

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

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Judgment reserved on: 02nd September 2015

Judgment delivered on: 15th January, 2016

+ **FAO(OS) 483/2015**

M/s National Highways Authority of India

.... Appellant

Versus

M/s BSC-RBM-PATI Joint Venture

..... Respondent

And

+ **FAO (OS) 55/2015**

M/s National Highways Authority of India

.... Appellant

Versus

M/s BSC-RBM-PATI Joint Venture

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Ravi Sikri, Sr Advocate with Mr Mukesh Kumar, Ms Meenakshi Sood and Mr Deepank Yadav, Advocates

For the Respondent : Mr Pravin H. Parekh, Sr Advocate with Mr Vishal Prasad, Mr Abhinay, Ms Aakansha Mehra, Ms Sanjana, Mr Ramachandran and Ms Himanjali, Advocates

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. These two appeals arise out of two separate orders passed in two different objection petitions under section 34 of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as “the Act”) impugning the award dated 04.03.2014. Both the appellant and the respondent filed objections under Section 34 of Act. The objections filed by the appellant to the impugned award were registered as OMP No. 1394/2014 whereas the objections filed by the respondent were registered as OMP No. 1392/2014. It appears that both the objections were not clubbed together and were taken up separately and disposed of by two learned single Judges of this court on different dates. FAO (OS) 483/2015 impugns order dated 23.05.2015 in OMP 1392/2014. FAO (OS) 55/2015 impugns order dated 12.11.2014 in OMP 1394/2014.

FAO (OS) 483/2015

2. The dispute pertains to a contract awarded by the appellant to the respondent dated 14th October, 1996 for four laning including strengthening of existing two lane pavement from Barwa Adda (Km. 398.750) to Barakar (Km. 441.440) in the State of Bihar (presently Jharkhand). With regard to the said contract, dispute had arisen between the parties and two claims were referred to the Arbitral Tribunal. The first claim by the Respondent (BSC-RBM) was on account of non-payment of the amounts, certified by the Engineer in (i) the 'statement at Completion' dated 11th February 2003 and (ii) the 'final statement' dated 25th December 2003. The second claim was on account of additional costs/expenses incurred by way of commission paid by it to IndusInd Bank ('Bank') for Bank Guarantee ('BG') No179/96-97 furnished by Respondent (BSC-RBM) as performance

security ('PS'). The case here was that despite the issuance of the Defect Liability Certificate ('DLC') dated 26th May 2003, Appellant (NHAI) did not return the original BG to the Bank for the purpose of discharge.

3. Interim award dated 19th December, 2012 was passed by the Arbitral Tribunal awarding compounded monthly interest at the rate of 12% per annum in respect of the two sub-claims under claim No.1 from two different dates, i.e., with regard to amount due under the sub-claim No.1, interest was granted with effect from 8th April, 2003 (i.e. on expiry of 56 days after date of completion dated 11th February, 2003 and in respect of sub-claim No. 2, interest was awarded from 19th February, 2004 (i.e. on expiry of 84 days from receipt of final certificate).

4. It may be pertinent to note that the interim award dated 19.12.2012 was challenged by the appellant (NHAI) by filing the Section 34 Petition registered as OMP No. 518/2013, which petition was dismissed on 22.09.2014. The order dated 22.09.2014 was challenged by way of an appeal registered as FAO (OS) 518/2014, which appeal was dismissed by a Division Bench by order dated 12.12.2014. The appellant (NHAI) did not challenge the award of interest from two different dates as awarded by the Arbitral Tribunal in the interim award any further.

5. In the final award dated 4.3.2014 with regard to sub-claim No. 1, an amount of Rs. 2.97 crores has been awarded in favour of the respondent and in respect of sub-claim No. 2, an amount of Rs. 21 lakhs has been awarded in favour of the claimant/respondent. The Arbitral Tribunal had awarded

interest on the above-said two claims from a single date, that is, 19th February, 2004 by clubbing both the amounts.

6. The grievance raised by the respondent (BSC-RBM) in its Section 34 petition was that the interest was payable under clause 60.8 of the contract on the said two amounts from different dates as had been awarded at the time of passing of the interim award.

7. By the impugned order dated 25.03.2015, the learned single Judge while referring to clause 60.8 held that interest was payable from two different dates as the amount became due and payable on two different dates. The learned single Judge also noticed that the interim award also granted interest from two different dates and the said interim award had been finally upheld.

8. The learned single Judge noticing that the Arbitral Tribunal once having determined in the interim award (which award was not interfered by this Court) that the interest would be payable in respect of the two sub-claims from different dates, held that the Arbitral Tribunal committed an error in clubbing both the amounts and directing payment of interest from a common date. He further held that it was contrary to clause 60.8 of the contract. Learned Single Judge has set aside the impugned award dated 04.03.2014 to the extent it denied the respondent interest on the sum of Rs. 2.97 crores with effect from 08.04.2003 and directed that the respondent would be entitled to interest on the said sum at the rate determined by the Arbitral Tribunal from 08.04.2003 onwards till the date of payment, and has

further set aside the impugned final award to the extent that it denied the Respondent (BSC-RBM) 50% of the amount which had been paid by it to the bank for the bank commission charges and held the respondent (BSC-RBM) entitled to recover the entire amount paid by it to the bank towards bank commission charges.

9. The appellant NHAI has impugned the order dated 25.3.2015 in this appeal.

10. Having heard counsel for the parties and perused the record, we find no infirmity in the view taken by the learned single Judge. The Arbitral Tribunal while interpreting clause 60.8 at the first instance at the time of passing the interim award had held that the interest would be payable on the two sub-claims from two different dates as envisaged under clause 60.8. The interim award was not interfered with by this court either under Section 34 or under Section 37 and had become final. Once having determined that clause 60.8 would apply in the facts and circumstances of the case, there was no rationale for the Arbitral Tribunal to club both the amounts and stipulate payment of interest from a later date and to take a view different from the view taken by it earlier. On parity of reasoning, the principles that applied at the time of passing of the interim award would equally apply to the amounts found payable under the final award. The amounts found payable under the interim award and the final award are both under the two sub-claims as originally claimed by the claimants/respondents, the only difference between the interim award and the final award was that interim award was passed

based on admissions made by the appellant whereas the final award has been made on the basis of a determination arrived at by the Arbitral Tribunal. On parity of reasoning, the same principle would apply for award of interest in respect of the amount determined by the Arbitral Tribunal at the time of passing of the final award as was applicable at the time when the amount was found to be payable based on admission at the time of passing of the interim award. The view taken by the learned single judge, thus, does not call for any interference.

11. With regard to claim No. 2, which was in respect of the bank guarantee charges, the learned single Judge has found that the Arbitral Tribunal while deciding the said claim had embarked on an issue, which was not before it, namely, whether the bank was justified in demanding the bank commission charges from the respondent? The Arbitral Tribunal had concluded that the bank was not justified in doing so and awarded the petitioner only 50% of the sum spent by the petitioner towards payment of bank commission charges. The learned single Judge has noticed that the only issue before the Arbitral Tribunal was: Whether the appellant NHAH ought not to have returned the original bank guarantee in question for purposes of discharge once it had issued the Defect Liability Certificate on 26th May, 2003? and What were the consequences to the respondent on account of such failure by the appellant in not returning the original bank guarantee in question? The learned single Judge has noticed that it was not the appellant's case that the respondent had not paid the bank commission charges even beyond the date of expiry of the bank guarantee, and it was not

in dispute that it was only on account of failure of the appellant in returning the original bank guarantee that the bank insisted that till such time it was returned, the respondent should continue to pay the bank commission charges. The learned single Judge has returned a finding that it was apparent from the documents placed on record before the Arbitral Tribunal that the respondent did incur the liability to the extent claimed towards bank commission charges. This liability has been held to be attributable to the failure of the appellant in returning the bank guarantee to the bank. No justification has been found for awarding the petitioner only 50% of the amount of the commission paid to the bank. The reasoning given by the Arbitral Tribunal has been found to be contrary to the evidence on record and based on consideration of an issue, which did not arise for consideration i.e. the conduct of the bank. The award to the extent that it denied 50% of the bank commission charges to the respondent has been set aside and the respondent has been held entitled to the same.

12. We find no infirmity with the view taken by the learned single Judge. Admittedly, the Defect Liability Certificate was issued by the appellant on 26th May, 2003. On issuance of the Defect Liability Certificate, the appellant was liable to refund the original bank guarantee for discharge, which was not done. Not only was the original bank guarantee not returned, the appellant had even written to the bank by its letters dated 07.05.2003, 16.07.2003, 19.07.2004 not to release/discharge the bank guarantee. On account of the non-return of the original bank guarantee and the letters written by the appellant, the bank continued to charge commission from the

respondent. It is not disputed by the appellant that the respondent paid the said amount. Despite the said fact, the Arbitral Tribunal had awarded only 50% of the amount paid by the respondent. The liability incurred by the respondent is solely because of the conduct of the appellant. The learned single Judge in our view has rightly held that the appellant should be liable for the entire amount and the same should not be apportioned equally between the respondent and the appellant. On this ground also, the order of the learned single judge does not call for any interference.

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13. Now coming to the second appeal filed by the appellant impugning the order dated 12.11.2014 in OMP 1394/2014 which was a section 34 petition filed by the appellant impugning the arbitral award.

14. As noted by the learned single judge in the impugned order, under claim No. 1 an amount of Rs. 12,17,42,012/- was claimed by the respondent i.e. Rs. 5,52,68,871 towards basic amount and Rs. 6,64,73,141/- towards interest calculated till 31.12.2009. Under claim no. 2, the respondent sought payment of Rs. 84,97,034/- i.e. Rs. 49,32,955/- towards basic amount and Rs. 35,64,079/- towards interest calculated upto 31.12.2009.

15. As noted above, the arbitral tribunal passed an interim award with the consent of the parties on 19.12.2012. By the interim award, a sum of Rs. 2,33,90,005/- was to be released in favour of the respondent and balance sum of Rs. 3,18,78,866/- was to be adjudicated upon by the arbitral tribunal

out of the basic sum claimed under claim no. 1, as indicated above. As noted hereinabove, the interim award has been upheld.

16. The learned single judge has noted in the impugned order that with regard to the balance sum of Rs. 3,18,78,866/- under claim no. 1, the arbitral tribunal referred to the certificate issued by the Engineer of “Statement at completion”, on 11.02.2003 and the “Final Statement” issued by him on 25.12.2003. As per the statement of completion dated 11.02.2003, the Engineer had certified an amount of Rs. 5,70,32,476/- out of which as noted by the arbitral tribunal in paragraph 3.2 of the award, the respondent did not dispute the payments equivalent to a sum of Rs. 2,72,56,352/- . Thus, out of a total of Rs. 5,70,32,476/-, the dispute in so far as the statement dated 11.02.2003 was concerned, narrowed down to Rs. 2,97,76,124/-. Similarly, in respect of the final statement dated 25.12.2003, the arbitral tribunal notes in paragraph 3.3 that the respondent had found that a sum of Rs. 2,11,33,653/- was correctly certified out of a total of Rs. 2,32,36,394/-. Resultantly, in respect of this statement, the dispute narrowed down to a claim in the sum of Rs. 21,02,742/-.

17. The learned single judge has noted that the sum total of the disputed amounts in the statement at completion dated 11.02.2003 and the final statement dated 25.12.2003 which formed the basis of claim no. 1 was Rs. 3,18,78,866/- comprising of Rs. 2,97,76,124/- as per statement dated 11.02.2003 and Rs. 21,02,742/- as per statement dated 25.12.2003. The arbitral tribunal has recorded a finding that the respondent had in a statement

referred to as RD-5 dated 27.12.2012 indicated that there was no dispute with regard to the sum of Rs. 2,97,76,124/-. Thus the dispute, ultimately, was narrowed down to Rs. 21,02,742 (Rs. 3,18,78,866/- less Rs. 2,97,76,124/-). The arbitral tribunal has indicated that the sum of Rs. 21,02,742/- pertains to the two items i.e. (i). Rs. 16,64,139/- against BHR No. 54 and (ii). Rs. 4,38,603/- for BOQ items No. 8, 11 and 8.13.

18. The learned single judge has noted that the arbitral tribunal has directed the payment of the remaining portion of the claim of Rs. 21,02,742/- essentially on the ground that no evidence whatsoever was produced by the appellant to support its difference of opinion with the certification issued by the Engineer.

19. The learned single judge has rejected the contention of the counsel for the appellant that the arbitral tribunal had committed an error in so far as claim no. 1 was concerned by not advertng to the quantities and rates as indicated in an earlier award passed by it on 05.05.2010 as on being queried as to whether this submission was advanced before the arbitral tribunal, the counsel contended that though oral submissions were made, they were not recorded by the arbitral tribunal. On the counsel being queried further as to whether a ground to that effect was taken in the captioned petition, the counsel submitted though a ground in those terms had not been taken, a ground had been taken to the effect that arbitral tribunal had failed to take into account the findings recorded in its own award dated 05.05.2010. The attention of the court in this behalf was drawn to ground (C).

20. The submissions of the counsel for the appellant in that behalf were not accepted as the ground taken involved appreciation of material placed before the arbitral tribunal. The arbitral tribunal has recorded the factum of acceptance of the claim in issue by the appellant in detail in paragraphs 3.2 to 3.6, these findings cannot be disturbed till such time appropriate pleadings are made in that behalf. In respect of the truncated portion of claim no. 1, the arbitral tribunal has recorded that no evidence was produced by the appellant to support its challenge to the certification carried out by the Engineer. No evidence to the contrary was pointed out before either the learned single judge or us.

21. We find no infirmity in the view taken by the learned single Judge. Findings of fact returned by the Arbitral Tribunal cannot be interfered with in objections under Section 34. This becomes fortified when there are no pleadings or evidence to the contrary either before the Arbitral Tribunal or before the Court. The challenge to the impugned award with regard to claim No. 1 thus cannot be sustained.

22. With regard to claim No. 2, i.e. with regard to the bank charges for non-return of the original bank guarantee by the appellant, the learned single Judge has noticed that the provisions of sub-clauses 10.2 of the General Conditions of Contract (GCC) [(as modified by the Conditions of Particular Application) (CPA)] required the appellant to return the performance security furnished in the form of bank guarantee to the respondent not later than 28 days of issuance of the Defect Liability Certificate and in respect of

the imported equipment on furnishing of necessary documentary evidence. The learned single Judge has confirmed the finding that the appellant was at fault in not returning the original bank guarantee and as such should be liable to bear the expenses for the same. The learned single Judge has held that the appellant should be called upon to bear at least 50% of the basic amount claimed under this head.

23. The appellant's objection petition (OMP No. 1394/2014) subject matter of FAO (OS) 55/2015 was taken up by the learned single judge independent of the respondent's objection petition (OMP No. 1392/2014), subject matter of FAO (OS) 483/2015. Thus, the challenge made by the respondent to the restriction of the award with regard to the said claim to 50% was not before the learned single judge when he passed the order dated 12.11.2014 impugned in FAO (OS) 55/2015. The finding thus returned in the order impugned dated 12.11.2014 in OMP 1394/2014, that the appellant should be called upon to bear "at least 50% of the basic amount", would not be in conflict with the finding returned in the impugned order dated 23.05.2015 in OMP 1392/2014 that the restriction of the amount to 50% is not justified and the same should be 100%. The learned single judge considering appellant's objection (OMP 1394/2014) by order dated 12.11.2014 has upheld the award of 50% by recording that the appellant was at fault and should bear at least 50%. The other learned single judge considering respondent's objections (OMP 1392/2014) by order dated 23.05.2015 has held that the restriction to 50% not justified and has thus

awarded 100% of the claim. We find the same to be justified and not requiring any interference.

24. In view of the above, we find no infirmity with the view taken by the both learned single Judges in the respective impugned orders. The appeals are accordingly dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

January 15, 2016
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