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* IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON: 2nd August, 2013

+ **FAO(OS) 347/2013**

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Appellant

Through : Mr. Sudhir Nandrajog, Sr. Adv. with
Ms.Meenakshi Sood, Mr. Mukesh
Kumar and Ms. Tanupriya, Advs.

versus

M/S SEW INFRASTRUCTURE LIMITED Respondent

Through : None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)**

CM 11705/2013(exemption)

Allowed, subject to all just exceptions.

The application stands disposed off.

FAO(OS) 347/2013 & CM 11704/2013(stay)

1. This appeal questions the order of the learned Single Judge dated 25th April, 2013 made in a Section 34 petition preferred by the appellant – National Highways Authority of India (NHAI).

2. Briefly the facts are that the respondent – M/s. Sew Infrastructure Limited (hereinafter referred to as “the Contractor”) made an offer to the NHAI to complete certain works which had been awarded to another Contractor sometimes in 2001. The offer was made by the Contractor in this case on 5th January, 2005. The Contractor stated that it was willing to execute the balance work of the contract on the same terms and conditions and BOQ rates with price adjustment formula as applicable. The offer was eventually accepted by the NHAI on 29th August, 2005. Apparently, the work had to be completed within a year; the site was handed over on 26th December, 2005; consequently the last date of completion was 25th December, 2006. Apparently, the Contractor made certain claims towards price escalation. In terms of the Agreement, the Contractor was obliged to approach the Engineer in the first instance with the claim. The Engineer opined against the Contractor on this aspect by his letter dated 12th January, 2008. The Contractor had relied upon clauses 70.1 – 70.8 of the Agreement. Apart from this, the Contractor also claimed amounts towards higher tax liability, i.e. local VAT. The rate

of taxation had been increased from the existing 2.6% to 4% post April, 2005.

3. The disputes were referred to arbitration; on the two aspects referred, the award was rendered in favour of the Contractor. NHAI claimed to be aggrieved and approached the Court under Section 34 of the Arbitration Act, 1996. By the impugned award, the learned Single Judge had rejected the challenge to the award on both counts.

4. So far as the first aspect, i.e. price escalation and interpretation placed by the Arbitrator on clause 17 is concerned, the learned Single Judge had relied upon previous decisions of this Court, including certain Division Bench judgments. The relevant discussions of the learned Single Judge in the impugned order are as follows:-

“22. Relating to the same issue of price escalation the Arbitral Tribunal has noticed the decision dated 8th March, 2010 of the learned Single Judge of High Court of Delhi in OMP No.362/2008 National Highways Authority of India Vs. Unitech-NCC JV dismissing the petitioner’s petition for setting aside the award in that case, made under Section 34 of the Arbitration and Conciliation Act, 1996 and further therein the judgment of Division Bench of High Court in FAO (OS) No.338/2010 NHAI Vs. Unitech-NCC JV upholding the judgment and order dated 8th March, 2010 of the learned Single

Judge and dismissing NHAI's appeal with additional costs. In both the said judgments relevant findings of that Arbitral Tribunal are itself reproduced as affirmed without reservation by the learned Single Judge and approved by Division Bench. Therefore, the matter relating to the price adjustment under clause 70 of the Contract is fully covered by the judgment of Division Bench of this Court in the said FAO No.338/2010 NHAI Vs. Unitech-NCC JV, reported as 178(2011) DLT 496."

23. The respondent has also placed the reliance on the orders passed by the Division Bench of High Court of Delhi dismissing several appeals filed by the applicant in FAO (OS)No.143/2011 NHAI Vs. ITD Cementation India Ltd., FAO (OS)No.144/2011 NHAI Vs. ITD Cementation India Ltd., FAO (OS)No.375/2011 NHAI Vs. Elsamexs-TWS-SNC (JV) as the matter being covered by the decision of Division Bench in the said FAO (OS)No.338/2010 NHAI Vs. Unitech-NCC JV.

24. It is settled law that finality is attached with the decision of the Arbitral Tribunal which is the final judge of both the questions of fact and law referred to it. The petitioner has no such case that the Arbitral Tribunal has no jurisdiction to adjudicate the disputes referred to the Arbitral Tribunal. When the petitioner has no such contention that the Arbitral Tribunal has no jurisdiction to decide the claim, the merit of the decision of the Arbitral Tribunal cannot be challenged by a party to the contract merely because the interpretation given by the Arbitral Tribunal to the contract terms is not to its liking. In this regard, the Supreme Court has held in the case of Maharashtra State Electricity Board Vs.

Sterilite Industries (India) & Anr. (2001) 8 SCC 482, in paragraph 9 of the said judgment, as under:

“9. ...the arbitrator's award both on facts and law is final; that there is no appeal from this verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it.”

25. Thus, I agree with the finding arrived at by the Arbitrator Tribunal with regard to Claim No.1. Under the scope of Section 34 of the Act, the objections raised by the petitioner are not tenable in view of settled law on this aspect.”

5. The learned senior counsel does not dispute this position but states that the said judgments are the subject matter of pending appeals by Special Leave in the Supreme Court.

6. This Court is of the opinion that rule of consistency compels us to follow the previous judgments of the Division Bench which are binding upon us. Consequently, the Court does not discern any infirmity on the approach of the learned Single Judge under Section 34 on claim No.1, i.e. price escalation. As far as claim No.2 is concerned, the learned senior counsel urged that the interpretation placed on clause 14.3 in the present case was misplaced. The counsel stressed that unlike in the case of original contract, there was no

bidding process and the respondent Contractor straightaway proceeded to make his offer. Thereafter, the process of negotiation was undertaken and the contract was a culmination of that process on 29th August, 2005. By that time, the increased in the rate of taxation had been put in place. Consequently, these facts had to be taken into consideration and reasonable interpretation had to be given to clause 14.3 which means that the said increased rate of taxation had to be borne by the Contractor. Clause 14.3 of the Agreement between the parties reads as follows:-

“All duties, taxes and other levies payable by the contractor under the contract, or for any other cause, as on date 28 days prior to the deadline for submission of bids, shall be included in the rates and prices and the total bid price submitted by the bidder and the evaluation and comparison of bids by the employer shall be made accordingly”

7. In this case there is no dispute that the bid was eventually finalized by the letter dated 29th August, 2005. Yet the Court cannot be oblivious of the circumstance that the Contractor in this case was none other than the one who approved the sub-Contractor for the very same contract, which had been successfully tendered for by another Contractor, who had entered into the original Agreement in 2001. The

terms of the bid or offer made by the respondent Contractor itself are revealing - in the letter dated 29th August, 2005, they were willing to execute the balance left out work on the same terms and conditions and BOQ rates with price adjustment formula, as applicable and would be bound by the same rates with original contract as per original sub-Contractors. The Arbitrator held that the subsequent rate of taxation had to be borne by the NHAI; a determination which was also formed by the learned Single Judge.

8. This Court is of the opinion that there is no infirmity in the reasoning of the impugned judgment in this regard. If the respondent Contractor stepped into the shoes of the original Contractor as he concededly did, his compelling rationale is obvious; if the original Contractor had continued with the Agreement, the enhanced rates were to be borne by the appellant – NHAI. Even otherwise, the reasonable construction – which has been favoured by the Arbitrator and the learned Single Judge concurrently as to clause 14.3 is that the 28 days of the period, which is determinative for fixing the rate of taxation was applicable in the present case and the period of 28 days prior to the bid or offer made by the Contractor sometimes the end in

December, 2004. At that time, concededly the rate of taxation was lower; it was enhanced later. The Court is unimpressed with the submission that the parties were negotiating and the contract was finalized only on 29th August, 2005. The reason is again simple; even in the case of the original bid, negotiations would have ensued on various aspects. But, it did not necessarily mean that the time or period mentioned in clause 14.3 was variable. It was constant and unaltered.

9. In view of the above reasons, the Court is of the opinion that the present appeal is meritless. It is accordingly dismissed without any order as to costs.

S. RAVINDRA BHAT, J
(JUDGE)

NAJMI WAZIRI, J
(JUDGE)

AUGUST 02, 2013

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