

* IN THE HIGH COURT OF DELHI AT NEW DELHI
% *Date of Judgment: 13.02.2013*

+ FAO(OS) 302/2012
NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through Mr. Arun Kumar Varma, Ms.
 Mansi Wadhera and Mr. Ashish
 Bansal, Adv.

versus

NCC-KNR Respondent

Through Mr. Amit George and Mr.Abin
 Mathew, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MS. JUSTICEINDERMEET KAUR

INDERMEET KAUR, J.

1 The National Highways Authority of India (appellant) had awarded a contract to NCC-KNR (respondent) on 22.03.1999 in terms of which the work was to commence on 28.04.1999 and the scheduled date of completion was 27.04.2002. The work could not be completed within the stipulated period and extension of time was accordingly granted by a period of five months i.e. up to 26.09.2002.

2 Disputes arose between the parties and the matter was referred to arbitration. By an Award dated 09.01.2012, the claims of the respondent were adjudicated and the amounts awarded under various heads.

3 The appellant not satisfied with the Award filed his objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act'). The learned Single Judge dismissed the objections by the impugned order dated 18.05.2012.

4 Learned counsel for the appellant has today restricted his submissions under two heads i.e. amounts awarded under claim No. 4 and claim No. 5 as also the amounts awarded under claim No. 1 and claim No. 2-A. He fairly concedes that the amount awarded under claim No. 8 which was a refund of royalty on earth deducted from the respondent's bill stood covered as against the appellant by a judgment of this Court in FAO (OS) No. 48/2012 titled NHAI Vs. Hindustan Construction Ltd. decided on 08.11.2002 which in turn referred to a recent pronouncement in FAO (OS) No.451/2012 titled NHAI Vs. Oriental Structural Engineers Pvt. Ltd. decided on 18.09.2012. The aforesaid decisions relied upon NHAI Vs. ITD Cementation India Ltd. 2008 (100) DRJ 431 to hold that the question regarding claim for additional royalty stood settled in terms of this decision. Learned counsel for the appellant did not seriously press claim No. 7 which was

a claim on account of bank charges incurred by the claimant due to undue extension of his bank guarantees.

5 Qua claim No. 4 and claim No. 5, the submission is that there is a overlap; while under claim No. 4, the amount awarded is additional overheads incurred for acceleration of work, at the same time, under claim No. 5, the amount has been awarded on account of idling of the plant and machinery; submission being that both the aforementioned claims could not have been awarded simultaneously; the amount awarded under both the heads would be contrary. Attention has been drawn to the statement of claim made by the claimant before the Arbitrator. Submission being that the case of the claimant was that there was an idling of his machinery for a considerable period before the start of the work; he was claiming hire charges for equipment and machinery brought to the site from the date of arrival of the machinery to the start of the effective working of those machines; this was during the initial period of contract and as such idling charges during this period could not be claimed. At best, he could claim idling charges for the extended period of contract (five months) but this is not what has been set up by

him in his statement of claim and the Arbitral Tribunal has proceeded to award him both amounts i.e. for acceleration of his work as also for idling of his plant and machinery which is an infirmity. This finding having been endorsed by the learned Single Judge is a further illegality.

6 His submission qua claim No. 1 and claim No. 2-A which have been awarded as extra payments because of variations in the work are against the express provisions of the contract; Clause 52 of the GCC (General Conditions of Contract) read along with amendment have been interpreted incorrectly. There were admittedly two threshold limits; the respondent had crossed the first threshold limit of 25% but the second threshold limit of 5% had not been reached by him which fact has been ignored by the Arbitral Tribunal by wrongly interpreting clause 52. There was no material to justify claim No. 2-A as well.

7 These submissions have been countered. Submissions being that it is a reasoned Award and calls for no interference.

8 We shall first deal with the amounts awarded under claim No. 4 and claim No. 5 and to answer this argument, the statement of claim as set up by the claimant before the Arbitrator is relevant. Under claim No.

4, the claimant has claimed an amount of Rs.12,18,60,452 as additional overhead expenses incurred by the claimant for acceleration of work. Under claim No. 5, the claimant has made a claim of Rs.9,17,88,600/- for payment due on account of idling of plant and machinery. While dealing with these claims, the Arbitral Tribunal has arrived at a finding (not challenged) that the extension of time granted by the appellant of five months was primarily because of the delay which was attributable to the appellant. It is in this background that the aforementioned two claims have to be viewed. The claimant under claim No. 4 has submitted that a hindrance free site was not handed over in time by the appellant and the completion of work could finally be achieved by the claimant by working between 16-20 hours, paying heavy overtime wages and incentives. Because of this piecemeal handing over of site, payment for unforeseen costs had to be incurred by the claimant in order to finalize his work in time. These overheads due to this delay had been communicated by the respondent to the appellant vide letter dated 16.11.1999. Admittedly the Engineer vide his letter dated 11.12.2004 had recommended a payment of Rs.117.14 lacs to the respondent based on the contention that the overheads are due in respect of the extended

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period only. The claimant was aggrieved by this amount returned by the Engineer and he had filed his claim before the Arbitral Tribunal. His submission was that the Engineer had not taken into account the claim made by the claimant for acceleration of work. Accordingly a sum of Rs.12,18,16,542/- had been claimed by the claimant under claim No. 4. Under claim No. 5, the claimant had claimed an amount of Rs.9,17,88,600/- on account of idling of plant and machinery. His submission in his claim petition was that he was fully prepared to execute and finish the whole of the work within the stipulated period of 36 months and the claimant had mobilized and deployed sufficient resources including machinery and manpower. However, because of delay caused by the appellant and due to no fault of the claimant, the machinery which had been deployed by the claimant could not be used but the same continued to be deployed at the site for the substantial completion of work. Initially his machinery idled for a considerable period of time because of these delays and hindrance. The work did not progress as had been planned; it got prolonged and the same was completed only in the extended period of time i.e. by September, 2002.

His submission being that had the claimant been allowed to work
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without any delay and hindrance, there was no need to keep the machinery and equipment in this prolonged period. This prolongation occurred on account of the various delays and hindrances on the part of the appellant.

9 The Arbitral Tribunal while dealing with claim No. 4 has noted that the Engineer of the appellant has himself accepted the fact that there was a five months overstay and the claimant was entitled for a compensation which had been worked out at Rs.117.14 lacs. The Arbitral Tribunal had, however, reduced this amount from Rs.117.14 to Rs.1,04,29,000/-. He had noted that overheads to which the respondent was entitled was the reduced figure of Rs.104.29 lacs. This sum had been awarded for the prolongation of the work which was due to the fault of the appellant and for which the claimant had suffered a loss. This amount as rightly pointed out by the learned counsel for the respondent was not for the acceleration of work. Under claim No. 5, the amount claimed by the claimant was Rs.9,17,88,600/- but the amount awarded by the Arbitral Tribunal was Rs.1,33,12,303/-. The Arbitral Tribunal had noted that the claimant could not complete his work as per

the approved programme and he could not mobilize the machines as planned; part of his equipment was hired and only part was owned by him. The claimant had in fact made a claim for damages for idling of machinery for two periods; i.e. during the original contract period which was between May, 1999 to actual deployment. In the second part, the claimant had made a claim for idling of machinery from May, 2002 to September, 2002 i.e. during the extended period of five months. The Arbitral Tribunal did not award any amount for idling/non-hindrance of machinery during the original period of contract noting that the claimant was the best Judge for the deployment of machinery and was solely responsible for its effective utilization. However, for the extended period of five months i.e. from May, 2002 to September, 2002 since there was ample evidence to show that the claimant had to overstay at the site for doing the balance work, he was entitled to appropriate compensation.

10 The learned Single Judge while dealing with these claims rightly thought it fit not to interfere with them. Apart from the fact that there was evidence to show that during the extended period of five months,

the claimant had to overstay at the site along with machinery, for which he had to pay hire charges to complete the balance work; the approach adopted by the Tribunal for calculation of the said amount (detailed as Annexure 2 with the impugned Award) also did not call for any interference. The reasoning given by the Arbitral Tribunal was correctly endorsed by the learned Single Judge. Under claim No. 4, the amount was not awarded for the acceleration of work; it was additional overhead expenses borne by the claimant for prolongation of the work. Under claim No. 5, the amount was awarded as compensation during the extended period of contract as admittedly the respondent had to overstay at the site and part of the machinery being on hire and not all of it owned by the respondent, there was a prolonged deployment of machinery. The ownership cost method for calculation under this head which was a detailed calculation (appended as Annexure 3 to the Award) had been gone into and rightly did not call for any interference by the learned Single Judge or even by this Court. There was no conflict in the grant of respective amounts under claim No. 4 and claim No. 5.

11 With regard to claim No. 1, the Arbitral Tribunal had considered clauses 52.1 & 52.2 of the contract. To better appreciate this controversy, clauses 52.1 and 52.2 are reproduced hereinbelow:-

“52.1 Valuation of Variations

All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purpose of this Clause referred to as ‘varied work’), shall be valued at the rates and prices set out in the Contract does not contain any rates as prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for valuation so far as may be reasonable, falling which after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement, the Engineer shall fix such rates or prices as are, in his opinion appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on account payments to be included in certificates issued in accordance with Clause 60.

52.2 Power of Engineer to Fix Rates

Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the works or to any part thereof, is such that in the opinion of the Engineer, the rate or price contained in the Contract for any item of the works is, by reason of such varied work, rendered inappropriate or inapplicable then after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement, the Engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on account payment to be included in certificates issued in accordance with Clause 60.

The following has been added here by way of SCC.

“Provided that no change in the unit rates or prices for any item considered for items included in the Bill of quantities, unless such items individually account for an amount of more than 5 (five) percent of the Contract Price named in the Letter Acceptance, and the actual quantity of work performed under the item exceeds or falls short of the original billed quantity by more than 25 percent.”

12 The proviso to clause 52.2 of the contract was added by way of an amendment. The question which had to be answered by the Arbitral Tribunal was whether the claimant was entitled to a variation of the rates and what would be the appropriate method to deal with the fixation of new rates. The submission of the learned counsel for the appellant that this proviso under clause 52.2 has been given a go-bye has been answered by the Arbitral Tribunal. It was noted that this proviso had been inserted by an amendment and did not find place in the original GCC of FIDIC. The basic purpose of this proviso was to guard against difficulties in contract administration arising out of minor variations in the BOQ item of work. However in the instant case, the situation was abnormal in as much as increase in the quantity of work was of the order of 196% and its value (at existing BOQ rates) was 14.82% of the contract price. The average lead for the varied work would be about

three kilometers. The frequent changes made in the profile by the appellant had rendered the planned working by the respondent to have become impossible; he was forced to work in a restricted width of 1-2 meters on both sides. Since the additional work was less than the eligibility threshold limit of 5%, the enhanced rate was not allowed. Although there was no alteration in the nature of the work yet the quantum of variations was material and required a detailed examination; it was 20% or more of the original contract price. The detailed calculation was worked out by the Arbitral Tribunal to arrive at the figure under claim No. 1 and this was after due consideration of clause 52.2 read along with its proviso. The view taken by the Tribunal which was endorsed by the learned Single Judge being a reasonable view rightly calls for no interference.

13 Under Claim No.2 the Arbitral Tribunal had noted that there was no justification for fixation of new rates for the ROB work particularly since the variation order dated 07.12.2000 regarding construction of the ROB was issued by the appellant and agreed to; there being no change of quantities; there was no justification of new rates. However, costs

were quantified taking into account the additional concrete quantities executed over the BOQ quantities and the percentage increase. The Arbitral Tribunal arrived at the aforementioned amount by a reasoned calculation. It was based on an analysis of the figure.

14 Thus although the amounts claimed under the two heads i.e. claim No. 1 and claim No. 2-A was much higher, yet much lower figures were awarded which in terms of the tabulated chart on the basis of which the aforementioned figures were arrived at, call for no interference. We are in full agreement with the approach of the learned Single Judge.

15 This Court is not an appellate body hearing an appeal against the fact findings arrived at by the Arbitral Tribunal; the scope of objections under Section 34 of the said Act is limited; in appeal, the ambit of the arguments would be confined to what has been answered in the impugned judgment. It was an expert body of three members of the Arbitral Tribunal who had dealt with the rival claims of the parties; the learned Single Judge has also discussed each submission in detail. On no count, does the impugned order call for any interference.

16 Appeal is without any merit. Dismissed leaving the parties to bear their own costs.

17 The balance amount lying in the Court is consequently directed to be released by the Registry to the respondent and the security furnished by the respondent be discharged.

INDERMEET KAUR, J

SANJAY KISHAN KAUL, J

FEBRUARY 13, 2013

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