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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **O.M.P. 351/2015**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner
Through: Mr. Rajiv Kapoor, Advocate.

versus

SRC PROJECTS PRIVATE LIMITED ..... Respondent
Through: Ms. Meenakshi Sood, Advocate.

CORAM: JUSTICE S. MURALIDHAR

O R D E R
% **21.02.2017**

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to the impugned Award dated 23rd March, 2015 passed by the learned Arbitral Tribunal ('AT') in the dispute between the Petitioner, National Highways Authority of India ('NHAI'), and the Respondent, SRC Projects Private Limited, arising out of the Contract Agreement dated 14th March, 2006 whereby the work of strengthening and upgradation with paved shoulders from Kangayam (Km. 277/400) to Coimbatore (Km. 332/600) of NH-67 in Tamil Nadu Package KC-2 was awarded to the Respondent.

2. There was only one claim i.e., Claim No. 5 which formed the subject matter of the arbitration. This was for costs incurred by the Claimant on account of filling of wells at various locations. The amount claimed was Rs. 39,46,805 together with interest worked out till September 2014 amounting

to Rs. 19,85,116.

3. The Engineer ordered payment for the work done under Bill of Quantities ('BOQ') Item No. 1.04 (p). The AT found that the Respondent had executed the work in accordance with the instructions and as per the methodology given by the Engineer. There was no dispute between the parties about the quantity of the work done executed, work measured and the payable rate of the item of work. The total quantity executed by the Respondent was 5561.25 cum. However, in the final bill, the payment of the executed work was restricted to the quantity of Item No. 1.04 (p) i.e., 25 cum only. The payment made of the executed work in the IPCs at 75% of the rate was recovered from the Respondent in the final bill.

4. The AT also found that post-execution approvals were in fact given for the variations beyond the permissible limits. The Variation Committee ('VC') approved the variation on 23rd February, 2012 for the work executed and completed upto 30th June, 2010. The final bill also revealed that there were many items of work in which the variation had exceeded the permissible limit of 25% of the BOQ quantities. Therefore, there was no reason for the VC to have not approved the variation order submitted to it by the Project Director ('PD'), PIU, Karur on 24th December, 2011 in respect of filling of wells. Even the Disputes Resolution Board ('DRB') recommended for making the payment to the Respondent. However, NHAI issued a notice of dissatisfaction and invoked the arbitration clause.

5. One of the grounds on which NHAI resisted the above claim was that the

Respondent has issued No Claim Certificate' on 30th July, 2012 at the time of requesting for extension of time ('EOT'). Two reasons were given by the AT in the impugned Award for rejecting the above plea. The first was that the claim had nothing to do with EOT. Secondly, the NOC was given by the Respondent on 30th July 2012, after the work had been taken over by NHAI. However, the cause of action of the present dispute arose on 1st December 2012 when the payment of the "executed work' was denied to the Respondent in the final bill prepared by NHAI.

6. The AT also found that the Engineer in the very first instance on 30th September, 2009 had ordered that the payment of the variation would be measured and paid as per the BOQ Item No. 1.04 (p). The Respondent by its conduct had agreed for the same. There was no question of even fixing any new rates as contended by NHAI. Consequently, the AT awarded payment of balance quantity of executed work at the BOQ rate of Rs. 619.00 per cum, less 8% rebate i.e., Rs. 569.48 per cum. Further, the Respondent was held entitled to the payment of balance quantity of 5,344.25 cum @ Rs. 569.48 per cum and, therefore, worked out at Rs. 30,43,443 only and an additional sum of Rs. 7,79,784 towards price adjustment was also awarded. The Respondent was awarded simple interest @ 10% per annum for the aforementioned sum from 1st March, 2013 till the date of the Award and 18% per annum from the date of the Award till its payment. If the awarded amount was paid within three months no further interest would be payable for the said period. The AT also awarded the Respondent costs of Rs. 2 lakhs.

7. Mr. Rajiv Kapoor, learned counsel appearing for the Petitioner assailed the impugned Award by urging that NHAI had to approve the variations of work that had been approved by the VC. In the circumstances, the AT ought not to have entertained such a plea. The awarded amount, according to him, was contrary to the agreement and in violation of Section 28 (3) of the Act. The reasons given by NHAI for making deductions had not been dealt with by the AT. The point about the Respondent by its letter dated 30th July 2012 having given an undertaking that no claim would be made towards extra costs associated with EOT was not appreciated by the AT. Finally, it is submitted that no costs could have been awarded by the AT contrary to Clause 67.3 (vii) which stipulated that the fee and expenses for the arbitration proceedings would be borne equally by both parties.

8. The above submissions have been considered.

9. As already noticed hereinabove, the AT has returned a factual finding that the Engineer had in fact approved the variation. It was further factually found that the variation was beyond the permissible limit of 25% of the BOQ quantities. The AT rejected the plea of NHAI that filing of wells was not approved by it. In the circumstances, the AT found that there was no legitimate ground to deny payment to the Respondent for the additional work. The view taken by the AT on the documents and evidence before it appears to be a plausible one. Indeed, NHAI has not been able to put forth any legitimate basis to deny to the Respondent payment for the work done. As observed by the AT, the Respondent had certainly not carried out the additional work gratuitously.

10. Further, considering what has been ordered to be paid are the rates as per the BOQ it cannot be said that the amount awarded was excessive. Even the rate of interest appears to be reasonable.

11. As regards awarding of costs of Rs. 2 lakhs, Mr. Kapoor is right in his submission that this is contrary to Clause 67.3 (vii). The Court finds that there is no possible explanation for the award of costs by the AT in favour of the Respondent in the teeth of the above clause. Consequently, that portion of the Award which grants the Respondent costs of arbitration in the sum of Rs. 2 lakhs is hereby set aside.

12. Except to the above extent, the challenge to the impugned Award on merits fails. The petition is disposed of in the above terms.

S. MURALIDHAR, J

FEBRUARY 21, 2017
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