

S-5

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ FAO(OS) 9/2013

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through: Mr. P.P. Khurana, Advocate
alongwith Mr. Saurabh Bindal,
Advocate.

versus

IJM GAYATRI

..... Respondent

Through: Mr. Arun Kathpalia, Advocate
alongwith Mr. Angad Mehta and Mr.
Samaksh Goyal, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

ORDER

% 23.11.2015

1. The appellant - National Highways Authority of India (hereinafter referred to as 'the NHAI') entered into a Contract with the respondent (hereinafter referred to as 'the claimant') pursuant to the latter's successful bid. The Contract dated 03.03.1999, was for widening of four lanes and strengthening of existing two lane road from 355 km to 380 km of Chitakaluripet- Vijayawada Section of NH-5 in Andhra Pradesh Contract Package-I. The Agreement estimated the contract price to be Rs. 60,15,70,712/-. In terms of the Agreement, the parties agreed *inter alia* that the time for performance i.e. completion of work was six months- the last being 30.03.2002. It is undisputed that extension of time was granted upto 30.12.2002 and

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ultimately the Defect Liability Certificate was issued on 23.03.2004.

2. Disputes arose between the parties during the execution of the Project which were mandatorily referred in terms of the Agreement for the decision of an independent engineer. The claimant was dissatisfied by the Engineer's decision and invoked the arbitration clause. This led to the constitution of a Tribunal comprised of three Arbitrators. In the course of the Tribunal proceedings, the claimant sought an award in respect of 19 Heads including cost and interest. The Tribunal rendered its award on 21.03.2012.

3. The NHAI felt aggrieved and approached this Court under Section 34 of the Arbitration and Conciliation Act (O.M.P. No. 842 of 2012). The learned Single Judge by his impugned judgment and order dated 07.09.2012 dismissed the objections. At the outset, it may be noticed that the impugned order recorded that though the findings in respect of 9 Heads of Claim were initially challenged under Section 34, the challenge to two Claims 5 and 10 were given up as not pressed. The Single Judge therefore considered the objections so far as it pertained to the award on Claim Nos. 1,2, 4,7,11,13 and 14.

4. Mr. P.P. Khurana, learned Senior Counsel for NHAI, confined the present appeal to issues concerning Claim Nos. 11, 13 and 14 only and submitted firstly that the learned Single Judge failed to notice that the findings of the Arbitrators were beyond the terms of the Contract and consequently violated Section 28(c) of the Act. Elaborating on this, it was contended that the learned Single Judge in upholding the award with respect to Claim No.11 to the extent of Rs. 13,27,576/- ignored the terms in respect of Clause 10.3.

5. It was next contended with respect to Claim 13 that the learned Single Judge over-looked the fact that the application of Hudson formula and consequent award of Rs.2,60,58,925/- towards loss of profit, was unwarranted. It is stressed here that the respondent/claimant did not lead any evidence to show the potential loss in terms of the parties which could have entered into a Contract but did not do so. It was lastly urged that beyond rendering the finding that there was no over-lapping of issues and findings in the award in respect of Claim Nos. 13 and 14, the learned Single Judge did not examine the merits of the amount awarded towards Claim No. 14 i.e. Rs. 2,04,95,455/-.

6. Mr. Arun Kathpalia, learned counsel for the respondents urged that this Court should be cautious in exercising its appellate jurisdiction under Section 37. He relied upon the findings of the arbitral Tribunal and emphasised that it is an elaborate and reasoned award which discussed the contentions of the parties as well as the materials on record. Learned counsel submitted that the award of Rs. 13,27,576/- given under Claim 11 was justified, considering that the Tribunal held that the extension of time was necessitated due to the NHAI's conduct. In these circumstances, the insistence that the securities ought to be locked up for an extended period meant that the economic cost to comply with such directions had to be borne by the appellant-NHAI. It was next contended that so far as the findings with respect to Claim Nos. 13 and 14 are concerned, no infirmity can be urged and that given the applicable standard for considering illegality of awards (*ONGC vs Saw Pipes Ltd.* (2003) 5 SCC 705) unless the award discloses a patent illegality or manifest unreasonableness in the examination of the

materials or transgresses the terms of the Agreement, the Courts would not interfere with mere factual error or errors of even matters of interpretation of the contract or law.

7. This Court has considered the submissions, as far as Claim No. 11 goes, the Court notices that the original date for completion of the contract (36 months) was 30.03.2002. However, it is an undisputed fact that extensions were necessitated and granted. Ultimately, the Contract was completed and Taking Over Certificate was issued on 30.05.2003. The No-Defect Liability Certificate in this case was issued as a matter of fact on 23.03.2004. The claimant had sought an award for a much higher amount however considering the circumstances, the Arbitral Tribunal reduced it to Rs. 13,27,576/-.
8. This Court notices that the Tribunal held that the delay was attributable to the Claimant, given the facts not disputed in the proceedings in Court atleast in the appeal. In these circumstances, that the claimant was compelled to keep the securities alive till the completion of the defect liability period is not disputed. All that the claimant said was that given the original date of completion, the defect liability period would not have ended on 31.03.2003. The extension meant that it had to block the amounts required of it to comply with Clause 10.3. This Court perceives no unreasonableness or patent illegality in the award nor sees it as contrary to any condition in the Contract when it directed the NHAI to pay Rs. 13,27,576/- to the claimant.
9. As far as the question of loss of profits i.e. the subject matter of Claim No. 13 goes, the learned Single Judge noticed that the Hudson's

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formula was applied in view of the Supreme Court ruling in *Mcdermott International Inc vs. Burn Standard Co. Ltd & Ors* (2006) 11 SCC 181. Furthermore, the loss of profits awarded (Rs.2,04,95,455/-) was against a much higher claim of over Rs 8 crores and in respect of the limited duration of 264 days. This finding in our opinion is not any error of law much less a patent illegality, falling within the standard spelt out in *Saw Pipes (supra)*. Likewise, so far as Claim No. 14 is concerned, whilst the NHAI does not dispute that the finding with respect to absence of over-lapping is for well founded reasons, this Court discerns no merit in the submission that the award was unwarranted. The claimant had sought an award of sum in excess of Rs. 12 crores for the loss of opportunity in the use of its machinery and the resultant costs. The NHAI relied upon the observations of its engineers who conceded theoretically that the claimant could seek damages but refused to actually grant what was sought on the basis that no evidence was forthcoming. The award is based upon detailed reasoning that runs into about 10 pages. Having regard to all the circumstances, we are of the opinion that there is no reason for interference that the award in respect of Claim 14 has been made out.

10. Pursuant to the Court's order, NHAI had deposited the amount in Court. On some previous occasions, by orders, the Court had permitted partial withdrawal of these amounts. It is hereby directed that in view of the above findings, that amounts so deposited would be released to the respondent/claimant within two weeks from today. Consequently, the bank guarantee amounts furnished in compliance with the Court's orders are also hereby ordered to be discharged.

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11. In view of the foregoing discussion, there is no merit in this appeal. It is consequently dismissed without any order as to costs.

S. Ravindra Bhat
S. RAVINDRA BHAT, J

Deepa Sharma
DEEPA SHARMA, J

NOVEMBER 23, 2015
sapna

Received
on 19-12-15

SCANNED
by
RICOH INDIA LTD.
On Date *11/4/16*
Signature *[Signature]*

S-22 to 24

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ REV. PET.164/2016, C.M. APPL.12160/2016 IN FAO(OS) 9/2013
NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Appellant
versus
IJM GAYATRI Respondent

+ REV. PET.166/2016, C.M. APPL.12163/2016 IN FAO(OS) 10/2013
NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Appellant
versus
IJM GAYATRI (JV) Respondent

+ REV. PET.165/2016, C.M. APPL.12161/2016 IN FAO(OS) 228/2015
M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant
versus
M/S IJM-GAYATRI (JV) Respondent

Through : Sh. P.P. Khurana, Sr. Advocate with Sh. Sumit Gupta and Sh. Saurabh Bindal, Advocates, for appellant, in Item Nos. 22 to 24.
Sh. Arun Kathpalia and Sh. Angad Mehta, Advocates, for respondent in Item Nos. 22 to 24.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

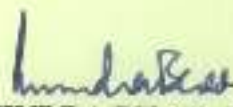
% **ORDER**
04.04.2016

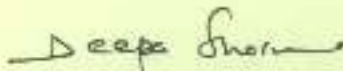
The review petitioner urges that the judgment disposing of the appeal finally on 23.11.2015 did not address the question of excessive interest. Learned senior counsel points to the grounds taken in the original appeal and submits that the final order has not dealt with the

question of interest.

It is pointed out by the learned counsel for the non-applicant/ claimant that the issue of interest was gone into by the Arbitral Tribunal which held that the NHAI's counter-claim itself was premised on interest exceeding 18%. He further pointed out that the learned Single Judge dealt with this issue but the matter was not urged in appeal at the time of hearing.

This Court has considered the submissions. The review petition nowhere states that the issue or question of interest was raised and argued in the appeal even though undoubtedly it was one of the grounds in appeal. In these circumstances, and also having regard to the fact that the NHAI in its counter-claim also sought 18% interest, we see no infirmity or error apparent on the face of the record, warranting recall or modification of the final judgment. The Review Petitions are accordingly dismissed along with the pending applications.


S. RAVINDRA BHAT, J


DEEPA SHARMA, J

APRIL 04, 2016
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