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IN THE HIGH COURT OF DELHI AT NEW DELHI

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OMP No. 12/2010

13th January, 2010

M/S. SMJ-RK-SD(JV)

...Petitioner

Through: Ms. Kiran Suri, Advocate

VERSUS

NATIONAL HIGHWAYS AUTHORITY OF INDIA

....Respondent

Through:

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

I.A. No.295/2010(Exemption) in O.M.P. No.12/2010

Exemption is allowed subject to all just exceptions.

I.A. is disposed of.

I.A. No.296/2010(Condonation of Delay) in O.M.P. No.12/2010

For the reasons stated in the application, the delay in filing the petition is condoned.

I.A. is disposed of.

OMP No. 12/2010

1. By this petition under Section 34 of the Arbitration and Conciliation Act, 1996 the petitioner challenges the impugned Award dated 5.9.09 passed by the Arbitral Tribunal. The Arbitral Tribunal was constituted to determine the disputes which arose between the petitioner as contractor and the respondent as employer in the work awarded to the petitioner of widening of 4/6 lanes and strengthening of existing two lane carriage way of NH-5 in the State of Orissa from Km 335.642 to Km 387.700 (Sunakhala to Khurda)-Contract package OR VI.

2. The only issue which has been urged before this Court by counsel for the petitioner is with regard to the petitioner's claim of interest payment with respect to alleged illegal recoveries which were made by the respondent from the interim bills of the petitioner.

3. Ms. Suri, learned counsel for the petitioner, has invited my attention to Sub Clauses 60.1 (d),(e),(f),(h),(i) as also Sub-Clause 60.2 and Sub-Clause 60.5 in support of her arguments. According to the counsel, out of the interim bills 10% of the amount which can be retained by the respondent can only be towards 60.1(d) (e) and (f) and not the total value of the certified Interim Payment Certificates.

4. I am afraid I cannot agree with the contention as raised by the counsel for the petitioner. This is because the Arbitrators in the impugned

Award have rightly declined the claim of the petitioner on two counts. The first aspect which has been held against the petitioner is that the aforesaid Clauses and Sub-Clauses of Clause 60 of the contract, will yield to the document being the Appendix to the Bid, inasmuch as and admittedly, as per the priority of documents fixed under the contract, it is the Appendix to the Bid which prevails and not COPA/GCC and SCC where the aforesaid Clause 60 and its sub-Clauses are found. It is very clearly mentioned in the Appendix to the Bid that the retention amount out of the Interim Payment Certificates is to an extent of 10% of the Interim Payment Certificates and it is not restricted in any manner only to the deductions from some items/heads as per sub Clause 60.1(d), (e) and (f) of the Interim Payment Certificates. The second point which has been considered by the Arbitrators to hold the issue against the petitioner is that for as many as 20 Interim Payment Certificates, the employer had deducted 10% of the amount towards retention money without any objection from the petitioner. Twenty Payment Certificates would be for 20 months of work. This means that the contractor has itself for a very long time understood that the amount of retention money of 10% is out of the total Interim Payment Certificates and not only for from limited heads of Clause 60.1.

5. The relevant portion of the impugned Award which gives the aforesaid findings in this regard runs as under:

“4.1 The priority of the various documents forming part of the contract is stipulated in Sub-Clause 5.2.2. of COPA. According to this the Appendix to Bid gets priority over COPA.

4.2 The provisions in Appendix to Bid are reproduced below:

Item	Clause	Percentage
Percentage Retention Money	Sub-Clause 60.5 of COPA	10(Ten) percent of IPC
Limit of Retention Money	Clause 60.5 of GCC	5(Five) percent of Final Contract Guarantee after the required "Limit of Retention Money" is achieved.

4.10 The legal opinion is considered to be flawed in view of findings in Para 4.9 supra. Incidentally the Employer has also admitted during arguments that the legal opinion was defective as the same does not take into account the provisions of the Contract. In view of the above, the AT has come to the conclusion that the action with regard to the deduction of retention money in the way it was done, should be tested by strictly following the priority of the contract documents to examine its contractual tenability. As per the priority of documents stipulated in para sub-clause 5.2.2 COPA, Appendix to Bid takes precedence over COPA and accordingly, the retention money is to be calculated at 10% of the value of IPC. Therefore, the deduction of retention money amounting to Rs.7,54,00,804/- representing 5% of Contract Price (upto IPC 20 of March, 2004) stands the test of the relevant contract provision. The whole amount was paid back in 2 stages on 20.08.2003 and 19.05.2004 and therefore, AT hold that there is no wrongful withholding of any legitimate amount belonging to the Contractor.

4.11 AT is of the opinion that the Contractor's letter dated 17.12.2004 (C-20) stating that Sub-Clause 60.1(i) has been worded differently and not found in the express language, is an after-thought since they have participated in the deduction of retention money upto IPC-20 without any protest/reservation from their end. AT is also surprised to note that in his letter dated 18.12.2004 (C-21), the Engineer has concluded that this could be due to a typographical slip without furnishing any corroborating evidence. The Engineer apparently has got carried away by the Employer's note dated 9.08.2004 to the legal counsel."

6. The scope for interference with an Award in a petition under Section 34 is limited. This Court can interfere with the Award only if either the Award is illegal or it is beyond the contractual provisions or that the findings/conclusions are so perverse that it shocks the judicial conscience. Putting it differently this Court does not sit as an appellate Court to re-appraise the findings and conclusions of the Arbitrator. The Arbitrator is perfectly justified in adopting one plausible interpretation of the contractual documents. Unless that interpretation is wholly perverse, meaning thereby unless only one

view of the situation was possible and the Arbitrator as an unreasonable man has taken another view, this Court cannot interfere with the one plausible view which is taken by the Arbitrator. In the facts of the present case, the Arbitrators have adopted one plausible view, and which in my opinion in any case, is absolutely correct because where there are voluminous documents contained in a contract of this nature, there is intentionally a prioritisation of documents and which specify that in case of conflict which should be the document whose language should take precedence over the language of other documents in the entire chain of the contractual documents. This interpretation of the Arbitrator of the contractual documents is all the more so of interference because in the facts of the case the petitioner/contractor itself understood this to be so for over as many as 20 Interim Payment Certificates of work for 20 months.

7. Accordingly, there is no scope for interference in the impugned Award and the objection petition is dismissed without any order as to costs.

VALMIKI J.MEHTA, J

January 13, 2010

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