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

Decided on : 01.10.2015

+ **FAO(OS) 448/2014, C.M. APPL.17439-17440/2014 & 12533/2015**

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Appellant

Through : Sh. Ravi Sikri, Sr. Advocate with Sh. Deepank Yadav, Ms. Meenakshi Sood and Sh. Mukesh Kumar, Advocates.

versus

M/S SRICON INFRASTRUCTURE PVT. LIMITED..... Respondent

Through : Sh. Ravi Gupta, Sr. Advocate with Ms. Kiran Shukla, Sh. Varun Amar and Sh. Junaid Akhtar, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. This appeal is preferred by the National Highways Authority of India (“NHAI”) impugning the judgment and order of a learned Single Judge, dismissing its objections/application, under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter “the Act”). NHAI had sought for setting aside an Award dated 03.06.2009, together with notice dated 11.06.2009

amending the Award dated 03.06.2009. The award had directed NHAI to pay the respondent (hereafter “the Contractor”) ₹1366.23 lakhs together with future interest @ 12% from three months from the date of the Award. By its correction dated 11.06.2009, the Arbitral Tribunal corrected the Award and enhanced the awarded amount to ₹1369.57 lakhs.

2. NHAI had, in 2005 invited bids for rehabilitation and improvement of pavement for Gurgaon-Kotputli-Amer Section of National Highway-8 from Km 42.00 to Km 248.00. The notice inviting tenders – so states NHAI- contained certain errors and, accordingly, on 18.03.2005, it informed the responsive bidders that the unit of item 10 of Bill of Quantities was inadvertently mentioned as Square Meters instead of Cubic Meters. The bidders were requested to submit bids as per the amended Bill of Quantity. The Contractor’s bid was accepted and a Contract Agreement dated 17.05.2005 was executed between it and NHAI. Disputes arose between the parties during the contract execution, which were referred to the Engineer. The claims of the Contractor were rejected by the Engineer on 02.02.2007, resulting in the issuance of notice of intention to commence the arbitration against Engineer's decision. An Arbitral Tribunal consisting of sole Arbitrator was constituted with the consent of the parties. The Contractor filed its statement of claim, which was resisted by the NHAI, which filed its statement of defence. After considering the materials, the pleadings and submission of the parties, the Arbitral Tribunal by the Award dated 03.06.2009 awarded a sum of ₹1366.23 lakhs. By issuing notice of making correction to the Arbitration Award, dated 11.06.2009, the Tribunal carried out 23 corrections to the Award and enhanced the awarded amount to ₹1369.57 lakhs from ₹1366.23 Lakhs. The NHAI preferred objections to the

award under Section 34, which were considered and rejected by the learned Single Judge, in his impugned judgment.

Appellant NHAI's contentions

3. It was argued that the impugned judgment discloses three serious errors which call for interference. Mr. Ravi Sikri, learned senior counsel for NHAI argued that the scope of work is clearly defined under Clause 8 of the Contract Data. The tender was complete in all respects as it contained drawings, specifications for execution of the work involved. The work in terms of the tender drawings to be completed by the Contractor were (i) Milling + DBM + BC (ii) DBM + BC and (iii) Reconstruction of road in some reaches. The said work was to be done in terms of Clause 16.1 of the General Conditions of Contract which required the Contractor to construct and install the Works in accordance with the Specification and Drawings. It was argued that Clause 15 of Contract Data stipulates that the site possession dates shall be the issue of notice to proceed with the work. Counsel stated that the notice to proceed with the execution of work was issued by NHAI to the Contractor by its letter dated 17.05.2005. Reliance was placed on the Contractor's letter dated 14.06.2005 to say that the latter was unprepared to commence work. Thus, stated counsel, submissions in the form of a detailed chart submitted to the Tribunal depicting true picture of front available month-wise that in the beginning of the contract periods, i.e. 15.6 Km. for milling 65mm, 51.40 Km for DBM 65mm, 5.750 Km for DBM 150 mm and 57.15 Km for BC 40 mm, were available in the month of May 2005 with Contractor and that adequate fronts were available throughout during the contract period. The Contractor defaulted in its contractual

obligations, which led to the prolongation of the contract period for which no fault could be attributed to NHAI. It was submitted that on this score as well as in regard to other claims, the findings of the Tribunal were clearly erroneous. Counsel highlighted the fact that ₹ 8,06,06,858/- was claimed against the respective Claims A & B. Thereafter, the Contractor unilaterally and without any basis increased the said amount to ₹12,99,49,000/-. Learned senior counsel submitted that the errors in appreciation and findings went to the root of the award and required interference. He stated that by refusing to exercise powers under Section 34 of the Act, the learned Single Judge erred in law.

4. It was next argued that as regards Claim No. 1, which was awarded due to difference of quantity actually executed and what was certified by the Engineer, the Tribunal fell into fundamental error. It was submitted that all along, till submission of Running Bill No. 12, the Contractor had not disputed the standard for measuring the thickness of the work. The insistence that there should be change in the standard, to judge work, was utterly unprincipled. Counsel relied on the details of computation of the claim (CH -20/Annexure 1/ 63) to show that the amount adopted for the claim was ₹1082/- per cu. Metre for 12,759.58 cu.m. However, the Tribunal erroneously awarded ₹ 1570/- for 27,229 cu. Metres. This was unsupported in law and evidence.

5. Counsel for NHAI lastly contended that the Tribunal awarded ₹51.47 lakhs, towards Sub-Claim C – 2. Here, it was submitted that the findings were clearly beyond the agreement, because the Contractor had insisted for payment at the rate of ₹4100/- per cu.metre. The Contractor had agreed to accept ₹ 3100/- per cu.metre. Despite these facts, the Tribunal awarded the

sum in favour of the Contractor at the rate of ₹ 4900/- per cubic metre.

6. At the outset, this Court notes that the learned Single Judge held that the rulings of the Supreme Court restrict the supervisory role of the courts while testing the validity of an Arbitration Award. *Mcdermott International Inc. v Burn Standard Co. Ltd. & Ors* (2006) 11 SCC 181, (“*Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the Arbitrators, violation of natural justice, etc. The court cannot correct errors of the Arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.*”) was relied on. It was also held that when a Tribunal assesses the material and evidence placed before it in detail, the Court, under Section 34 cannot sit as a court of appeal and re-appreciate the entire evidence or reassess the case of the parties.

7. The first two grounds urged in support of this appeal, by NHAI relate to pure findings of fact. *Sans* patent illegality or the terms of an award exceeding the reference or a term of the contract, the Court cannot re-appreciate the Tribunal’s findings. Unlike in traditional litigation, where courts assume the primary adjudicatory role of fact appreciation, the jurisdiction conferred by Section 34 calls for a radically different- by and large deferential, “hands off” approach. The jurisprudence evolved by Indian courts admits a narrow window of appreciation- to courts, under Section 34, i.e. patent illegality, findings contrary to or in excess of express terms of contract, or findings which are so unreasonable as to conclude that no

reasonable man, given the set of facts, could have arrived at them. Approached from this prism, there is no infirmity in the findings or judgment of the learned Single Judge, warranting interference. We also notice that on the second question, i.e. findings on Claim No. C-1, NHAI significantly does not say that the issue was urged, but erroneously overlooked or not discussed by the impugned judgment. Therefore, no interference on the first two contentions is called for.

8. In regard to Claim No. C-2, this Court notices that the claimant had in two letters of September, 2005, stated that it would not agree for any amount less than ₹ 4100/- per cu.metre. Subsequently, it claimed before the Tribunal that it was pressurized to accept ₹ 3100/- per cu.metre. It however, claimed ₹ 4900/- per cu.metre which was uncritically accepted. This Court had enquired of the Contractor's counsel whether there was any justification for increasing the amount originally agreed to, i.e. ₹4100/- per cu.metre; he was unable to disclose any. In these circumstances, we are of the opinion that the sum awarded ₹ 4900/- per cu.metre, cannot be justified- there is no apparent basis for this; the award is also silent on this aspect. The claimant's counsel furthermore did not press for affirmation of the award on this score. Consequently, we direct that instead of ₹ 4900/- per cu.metre the Contractor can claim the sum of ₹ 4100/- per cu.metre (or in other words, ₹ 800/- per cu.metre less) for the quantity in question, i.e. 2820 cubic metres. The award on this score shall stand modified to ₹ 4100/- per cu.metre for 2820 cubic metres (Claim C-2).

9. No other contentions were urged in support of the appeal. The appeal, FAO 448/2014 accordingly succeeds in part, to the extent of modification in

the award, indicated in respect of Claim No. C-2; the rest of the impugned judgment is allowed. The appeal is, to the said extent, partly allowed.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

OCTOBER 1, 2015

