

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

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Judgment reserved on: 28th April, 2015

Judgment delivered on: 11th August, 2015

F.A.O. (OS) 234 of 2015

NATIONAL HIGHWAYS AUTHORITY OF INDIA APPELLANT

VERSUS

AFCONS INFRASTRUCTURE LTD.

... RESPONDENT

Advocates who appeared in this case:

For the Appellant:

Mr Ravi Sikri, Sr Advocate with Ms Tanu Priya Gupta and
Mr Deepank Yadav, Advocates

For the Respondent :

Mr Sandeep Sethi, Sr Advocate with Mr Manu Seshadri
and Mr Tanmay Nandi, Advocates

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. This appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) impugns the order dated 10th February, 2015 whereby the objections of the appellant under Section 34 of the Act challenging the award dated 05th March, 2013 have been rejected. The award was in respect of disputes arising out of a contract dated 28th

March 2001 for the construction of a new carriageway (NCW) and the widening and strengthening of the existing carriageway (ECW) between km 340 and km 402 Haveri to Hubli Section on NH-4 in Karnataka.

2. The Arbitral Tribunal in the award was concerned with two claims raised by the respondent. The first claim being on account of compensation for repair of distress pavement and the second claim being on account of compensation for differing ground conditions in respect of quarries.

3. The contract stipulated that the NCW was to be completed first and thereafter work on the ECW was to be undertaken after the traffic was diverted over the NCW. The new pavement on NCW showed certain distress over the total length of 2.48 km. To ascertain the probable causes, investigations were undertaken by the respondents through a Professor of Civil Engineering at IIT, Chennai who submitted a report based on which the Engineer instructed the respondent to carry out the repair work.

4. The respondent claims payment for the repair work contending the same to be a compensation event under clauses 44.1 (g), 44.1 (i) read with Clause 11.1 of the conditions of contract. The appellants denied the claim. The defence raised by the appellant was that the distress in the pavement was due to non-compliance of the Respondent of the instructions given, poor management, non-performing construction, slow progress of work, poor quality work, use of non-compliance materials and negligence in undertaking proper action on different layers. The contention was that the

recommendation was by way of repairs and that there was no additional work or variation in the nature of work and the repairs and restorations were on account of defective workmanship solely attributable to the Respondent.

5. The Arbitral Tribunal found, as a matter of fact, that there was no defect in the work executed by the respondent. The Arbitral Tribunal found that there was a lack of vertical lateral support to the revision of the final road level (FRL) and during construction of the NCW, the approved FRL was at a much higher level than the ECW and there was insufficient drainage due to revision of the FRL and distress pavement occurred, no drawings for longitudinal side drains/median drains were supplied for construction. As a result of insufficient drainage, the rainwater could not drain out and ingressed to the lower pavement layers where it was causing distress to the pavement. The Arbitral Tribunal found that the work had been executed under the direct control and supervision of the representative of the Engineer and had been carried out as per the contract specifications. The materials were tested and approved before laying of each layer and compaction tests and other tests were conducted and approved as per the terms of the contract. The Arbitral Tribunal rejected the contention of the appellant that the failure of the pavement was due to substandard workmanship and use of non-compliance materials. The Arbitral Tribunal thus found the respondent entitled for the cost of repair works under the above referred conditions of the contract.

6. The learned Single Judge has noticed that the Arbitral Tribunal had discussed the report of the Professor at IIT who had conducted the investigation in great detail and noticed that the report did not include the results of various tests and had not taken into consideration the increase in the FRL of the NCW. The Arbitral Tribunal did not find that the report of IIT suggested that the distress in pavement was due to use of non-compliant materials. The Arbitral Tribunal and the learned Single Judge thus found that the appellant had been unable to establish that the distress was on account of defective work on the part of the respondent. The learned Single Judge held that the conclusion reached by the Arbitral Tribunal, that the reasons for distress of the pavement was not attributable to the respondent, was based on detailed analysis of the data and the correspondence placed before it. The Arbitral Tribunal has concluded that the Engineer's instructions to the respondent to carry out the work was in the nature of additional work for safety and other reasons and therefore was a compensation event covered under Section 44.1 (g). Learned Single Judge has thus declined to interfere with the conclusions reached by the Arbitral Tribunal. The Arbitral Tribunal after detailed examination of the materials and the evidence before it has concluded that the distress event occurred not on account of fault of the respondent but on account of the factors attributable to the appellant. Since it is a finding of fact based on appreciation of evidence and material placed before the Arbitral Tribunal, the learned Single Judge has rightly refused to interfere with the said finding of fact. We see no reason to interfere with the

findings arrived at by the Arbitral Tribunal with regard to claim No. 1 and the view taken by the learned Single Judge.

7. Now coming to claim No. 2. It arose on account of differing ground conditions in respect of quarries. The property of rock in the area of the project was such that stone aggregates from the quarried rock met all the specific specifications provided by Appellant except the maximum 30% specification for combined index of flakiness and elongation. The respondent in terms of the requirement of the contract installed and commissioned two 125 tonnes per hours crushers for primary and secondary crushing. The respondent, however, found that the flakiness and elongation index was on the higher side due to inherent property of rock extracted from the quarries and could not be improved. The respondent tried all combinations of crushing equipment, however, with no success. The respondent developed more than 40 quarries in different locations but none yielded the rock needed to meet the required specifications. The Engineer and the Project Director of the appellant accepted that given the inherent property of the rock in the area, the required quantity of aggregates of the required specification was not available. The requirement was requested to be relaxed and was subsequently relaxed by the appellant at the meeting held on 09th March, 2005. The appellant resisted the claim contending that the rates quoted by the respondents in the bid included all leads, taxes and other levies.

8. The Arbitral Tribunal examined the material report prepared by the consultants at the stage of tendering and noticed that the report did indicate that the aggregates of most of the quarries did meet the specific requirement and this was the information available to bidders. The minutes of meeting held of a high-powered committee headed by the chairman of the appellant showed that they had accepted the Respondent's contention that the inherent property of the rock encountered could not meet the specifications of combined index of flakiness and elongation despite various measures taken by the Respondent. The Arbitral Tribunal found that a visual inspection of the site could not have revealed the adverse property of the rock.

9. The Arbitral Tribunal on a detailed analysis of the relevant clauses and the evidence on record before it came to the conclusion that the said amounted to a compensation event entitling the respondent to compensation. The learned Single Judge has noticed that the Arbitral Tribunal comprised of technical experts who were also conscious of the industry practice. The learned Single Judge has found that the conclusion reached by the Arbitral Tribunal that the quarries made available could not have yielded aggregates of the required specification was a finding of fact and it was not a perverse finding or so shocking as to require interference under Section 34 of the Act.

10. The extent of judicial scrutiny under Section 34 of the Act is limited and scope of interference is narrow. Under Section 37, the same is further

narrower. The supervisory role of the Court in arbitration proceedings has been kept at a minimum level. The court is not to re-appreciate evidence. If the view taken by the Arbitral Tribunal were plausible and reasonable, the court would not interfere with the same unless the view was so perverse that no reasonable person could arrive at such a conclusion.

11. The Arbitral Tribunal comprising of experts, on a detailed examination of the material before it, has returned the finding that the said event amounted to a compensation event entitling the respondent to compensation for the works carried out. The learned Single Judge after examining the material has confirmed the same. We find no reason to interfere with the finding returned by the Arbitral Tribunal and confirmed by the learned Single Judge. The finding of the facts in our view are plausible and reasonable and do not call for any interference.

12. The appeal is accordingly dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

AUGUST 11, 2015
RS

BADAR DURREZ AHMED, J