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

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Date of Judgment: 21.01.2013

FAO(OS) No.40/2013

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant
Through: Mr.Sudhir Nandrajog, Sr.
Advocate with Ms.Meenakshi
Sood, Ms.Padma Priya, and
Mr.Mukesh Kumar, Advocates.

versus

BEL- ACC (JV) Respondent
Through: Mr.Amit George and Mr.Abin
Mathew, Advocates.

CORAM:

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

INDERMEET KAUR, J.

C.M. No.1122/2013 (for exemption)

Exemption is allowed subject to just exceptions.

FAO(OS) No.40/2013 & C. M.No.1121/2013 (for stay)

1. A contract dated 01.02.2001 had been entered into between the National Highways Authority of India (hereinafter referred to as 'the petitioner) and M/s BEL- ACC (JV) (hereinafter referred to as 'the

respondent') wherein the project of strengthening and four laning of the existing two lane sections between 307.500 Km to 321.00 Km of Etawah Bypass on NH-2 in Uttar Pradesh had been awarded to the respondent. The work was to be completed by 03.10.2003 i.e. within a period of two and half years. Delays were noted by the NHAI pursuant to which notice dated 15.11.2001 had been issued to the respondent followed by other correspondences evidencing that the work progress was slow on account of various reasons which were attributable to the respondent. Variations in the work contract were discussed in meetings held between the parties on various occasions i.e. in the first meeting on 19.11.2001 followed by exchange of correspondence in the year 2002 which led to the revised date of completion which was accordingly fixed for March, 2004. The date of completion was further enlarged in view of the re-revised work programme dated 26.11.2003 up to January, 2006. The Variations Committee took a decision that the service road be deleted; this decision was conveyed to the respondent only on 24th and 26th June 2003. Submission of the respondent being that up to this time he had already begun work on the construction of the service road and by his reply letter dated 21.7.2003 he disputed the deletion of the

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service road. A representation dated 09.3.2004 was also submitted by the respondent to the Engineer of the NHAI against the decision to exclude the service road.

2. The work progress still being slow, a show cause notice was issued to the respondent on 31.8.2004 followed by a recommendation dated 04.11.2004 of the Engineer of the NHAI recommending the expulsion of the respondent and the completion of the balance work by the NHAI. This was followed by the expulsion notice dated 05.4.2005 issued to the respondent and the balance work including work of the service road was awarded to a new agency at the cost of the respondent. Disputes arose between the parties; the arbitration clause was invoked by the respondent. The Arbitral Tribunal by its majority Award dated 31.01.2009 noted that up to March 2001 i.e. till the time that the major variations have been initiated by the NHAI (which was vide its letter dated 19.11.2001) the progress of the work was slow which was primarily the responsibility of the respondent, major variations having been initiated by the NHAI on 19.11.2001 and which were conveyed to the respondent only on 24-26.6.2003.

3. The relevant extract of these findings of the Arbitrator were reproduced in the impugned order, which read as under:

- (a) For the period from the date of the award of the work i.e. 6th March 2001 till the proposed major variations were initiated by NHAI (19th November 2001), the progress of the work was slow and the Respondent was solely responsible for this;
- (b) For the period from the date on which proposal for major variation was initiated by NHAI (19th November 2001) till variation order was approved by the Engineer on 24th/26th June 2003 by excluding the service road, the Respondent could not be held responsible for any delay, since the decision had to be taken by NHAI. Therefore, both the parties were held responsible for slow progress of the work;
- (c) The Engineer too was responsible for not operating the CA in proper manner. The Engineer had the authority to fix rate in accordance with General Conditions of Contract ('GCC') Clause 52.1. The Engineer could have fixed provisional rates to enable work to progress. The parties could have objected to its decision and decided to go for arbitration;
- (d) On the one hand, NHAI issued notice under Clause 46.1 and on the other hand, tried to find an alternative solution with the Respondent. This showed lack of clarity on the part of NHAI, for the course of action. The certificate dated 4th November 2004 of the Engineer lost its value with simultaneous efforts being made to find alternative solution;
- (e) In case NHAI intended to terminate the contract then another certificate should have been issued by the Engineer giving a copy to the Respondent by referring to all that happened after earlier certificate. Thereafter, expulsion order could have been issued in reasonable time. The expulsion order of NHAI was "illegal, improper and not justified":

- (f) Since, the termination order was not issued by the competent authority, it was illegal;
- (g) Disputes arising on account of termination order issued by NHAI would be dealt with by AT-II and another dispute by AT-I.
- (h) The varied works awarded to the Respondent included the service road. At much later stage on 26th July 2003, it was conveyed that service road had been taken out from the scope of the work. NHAI did not act in a proper manner by withdrawing the service road at a belated stage without any reasons. At the alternative of Engineer deciding on provisional rates and work of service road being allowed to be completed, a submission of the Respondent that contract was materially altered stood proved beyond any doubt.

5. Eleven claims had been raised by the claimant. Except for claim No. 4 all claims were answered in favour of the respondent. It was held that the variations noted in the contract did not define the rights and obligation of the parties; the variations had in fact led to major changes and it was unjust and unreasonable to expect the respondent to continue the new work on the old rates and on the same terms and conditions, as these amounted to a new work and not mere variations. The act of the NHAI terminating the contract with the expulsion of the respondent in these circumstances was held to be illegal.

6. Against this Award objections were filed by the NHAI under Section 34 of the Arbitration and Conciliation Act (hereinafter referred to as 'the said Act'). The impugned order dated 11.10.2012 had dismissed these objections.

7. Learned counsel for the appellant has assailed the impugned order on two grounds. His primary submission is that the Single Judge has noted the variations in the work only in the year 2001 and 2002 and this is evident from para 19 and 20 of the impugned order; there has been no discussion in the impugned order about the variations made in the subsequent years and which have been accepted by the respondent which is clear from the correspondences exchanged between the parties and in fact the respondent himself had agreed to the enlargement of time to be granted to him to complete the work. Second submission being that the work was to be executed in two phases; in the first phase the respondent had to construct an additional lane by widening the existing road whereas in the second phase new construction of four lanes had to be done and there was no reason for delay in the second phase of the

work and both the submissions have remained unanswered by the learned single Judge.

8. These submissions are ill-founded. Not only has the majority award but the learned single Judge has also dealt with and answered both these arguments. The fact finding of the Arbitrator was that the correspondences exchanged between the parties showed that the works which were awarded to the claimant in November 2001 stood varied but this decision on the variation was conveyed to the claimant at a much later stage i.e. on 26.7.2003 and it was accepted by the parties that in case the service road had to be executed by the claimant the contract would have been materially altered. The learned Arbitrator has noted that for almost 20 months i.e. w.e.f. 2001 to July 2003 both the parties had accepted that the contract was materially altered and this is evident from the proposal of the engineer for revision of rates of work including the service road but thereafter the decision had been taken at a belated stage for the withdrawal of the work of the service road. This was without any reason. A positive fact finding has been returned by the Arbitrator in this regard which has been endorsed by the learned single

Judge. Learned single Judge had noted that the decision of the NHAI to recommend termination of the contract after making the respondent carry out the work of construction of service road for nearly two years was neither reasonable and nor valid and as such the expulsion order passed by the NHAI was illegal. This was a fact finding returned by the Arbitral Tribunal and endorsed by the learned single Judge. The termination of the contract by the NHAI being illegal the decision on the individual claims was a necessary consequence and the awarded amounts in favour of the claimant were rightly not interfered with.

9. The submission made by learned senior counsel before this Court that the work was in fact being carried out in two phases and even if there was a delay in the execution of work in relation to phase-I there was no hurdle in the completion of work regarding phase-II which submission was noted by the learned single Judge to have been taken for the first time before him and was not an issue urged before the Arbitrator. The terms of the contract also did not strengthen this argument of the appellant.

10. Trite it is to state that the scope of objections under Section 34 of the said Act are limited; the Award can be set aside only on any one of the grounds enumerated therein. It is a reasoned Award. The interpretation of the terms of the contract as adopted by the majority Award and upheld by the learned single Judge is a plausible view, the termination of the contract was rightly noted to be illegal. There is no error apparent on the face of the record which calls for any interference by this Court. In fact apart from the aforementioned two submissions as argued before us there is no other argument which has been urged. Although in the grounds of appeal it has been pleaded that this Award is opposed to public policy but there has been no elaboration on this point.

11. In this conspectus we see no reason to interfere with the impugned order. Appeal as also the stay application is dismissed.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

JANUARY 21, 2013
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