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

Decided on: 07.01.2019

+ O.M.P. (COMM) 1/2019

NATIONAL HIGHWAY AUTHORITY OF INDIA..... Petitioner

Through: Mr. Ramesh Kumar with Mr. Gaurav
Mishra, Advs

versus

M/S BLA PROJECT PVT LTD

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

I.A. No. 34/2019 (Exemption)

1. Allowed, subject to just exceptions.

O.M.P. (COMM) 1/2019

Prefatory Facts:

2. This is a petition which seeks to challenge an award dated 31.08.2018.

3. The respondent i.e. the original claimant, had lodged 13 claims while the petitioner i.e. the original respondent, had lodged 7 counter claims.

4. Via the impugned award, the Arbitral Tribunal (in short 'A.T.') has awarded a total sum of Rs. 4,72,82,443/- along with interest at the rate of 10% per annum with effect from 01.09.2018.

4.1. Furthermore, the A.T. has also held that if the awarded amount is not paid as indicated in Annexure 1 appended to the award within the stipulated period, interest at the rate given in the award will continue to run.

4.2 The interest, thus, quantified against claims 1 to 10 is a sum of Rs. 1,73,13,492/-. This interest is quantified upto 31.08.2018.

5. As indicated above, the principal amount awarded by the A.T. qua thirteen claims lodged by the respondent is a sum of Rs. 4,72,82,443/-.

6. A brief description of the claims and the amounts awarded against them in favour of the respondent as set out in para 8.1 of the impugned award, for the sake of convenience, is set out hereafter: -

“ 8.1 Amount as payable by the Respondent to Claimant.

<i>Claim No.</i>	<i>Claim Description</i>	<i>Amount (in Rs)</i>
<i>1</i>	<i>Payment against 1st RA Bill including refund of Security Deposit and interest on mobilization advance</i>	<i>34,34,408.00</i>
<i>2</i>	<i>Balance quantity of work</i>	<i>4,76,780.00</i>
<i>3</i>	<i>Value of work done at site (Non BOQ item)</i>	<i>11,99,696.00</i>
<i>4</i>	<i>Financial Charges</i>	<i>14,91,631.30</i>
<i>5</i>	<i>Refund of revoked amount against Bank Guarantee towards Performance Security</i>	<i>1,95,81,134.00</i>
<i>6</i>	<i>Expenses towards Establishment</i>	<i>27,94,000.00</i>
<i>7</i>	<i>Idling of Plant & Machinery</i>	<i>34,05,067.00</i>
<i>8</i>	<i>Idling of site Overheads</i>	<i>24,09,037.00</i>
<i>9</i>	<i>Loss of profit on amount of the work not executed</i>	<i>1,24,82,670.00</i>
<i>10</i>	<i>Loss of reputation</i>	<i>Nil</i>
	<i>Total</i>	<i>4,72,82,443.00</i>
<i>11</i>	<i>Interest @ 10% per annum upto 31.08.2018</i>	<i>1,73,13,492.00</i>

	<i>(As worked out in attached sheet (Annexure-1)</i>	
<i>12</i>	<i>Cost of Arbitration</i>	<i>10,00,000.00</i>
<i>13</i>	<i>GST, if payable</i>	<i>As actually paid or payable.</i>

7. In order to adjudicate upon the petition, the following broad facts are required to be noticed: -

7.1 The petitioner, it appears, floated a tender in August, 2012, for Construction of Service Road on both sides of Belghoria Expressway from (a) Rabindra Sarani at Adarsh Nagar (Ch, 2.835km to 4.900km) and (b) NH-34 to Bangaon ROB (Ch. 0.000 to 1.750 Km), in the State of West Bengal (hereafter referred to as “subject works”).

7.2 The total road length for which bids were invited admeasured 7.63 kms.

7.3 Against the tender, the respondent preferred a bid. Upon the bids being opened, the respondent was declared successful and its bid being the lowest was accepted for the value of Rs. 19,58,91,538/-

7.4 Consequently, a Letter of Acceptance (in short “LoA”) dated 01.11.2012 was issued to the respondent for the aforementioned contract price i.e. Rs.19,58, 91,538/-.

7.5 The tenure set down for completion of the subject works was 12 months.

7.6 With the issuance of the LOA, a Contract Agreement dated 24.12.2012 was executed between the parties. On the very same date, Notice to Proceed (NTP) was also issued by the petitioner.

7.7 The respondent, in terms of Clause 1.1 of the General Conditions of Contract (in short “GCC”), was to commence the work after 10 days of issuance of the NTP i.e. by 03.01.2013.

7.8 To begin with, the petitioner appointed PD-PIU-Kolkata as the Engineer qua the subject works to be replaced by CES (India) Pvt Ltd in April, 2013.

8 Concededly, the respondent against the mobilisation advance received from the petitioner, furnished an unconditional Bank guarantee.

8.1 It appears that disputes arose between the petitioner and the respondent which finally led to the petitioner terminating the Contract on 22.01.2015.

8.2. Just before the termination of the Contract, on 03.01.2015, the petitioner also encashed the Bank guarantee in the sum of Rs. 98,00,000/- furnished in its favour by the respondent.

8.3. The record shows that the A.T. which included three members was constituted only upon the respondent approaching the Calcutta High Court.

9. As indicated at the outset, the respondent upon constitution of the A.T. lodged its Statement of Claim which included 13 claims.

9.1 The petitioner on the other hand, filed its Statement of Defence which included 7 counter claims.

10. The A.T. based on the pleadings and the documents placed before it, framed the following issues: -

“i) Whether the Claimant has not referred the disputes to Dispute Review Expert under Clause 19.1 of the contract before invoking arbitration and if not, the claims of the Claimant are not maintainable?

ii) Whether the claims of the Claimant are not maintainable in view of termination of the Contract by the Respondent vide notice dated 22.01.2015 which remains unchallenged in the Statement of Claims and no

declaration is sought against the same?

iii) Whether the Respondent was justified in adjusting the amount certified by the Engineer under 1st RA Bill, Engineer's final certificate dated 16.07.2015 and other amounts recoverable against the Bank Guarantees towards performance security and mobilization advance?

iv) Who has committed the breach of the agreement and its effect?

v) Whether the Claimant is entitled to the amounts claimed in para-52 of the claim? If so, to what amount?

vi) Whether the Respondent is entitled to the amounts Claimed in the counter claim? If so, to what amount?

vii) Relief.”

11. The main finding based on which the A.T. has come to the conclusion that the stand of the petitioner was untenable is pivoted on the finding that the petitioner was unable to give a hindrance free site to the respondent.

Challenge:

12. Given this backdrop, Mr. Ramesh Kumar, who, appears for the petitioner, assails the award on the following three grounds: -

(i) First, since the respondent had not challenged the termination notice dated 22.01.2015, the A.T. could not have returned a finding that the termination was invalid.

(ii) Second, most of the claims which were awarded in favour of the respondent were not based on any evidence.

(iii) Third, the conclusion reached by the A.T. qua issue no. 1 was flawed.

Reasons:

13. I have perused the record with the assistance of learned counsel for the petitioner.

14. In my view, all three submissions made by learned counsel for the petitioner are untenable.

15. The A.T., in no uncertain terms, has returned the following finding of fact as to who was responsible for breach of contract.

“....The Claimant furnished the same on 09.12.2017 with their synopsis whereas the Respondent submitted the same on 22.01.2018. On perusal of these plans it is noted that as in Feb, 2018, the site still remained obstructed to the extent of about 50% in the form of 538 trees 38 electrical poles, IOCL pipeline, houses. Some part is marshy land requiring soil removal operation and special reclamation treatment. It could be possible to work from one end to other as road width is 5.5 m requiring at any time continuous full width operation. This was not possible since full length in whole road way width has not been possible due to failure of the Respondent.

The Respondent on 23.02.2018, on an oral enquiry by AT, admitted that the actual site situation has not been fit for completion of the contracted work. The work so far done could not be continued due to site full of obstructions namely 538 trees + 38 electrical poles i.e. 576nos. in a length of 7.630km i.e. on an average every 13 m distance besides IOCL pipe line, buildings and marshy stretch and not yet fit even on 23.02.2018 for further work. The Respondent admitted that the balance work after

termination in January 2015, has not been rewarded and it seemed that the project has been abandoned.

The AT finds that the Respondent failed to provide the site for construction without hindrance and even as in February 2018, the work has not been resumed at the risk and cost of the Claimant. The Respondent has not been able to make the site fit for pre-construction activities even as upto January 2015 the extended date for execution. The Respondent has abandoned the project and it didn't divulge the truth but only on 23.02.2018, it confirmed that the Respondent failed to deliver the site free from obstructions, obstacles and buildings etc. The Claimant, thus, cannot be made responsible for failure and therefore, termination of contract is unlawful and against the Contract Agreement between the parties. The Respondent is, therefore, liable to compensate the Claimant in accordance with the Contract conditions and law of the land."

(emphasis is mine)

16. Given the aforesaid finding, which, in sum, points in the direction that even though the Contract Agreement was terminated on 22.01.2015, concededly, till Feb, 2018, the petitioner was not able to provide a hindrance free site to the respondent.

16.1 According to the A.T., fifty percent (50%) of the site remained obstructed on account of 583 unfelled trees, utilities, buildings, IOCL pipelines and marshy land. It also found that electrical poles were found at average distance of 13 metres.

16.2 In view of the aforesaid, the A.T. came to a definitive conclusion that

the respondent was in breach of its obligations contained in the Contract Agreement and therefore, the submission of learned counsel for the petitioner that because the respondent had not assailed the termination notice it could not have reached the conclusion that the termination was invalid overlooks the fact that issue (iv) framed in the matter, required the A.T. to reach a conclusion as to which of the two sides was responsible for the breach of the Contract Agreement. Thus, once the A.T. reached a conclusion qua this issue, against the Petitioner, the finding returned that the termination notice invalid was only a logical next step in the matter.

17. Insofar as the other argument that the claims awarded were not backed by evidence, in my view, a bare perusal of the award would show that this submission of the counsel for the petitioner is not correct.

18. I was taken by the counsel for the petitioner through each of the claims. The claims are pivoted on the finding as to whether or not the petitioner was in breach of its contractual obligations. Since, the petitioner was found to be in breach of the contract, the quantification of the claims was made based on material which was placed on record by the petitioner.

19. The other submission of the counsel for the petitioner with regard to issue no.(i) which pertains to the objection taken by the petitioner that since the respondent had not, in the first instance, approached the Dispute Review Expert (“DRE”), its action was not maintainable does not impress me. To my mind, the finding returned by the A.T. in that behalf squarely answers the submission raised before me by the counsel for the petitioner.

19.1 For the sake of convenience, the same is extracted hereafter:-

“Issue No.1

Whether the Claimant has not referred the disputes to

Dispute Review Expert under clause 19.1 of the Contract before invoking arbitration and if not the claims of the Claimant and not maintainable?

The Contract was started on 03.01.2013 for completion of work on 02.01.2014. However, due to non availability of work front the work worth 5% financial progress was completed when the Respondent terminated the contract on 22.01.2015 in terms of contract clause 40 and encashed the bank guarantees. The Contract from 03.01.2014 remained at large.

The Claimant on 26.05.2014 requested the Respondent for appointment of Dispute Review Board (DRE) within 14 days of the said letter as per contract clause 19. Although, the Respondent should have appointed the DRE soon after 24.12.2012. But the DRE was not appointed in spite of Claimants request on 26.05.2014. The Claimant on termination on 22.01.2015 repeatedly requested but the Respondent didn't respond. The Claimant approached the Hon'ble High Court, Calcutta and as directed by the Court, the Arbitration Tribunal members thereafter, were appointed. The Respondent didn't press for appointment of DRE, the parties have rightly formed the Arbitral Tribunal. There is thus no case now, for appointment of DRE. The blame lies with the Respondent. The AT considers the Respondent belated request defeated the purpose of the DRE who was required to perform work during currency of the contract.

The AT considers this demand as too late therefore redundant. The AT unanimously rejects the same. Inter-alia constitution of Arbitration Tribunal following the Hon'ble High Court direction, is considered as valid.”

(emphasis is mine)

20. The above finding clearly notes that the respondent approached the petitioner on several occasions, despite which the petitioner did not move to appoint a DRE, and when, the Calcutta High Court embarked upon the exercise of appointing an A.T., no such aspect was put forth. The submission, in my opinion, is completely unsustainable.

21 Given the aforesaid, I am of the view that no interference is called for with the award.

22. The petition is, accordingly, dismissed.

RAJIV SHAKDHER, J

JANUARY 07, 2019

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