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

Date of decision: 17.04.2018

+ **FAO(OS) (COMM) 17/2018**

NATIONAL HIGHWAY AUTHORITY OF INDIA Appellant

Through: Ms. Pinky Anand, ASG, Mr. Debojit Borkakati and Mr. Sumit Teterwal, Advocates.

versus

M/S MADHUCON PROJECTS LIMITED Respondent

Through: Mr. Akhil Sibal, Sr. Adv. with Mr. Pradeep Chhindra and Mr. Suryadeep Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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Caveat No. 82/2018

Since the counsel for the respondent/caveator has put in appearance the caveat stands discharged.

CM APPL. 3886/2018 *(for exemption)*

Allowed, subject to all just exceptions.

CM APPL. 3887/2018 *(for condonation of delay)*

For the reasons mentioned in the application, the delay of 93 days in filing the appeal is hereby condoned.

Application stands disposed of.

FAO(OS) (COMM) 17/2018 & CM APPL. 3885/2018 *(for stay)*

The appellant/National Highway Authority of India (hereinafter referred to as the 'NHAI') appeals the decision of the learned Single Judge rejecting its petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act').

Briefly, the facts are that the NHAI entered into a contract with the respondent (hereinafter referred to as the 'claimant') for the execution of the lane carriageway of National Highway No.57 Section from Km. 110 to Km. 17 (Jhanjharpur-Dharbhanga Section in the State of Bihar). The total contract value agreed was ₹388,23,24,691/-. Inevitably the execution got delayed and the parties agreed to extend the period of performance. Claiming to have suffered injury, the NHAI withheld certain amounts payable to the contractor (₹2.01 crores and ₹2.56 crores, respectively). Aggrieved, the contractor invoked the arbitration clause and lodged his claim contending, *inter alia*, that in the absence of any condition authorising NHAI to deduct the amounts on account of compensation or liquidated damages, as was done, the withholding of the amounts was illegal and that, it was entitled to an award. The claims were apparently lodged and the matter proceeded and the proceedings ensued; it is a matter of record that till that point of time the NHAI had not processed and cleared the final bill presented by the contractor, which was in excess of ₹22 crores. During the pendency of the arbitration proceedings, the parties entered into a Supplementary Agreement on 27.05.2015. The principal objective of this supplementary agreement was to novate the contract so as to include the liquidated damages clause for the

extended period. Once the agreement was signed, the NHAI proceeded to clear and process the final bill and made all payments (except withheld amounts) – the last payment was made in this series on 27.06.2015. The Arbitral Tribunal proceeded to adjudicate upon the claims of the parties and held that withholding of the amounts towards the two claims (both falling during the extended period) was unjustified, a final reasoning was rendered.

Aggrieved, NHAI approached the learned Single Judge under Section 34 of the Act contending *inter alia* that the Arbitral Tribunal's findings with respect to coercion in the manner of the execution of the supplementary agreement, were contrary to the facts; it relied upon the judgment of the Supreme Court in the case of '*Cauvery Coffee Traders, Mangalore vs. M/s Hornor Resources (International) Company Limited*', (2011) 10 SCC 420. The contractor relied upon another decision in the case of '*R.L. Kalathia & Company vs. State of Gujarat*', (2011) 2 SCC 400 to contend that the economic coercion had been practiced and that was apparent from an overall conspectus of the circumstances.

The learned Single Judge, after noticing the circumstances as well as the NHAI's plea that consequent upon the execution of the supplementary agreement, the contractor had withdrawn its claim in respect of the liquidated damages, which were allegedly illegally withheld, held that there was no patent illegality in the award and that none of the vitiating circumstances, such as the award being contrary to the contract or disclosing a manifestly unreasonable conclusion, were found.

The learned Additional Solicitor General relied upon the judgment in the case of '*Cauvery Coffee Traders, Mangalore*' (supra) and contended that the learned Single Judge fell into error in overlooking that the supplementary agreement dated 27.05.2015 and the withdrawal of the claims towards the amounts withheld, were voluntary and that the Tribunal had fallen into error in permitting the contractor to re-instate the claims on 16.11.2015, which it had abandoned.

It is evident from the above discussion that when the parties entered into arbitration, the contractor made a composite claim which basically included the amount withheld. Concededly, at the point of time the parties entered into the original agreement, NHAI could not have withheld the amount on accounts of the liquidated damages. Nevertheless, it did; that became the subject matter of the claim. At the same time, the contractor's final bill was pending, which was for an amount of ₹22 crores. In these circumstances, the supplementary agreement was entered into on 27.05.2015, after which, the NHAI released the amounts (which were undisputed by it) and had been apparently kept back only to justify its claim for the liquidated damages, which, otherwise was impermissible under the original agreement. Its contention that the supplementary agreement was entered into voluntarily and consequent upon it, the contractor could not urge against the withdrawal of its claims, is not sustainable. This Court is of the opinion that the findings of the Arbitral Tribunal with respect to coercion, having regard to the law declared in '*R.L. Kalathia v. State of Gujarat*' (2011) 2 SCC 400, are justified.

Besides that ruling, the Court also notices that in the cases of '*National Insurance Company Ltd. vs. M/s Boghara Polyfab Pvt. Ltd.*' 2009(1) SCC 267 and '*Union of India & Ors. vs. M/s Mater Construction Company*', 2011 (12) SCC 349, the finding by the Tribunal with respect to the economic coercion was justified in the circumstances. With respect to the NHAI's argument that the arbitrator and the learned Single Judge overlooked the withdrawal of the claims and that impacted the award, this Court notes that no such ground was urged in the pleadings under Section 34 of the Act by the NHAI.

For the foregoing reasons, this Court is of the opinion that there is no merit in the appeal. It is, accordingly, dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

APRIL 17, 2018

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