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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (COMM.) 232/2016

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through: Mr. Mukesh Kumar and Ms. Gunjan Sinha
Jain, Advocates.

versus

BSC-RBM-PATI JOINT VENTURE Respondent
Through: Mr. Pravin H. Parekh, Mr. Vishal Prasad,
Ms. Nandita Bajpai and Ms. Swati Bhardwaj,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

03.01.2017

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1. The National Highways Authority of India (NHAI) has filed this petition under Section 34 of the Arbitration & Conciliation Act, 1996 (Act) challenging the Award dated 10th October, 2014 as well as a further order dated 22nd January, 2015 passed by the Arbitral Tribunal (AT) modifying the said Award in the disputes between the NHAI and BSC-RBM-PATI Joint Venture (hereafter referred to as the 'Contractor') arising out of a contract agreement dated 24th July, 1997 for execution of Four laning and strengthening of existing two lane pavement between Raniganj (KM 474) and Panagarh (KM 515.236) section of NH-2 in West Bengal.

2. The NHAI was the claimant before the AT. The NHAI filed three claims and the Contractor filed three counter claims. The AT has by the impugned Award allowed one of the claims of the NHAI in part and three counter

claims of the Contractor.

3. It is stated at the outset by Mr. Mukesh Kumar, learned counsel appearing for the NHAI that in the present petition, NHAI does not challenge the Award in respect of counter claim No.2 sub claim No.1 and has partially challenged the Award to the extent it is against the NHAI regards sub claims 2 and 3. The NHAI also challenges the Award in respect of Claim Nos.1 and 3, Claim No.2 (which has been rejected) and counter claim No.1 of the Contractor, which has been allowed.

4. Claim Nos.1 and 3 concerned the applicability of 'Rates of Provisional Sums Items' in the sum of Rs.2,73,19,610. The issue concerned the removal of unsuitable material at embankment foundation and disposal as per direction of the Engineer. The Contractor relied upon Clause 10.03 of the Conditions of Particular Application (COPA) in respect of which under Bill No.10 under the title "provisional sums", the Contractor had quoted a rate of 150 per cubic metre. Clause 10.03 reads as under:

"10.03. Removal of unsuitable material at embankment foundation and disposal as per direction of the Engineer complete as per Technical Specification Clauses 301 and 305."

5. The case of the NHAI, on the other hand, was that the removal of the unwanted material was covered under Clause 58.2 read with clause 52 of the contract agreement and clause 2.1 of the COPA. Reliance was placed on the definition of "provisional sums" in Clause 58.1 to urge that it is included in the contract as such and forms part of the bill of quantities (BOQ). It was pointed out that the rates quoted in bill items 1 to 9 are contract rates

whereas rates quoted in BOQ are tendered rates. Clause 52 uses the expression contract rates whereas clause 58.3 uses the term ‘tender rates’. The submission is that the rates quoted under BOQ item No.10 are not part of the contract and cannot therefore be applied *ipso facto* to determine a claim of the Contractor. It is submitted that the rates determined by the Engineer in terms of BOQ item No.10 were inapplicable and contrary to clause 52 and therefore not binding on NHAI. Reliance is placed on the decision in ***Ram Chandra Reddy v. State of Andhra Pradesh AIR 2001 SC 1523.***

6. The further submission on behalf of the NHAI is that the provisional sum rates quoted would not be applicable unless prior approval of the NHAI is taken. In terms of clause 58.2 (a) of all items of work operated under bill No.10 are to be valued as “variations” under clause 52.1. In terms of clause 2.1 of the COPA the Engineer has to obtain specific prior approval of NHAI before taking any action for issuing or approving variation orders which have financial implications except in emergency situation as reasonably determined by the Engineer, except in emergency, unless specific prior approval of the NHAI is obtained.

7. Mr. Mukesh Kumar sought to rely on the dissenting Award of one of the members of the AT in support of the submission that it would be against the public policy of India to pay for any item as per rates that are not competitive. Thus, the payment of the provisional rates quoted by the Contractor under Bill No.10 was against public policy.

8. On the other hand, Mr. Pravin Parekh, learned Senior Advocate appearing

for the Contractor relied upon the majority Award where there is a detailed discussion of these very clauses. He pointed out that the majority Award has given cogent reasons for not accepting the plea of NHAI and there was no ground made out in terms of Section 34 of the Act for interference.

9. The above submissions have been considered. The majority Award points out that there is no basis in the argument of the NHAI that provisional sums are to be treated as a variation and not as part of the contract agreement. The letter of acceptance mentions that the rates quoted in the tender have been accepted. The contract agreement itself mentions that the priced BOQ in Section VI, which includes Bill No.10 of the bidding documents, shall be deemed to form part of the contract agreement and has to be read and construed as a part thereof. Further as rightly pointed out by the majority Award, Clause 52 provides for evaluation of valid works on the price set out in the contract as the first alternative. It only lays down a method for evaluation of the varied items of work. Since rates were available in Bill No.10 they had to be applied. The Engineer, in fact, held them applicable first in February, 2000 and again in May, 2001. The majority Award also notes that throughout the IPCs were processed on that basis. As regards seeking prior approval of NHAI by the Engineer it was not obligatory.

10. The dissenting Award referred to Item 2.01 which talked of roadway excavation necessary for construction of the roadway complete as per TS-301 which envisaged excavation of both ordinary soil as well as marshy soil. The Contractor had quoted Rs.40 per cubic meter for ordinary soil. After discussing TS Clause 301.3.11 which spoke about unsuitable soil, the

dissenting Award concludes that the item of work would include “all types of ordinary soils” as per the specifications clause. Consequently, it concluded that Item 2.01 of the BOQ would cover both excavation of suitable soil as well as unsuitable soil as long as the category of soil is described in Clause 301.2.1 of the technical specification. On the other hand, the majority found that the NHAI had required the bidders to quote the rates for all individual items which included 10.3 and 10.4. No quantities were cited in the tender but only rates were asked for. In that sense, NHAI had not followed Clause 58 while calling for the bids. Consequently, the Engineer’s conclusion that it could not be treated as varied item under Clause 52 was found by the majority to be correct. Even if Clause 52 was considered applicable then as per the first option thereunder the rates available under available BOQ items 10.3 and 10.4 had to be adopted. Therefore, the Engineer was right in adopting the said rates.

11. The majority noted the contention of the Contractor that it had received payments at the rates decided by the Engineer for more than two years and under Clause 2.1 of the GCC such approval by the NHAI should be deemed to have been given. The Engineer certified the payments of the BOQ rates in terms of BOQ item price 10.03 and 10.04 in the various IPCs for more than two years on the basis that this was not varied work but part of the contract. The majority referred to the decision in *Abdulla Ahmed v. Animendra Kissen Mitter 1950 AIR 15* and held that from the conduct of the parties throughout the long period of three years of execution of the work “the inevitable conclusion is that both parties understood that payment for the BOQ Item Nos. 10.03 and 10.04 was required to be made at the BOQ rates

and not as variation items.” Claim No.3 was found to be part of Claim No.1 and it was not pressed by NHAI.

12. The Court is satisfied that the view taken by the majority of the AT cannot be said to be contrary to the clauses of the contract much less a view that is implausible or perverse. Clause 10.03 was specific to excavation of unsuitable soil and was straightway attracted rather than Item 2.01 which only talked of ‘ordinary soil’ in a general sense. If the majority of the AT preferred to apply Clause 10.03 on that basis, that view cannot be said to be shocking to the judicial conscience so as to warrant interference. Consequently, the majority Award rejecting Claims 1 and 3 of the NHAI does not call for any interference.

13. The next ground of challenge is as regards the rejection of the claim for Rs.3,40,97,324 on account of the rates determined by the Engineer for variations. Variation items could be of three types. Under the first was the rate of variation item of works derived from the BOQ rates. Here the price adjustment was in accordance with Clause 70 of COPA. The second was rates of the variation items derived from market rates. Varied items valued at current price were not eligible for price adjustment. The third was a combination of the BOQ and the market rates. To the extent that the component was based on market rates it was not eligible for escalation. The Contractor worked out escalation at the rates for varied items of work consisting of two components namely combination of BOQ rates and current rates. The majority found that the escalation payable on the different variation orders (‘VOs’) had already been accounted for the Award in

respect of Claim No.2/Counter-Claim No.1 except VO Nos. 26 and 44 in respect of which Rs.11209 was found admissible. Therefore, as regards Counter-Claim (Sub-Claim No.1) the majority of the AT awarded Rs.41,98,683 of which an extent of Rs.32,49,784 was admitted by NHAI itself. It was further noticed that while the amounts recovered in IPCs 26 and 27 were repaid by NHAI in IPC 48. The amount recovered in IPC 28 was missed.

14. It was not denied by NHAI that the amount of Rs.37,54,453 had been deducted from IPC-28. It was found that the counter-claim for Rs.37,54,453 was merely an amendment of the initial counter-claim for short payments against IPCs 26 and 48. The majority of the AT found that the counter-claim was not time barred and hence the contemporary documents filed by the Contractor. It was held that a sum of Rs.37,54,453 had in fact been deducted by the employer from the amount certified by the Engineer which had not been repaid in IPC-48 or thereafter. This sum was accordingly awarded to the Contractor against sub-claim No.2.

15. Apart from saying that the rates recommended by the Engineer were unreasonable and inconsistent nothing has been placed before the Court to come to a different conclusion as regards the rates for variations. The AT had to necessarily go by the clauses of the contract and that the view it had taken was a plausible one to take.

16. Under counter-claim No.2 and sub-claims 2 and 3 the Contractor disputed the method of calculation. Again sub-claim No.3 of counter-claim No.2 as regards interest, it is pointed out that part of the interest of

Rs.86,76,070 was calculated on the sum of Rs.93,18,384 which was a recovery made by the NHAI as per the certification of the Engineer. The majority AT upheld this part of the claim of NHAI. It was held that again under sub-claim No.1 a sum of Rs.41,98,683 had been awarded as against Rs.93,18,384. Therefore, a sum of Rs.51,19,701 was not eligible for payment of interest. On a proportionate basis the amount of interest not payable worked out to Rs.13,06,798. Consequently, the majority of the AT awarded a sum of Rs.84,66,713 against the second part of counter-claim No.2 for payment to the Contractor against the Statement at Completion.

17. Learned counsel for the NHAI was unable to point out why the above determination by the majority of the AT suffered from any legal infirmity attracting any of the grounds under Section 34 of the Act.

18. Lastly, it was stated that the interest @ 12% per annum from the date of the Award till the date of actual payment was excessive. The Court does not agree with the above submission. The rate of interest @ 12% per annum does not appear to be excessive or unreasonable.

19. For the aforementioned reasons, the Court finds no grounds having been made out for interference with the impugned majority award of the AT.

20. The petition is accordingly dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

JANUARY 03, 2017/b'nesh/dn