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IN THE HIGH COURT OF DELHI AT NEW DELHI

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OMP No.111/2003

4th February, 2010

NATIONAL PROJECT CONSTRUCTION CORPORATION LTD.

...Petitioner

Through: Mr. Santosh Kumar, Advocate.

VERSUS

M/S. SHARMA & ASSOCIATES CONTRACTORS (P) LTD. Respondent.

Through: Mr. Sandeep Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. By this petition under Section 34 of the Arbitration and Conciliation Act, 1996 the petitioner challenges the Award dated 23.7.2002 passed by the sole Arbitrator.

2. The petitioner was engaged in execution of the project of construction of Canals for Mahakali Irrigation of the Government of Nepal. The respondent was a sub-contractor of the petitioner for site levelling including the site clearance, earthwork for main canal and so on.

3. Disputes and differences arose between the parties and ultimately the same were referred to arbitration and have been decided by the impugned Award. The counsel for the petitioner has very fairly pressed his objections only with regard to Claim Nos. 1,4,6,15,18 and 23.

4. Claim No.1 was the claim for the work done. The issue was what was the amount of the work done by the respondent firstly till 31.07.1992 and thereafter till February, 1993. It is not disputed that under the terms of the Contract, it was the petitioner who was to do the measurements of the work. The further admitted fact is that the petitioner failed to do the measurements of the work. The respondent, therefore, did the measurements of the work and gave details of such measurements with the running bills sent to the petitioner. In fact, on account of the gross negligence of the petitioner, in not doing the measurements, the respondent was ultimately forced to issue a notice that in case the petitioner did not appear for measurements of the work by 1.11.1992, then, the present petitioner will be responsible. Not only this, when the respondent sent measurements along with the running bills, these measurements were never objected to by the petitioner. The Arbitrator, in view of the above facts, has arrived at a finding of fact that the work was actually done by the respondent in terms of the running accounts bills submitted and Award has been passed accordingly. The relevant portion of the Award reads as under:

“The main question for consideration is whether the measurements for the work executed upto 31.07.92 stated to have been done by the respondent and MIP in the absence of the claimant, is binding upon the claimant. When

the agreement between the parties provides for a procedure for recording the measurements and if after due notice the claimant does not come forward for recording the measurements jointly with the respondent then only the measurements recorded by the respondent are binding upon the claimant. In this case the respondent did not write any letter not to speak of giving any notice to the claimant for recording the joint measurements. On the contrary letters dated 16.6.91(C-42), 12.02.1992(C-68), 07.01.93(C-120), 04.06.93(at pages 44 of the claimant's document), 21.06.93(C-124) 22.6.93 (C-125) were written by the claimant for requesting the respondent for recording the measurements for the work executed by the claimant. Not only this but by the letter dated 27.10.92 the claimant made clear that if the staff is not deputed latest by 01.11.92 for joint measurements, the measurements submitted by the claimant for the work executed till then will be acceptable to the respondent. Even then also the respondent did not refute this. Not only this but the claimant with their letters dated 17.11.92 and 21.08.93 submitted the bills and detailed measurements evidencing the quantities executed. Even then also the respondent did not take any step to verify those quantities, which they were under contractual obligation, in view of clause 34 at CC-16 of the agreement. The claim of the claimant denied by the respondent on the basis of the letter dated 28.01.93 enclosing therewith the statement for the quantity stated to have been measured by the respondent with MIP officials. The quantities given in the statement along with the final bill are measured in February 95, as mentioned and is contrary to the letter dated 28.01.93. From the above it seems, the claimant has taken measurement on their own when respondent did not turn up after their letter dated 1.11.92. The claimant submitted the bills on 21.08.93 giving detailed measurements of the quantities executed.

In view of the above the quantities relied upon by the respondent are being the basis for denying the claim of the claimant cannot be relied upon. The measurements were to be taken along with the claimant and not with MIP, as submitted by the respondent though nothing had also not been filed.

I have examined the tendered documents/agreement between the claimant and the respondent and there is no provision for recording of the measurements by three agencies namely the respondent, the claimant and the MIP. The respondent was either to record the measurements along with the claimant jointly and or to verify the measurements submitted by the claimant by doing the measurements alongwith the claimant. This has not been followed and despite this the plea (illegible) measurements stated to have been recorded by the respondent and MIP are binding upon the claimant, is wrong.

Even during argument the respondent did not point out any short coming discrepancies in the measurements submitted by the claimant with the letter dated 17.11.92 and 21.08.93. There was no difficulty in not verifying the measurements having been submitted by the claimant during the execution of the work and immediately after the termination of the contract by the respondent. In view of this I am satisfied that there is no reason not to rely upon the measurements submitted by the claimant with their letter dated 17.11.92 and 21.08.93 except items disallowed.”

No fault therefore can be found with the Award with respect to awarding of Claim No.1 except a minor claim of NRs.76,320/- for work done of Kamari Canal which work was in fact not done. The counsel for the respondent does not dispute deletion of this part of Claim No.1 and accordingly I hold that Claim No.1 will be as allowed by the Arbitrator less a sum of NRs.76,320/-.

5. The next claim objected to by the counsel for the petitioner was Claim No.4. This was the claim of the respondent for having incurred additional costs for excess consumption of diesel, damage to machinery etc. on account of failure of the petitioner to construct a gravelled road in terms of its obligations under Clause 1.08 of GS-4 of the contract. I have gone through the clause. It is quite clear that it was the petitioner, who was to make this gravelled road. The counsel for the petitioner tried to feebly argue that this gravelled road was within the scope of the work of the respondent. Surely, this is a very absurd argument because if making of a gravelled road was within the scope of the work of the respondent, this item would surely have been in the Bill of Quantities under the contract. The counsel for the petitioner agrees that admittedly there is no item rate specified for any of the works to be performed for construction of a gravelled road. I, therefore, do not find any fault whatsoever in the Award with respect to Claim No.4 whereby the Arbitrator under this claim with respect to a claim of NRs.18,08,395/- has awarded a sum of NRs.2,64,616/-. I may note that the Arbitrator has disallowed the claim made for damage to the swing gear of the Tata-Hitachi excavator of the

respondent. The Arbitrator has, therefore, very fairly, analysing the facts, arrived at a finding of fact. No challenge can therefore be laid to this part of the Award pertaining to Claim No.4.

6. Claim No.6 as dealt with by the Arbitrator was the claim towards medical expenses incurred by the respondent for its labour etc. and which the respondent had to incur because of the failure of the petitioner to comply with its obligations of opening of a dispensary. Not much argument was advanced by the counsel for the petitioner with respect to this finding of fact. Since there is no effective challenge, objections with respect to Claim No.6 are therefore dismissed.

7. Claim No.15 as awarded by the Arbitrator was towards the illegal retention of machinery by the petitioner and which machinery belonged to the respondent. The Arbitrator has held that the petitioner was guilty of illegal rescission of the contract. That the rescission of the contract by the petitioner was illegal has not been challenged by the petitioner. If that be so, and there is a finding of fact that the machinery has been wrongfully retained by the petitioner, then, the Arbitrator was surely justified in awarding the hire charges for the machinery. The Arbitrator, therefore, has rightly awarded NRs. 4,31,335/- under this claim. No illegality or perversity is found with respect to awarding of Claim No.15.

8. Claim No.18 awarded by the Arbitrator was on account of extra cost incurred by the respondent because of the failure of the petitioner to

provide sites where good earth could be excavated for doing of the earth work. The Arbitrator has arrived at a finding of fact that instead of sites for good earth being provided, the sites provided had earth classified as “Jharnakola” and “Kalli-Keech”. “Kalli-Keech” means black mud and “Jharnakola” means rivulet source. Therefore, such unfit soil took not only long time for spreading but also caused heavy breakdown resulting in extra expenses to the respondent. This finding of fact could not in any manner be challenged by the petitioner before this Court. Objections with regard to this claim are accordingly dismissed.

9. That leaves me with regard to the rate of interest which has been granted. The Arbitrator has awarded interest @ 12% per annum. This rate of interest has been awarded to both the parties. In view of the recent trend of the Supreme Court in its judgments reported as *Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.* 2005 (6) 678, *McDermott International Inc. Vs. Burn Standard Co. Ltd. & ors* 2006 (11) SCC 181, *Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd.* (2006) 7 SCC 700 and *Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra*, 2007 (2) SCC 720 and *State of Rajasthan vs. Ferro Concrete Construction Pvt. Ltd* (2009) 3 Arb. LR 140(SC) and in the facts and circumstances of the case, I therefore direct that both the parties will be entitled to receive interest @ 9% per annum simple instead of interest @ 12% per annum wherever so awarded in the Award. I am, however, not changing the period for which the Arbitrator has awarded the interest. In case the payment under the Award and

as modified by the judgment is made within a period of 8 weeks from today, then rate of interest will be continued at 9% per annum simple. However, in case the payment is not made within 8 weeks, the rates of interest will remain @ 12% as given under the Award.

10. In view of the aforesaid, the objection petition is dismissed with costs of Rs.15,000/-.

VALMIKI J.MEHTA, J

February 04, 2010

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