

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

% Judgment delivered on: 12.11.2014

+ **OMP 1394/2014**

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA** **..... PETITIONER**

VERSUS

M/S. BSC-RBM-PATI JOINT VENTURE RESPONDENT

Advocates who appeared in this case:

For the Petitioner : Ms. Ayushi Kiran, Advocate

For the Respondent: Mr. Pravin H. Parekh, Sr. Advocate with Ms. Pallavi Sharma, Mr. Vishal Prasad, Ms. Ritika Sethi, Ms. Aakanksha Mehra, Advocates

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

CAV 988/2014

1. Since the learned counsel for the respondent has entered appearance, the caveat stands discharged.

IA No.21902/2014 (Exemption)

2. Allowed subject to just exceptions.

OMP 1394/2014

3. This petition seeks to assail the award dated 04.03.2014. It is pertinent to note that the respondent herein, that is the original claimant, had moved an application under Section 33 of the Arbitration and Conciliation Act, 1996 (in short the Act) on 06.03.2014 which was dismissed by the arbitral tribunal on 11.07.2014. Upon receipt of the impugned arbitral

award, it filed the captioned petition within the prescribed time. The record shows that the captioned petition was filed on 09.10.2014.

4. The impugned award dealt with two claims preferred by the respondent. The said claims are set out below :-

4.1 Claim no.1 related to non payment of dues certified by the Engineer in the statement prepared by him at completion and that which was reflected in the final statement of the petitioner.

4.2 Claim no.2 pertained to expenses / additional costs incurred and paid by the respondent qua bank guarantee furnished by it due to the failure on the part of the petitioner to discharge or return the original bank guarantee even after it had issued a Defect Liability Certificate.

4.3 In so far as claim no.1 was concerned, an amount of Rs.12,17,42,012/- was claimed by the respondent. The break-up of which was as follows :- Rs.5,52,68,871 towards basic amount and Rs.6,64,73,141/- on account of interest calculated till 31.01.2009.

4.4 As regards claim no.2, the respondent sought payment of Rs.84,97,034/-. The break-up of this amount was as follows :- Rs.49,32,955/- was claimed towards the basic amount while a sum of Rs.35,64,079/- was claimed towards interest calculated upto 31.02.2009.

4.5 It is important to note that the arbitral tribunal passed an interim award in this case, which is dated 19.12.2012. The interim award admittedly was passed with the consent of parties herein. By this award, it was agreed that a sum of Rs.2,33,90,005/- would be released in favour of the respondent leaving a balance sum of Rs.3,18,78,866/- to be adjudicated upon by the arbitral tribunal out of the basic sum claimed under claim no.1 as indicated above. The petitioner as would be expected has not laid a challenge to the said interim award dated 19.12.2012.

4.6 In so far as the balance sum of Rs.3,18,78,866/- is concerned under claim no.1, the arbitral tribunal has referred to the certificate issued by the Engineer of “Statement at completion”, on 11.02.2003 and the “Final Statement” issued by him on 25.12.2003. As per the statement of completion dated 11.02.2003 is concerned, the Engineer had certified an amount of Rs.5,70,32,476/- out of which as noted by the arbitral tribunal in paragraph 3.2 of the award, the respondent did not dispute the payments equivalent to a sum of Rs.2,72,56,352/- . Thus, out of a total of Rs.5,70,32,476/-, the dispute in so far as the statement dated 11.02.2003 was concerned, was narrowed down to Rs.2,97,76,124/-.

4.7 Similarly, in respect of the final statement dated 25.12.2003, the arbitral tribunal notes in paragraph 3.3 that the respondent had found that a sum of Rs.2,11,33,653/- was correctly certified out of a total of Rs.2,32,36,395/-. Resultantly, in respect of this statement, the dispute narrowed down to a claim in the sum of Rs.21,02,742/-.

4.8 It was, therefore, the sum total of the disputed amounts in the statement at completion dated 11.02.2003 and the final statement dated 25.12.2003 which formed the basis of claim no.1. The total claim alongwith the break-up is reads as follows :- Rs.3,18,76,866/- comprising of Rs.2,97,76,124/- as per statement dated 11.02.2003 and Rs.21,02,742/- as per statement dated 25.12.2003.

4.9 The arbitral tribunal has also observed in paragraph 3.5 of its award that the respondent had in a statement referred to as a RD-5 dated 27.12.2012 indicated that there was no dispute with regard to the sum of Rs.2,97,76,124/-. Accordingly, in so far as claim no.1 was concerned, the dispute ultimately got narrowed down to Rs.21,02,742 (Rs.3,18,78,866/- (-) Rs.2,97,76,124/-).

5. In paragraph 4.4 of the award, the arbitral tribunal has indicated that the sum of Rs.21,02,742/- pertains to the following two items :

- “..(i). Rs.16,64,139/- against BHR No.54 and
- (ii). Rs.4,38,603/- for BOQ items No.8, 11 and 8.13..”

5.1 The arbitral tribunal has by virtue of the impugned award also directed the payment of the remaining portion of the claim in the sum of Rs.21,02,742/- in respect of claim no.1 essentially on the ground that no evidence whatsoever was produced by the petitioner to support its difference of opinion with the certification made by the Engineer.

5.2 Counsel for the petitioner has submitted that the arbitral tribunal committed an error in so far as claim no.1 was concerned by not advertng to the quantities and rates as indicated in an earlier award passed by it on 05.05.2010. The learned counsel for the petitioner also informed me that the said award had been challenged and is subject matter of a petition filed in this court being: OMP No.107/2011, under Section 34 of the Act.

5.3 On being queried as to whether this submission was advanced before the arbitral tribunal, the learned counsel submitted that though oral submissions were made, they were not recorded by the arbitral tribunal. On the counsel being queried further as to whether a ground to that effect was taken in the captioned petition, the counsel submitted though a ground in those terms had not been taken, a ground had been taken to the effect that arbitral tribunal had failed to take into account the findings recorded in its own award dated 05.05.2010. My attention in this behalf was drawn to ground (C).

6. In my opinion, the submission of the learned counsel is completely untenable and hence, cannot be accepted. The ground taken involves appreciation of material raised before the arbitral tribunal. A submission of

this nature ought to have been taken before the arbitral tribunal and if a submission was made which was not recorded or dealt with by the arbitral tribunal, the very least that the petitioner could have done, was to at least take a ground to that effect in the captioned petition.

6.1 As indicated above, the arbitral tribunal has recorded the factum of acceptance of the claim in issue by the petitioner in detail in paragraphs 3.2 to 3.6, these findings cannot be disturbed till such time appropriate pleadings are made in that behalf because of the acceptance by the petitioner of a major part of the claim, the grievance of the respondent got narrowed down under claim no.1 to a sum of Rs.21,02,742/-.

6.2 In respect of this submission, the arbitral tribunal has recorded that no evidence was produced by the petitioner to support its challenge to the certification returned by the Engineer. There has been no attempt whatsoever to draw my attention to any evidence on record so as to persuade me to rule otherwise. In these circumstances, the challenge to claim no.1 is rejected.

7. In so far as claim no.2 is concerned, which as indicated above, pertains to payment of charges by the respondent on account of failure of the petitioner to return or discharge the bank guarantees in issue, the counsel for the petitioner submits that the petitioner ought to have been mulcted with the charges as the lapse of the bank guarantee in issue on 16.07.2003, had resulted in the same being turned into a worthless piece of paper qua which the concerned bank had no authority to levy or recover charges towards commission. The learned counsel submitted that even after the arbitral tribunal had so observed in paragraph 4.3.1.(i) of the award, it awarded 50% of the sum claimed by the respondent under this head.

7.1 In my view, the submission of the learned counsel for the petitioner

misses the point that the arbitral tribunal has also returned a finding to the effect that even though the concerned bank addressed several communications of the petitioner between July 2003 and June 2007 to either discharge or return the bank guarantee for cancellation, the needful was not done. The arbitral tribunal specifically records that the petitioner had requested the concerned bank not to discharge the bank guarantee in issue unless it got clearance from the petitioner.

7.2 Furthermore, the arbitral tribunal records that since the bank guarantee in issue was neither returned for cancellation nor discharged, the concerned bank informed the respondent vide communication dated 12.06.2006 that liability qua the bank guarantee in issue was outstanding in their books of accounts and therefore, it should remit the commission to it. The bank, as observed by the arbitral tribunal, took the position that till such time the original bank guarantee was returned to it, the respondent would be required to pay the contracted commission.

7.3 It is also not in dispute that although the work in issue was completed on 22.12.2001 whereupon a Taking Over and a Defect Liability Certificate was issued on 17.07.2002 and 26.05.2003, the petitioner chose not to return the bank guarantee despite the request of the respondent and the recommendation of the Engineer. The respondent made the request in this behalf vide communication dated 26.05.2003 while the Engineer had made a recommendation to the same effect vide letter dated 25.07.2003.

8. Having regard to the aforementioned facts and the provisions of sub-clause 10.2 of the General Conditions of the Contract (GCC) [as modified by the Conditions of Particular Application (COPA)] which required the petitioner to return the performance security furnished in the form of the bank guarantee to the respondent, not later than 28 days of issuance of the

Defect Liability Certificate and in respect of imported equipment on furnishing of necessary documentary evidence, I am inclined to sustain the finding that the petitioner should be called upon to bear at least 50% of the basic amount claimed under this head by the respondent. In my view, this direction in the award requires to be sustained as there is no dispute that the respondent has been out of pocket in respect of sums far greater than that which is awarded under claim no.2.

9. There are no other grounds agitated before me. Accordingly, the petition is dismissed leaving parties to bear their own costs.

RAJIV SHAKDHER, J

NOVEMBER 12, 2014

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