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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. 912/2011

% **Judgment dated 29.03.2012**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through : Ms.Tanu Priya Gupta and Mr.Mukesh
Verma, Advs.

versus

M/S INTERCONTINENTAL CONSULTANT
AND TECHNOCRATS PRIVATE LTD. Respondent
Through : Mr.Anish Dayal, Mr.Siddhrth Vaid and
Mr.Ranabir Datta, Advs.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Present objections have been filed by petitioner under Section 34 of Arbitration and Conciliation Act, 1996, seeking to assail the Award rendered by the sole Arbitrator dated 27.7.2011. Respondent claimant had raised six claims before the Arbitrator all of which have been decided in favour of the respondent.
2. The necessary facts, to be noticed for disposal of the present objections, are that the petitioner entered into an Agreement on 25.1.2001 with the respondent for the supervision of work for 4-laning and strengthening of the existing 2-lane stretch between 65 km to 110 km (ICB Package IVB) and between 140 km and 180 km (ICB Package IVD) on National Highway-2. The learned Arbitrator has framed the following issues:

“Issue No.1 :	Alleged deficiency in supervision services in case of Package IVD pertaining to performance of civil work contract and
Issue No.2:	On account of alleged wrong estimation of

office rent in case of Packages IVB and IVD for the payment of rent to the Consultant as per provision in the consultancy contract.”

3. Claims of the respondent are as under:

- Claim No.1: Release of FDR of Rs.1.22 crores furnished on demand to the Respondent for indemnifying them for the final outcome of arbitral award for rates of variation due to change from box culvert to slab culvert for the alleged deficiency in the consultancy services of Package IV-D (km 140 to km 180) of NH-2 in the State of Bihar.
- Claim No.2: Claim for refund of Rs.50,40,000/- paid towards the rent of the office provided by the Claimant, wrongfully recovered from the dues of other works by misinterpreting the contract provision of the consultancy services agreement of Package IVB & IVD of NH-2 in the State of Bihar.
- Claim No.3: Payment of the difference of borrowed rate of interest and the interest on FDR of Rs.1.22 crores deposited with the Respondent as compensation/damages (upto July 2011).
- Claim No.4: Payment of interest on the amount of Rs.50,40,000/- wrongfully recovered.
- Claim No.5: Interest claim from Aug. 2011 to the date of award and future interest on the awarded claim amounts.
- Claim No.6: Payment of Arbitration Cost.”

4. No counter claim was raised by the petitioner herein. By claim no.1 the respondent/claimant had sought release of Fixed Deposit Receipt of Rs.1.22 crores, which was furnished on demand by the respondent to the

petitioner for indemnifying them for the final outcome of the arbitral award for rates of variation due to change from box culvert to slab culvert for the alleged deficiency in the consultancy services of Package IV-D of National Highway-2 in the State of Bihar.

5. The main thrust of the argument of learned counsel for the petitioner is that the respondent had exceeded the terms of the employment as the job of the respondent was simply to provide consultancy services and thus the respondent had no role to play or to suggest change in the design, which according to the petitioner was made only with the purpose of benefiting the contractor.
6. Learned counsel for the petitioner submits that the illegal acts of the respondent has led to the disputes between the petitioner and the contractor as the respondent raised an illegal demand for the work carried out by him on account of change of design and on account of disputes the matter was referred to Arbitration between the petitioner herein and the contractor, which led to financial loss to the petitioner as the award was rendered in favour of the contractor, which has since been challenged by the petitioner in this Court. Counsel further submits that although change of design was accepted by the petitioner but it is only after the disputes had arisen between the petitioner and the contractor the matter was referred to the Vigilance Division of the petitioner and the Vigilance Division has given a detailed report on Claims no.1 and 2. Counsel has placed reliance on the report submitted by the Vigilance Division of the petitioner wherein it has been held by the Vigilance Division that there was no justification provided by the Supervision Consultancy for changes made in the designs. The Vigilance Division was also not satisfied with the explanation rendered by the Consultant as to whether the change in design of the culverts was for technical reasons or not. The explanation

rendered by the Engineer of the respondent that matching old structure with the same type of structures (slab with slab), a globally accepted practice, was not relevant.

7. Learned counsel for the petitioner submits that the learned Arbitrator should in fact have relied on the findings of the Vigilance Division and should have permitted the petitioner to encash the FDR to make up the loss suffered by them.
8. I have heard counsel for the parties and carefully perused the findings of the learned Arbitrator on claim no.1. It is not in dispute that there was no provision in terms of the agreement by which the respondent could have been called upon to furnish a FDR in the sum of Rs.1.22 crores in favour of the petitioner to indemnify them for the losses likely to be suffered in case the award of the contract is made against the petitioner for prospective loss. Even otherwise, as per the terms of the contract between the parties in Clause 6.3 the review of design was not within the scope of the Supervision Consultancy. The stand taken by learned counsel for the petitioner that at no stage could the respondent advise for change of design is not borne out from Clause 6.3 of the Contract as it was open for the Consultant, if it felt necessary, to make some changes in the design and thereafter it was upon the experts to be hired by the employer and take up the matter for mutual negotiations. The learned Arbitrator has observed that the respondent/ claimant vide its letter dated 8.9.2001 had intimated the petitioner herein that, as directed by them in February, 2001 that it would be reviewing the design as carried out by DPR consultant and on 30.10.2001 the respondent herein furnished the Design Review Report to the petitioner. It is also the stand of the respondent that on receipt of the approval of the modified design reviewed by the petitioner vide their communication dated 6.12.2001 and as per their directions to

work out its effect on the BOQ items, the respondent had furnished the variation statements to the petitioner vide communication dated 14.1.2002. Besides communication dated 14.01.2002 respondent also communicated to the petitioner the rate as worked out in the variation statement to the contractor vide communication dated 22.5.2002 under intimation to the petitioner (their project Director). In the light of the change of design and the rates worked out by the respondent, the petitioner herein continued to make payment to the contractor as certified by the Engineer of the respondent herein from June, 2002, to March, 2003. In April, 2003 the petitioner directed the respondent to modify the rates, which were modified and approved by the petitioner herein in May, 2003. The stand taken by counsel for the petitioner that the changes in design resulted in variation of the contract of the civil works contractor and the change in rate resulted in loss to the petitioner for which the respondent is responsible cannot be accepted in view of the fact that in case the respondent had exceeded the terms of the contract, it was upon the petitioner not to have accepted the change in design as recommended by the respondent and the petitioner should also not have accepted the change in rates, and thereafter should not have made payments to the contractor as per the rates suggested by the respondent. As far as change in rates is concerned, during the course of arbitration between civil works contractor and the petitioner herein the same were tested, which is evident from the observations made by the Arbitrator wherein he has made a chart showing rates recommended by the respondent such as rates approved by the petitioner herein, rates recommended by the DRB (Dispute Review Board), the rates awarded by the Arbitral Tribunal and the average rates.

9. A perusal of this chart would show that the rates recommended by the Disputes Review Board are closest to the rates recommended by the

respondent herein and the rates approved by the petitioner are much less in comparison to the rates recommended by any of the four bodies, which approved the rates. Based on the terms of the agreement, the learned Arbitrator has given a reasoned Award and rightly held that the petitioner herein could not have demanded a fixed deposit receipt from the respondent and as such was justified in accepting the claim of the consultant. The reasoning given by the Arbitrator is cogent. It cannot be said that the finding of the Arbitrator is such which needs to be set aside or the Arbitrator has exceeded either the terms of reference or the decision is such which would shock the conscience of the Court.

- 10. The second claim of the respondent pertains to the amount of Rs.50.40 lakhs, which was wrongly recovered from the bills of the respondent. As per the agreement it was open for the respondent to hire office space for which the petitioner was to pay water and electricity charges. The (1000 sq. meters) office was to be rented for 36 months.
- 11. Claim No.2: “Claim for refund of Rs.50,40,000/- paid towards the rent of the office provided by the Claimant, wrongfully recovered from the dues of other works by misinterpreting the contract provision of the consultancy services agreement of Package IVB & IVD of NH-2 in the State of Bihar.”
- 12. As per the consultancy contract the respondent was to pay office rent. The relevant clause reads as under:

“Appendix H. Cost Estimates in Local Currency (INR)
V. Office Rent (Fixed Costs)

S.No.	Description	No. of Months	Sq. M.	Rate (Rs.)/ month	Amount
1.	Office rent including maintenance water supply electricity etc.	36	1000	140	5,04,0000

Total carried to Summary	5,04,0000
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13. Based on this clause, admittedly during the currency of the contract petitioner paid rent to the respondent, which the petitioner subsequently deducted from the bills of the respondent.
14. Counsel for the petitioner submits that the respondent has quoted his rates under the rate column as Rs.140 per month for 36 months. It is also submitted that during the contract payment was made to the petitioner in monthly invoices for an amount of Rs.1,40,000/- each month. However, the vigilance Division of the petitioner brought out their observation that the rate quoted by the respondent to be treated as Rs.140 per month for the whole area of 1000 sqm with total amount payable to be Rs.5040/- for 36 months. It is further submitted that based on the “intensive Technical Investigation” by the Vigilance Division of the respondent clarifications were sought from the respondent for allowing rate of Rs.140 per month only for the total area of 1,000 sqm. vide letter dated 20.10.2006; and vide letter dated 25.10.2006 the respondent submitted his reply stating that the rate (Rs.)/ month has been indicated in the column as “Rate (Rs)/ month” inadvertently.
15. It is the case of the petitioner that the demand made by the respondent did not specify Rs.140/- per sq. meters although the amount of rent was claimed @Rs.140/- per sq. meters per month. Perusal of the clause would show that in fact in the third column the words ‘square meter’ were missing, the Vigilance report which is relied upon by counsel for the petitioner, has held that the Consultant has wrongly raised the bill @Rs.1.40 lakhs per month while the approved rent was only Rs.140/-, per month. The report of the Vigilance Division, to say the least, seems to be without any application of mind, as in the overall contract the provision for rent was made @Rs.50.40 lakhs. Even otherwise, it is impossible to

rent an office space including water and electricity of 1000 sq. meters @ Rs.140/- per month. The learned Arbitrator has relied on Appendix H of the Consultancy Contract wherein a sum of Rs.50.40 lakhs has been carried to the summary costs in local currency, which is part of the contract amount, which was negotiated and accepted by the petitioner herein. There is no infirmity in the reasoning given by the learned Arbitrator.

16. Claims no.3, 4 and 5 pertain to claiming of rate of interest and interest on the FDR. Since the FDR is to be returned to the respondent, I find no infirmity in the reasoning of the Arbitrator that the same is to be returned with interest accrued thereon.
17. The respondent had also claimed interest on the sum of Rs.50.40 lakhs, which was wrongly deducted. In view of the finding in claim no.2, there is no infirmity in the grant of interest by the Arbitrator @10%.
18. The arbitral award by the Arbitrator has been rendered after due consideration of the evidence before him and the reasoning shows proper application of mind. There is no plausible ground which would warrant interference. The award is neither unfair, nor unreasonable, nor shocks the conscience of the Court.
19. It is a settled law that interference of Court is unwarranted in an award rendered by an Arbitrator, unless it suffers from infirmity and is perverse.
20. In the case of **J.G. Engineers private Limited Versus Union of India And Another** reported in (2011) 5 SCC 758 it has been held by the Hon'ble Supreme Court of India that:

10. "A Civil Court examining the validity of an arbitral award under Section 34 of the said Act exercises supervisory and not appellate jurisdiction over the awards of an Arbitral Tribunal. A Court can set aside an arbitral award, only if any of the grounds mentioned in Section 34 (2) (a) (i) to (v) or Section 34 (2) (b) (i) &

(ii) or Section 28 (1)(a) or Section 28 (3) r/w. Section 34 (2) (b) (ii) of the Act, are made out”.

21. Recent observation of the Apex Court in the case of **P.R. Shah, Shares and Stock Brokers Private Limited Versus B.H.H. Securities Private Limited And Others** reported in (2012) 1 Supreme Court Cases 594 is also worth noting in this respect. Relevant portion of paragraph 21 is reproduced as under:

21. “A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. Therefore, in the absence of any ground under section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at”.

22. I am of the opinion that the petitioner has failed to satisfy the Court on any of the grounds enumerated under the said Act for setting aside an arbitral award. Accordingly, there is no merit in the present petition and the same is dismissed.

G.S.SISTANI, J

MARCH 29, 2012

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