

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20.12.2021

+ **O.M.P. (COMM) 299/2021 & I.A. 12966/2021**

UNION OF INDIA

..... Petitioner

versus

**OM VAJRAKAYA CONSTRUCTION
COMPANY**

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Ashok Singh, Advocate.

For the Respondent : Mr S.W. Haider, Advocate.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereinafter the '**Railway**') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the '**A&C Act**') impugning an arbitral award dated 08.04.2020 (hereinafter the '**impugned award**') passed by the Arbitral Tribunal constituted by Justice (Retd.) Anil Kumar as the Sole Arbitrator (hereinafter the '**Arbitral Tribunal**').

2. The impugned award was rendered in the context of disputes that have arisen between the parties in relation to a contract signed between the parties on 16.12.2011 (hereafter the '**Contract**').

Factual Matrix

3. On 13.01.2011, tenders were invited by the Railway for work described as '*Earth work in filling for embankment with contractor's own earth and cutting to the required profile , Blanketing materials including compaction by vibratory roller, construction/extension of minor bridges less than 6.00 m, retaining wall and other allied works from Ch 0.00 km to Ch 22.71 kms between Ambala Cantt- Dhappar railway Stations in connection with Ambala-Dhappar doubling on UMB-KLK Section, with the overall supervisory control of the Dy. Chief Engineer/C Ambala, Northern Railway.*' (hereafter the '**Project**').

4. Pursuant to the said tender, the respondent firm (hereafter '**OVC**') submitted its bid. The same was accepted and by a Letter of Acceptance dated 07.04.2011 (hereafter the '**LoA**'), the work was awarded to OVC. The period of completion of the works was stipulated to be eighteen months and was required to be completed by 06.10.2012. The Contract with respect to the said work was finally signed on 16.12.2011.

5. OVC claims that after the award of the works, the Railway advised it to deploy its machinery, staff, labour and construct the site office(s) as per the tender stipulations for expeditious execution of the works within the stipulated time. However, the arrangements made by

OVC at the site remained unutilized due to non-availability of drawings, site for execution, cutting of trees, non-sanctioning of Engineering Scale Plan (ESP) etc.

6. Despite, OVC's repeated efforts to execute the works, no progress was made as the trees causing hinderances were not removed and full site was not made available to OVC. Thereafter, OVC sent several letters to the Railway requesting it to supply a complete set of drawings, remove the ESP of Dhappar, Lallru and Dhoulkot stations and, to remove the trees at the railway track at Lallru station; however, the said letters did not elicit any satisfactory response.

7. Due to addition in the scope of work and the various hindrances in executing the works, the Railway extended the date of completion of the works to 30.10.2014, without levy of any penalties.

8. Thereafter, on 08.08.2013, one of the constituent partners of OVC expired in a road accident and OVC requested the Railway to treat the work as closed. OVC requested the Railway to prepare the Final Bill along with the extra items executed at the site on the instructions of the supervisory staff. OVC claimed that it was assured that the extra items would be paid along with the Final Bill at an early date along with the earnest money, Performance Guarantee and security deposit.

9. The work was finally treated as 'satisfactorily completed' on 15.10.2014 and thereafter, a Completion Certificate was issued and the Performance Guarantee furnished by OVC was released.

10. OVC states that the Railway had assured it that it would settle all disputes at the time of finalization of the Final Bill. However, the Railway failed to include some of OVC's claims in the Final Bill. OVC claims that it was directed to accept the Final Bill prepared by the Railway without any protest and, to tender its 'No Claim Certificate' failing which the admitted amounts due would not be released.

11. OVC had requested the Railway to prepare the Final Bill on 18.11.2014. However, the Final Bill was prepared after a period of fourteen months from the date of completion of the works and was finally paid on 07.12.2015. The payments did not include certain payments as claimed by OVC.

12. OVC claims that in addition to the delay in payment of the Final Bill, the Railway did not release the PVC Bill, which was required to be paid along with the Final Bill. The PVC Bill was finally paid on 19.12.2015, and the amount paid was less than the calculations made in accordance with the tender conditions.

13. Aggrieved by the delay in payment as well as the payment made for a lesser amount, by a letter dated 12.04.2016, OVC invoked the arbitration agreement [Clause 64 of the Indian Railways Standard General Conditions of Contract (hereafter the 'GCC')] and the disputes were referred to arbitration.

14. The summary of claims made by OVC in its Statement of Claims is set out below:

Claim 1	Less payment of PVC	₹60,30,000/-
Claim 2	Less payment of earthwork in embankment	₹40,64,000/-
Claim 3	Less payment of mechanical compaction of earthwork in embankment	₹2,24,000/-
Claim 4	Release of earthwork in embankment deducted for cutting	₹19,05,000/-
Claim 5	Less payment for providing and maintenance of barricading along the track	₹28,45,350/-
Claim 6	Extra expenses on deployment of equipment and machinery in the prolonged period of 24 months @1,20,000/- per month	₹28,80,000/-
Claim 7	Maintenance of site office in extended period as per tender conditions	₹4,80,000/-
Claim 8	Extra expenses on deployment of staff in prolonged period of 24 months	₹12,00,000/-
Claim 9	Arbitration cost	₹5,00,000/-
Claim 10	<i>Pendente lite</i> and future interest @18% per annum on all claims	As accrued

15. The Railway filed its Statement of Defence, however, it did not raise any counter-claims.

16. By the impugned award, the Arbitral Tribunal accepted certain claims and awarded ₹1,34,33,350/- along with *pendente lite* interest and future interest at the rate of 9% per annum till its realization in satisfaction of OVC's Claim nos. 1,5,6,7,8 and 10. Additionally, the Arbitral Tribunal awarded arbitration cost to OVC equivalent to the arbitration fees and the actual counsel fees paid by OVC, subject to the maximum amount equivalent to the Arbitral fees.

17. Aggrieved by the impugned award, the Railway has filed the present petition.

Submissions

18. Mr Ashok Singh, learned counsel appearing for the Railway assailed the impugned award on three fronts. First, he submitted that the Arbitral Tribunal had grossly erred in awarding *pendente lite* interest as the same was contrary to the express provisions of the GCC forming part of the Contract.

19. Next, he submitted that the Arbitral Tribunal had erred in holding that the Railway was responsible for the delays in execution of the works. He submitted that the findings to the said effect were erroneous as there were admitted delays on the part of OVC. He submitted that the Contract was awarded on 07.04.2011 and OVC was required to furnish the Performance Bank Guarantee within the period of fifteen days

thereof, but it had delayed furnishing the same. After several reminders, OVC finally submitted the Performance Bank Guarantee, three months after the issuance of the LoA. In this context, he submitted that OVC had delayed the execution of the works from the very beginning.

20. Lastly, he submitted that the impugned award to the extent it awarded costs in favour of OVC was also contrary to the express terms of the GCC, which stipulated that each party would bear its own costs.

21. Mr Haider, learned counsel appearing for OVC countered the aforesaid submissions. He submitted that the Arbitral Tribunal had examined the aforesaid submissions and rendered the impugned award, which was final and binding. However, he conceded that in the event, a contract expressly prohibits grant of interest, an arbitral tribunal would not have any jurisdiction to award pre-award interest. Insofar as the question of delay in completion of works is concerned, he submitted that the Arbitral Tribunal had examined the issue and had returned its finding after evaluating the evidence on record and the Arbitral Tribunal's findings were final and binding. Insofar as the award of costs is concerned, he submitted that the Arbitral Tribunal had the discretion to determine costs by virtue of Section 31A of the A&C Act.

Reasons and Conclusion

22. Before proceeding further, it would be relevant to refer to Clause 64 of the GCC, which contains provisions regarding dispute resolution and arbitration. Clauses 64.(5) and 64.(6) of the GCC are relevant and are set out below:-

“64.(5) Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made’

64.(6) The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s), as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the parties, provided parties sign an agreement in the format given at Annexure XV to these condition after/ while referring these disputes to Arbitration. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued on the subject by Railway Board from time to time irrespective of the fact whether the arbitrator(s) is/are appointed by the Railway Administration or by the court of law unless specifically directed by Hon’ble court otherwise on the matter. ”

23. The Arbitral Tribunal has awarded *pendente lite* and future interest at the rate of 9% per annum. There is merit in the contention advanced by Mr Singh that the award of *pendente lite* interest runs contrary to Clause 64.5 of the GCC which expressly provides that ‘*no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.*’

24. The Supreme Court in ***Union of India v Bright Power Projects India (P) Ltd: 2015 9 SCC 695*** had held that if there is a specific contract between the parties that proscribes award of interest, award of pre-reference interest would be impermissible. This view was reiterated by the Supreme Court in its later decisions including in ***Jaiprakash***

Associates Limited v. Tehri Hydro Development Corporation (India) Ltd : 2019 17 SCC 786. This question is no longer *res-integra*. Thus, the impugned award to the extent that it awards *pendente lite* interest, is liable to be set aside.

25. Insofar as the question of delay in execution of the works is concerned, the Arbitral Tribunal had evaluated the matter placed before it and had found that OVC had deployed the required labour staff, machinery and had also made arrangements for raw material. However, its resources could not be deployed in entirety due to several reasons including non-availability of drawings, non-availability of free site for execution, non-sanctioning of ESP, cutting of trees, etc. The Arbitral Tribunal found that there was extensive correspondence on record to establish that OVC had repeatedly requested for the necessary drawings. The Arbitral Tribunal also found that there were inter departmental communications wherein, the delays, and hindrances as pointed out by OVC had been admitted. A plain reading of the impugned award indicates that the Arbitral Tribunal has discussed the material available on record and its finding that OVC was not responsible for the delays is a well-considered view.

26. The Arbitral Tribunal found that OVC was compelled to execute additional items. The Arbitral Tribunal also found that if there were no lapses on the part of UOI, OVC would have completed the Project well within the stipulated period. The said finding is a question of fact and cannot be interfered with in these proceedings under Section 34 of the A&C Act unless, this Court finds that the same is patently illegal. In

this case, there is no ground for the Court to fault the said finding.

27. The delay in furnishing of the Performance Bank Guarantee is not dispositive of the controversy as to which party was responsible for the delay in execution of the Contract. The Arbitral Tribunal had evaluated the evidence and material and, had found in favour of OVC. The import of Mr Singh's contentions is to invite this Court to re-examine the material and re-adjudicate the disputes; clearly, that is not the scope of the proceedings under Section 34 of the A&C Act. The decision of the Arbitral Tribunal is a well considered one and it cannot be accepted that it is patently illegal and vitiates the impugned award.

28. OVC had claimed costs quantified at ₹5,00,000/- however, the same was not allowed. The Arbitral Tribunal had awarded costs of the arbitral proceedings, which would include the Arbitral Tribunal's fees paid by OVC and the counsel fee paid, limited to the Arbitral Tribunal's fee.

29. Although it is contended on behalf of the Railway that in terms of Clause 64(6) of the GCC, the parties were required to bear their respective costs; however, no such contention was advanced before the Arbitral Tribunal.

30. The Statement of Defence filed by the Railway in respect of Claim of Costs (Claim no. 9) reads as under:-

“Claim No. 9 Wrongly mentioned as Claim No. 10. The Claimant’s claim of Rs. 5,00,000/- for arbitration cost is wrong and denied. It is submitted that all the claims made by the applicant are fictitious, wrong and denied in totality by the Respondent and also not tenable and beyond the scope of Arbitration being “excepted matters”. The Claimant has made wrong claims and dragged the Respondent in unwarranted litigation. As such the claim put forward by the Claimant is also not tenable and be rejected in totality. On the contrary, the claimant is liable to pay the costs of arbitration to the respondents.”

31. The Railway had also filed written submissions reproducing the aforesaid averments made in its Statement of Defence. It is thus clear that, the Railway had not contested OVC’s claim for costs on the ground that it was contrary to the terms of the Contract. The contention that award of costs is contrary to the Contract has been raised for the first time before this Court and is liable to be rejected on this ground alone. However, notwithstanding that the contention has been raised at a belated stage, it is also without merit.

32. It is relevant to refer to Section 31A of the A&C Act as introduced by virtue of the Arbitration and Conciliation (Amendment) Act, 2015 which contains provisions regarding determination of costs. The said section is reproduced below:-

“31A. Regime for costs.—(1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine—

- (a) whether costs are payable by one party to another;
- (b) the amount of such costs; and
- (c) when such costs are to be paid.

Explanation. —For the purpose of this sub-section, “costs” means reasonable costs relating to—

- (i) the fees and expenses of the arbitrators, Courts and witnesses;
- (ii) legal fees and expenses;
- (iii) any administration fees of the institution supervising the arbitration; and
- (iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,—

- (a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or
- (b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including—

- (a) the conduct of all the parties;
- (b) whether a party has succeeded partly in the case;
- (c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings; and
- (d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay—

- (a) a proportion of another party’s costs;
- (b) a stated amount in respect of another party’s costs;
- (c) costs from or until a certain date only;
- (d) costs incurred before proceedings have begun;

- (e) costs relating to particular steps taken in the proceedings;
- (f) costs relating only to a distinct part of the proceedings; and
- (g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.]

33. Unlike the power of the Arbitral Tribunal to award interest under Section 31 (7)(a) of the A&C Act, which is subject to the contract between the parties, there are no such fetters on the discretion of the Arbitral Tribunal to award costs under Section 31A of the A&C Act. The only exception being any agreement between the parties regarding costs which is entered into after the disputes have arisen.

34. It is also relevant to note that Section 31A of the A&C Act not only provides for a regime of costs that may be awarded by the Arbitral Tribunal but the Court as well. The opening sentence of Sub-Section (1) of Section 31A of the A&C Act also contains a non-obstante provision. The import of the non-obstante provision is that Section 31A of the A&C Act has an overriding effect over any contrary provision contained in the Code of Civil Procedure, 1908 (CPC). Thus, the Arbitral Tribunal and the Courts would have the power to award costs at their discretion, in terms of Section 31A of the A&C Act despite any repugnancy with the regime of costs under the CPC.

35. The provisions of the contract cannot be read to override the provisions of Section 31A of the A&C Act unless the parties enter into

the contract after the disputes have arisen. The discretion of the Court or the Arbitral Tribunal to award costs is not subject to the agreement between the parties unless that agreement is entered after the disputes have arisen.

36. Sub-Section (5) of Section 31A of the A&C Act makes it amply clear that an agreement, which has the effect that a party has to pay whole, or part of the costs would be valid only if such an agreement is made after the disputes have arisen.

37. Clause 64(6) of the GCC which provides that parties would bear their own costs does amount to an agreement that a party would bear a part of the costs and, by virtue of Section 31A(5) of the A&C Act, this agreement is not valid as it was not entered into after the disputes have arisen.

38. This Court finds no ground to interfere with the costs awarded under the impugned award.

39. In view of the above, the impugned award to the extent it awards *pendente lite* interest, is set aside.

40. The petition is disposed of in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

DECEMBER 20, 2021

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[Click here to check corrigendum, if any](#)