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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (COMM) 289/2016

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Petitioner
Through: Mr. Vikas Goel, Mr. Vivek Gupta,
Advocates.

versus

M/S ITD-SDB(JV) Respondent
Through: Ms. Anusuya Salwan, Mr. Abhishek
Pundir, Mr.Kunal Kohli, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

% **16.11.2016**

1. The challenge by the National Highways Authority of India (NHAI) in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 28th October, 2010 passed by the AT by majority of 2:1 allowing the claim of the Respondent contractor in the disputes arising out of the contract dated 7th February, 2001 for four-laning and strengthening of existing two lane section between KM. 393 and KM 470 on NH-2 in the State of UP (construction package II A).

2. The dispute arose between the parties regarding implementation of bill of quantity ('BOQ') Item No. 9.35 pertaining to provision and erection of hand pumps. Although in terms of the contract 30 hand pumps were to be erected by the Respondent, only six were. According to the Respondent Claimant, NHAI committed breach of the contract by omitting the work of erection of

the balance pumps and getting it done through another agency, in this case, the UP Jal Nigam. According to the Respondent this was against the opinion of the Independent Engineer and despite there being a clear bar under Clause 51.1(b) of the contract.

3. NHAI resisted the above claim by pointing out that there was no omission of work but only a reduction in the quantity. The NHAI contended that the number of hand pumps to be erected was reduced from 30 to 6. Therefore it was Clause 51.1(a) of the contract dealing with decrease in work which stood attracted. It was further contended that the work done by the U.P. Jal Nigam was that of shifting of pumps which belonged to it and that NHAI did not entrust the balance work to the UP Jal Nigam.

4. The majority Award upheld the contention of the Respondent that there was a breach of the contract. It found that the IE had not issued any direction reducing the items of work. Twenty-one hand pumps were erected by UP Jal Nigam under orders of NHAI. The majority of the AT further concluded that once the contract was entered into between the parties for provision and erection of hand pumps, the parties were bound by the contract. Item No. 9.35 contemplated the said provision and erection of hand pumps which expression included “shifting of existing hand pumps from one place to another” and also “erection of new hand pumps”. Learned counsel for the Petitioner sought to assail this finding by referring to a letter written by NHAI to the Respondent on 25th April, 2006 which reads as under:

“With respect to your letter ref. 1) above, we would like to mention that at this stage we have no intention of instructing any further hand pumps to be paid under BOQ Item no. 9.35.

Our letters ref. 2) and 3) above with respect to new hand pumps, remain effective.”

5. The reference made in the above letter is to an earlier letter written by the Respondent to the NHAI on 6th April, 2006, specifically drawing its attention on whether any hand pump had to be installed and if no reply was received within 15 days, “it will be considered that there are no further hand pumps to be installed”.

6. The Court also finds that subsequently on 6th September, 2007, the Respondent wrote to NHAI referring to the request made by the Respondent way back on 28th June, 2004 “for payment of compensation due to wrongful action of the Employer in not allowing Contractor (JV) to execute the work of the hand pumps as provided in the contract and for getting the same done through another agency”. It was the letter which also noted that during the deliberation before the Dispute Resolution Board (‘DRP’), it was submitted by NHAI “that some more pumps are still to be ordered for execution by Contractor (JV) under the provision of above referred BOQ item.” The DRP at that stage did not give decision but permitted the case to be referred again after additional hand pumps were executed by the contractor. Thereafter, the engineer ordered five more pumps but only four in addition to the earlier two provided could be installed because “the location for one pump could not be finalized”.

7. When all the above correspondences are read together, it does not appear that NHAI in unequivocal terms communicated to the Respondent that there

was reduction in the work of installation of pumps as contemplated in Clause 51.1(a) of the Act.

8. While before this Court, counsel for the Petitioner sought to make out a case that NHAI had no option in the matter since the UP Jal Nigam insisted on installing the remaining pumps. However, such a case does not appear to be put forth by NHAI before the AT either in its pleadings or even during the course of arguments.

9. The Court is unable to find any error having been committed by the AT in concluding that there was breach of terms of the contract by NHAI in not getting the work of balance hand pumps installed by the Respondent contractor.

10. Learned counsel for NHAI then submitted that the majority of the AT ought not to have allowed the claim of the Respondent for the differential sum i.e., the difference in the payment to be made by NHAI and the amount actually incurred in erecting the hand pumps had the contract been executed by it as contemplated. In other words, the submission was that only 10% of the profit that the Respondent might have made had the contract been executed could have been awarded in terms of Section 73 of the Contract Act, 1872.

11. Having heard learned counsel for the parties and having perused the impugned Award, the Court finds that the AT rightly determined that for the purposes of Section 73 of the Contract Act, the question that required to be asked was what would the contractor have been paid had it executed the

contract as was contemplated by the parties. Although a passing remark was made by the AT regarding the rate quoted by the Respondent for erection of hand pumps being excessive, that issue was not before the AT. The rate quoted by the Respondent contractor for erecting the hand pumps got crystallized when its financial bid was accepted and the contract was entered into between the parties. In other words, it was not open to the AT to determine whether what was quoted by the Respondent (and accepted by NHAI) for a particular BOQ item was excessive or otherwise. The AT could not have, at the stage of determination of claims, come to the conclusion that the rate quoted by the contractor was high and therefore the contractor was not entitled to compensation on that basis.

12. All that the AT did was to award the Respondent the costs that would have been incurred by it in erecting the remaining hand pumps and the amount it would have received for that work in terms of the contract. The Court is, therefore, unable to accept the submission of the learned counsel for NHAI that the compensation awarded to the Respondent by the AT was far beyond what was contemplated in the contract. This is consistent with Section 73 of the Contract Act, Illustration (d) which reads: A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise."

13. The last submission was that in any event the AT erred in also allowing the claim for price variation. A specific issue No. 5 in this regard was framed by the AT. It was noted that in terms of Clause 70.3 (i) to (ix) of the contract, the price adjustment was admissible on any item of work which

was carried out. Therefore, it was available even on BOQ item 7.35. The AT rightly concluded that “the price adjustment prevailing on 28.06.2004, the date of notice claiming the compensation amount due to breach of contract by the Employer, for interim payment certificate No. 34 for the month of May 2004, is 15.26%”. This was applied to the BOQ rate minus the rebate and the total amount that the contractor would have got for erecting 21 hand pumps was worked out on that basis. The Court finds no error having been committed by the AT even in this regard.

14. Lastly, it was submitted that the interest should not have been awarded *pendente lite* and could have been awarded only from the time the claim was crystallized i.e. the date of the Award. Again here, the Court finds that what has been awarded by way of interest is from the date of the claim. Once the claim got crystallized by the Award it was obviously related back to the date the claim was made. The challenge to the award of interest is hereby negatived.

15. For the aforesaid reasons, the petition is dismissed.

S. MURALIDHAR, J

NOVEMBER 16, 2016/mg