

(2013) 01 DEL CK 0401

Delhi High Court

Case No: FAO (OS) NO. 461 of 2012 and CM Application No. 16629 of 2012

National Highways
Authority of India

APPELLANT

Vs

Oriental Structural
Engineers Pvt.
Ltd.-Gammon India
Ltd. (JV)

RESPONDENT

Date of Decision: Jan. 31, 2013

Citation: (2013) 2 AD 450 : (2013) 2 ARBLR 264 : (2013) 2 PLR 38

Hon'ble Judges: Sanjay Kishan Kaul, J; Indermeet Kaur, J

Bench: Division Bench

Advocate: Sudhir Nandrajog, with Ms. Meenakshi Sood and Mr. Mukesh Kumar, for the Appellant; Anil Airi, Ravi Krishan, Ms. Sadhana Sharma, Hemant Majani and Mr. Pratyush Sharma, for the Respondent

Final Decision: Dismissed

Judgement

Indermeet Kaur, J.

Oriental Structural Engineers Pvt. Ltd. (hereinafter referred to as "the claimant") had entered into a contract with the National Highways Authority of India (hereinafter referred to as the respondent) for the execution of work of four laning and strengthening the existing two lane highway from KM 180.00 to KM 240.00 on NH-2 in Bihar, Construction Package VA. Disputes arose between the parties which were referred to an Arbitral Tribunal who pronounced its Award on 17.12.2012. Two claims had been referred before the Arbitrator. Claim no. 1 was for refixing of rates in terms of reduction of the work quantity. Further details need not be gone into as this claim is not subject matter of dispute before this Court. Claim no. 2 related to Compensation on account of delays in completion of the work.

2. The work was to be carried out in three different sections. The date of the commencement of the work was 27.09.2001. The stipulated date for completion of

Section-I was 26.3.2004; for Section-II it was 26.9.2004 and for Section-III the date of completion was 26.3.2005. On account of the prolongation of the work for which purpose extension of time was granted by the respondent, claimant claimed compensation for this delay which as per his submission was attributable to the respondent. Submission being that the date of completion could not be achieved because of the aforementioned reasons.

3. The Arbitral Tribunal under claim No. 2 awarded a sum of Rs. 23,51,53,889/- payable with interest at 12% per annum from the date of the invocation of arbitration till the date of the Award.

4. This Award became the subject matter of objections filed by the respondent u/s 34 of the Arbitration and Conciliation Act (hereinafter referred to as "the said Act"). The impugned order dated 06.7.2012 dismissed the objections qua both the claims i.e. the Claim No. 1 and Claim No. 2. As already noted supra Claim No. 1 is no longer in dispute; as regard Claim No. 2 the learned single Judge was of the view that the Arbitral Tribunal has enumerated seven factors on account of which there was a delay for the completion of the work which were at different stages of the work; since these were attributable to the respondent he was liable to compensate the claimant. It had endorsed the finding of the Arbitral Tribunal that claimant was not justified to claim loss of profit and the said claim had been specifically negated; what had been awarded under Claim No. 2 was only the "cost" for delay; it was noted that the evidence adduced before the Arbitral Tribunal has been discussed at length by the Arbitral Tribunal and accordingly no interference was called for. The challenge to the Award qua both the claims was accordingly dismissed. However, since the additional Award had been passed by the Arbitral Tribunal without any application by either party; notice was issued, limited only to the question of the validity of the additional Award.

5. Learned senior counsel for the appellant submits that the Arbitral Tribunal has awarded the amount under Claim No. 2 on presumptions; there were no actual figures available before him; even otherwise compensation for delay in work was adequately covered by the escalation clause for which purpose attention has been drawn to Clause 44 of the contract. Submission being that in all cases where extension of time was granted to the contractor he would be adequately compensated; further submission being that the formula adopted by the Arbitral Tribunal for the computation of the claim contained an element of profit and this is evident from the calculation chart given by him while allowing the aforesaid compensation. Submission being that the definition of "cost" as defined under Clause 1.1(g)(i) of the contract in no manner includes any allowance for profits; it is only "the expenditure properly incurred or to be incurred, whether on or off the Site", which has to be afforded; this fact has been overlooked by the Arbitral Tribunal and the learned single Judge endorsing the finding of the Arbitral Tribunal on this count has committed an illegality. In support of his submissions reliance has

been placed upon [Bharat Coking Coal Ltd. Vs. L.K. Ahuja](#), . Submission being what has been awarded under Claim No. 2 is the loss of profit which could not have been awarded; the contract specifically excludes the grant of loss of profit; the error is apparent.

6. Arguments have been countered. Attention has been drawn to the reasoning given by the Arbitral Tribunal while awarding the aforementioned amount under Claim No. 2. Submission being that there was voluminous evidence before the Arbitrator which had led him to draw the conclusion in terms of Claim No. 2. The impugned order refusing to interfere with this fact finding in no manner calls for any interference. To support these submissions reliance has been placed upon [Delhi Development Authority Vs. M/s. S.S. Jetley](#), , 2006 IV AD (Delhi) 168 Puran Chand Nagia Vs. DDA and [DDA Vs. Naraindas R. Israni](#), .

7. Record shows that the date of completion of all three sections of the work were different; admittedly in all sections extensions of time had been granted by the respondent. The delay period in Section-I was calculated at 429 days. For Section-II there was a delay of 219 days; the claimant had however claimed compensation in this section for 202 days only. There was a delay of 193 days for completion of Section- III.

8. The Tribunal had noted that the highway which was the subject matter of the contract was split into three sections; the possession of the site was given on different dates for the three sections. During the progress of work impediments occurred and extensions of time has been given for all three sections. Salaries, wages, overhead expenses, proportionate corporate overheads were claimed by the claimant. Fixed machinery cost based on actual deployment was also claimed on pro-rata basis. The calculation made by the claimant in computing the cost was verified by the monthly reports submitted by him and verified and forwarded to the Engineer of the respondent. MORTH method was applied in computation of this claim. This was noted to be a reasonable and appropriate method which methodology is even otherwise not the subject matter of challenge. The factual delays and consequent extension of time recommended by the Engineer of the respondent were noted in detail by the Arbitral Tribunal. Relevant would it be to state that the initial dates of completion of Section-I was enlarged by the respondent up to 30.10.2007; for completion of Section-II it was enlarged up to 03.4.2007 and for Section-III it was extended up to 03.4.2007. All these extensions stood approved by the respondent. The Arbitral Tribunal had in fact noted seven reasons for the delays which included belated possession of site; delay in issue of construction drawings and their revision; delay due to adverse law and order condition including terrorist attacks; delay due to strike, delay due to additional work. These facts are not disputed. The Tribunal had also noted that climatic and weather condition which would delay the work could not be attributable to the respondent but to provide an encumbrance free site and designs/drawing at

appropriate time was definitely the responsibility of the respondent; similarly terrorist attack, law and order condition also fell under the respondent risk list. These delays were attributed to the respondent. The Tribunal had noted that compensation for delays could be worked out in favour of the claimant in terms of the definition of "cost" to be determined under sub clause 6.4, 12.2, 42.2 in terms of its definition as contained in sub-clause 1.1(g)(i) of the contract conditions. Clause 6.4 dealt with delay and cost of delay of drawings; Clause 12.2 dealt with unforeseeable physical obstructions or conditions and so also Clause 42.2 which dealt with failure on the part of the respondent to give possession of the site to the claimant. All these clauses envisaged additional costs to be awarded to the contractor. The Arbitral Tribunal has noted with caution that the claimant is not entitled to claim loss of profit and cost compensation for delay is alone to be considered.

9. These factual findings which were based on voluminous evidence i.e. the monthly reports submitted by the claimant and verified by the Engineer of the respondent and by applying the MORTH formula to determine the "cost" and noting the facts that the delays in the work being attributable to the respondent, the claimant was accordingly awarded the aforementioned amount.

10. These finding were rightly not interfered with by the learned Single Judge. Objections u/s 34 of the said Act are limited in scope; the learned single Judge while dealing with such objections is not an appellate form. Unless there is a plain perversity appearing on the face of the Award there is little scope for interference; non-interference was accordingly rightly adhered to by the learned single Judge.

11. The judgment of I.K. Ahuja (supra) does not in any manner help the case of the appellant. In this case the Court had noted that for the claimant to establish his claim for loss of profit he must establish by evidence that he had incurred a loss of profit because of prolongation of work. In the present case claim for loss of profit has been specifically rejected by the Arbitral Tribunal; he being conscious of the fact that under Claim No. 2 he only award "cost" as defined in sub-clause 1.1(g)(i) of the contract conditions which meant "all expenditure properly incurred or to be incurred, whether on or off the site" The Arbitral Tribunal had also taken into account the mitigation factor while dealing with the aforementioned claim.

12. This was a case where there was ample evidence before the Arbitrator which had been examined with in depth and detail. The Award being a reasoned Award and having given cogent and coherent reasons for the same, the learned single Judge rightly noted that there is no reason to differ from the same. Appeal is without any merit. The appeal as also the stay application is dismissed. Parties are left to bear their own costs.