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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 22.05.2015

+ **FAO(OS) 282/2015**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Appellant

versus

**M/S ORIENTAL STRUCTURE ENGINEERS LTD
GAMMON INDIA LTD (JV)** ... Respondent

Advocates who appeared in this case:-

For the Appellant : Mr A.B. Dayal, Sr Advocate with Ms Tanu Priya Gupta and
Ms Khushbu Sahu

For the Respondent : Nemo

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No. 9564/2015s

The exemption is allowed subject to all just exceptions.

FAO(OS) 282/2015 and CM No. 9563/2015

This appeal is directed against the judgment and order dated 05.03.2015 passed by a learned Single Judge of this court in OMP 247/2014 which was a petition under Section 34 of the Arbitration and Conciliation Act, 1996

(hereinafter referred to as 'the said Act'). The said petition had been filed by the National Highways Authority of India (NHAI), the appellant herein. It was in challenge to an award dated 11.11.2013 passed by the Arbitral Tribunal in respect of the disputes between the appellant and the respondent.

2. The disputes which arose between the parties were as under:-

- “a) Change of currency proportion as 100% in Indian Currency (INR) and 0% in Foreign Currency (US Dollar) (USD) with effect from 1st September 2004 onwards till completion of work.
- b) Payment of the additional price adjustment amount considering Indian basket of indices for 100% of the value of works executed during the period from 1st September 2004 onwards till completion of work.
- c) Payment of loss incurred by the claimant due to USD exchange rate variation while receiving 20% payments in USD during the period from 01st September 2004 onwards.
- d) Interest @ 12% p.a. (compounded monthly) from the due date till date of payment.”

The disputes had been referred to the Dispute Review Board which gave its findings on 30.12.2012. Thereafter, the matter was taken before the Arbitral Tribunal by the respondent inasmuch as the appellant had not accepted the recommendations of the DRB. The sole point of controversy in the present

case is with regard to clause 72.4 of the contract between the appellant and the respondent. Clause 72.4 of the contract reads as under:

“The foreign and local currency portions of the balance of the Contract Price shall be amended by agreement between the Employer and The Contractor to reflect any substantial changes in the expected foreign and local Currency requirements of the Contractor during the execution of the works, provided that

- a) The Contractor shall inform the Employer and the Engineer whenever any such substantial change may occur or
- b) The Engineer may recommend a review of such expected requirements if in his judgment there is evidence of a change in the country of origin of materials, Plant, or services to be provided under the Contract which should result in any substantial change of such expected requirements.”

(underlining added)

In respect of this dispute, the respondent had claimed various amounts for different periods as indicated below:-

- “a) Payment of Rs 6,08,99,978/- as additional price adjustment considering the Indian basket of Indices for 100% of the value of the works executed during 1st September 2004 to 31st December 2008;
- b) Payment of Rs 11,57,311/- as additional price adjustment for the period from 1st January 2009 to 31st May 2009;
- c) Payment of additional Price Adjustment of Rs 19,88,636/- for the period from 1st June 2009 to 31st October 2010;

- d) Payment of additional price adjustment amount for the period from 1st November 2010 till completion of works;
- e) Payment of Rs 2,26,94,848/- being the exchange rate loss incurred by the claimant in receiving 20% of payments in US\$ during the period from 1st September 2004 till 31st October 2010 and also exchange rate loss thereafter till completion of works;
- f) Payment of interest on the above sums @ 12% per annum compounded monthly;
- g) Payment of sums in Indian currency; and
- h) Payment of cost of Arbitration.”

The Arbitral Tribunal, however, awarded a total sum of Rs 4,60,73,452/- for the period 01.08.2005 to 31.01.2013 and a further sum worked out thereafter till completion of the work. In addition, interest was also awarded with which we are not concerned.

3. It is evident from the impugned order that the Engineer had recommended the change in the components of foreign and local currency requirements. This was more or less accepted by the Dispute Review Board. The Arbitral Tribunal also awarded the claim on the basis of the recommendations subject to the fact that for the period prior to 01.08.2005, it was not awarded in favour of the respondent and the award was only in respect

of the period 01.08.2005 onwards. This is so because the adjustment had already been done upto IPC 35.

4. The controversy that was raised was that when the contract was entered into, the distribution of the Indian rupee component and the US\$ component was in the ratio of 80:20. It was specifically stipulated in clause 72.4 that this ratio could be changed when there was any substantial change in the expected foreign and local currency requirements of the contractor (respondent). According to the learned counsel for the appellant, the change was subject to two conditions being satisfied which were stipulated in sub-clause (a) and sub-clause (b) of the clause 72.4 of the contract. First of all, the contractor was to inform the Employer and the Engineer whenever any substantial change which required a change in the currency component occurred. Secondly, the Engineer could recommend a review of such expected requirements of currency components if in his judgment there was evidence of a change in the country of origin of materials, plant, or services to be provided under the contract which would result in any substantial change of the expected requirements. According to the learned counsel for the appellant, no such substantial change had been brought to the fore by way of any evidence. Yet, the Engineer recommended a review of the change in percentage of the Indian Currency Component and the Foreign Currency Component. In sum, the learned counsel for the appellant submitted that before the Engineer could recommend a review

of the expected requirements, his judgment ought to have been based on some evidence upon consideration of objective criteria with regard to there being a substantial change so as to alter the expected requirements with regard to foreign and local currency requirements. He submitted that in the present case there was no such objective analysis of a substantial change nor any evidence had been produced.

5. We have examined the recommendations of the DRB as well as the Award made by the Arbitral Tribunal and the decision of the learned Single Judge. We find that the Engineer after a detailed review has recommended the change in the local and foreign currency ratio. The Arbitral Tribunal has examined this aspect as under:-

“5. The case of the claimant is that the claimant in its Bid (p22-CD/01) had sought payment for the work in the proportions as given below:

Local Currency	Rs 2,600,053,163/-	Rs 2,600,053,163/-	80%
US\$ @ Rs 48.09	US\$ 13,516,600	Rs 650,013,291/-	20%
Total Bid Price	Rs 3,250,066,454/-	(Excluding provisional sums and after discount)	

During the course of execution of the works, the claimant sourced most of the inputs from India, in pursuance of sub clause 36.1 of the conditions of contract. In consequence thereof, the requirement of

US\$ came down substantially. The claimant proposed on 6th October 2003, (p32-CD/01) change in currency proportion of payment to 95.75% INR & 4.25% US\$ with effect from 1st August 2003.

6. The Engineer carried out a detailed review of the request made by the claimant for this revision on the basis of data available with him and keeping in view the advance recovery balance, had recommended for respondent's approval, vide exhibit C-06 (p38-CD/01) amendment of contract for change in local and foreign currency proportions as 88% and 12% respectively, effective from April 2004 onwards.

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11. Sub-clause 36.1 in the "Conditions of Particular Application (COPA)" in the Contract Agreement further stipulates that:

"The Contractor is encouraged to the extent practicable and reasonable, to use materials. Contractor's Equipment, Plant and supplies from sources within the country of the Employer, as stipulated in the Appendix to Bid".

12. Sub-clause 70.3 of the conditions of contract provides for changes in price adjustment to reflect the actual currency requirements and the actual country of origin of inputs. It is, therefore, clear that not only the contract

provided for revision of the currency proportions in circumstances that may warrant such revision, but the contractor is also encouraged to procure as much of material, equipment, plant and supplies as was practicable and reasonable from sources within the country of the employer, in this case India.

13. The contract agreement in sub clause 36.1 of COPA specifically encourages the claimant to use materials, supplies and equipment from within the country of the Employer, so far as was practicable and reasonable. The claimant cannot therefore be faulted or put to any detriment for doing so. It is evident from sub clause 72.4 that when circumstances so demand, “the foreign and local currency portions of the balance of the Contract Price shall be amended.....” and it is for the Engineer to be satisfied in his judgment of the evidence of a change for him to recommend a change in currency proportion of payment. That the Engineer had acted accordingly, the foreign and local currency portions of the balance of the Contract Price shall have to be amended, albeit by agreement between the Employer and the Contractor.”

(underlining added)

6. Insofar as the finding and the review by the Engineer and the recommendations made by the DRB as well as the finding returned by the Arbitral Tribunal are concerned, those are findings of fact and we cannot delve

into that that area of consideration. On facts, the Engineer has recommended that there should be an alteration in the foreign exchange and local currency components. This was necessitated because of the circumstance that most of the items were sourced in India. The fact that the contractor could source the items from within India was also a recommendation as would be evident from clause 36.1 of the contract which has also been noticed by the Arbitral Tribunal. Therefore, the Arbitral Tribunal rightly held that the contractor having sourced the items from India cannot be faulted. This in itself has been considered as substantial change within the meaning of the expression as occurring in clause 72.4 of the contract. The learned Single Judge has rightly observed that this is a possible interpretation that could be given to clause 72.4 of the contract and we see no reason to interfere with the view taken by him. In these circumstances, the appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

MAY 22, 2015

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