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

\+ **<u>FAO(OS) (COMM) 95/2018</u>**

Date of decision: 14th August, 2018

M/S SUBHASH INFRAENGINEERS PVT LTD ..... Appellant
Through Mr. Anil Mittal and Ms. Komal Aggarwal, Advocates.

versus

UNION OF INDIA ..... Respondent
Through Mr. Jagjit Singh and Mr. Preet Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

This intra-Court appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 and Section 37 of the Arbitration and Conciliation Act, 1996 (A & C Act, for short) impugns order dated 23rd February, 2018 passed in OMP (COMM) No. 38/2018 rejecting objections filed by the appellant under Section 34 of the A & C Act.

2. The appellant was awarded work of earth work in filling, embankment and cutting, provision of the blanketing material,

construction of bridges and other works between K.M 49.00 to K.M 74.4 on the Rewari-Jhajjar-Rohtak section.

3. The work was to be completed within 18 months from the date of acceptance letter, i.e. on or before 3rd January, 2009. The work, it is accepted, was completed on 28th February, 2011.

4. The dispute raised by the appellant before the Arbitrator was regarding benefit of price variation clause. The contention was that the respondent having extended time for execution of the work vide letters dated 4th August, 2009, 7th August, 2009, 10th March, 2010 and 20th June, 2010 without penalty, the appellant was entitled to benefit of price variation clause. The appellant was granted first extension of time with benefit of price variation clause vide letter dated 12th February, 2009. Subsequent extensions vide letter dated 4th August, 2009, 7th August, 2009, 10th March, 2010 and 20th June, 2010 were without benefit of price variation clause.

5. The aforesaid aspect and facts as to the reason and cause for delay was examined by the learned Arbitrator-Mr. Justice G.S. Singhvi (Retd.) in depth and detail vide paragraphs 43 to 52 in the Award. The paragraphs examine the contention of the appellant that L section drawings were furnished belatedly, and whether this delay

would justify and explain repeated extensions and prolongation of the work. The contention was rejected by the learned Arbitrator after referring to the letters exchanged between the parties as well as ocular evidence. It has been held that delay in execution of work was not on the said account and there were several other reasons and causes which were attributable to the appellant. The findings on the said aspect are cogent and well-reasoned. Learned single Judge in the impugned order has also referred to and quoted paragraph 49 from the award, which reads:-

> *"49. There is no doubt that there was some delay in supply of drawings of the bridges required to be constructed but the claimant cannot take advantage of the same because M/s.Subhash Chander & Co. failed to carry out the work in accordance with terms and conditions of LoA and the Contract Agreement and could construct only 35 minor bridges and that too after grant of four extensions and one post facto extension on the basis of written requests made by M/s. Subhash Chander & Co, While granting first extension vide letter dated 12.02.2009 the competent authority had taken cognizance of the fact that there was some delay on the part of the respondent in supplying the drawings of bridges and this is the precise reason why the benefit of price variation clause was given to the claimant and a sum of Rs.64,89,807.54 was paid in terms of price variation clause. However, all subsequent extensions were granted without the benefit of price because the concerned authority was convinced that M/s. Subhash Chander & Co. had failed to carry out the work with a due diligence. This is amply proved from letters dated 04.08.2009*

(Annexure R-2/ 2) dated 17.08.2009 (Annexure R-2/1), 10.03.2010 (Annexure R-2/3), 29.06.2010 (Annexure R2/4), 17.03.2011 (Annexure R-2/5). Apart from these letters, the concerned authority had made request to the claimant vide the letters dated 30.07.2008 (Exhibit RW1/7), 27.12.2008 (Exhibit RW-1/8), 22,01.2009 (Exhibit RW-1/9), 30.10.2009 (Exhibit RW-1/10), 23.07.2010 (Exhibit RW-1/11), 09.08.2010 (Exhibit RW-1/12), 12.11.2010 (Exhibit RW-1/13), 20.10.2010 (Exhibit RW1/14), 29.11 2010 (Exhibit RW-1/15), 25.07.2011 (Exhibit RW-1 /16) and 29.09.2011 (Exhibit RW-1/18). When the claimant made representation dated 12.05.2011 for grant of the benefit of PVC on extended period of contract, the Headquarter Office of the Northern Railway specifically rejected, the same vide letter dated 22.06.2011 (Annexure R - 6) by pointing out that approved section was finalized in November 2007. The drawings of the bridges were given in stages to commensurate with the progress of the work at the site and complete set of drawings were given in February 2008, but even then the progress of bridges were very poor and took it nearly three years to complete the same. It was also mentioned that some investigation was got done by M/s Subhash Chander & Co. as nonschedule item, but it was in no way handicapped in constructing tile bridges when there was no loss on account of idling of labour, payment due to PVC and in fact the work of the progress was very poor. It is quite interesting to note that M/s Subhash Chander & Co. did not protest against the denial of the benefit of price variation clause in second, third, fourth and fifth extensions till February 2012 . This goes a long way to show that delay in the execution of work was directly attributable to claimant."

The findings cannot be said to be bad and unreasonable on application of Wednesbury principles.

6. The second objection raised by the appellant was in respect of extra payment for bringing material from Tiba Basai, Rajasthan to Jhajjar, Haryana in view of the stated ban imposed by the Punjab and Haryana High Court and the circular issued by the Director Industries and Commerce, Mines and Geology, Haryana. The said contention has also been rejected after referring to the evidence and material on record, including the factum that the appellant herein had not been able to show and prove that the bills of M/s. Ashok Kumar and M/s. Prem Engineers relied by the appellant were relating to the contract in question. Factual findings on the said aspect are to be found in paragraphs 53 to 58 of the Award. The said findings again are cogent and well-reasoned. They do not require interference when we apply Wednesbury Principles.

7. No other contention is raised.

8. The appeal has no merit and is accordingly dismissed, without any order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

AUGUST 14, 2018
NA/VKR