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

+ **O.M.P. (COMM.) 136/2016**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through: Mr. Karunesh Tandon, Advocate.

versus

ORIENTAL PATHWAYS (AGRA) PVT. LTD. Respondent
Through: Mr. Anil Airi, Senior Advocate with Mr.
Ravi Krishan Chandna, Ms. Sadhana
Sharma & Ms. Bindiya, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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25.01.2017

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 (Act) filed by the National Highways Authority of India (NHAI) is directed against an Award dated 30th March, 2015, passed by the Arbitral Tribunal (AT) in the disputes between the parties arising out of Concession Agreement (CA) dated 10th March, 2006 entered into between the NHAI and the Respondent for improvement and widening of existing 2 lane road to 4 lane dual carriage way (Agra – Bharatpur Section) in the States of Uttar Pradesh and Rajasthan on build, operate and transfer (BOT) basis.

2. NHAI had invited proposals under a single stage process from bidders under its notice inviting proposal on 24th April, 2006 for the above work. The scope of the project was described in Schedule A to the Agreement read

with Clause 2.1. Pursuant thereto, the Respondent was the successful bidder and the aforesaid CA agreement was entered into with it by NHAI.

3. The CA also envisaged construction of ancillary work pertaining to 13 bridges, which were defined under Schedule B thereto. In Schedule B, the work was defined under Table B-4 (and this had to be read with Clause 2.4.1 of the CA). Under Table B-4 the details of the 13 bridges, which were to be either constructed anew or re-constructed alongside the older bridge were set out. The first entry in this Table was a bridge located at km 18+100, of a length of 37 mtrs. In another column it was stated that a new three lane bridge was to be constructed along side of the existing bridge. The existing bridges were described in Table A-7 read with Clause 2.10 under Schedule A to the CA. There were 13 minor bridges and there were to be 82 culverts.

4. The case of the NHAI was that all the vendors were fully aware of the ground situation and submitted their bids only after being acquainted with the scope of the work. A letter dated 29th September, 2009 was written by the Respondent to NHAI pointing out that the location of the minor bridge was stated to be at km 18+100 whereas no such bridge existed. The Respondent accordingly sought the deletion of the said work from the punch list.

5. On 2nd December, 2010, the Independent Consultant (IC) quantified a sum of Rs.116.59 lakh to be recovered from the Respondent on account of the deletion of aforementioned minor bridge as a negative change of scope of work. An audit office note dated 18th October, 2011, recommended the recovery of costs of such minor bridge along with interest amounting to

Rs.178.55 lakh. By the letter dated 26th July, 2012, NHAI called upon the Respondent to deposit the sum of Rs.1,96,65,289 within ten days for negative change of scope due to deletion of the minor bridge No.18/1.

6. Initially OMP No.772/2012 was filed by the Respondent in this Court under Section 9 of the Act for interim reliefs. By an order dated 27th August, 2012, the Court restrained NHAI from withdrawing any amount from the escrow account in terms of the demand raised by it on 13th August, 2012.

7. It is stated that NHAI by letter dated 5th September, 2012 invited the Respondent for a conciliation meeting at its headquarters. However, no settlement could be arrived at. The matter, therefore, came to be referred to arbitration before the AT.

8. By the impugned Award, the AT held that the minor bridge did not form part of the stretch of the highway entrusted to the Respondent for the above work. It accordingly held that no recovery of the aforementioned sum of any kind could be made from the Respondent in that regard.

9. The short question before the AT was whether the recovery of the costs negative variation could at all be made by NHAI. The case of the Respondents was that the minor bridge 18/1 was not part of the scope of the work at all. The CA showed that the work pertained to development of the highway from km 17.756 to km 62.295 on NH-11 only. There was no obligation of the Respondent to perform any work beyond the above scope of the work. For any change in the scope of the work, the procedure under Clause 17 had to be followed. The finding of the AT was that NHAI never

issued any notice of change of scope of work as mandated by clause 17.2 of the CA.

10. Importantly, the AT made the distinction between the location of the minor bridge and it being identified as such. In other words the minor bridge in question was not “numbered as MB # 18/1” but its location was supposed to be at km 18+100. Unless there was an existing bridge at location km 18+100 the question of a new minor bridge having to be constructed alongside did not arise. The legal expert of the IC by a letter dated 26th November, 2008 also concluded that “the construction of bridge No. 18/1 is not within the scope of work of the Concessionaire.” It is on this basis that the IC by a letter dated 28th November, 2008 also opined that the Respondent was not contractually obliged to construct the said minor bridge at 18+100.

11. The above conclusion of the AT is a factual one. Even NHAI admitted in its written synopsis in para 9 before the AT “the minor bridge is at chainage 17.347.” The AT returned the following factual finding in para 10.11 of the Award:

“10.11 In view of the facts of the case brought out above, it is established that minor bridge 18/1 is falling at chainage 17.347 which is, of course, outside the Project Highways (Km 17.756 to 62.295) but in the Concession Agreement, there is a provision for reconstruction of this bridge 18/1 as is evident from table B-4 of the abovesaid Concession Agreement.”

12. The above factual determination is unable to be shown to be perverse by NHAI. The consequential finding in para 10.24 of the impugned Award to

the effect that the provision in the contract for widening of bridge 18/1, is inconsistent with the main CA, which was only to develop section km 17.756 to km 62.295 of NH-11, does not therefore call for interference.

13. The AT accepted the case of the Respondent that in order to receive payment from NHAI it was compelled to issue the completion certificate by giving an undertaking that it would pay NHAI for the value of the work assessed due to deletion of the aforesaid minor bridge. The AT rightly held that in the absence of NHAI following the procedure in terms of Clauses 17.2(c) and 17.3 for change in the scope of work, such undertaking by the Respondent Concessionaire cannot justify NHAI denying its claim.

14. None of the above conclusions of the AT have been able to be shown to be contrary to the evidence on record or any clause of the CA. None of the grounds under Section 34 of the Act have been made out.

15. The petition is accordingly dismissed. No costs.

S. MURALIDHAR, J.

JANUARY 25, 2017

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