account the contractual terms and conditions.

26. The Division Bench of this Court has dismissed the appeals being FAO(OS) Nos. 551/2011 & 552/2011 filed by the petitioner on 17th

November, 2011 by confirming the above said order passed by the learned Single Judge.

27. Under the scheme of the Arbitration and Conciliation Act, 1996 (hereinafter ""the Act""), an award can be challenged only on limited grounds

mentioned in Section 34(2) of the Act.

28. The petitioner has not pleaded any of the grounds required to be established, u/s 34(2) of the Act, for setting aside an award, namely,

incapacity, invalidity of arbitration agreement, failure of notice of arbitration proceedings, that the award deals with a dispute which was not

submitted to the arbitration proceedings, non-arbitrability of the dispute itself and that the composition of the learned Arbitral Tribunal was not in

accordance with the law.

29. The grounds of misconduct and violation of public policy made in the objection are not clear in nature and the petitioner has failed to furnish

sufficient evidence in this regard.

30. From the instant objections, it appears that the petitioner challenged the award merely on the ground that the learned Arbitral Tribunal had

rejected the applicant''s submissions on the interpretation of the Contract between the parties and the other tender documents after a perusal of the

facts and circumstances presented by the applicant before the learned Tribunal.

31. A bare perusal of the objections show that the petitioner has re-agitated its claims before this Court in an attempt to treat this Court as an

appellate body, which is clearly not permissible u/s 34 or any other provisions of the Arbitration and Conciliation Act, 1996.

32. The impugned award has been passed in favour of the respondent by the learned Arbitral Tribunal, consisting of members with technical

expertise and technical acumen to interpret the contract and the technical specification under which the dispute has arisen.

33. The petitioner has merely challenged the Award without having made any specific pleading to establish either manifest error apparent on the

fact of the record and/or perversity.

34. The applicant has made out no case to bring the impugned Award within the fold of Section 34(2) of the Act whereupon this Court may

exercise its jurisdiction u/s 34 of the Act. In view of aforesaid reasons, the objections filed by petitioner are not sustainable and the same are

dismissed. This Court hence upholds the award passed by the learned Arbitrator.