SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Union of India Vs. M/S. K.K. Gupta Const. Engineers (Jv)

Union of India Vs. M/S. K.K. Gupta Const. Engineers (Jv)

SooperKanoon Citation : sooperkanoon.com/921087

Court : Delhi

Decided On : Sep-19-2011

Judge : Sanjay Kishan Kaul; Rajiv Shakdher, Jj.

Acts : Arbitration And Conciliation Act, 1996 - Section 34

Appeal No. : FAO (OS) No.443 of 2011 & CM No.17108 of 2011

Appellant : Union of India

Respondent : M/S. K.K. Gupta Const. Engineers (Jv)

Advocate for Def. : Mr. Navin Chawla, Adv.

Advocate for Pet/Ap. : Mr. Jitendra Kumar Singh, Adv.

Judgement :

1. A tender was floated for award of the work of construction of bridge No.81 over all spans over river UJH to the appellant vide contract dated 10.6.2005. The contract had to be completed within a period of 24 months and it is stated that two extensions were granted. It is during the course of the work itself that disputes arose between the parties and the respondent invoked arbitration clause No.64. The designated authority, being the General Manager, Northern Railway, vide letter dated 3.9.2007 appointed a panel of three arbitrators who entered upon reference on 10.9.2007 and made & published the award on 28.5.2008. The petitioner aggrieved by the award filed an application under Section 34 of the

Arbitration & Conciliation Act, 1996 objecting to the award albeit there being some delay in refiling which was condoned. The objections have been decided vide impugned order dated 6.7.2011 in OMP No.582/2008. It is this order which is now sought to be assailed in the present appeal.

2. A perusal of the impugned order shows that each of the claims as preferred by the respondent and adjudicated by the arbitral tribunal and the objections thereto have been discussed and dealt with on merits.

3. The first claim was regarding an amount withheld of `25.00 lakh for alleged breach of a milestone. This claim was allowed by the arbitral tribunal on the ground that extensions were granted to the respondent by the appellant without imposition of penalty and thus the delay cannot be said to be attributable to the respondent/claimant. The learned single Judge has found that it was in the interest of the earlier completion of work and in view of rising costs that extension was granted to the respondent while retaining the milestone penalties imposed. This claim has not been sustained in terms of the impugned order as it was found that there was non-consideration of the relevant and material evidence and was sent back to the arbitral tribunal for re- consideration in the light of the evidence produced by the parties.

4. We may notice that in the appeal filed by the appellant there are grounds A to G. Grounds A, E & G are general in character without dealing with any specific adjudication by the learned single Judge. Grounds B, C & D deal with the aspect of delay and extension of time granted by the appellant to the respondent. Thus, the award of the claim, which has been set aside by the learned single Judge is sought to be assailed by the appellant by referring to these grounds as if the claims have been upheld. We are constrained to point this out as there cannot be a greater non-application of mind where a Government authority in whose favour the learned single Judge has found that a particular claim which has been awarded by the arbitral tribunal deserves to be remitted, makes out grounds as if the claims awarded in favour of the respondent/contractor have been upheld. Clearly the deponent of the affidavit in support of the appeal has not even cared to see as to what is the actual adjudication in the appeal.

5. We are pained to note this aspect as unnecessary appeals are filed in routine course without any application of mind despite the so called professed policy of the Government of India that unnecessary litigation by the Government should not take place. The affidavit in support of this appeal has been filed by one Mr. R.S. Ranote, who is the Deputy Chief Engineer and is, thus, fully aware of the dispute. We are, thus, of the view that the matter needs to be looked into administratively at the highest level not only because such mindless exercise must be brought to the notice of the concerned authorities but because of the utter wastage of court time by such appeals. In fact, after hearing the matter on 14.9.2011 when we were proceeding to pen down our order we had noticed this fact but at that time learned counsel for the appellant sought some time to take instructions whether the appellant would like to press the appeal. Learned counsel for the appellant has come back with the instructions that despite the aforesaid facts, the appellant seeks to press the appeal.

6. We, thus, call upon the General Manager, Northern Railway to hold an inquiry into this aspect and submit a report to us within a period of one (1) month.

7. We now proceed to deal with the remaining claims and the objections thereto.

8. Claim No.2 arises on account of extra amount for classification and well sinking paid to the appellant while sinking the wells which was contrary to the nature and condition of soil stated in para 51.311 of the contract. The clause stated that the strata through which the well foundation is to be sunk consists of weak sandstone/soil stone/silt stone/clay beds below the top layers of boulders and gravel in sand matrix. It is only at the time of sinking of 22 wells that the respondent/contractor encountered heavy boulders of the size of 0.50 metre to 1.0 metre and heavy boulders of sand mix with clay of the size 0.50 and 1.0 metre against strata of sand with gravel, sand and clay with fine gravel and clay. Two members of the arbitral tribunal visited the work site accompanied by the parties while the sinking was in progress. Large boulders were, in fact, found at the site and thus the tribunal found that this was quite different and difficult from the operation normally done under BOQ item No.NS-7. The arbitral tribunal, however, discounted for the fact that no blasting was involved and thus considered a rate of

`600.00 per cubic metre in place of NS-6 rate of `328.24 per cubic metre. An award of `27,17,600.00 was made in favour of the respondent.

9. The learned single Judge considered the submissions of the appellant that there was assumption by the tribunal that the strata was the same in respect of all piers as found by them at the time of inspection of pier No.22. A specific query was posed to the learned counsel as to whether at the time of inspection or soon thereafter the petitioner had required the tribunal to inspect the soil strata in respect of other piers as well and whether such a stand was taken before the tribunal. It was found that the answer to the same was in the negative. Not only that, the measurement books maintained by the respondent in respect of the piers showed the same position in respect of all the piers. Thus, the learned single Judge naturally came to the conclusion that there was no illegality in the award.

10. We find that the reasoning of the arbitral tribunal and the learned single Judge is unexceptionable and it is a pure question of finding of fact where the technical experts on visiting the site found that the soil condition was different from the contract and awarded the amount for the same.

11. Claim No.3 made by the respondent was qua price variation clause. It was the stand of the appellant that such price variation could be claimed only if the price index varies by + 10 per cent. Thus, if the variation in the price index was 12 per cent which was on the higher side it was the plea that the claim variation could only be to the extent of 2 per cent, i.e., the differential of 2 per cent and not the 12 per cent. This plea was rejected by the arbitral tribunal in view of the relevant clause, which reads as under:

"No price Variation/Recovery shall be paid/deducted till the price index of steel & cement items as mentioned above changes by + 10% from the price index for the month of term opening/negotiation. However, when price index varies by more than + 10% fall payment of PVC for that period will be made as per above formula."

12. The tribunal also found that the word „fall should read as „full as otherwise it would not make any sense and took cue from clause 13.2.3 where also in an

identical clause for price variation the word „full has been used. The learned single Judge rightly found that it was a pure interpretation of a contractual clause which falls within the domain of the arbitral tribunal and the price variation clause would not make any sense if the word „fall was read as „fall instead of „full.

13. We find that there can hardly be any dispute in this regard in view of the clarification issued in this behalf in terms of letter dated 7.3.2007 by the petitioner to the respondent clarifying that "fall payment of PVC" may be read as "full payment of PVC".

14. The last claim No.4 relates to NS item Nos.37 & 39 requiring the respondent to excavate the earth for purposes of filling. This is, once again, directly connected with the issue of big boulders since the excavated material was found to be partly unsuitable for carrying out the work of filling in view of the presence of large bounders.

15. The plea sought to be advanced before the learned single Judge that the respondent had not used the excavated earth for the purposes of filling up during floods was not even found as an averment in the counter-statement of fact. The balance amount payable was, thus, upheld.

16. If we see the grounds of appeal, as noticed above, the only mention is in ground F regarding claim No.4 stating that this amount had already been paid in the item of cutting of earth. There is no specific ground even dealing with claims 2 & 3. We may, however, note that in the body of the appeal, a reference has been made to claim 2, once again, stating that the geo-technical investigation was not part of the tender document, therefore could not have been referred to before quoting the rate of the tender. The terms of the tender required the person to visit the site and verify the position at the ground level. These submissions, however, do not take away the fact that the nature of soil to be found at the particular place itself had been specified which was found to be contrary to the actual position. It has also been stated that some of the boulders were of smaller size than one metre and that should have been taken into account. All that we are required to say is that these are all matters of fact finding of the arbitral tribunal which are not required to be gone into by this Court.

17. We find that a reasoned judgement has been passed to which not even a proper appeal has been filed and the appellant seems to be carrying out a ritual of filing an appeal rather than any challenge being laid.

18. We dismiss the appeal and the application with costs of `50,000.00 to be paid to the respondent within a period of two (2) weeks.

19. List for compliance on 29.11.2011.

20. Dasti.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com