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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 17.07.2015

+ **FAO(OS) 370/2015**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Appellant

versus

M/S SUNWAY CONSTRUCTION SDN BHD ... Respondent

Advocates who appeared in this case:

For the Appellant : Ms Ayushi Kiran

For the Respondent : Mr Amit George with Ms Rajsree Ajay

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM 12271/2015

Allowed subject to all just exceptions.

CM 12269/2015

We have heard the learned counsel for the parties. The delay is condoned.

The application stands allowed.

FAO(OS) 370/2015 & CM 12268/2015 & CM 12270/2015

1. This appeal is directed against the judgment and/ or order dated 13.03.2015 passed by a learned Single Judge of this Court in OMP 166/2015,

which was a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') in respect of an Award dated 30.09.2014 passed by the Arbitral Tribunal. The said petition was filed by the appellant herein being aggrieved by the said Award. The Arbitral proceedings arose out of an agreement dated 11.08.2005 entered into between the appellant and the respondent for rehabilitation and upgrading of Km 406.00 to km 449.150 of NH-76 to 4 lane configuration in the State of Rajasthan, Contract Package - EW-II (RJ-9) (hereinafter referred to as 'the contract').

2. Essentially, the dispute centres around two amounts. First of all, there is an amount of Rs 3,39,31,497/-. This amount had been withheld by the petitioner on account of certain observations made by the Comptroller and Auditor General of India in an enquiry which he undertook in January, 2010. This is an undisputed amount certified for payment, but has not been paid to the respondent because of the observations of the CAG. It essentially relates to the excise duty liability. The learned counsel for the appellant submits that as long as that liability stands and the vigilance enquiry is in progress, the said amount cannot be paid. This aspect of the matter has been considered in detail by the Arbitral Tribunal as also by the learned Single Judge. Both have

held that there is no provision in the contract which permits the appellant to withhold payment of the said amount.

3. In response to this, the learned counsel for the appellant draws our attention to Clause 26.1 of the General Conditions of Contract which provides that the contractor shall keep the employer indemnified against all penalties and liability of every kind against the breach of any statute and/or regulation.

4. In response to this submission, the learned counsel for the respondent states that this is a condition of the contract and the respondent shall continue to be bound by this provision even if the payment of the said amount of Rs 3,39,31,497/- is made. He further submitted that Clause 26.1 was only an indemnity clause and the respondent shall continue to be bound by the said clause and shall keep the appellant indemnified against all penalties and liability of every kind against any breach of any statute and/ or regulation. We accept the view expressed by the learned counsel for the respondent.

5. Consequently, we feel that no interference is called for in the impugned order or Award directing the appellant to make the payment of

Rs 3,39,31,497/-. This would, however, be subject to the indemnity given by the respondent under Clause 26.1 which shall continue to hold good.

6. The second dispute is with regard to an amount of Rs 2,28,43,270.52. Insofar as this amount is concerned, we note that in the Section 34 petition, which was filed by the appellant, ground 'D' has referred to the same. In the said ground, it was mentioned that the contractor had repeatedly and persistently disputed the final payment certificate issued by the engineer. It was also mentioned that all along the payment received by the contractor on account of variation valued by the engineer was disputed and the provisional payments were also received under protest. It was further stated that the contractor had till date not given its acceptance of the rate analysis and rate proposed by the engineer and on that account Rs 2,28,43,270.52 was kept on hold by the appellant.

7. The learned counsel for the respondent submits that he accepts the rate analysis and the rate proposed by the engineer in respect of the items which form the subject matter of the present Award. It is also accepted by him that in case there is an overlap with regard to the items covered by the present Award and the subject matter of disputes which are pending between the

parties, then the statement made here shall be binding in those cases also to the extent of the overlap.

8. Accordingly, we direct that the sum of Rs 2,28,43,270.52 shall be paid by the appellant to the respondent and simultaneously the respondent shall give a discharge certificate in respect of all claims which form the subject matter of this Award.

The appeal stands disposed of in the above terms.

BADAR DURREZ AHMED, J

JULY 17, 2015
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SANJEEV SACHDEVA, J