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

+ O.M.P. (COMM) 150/2016

Date of Decision : 5th December, 2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr.Pradeep K.Bakshi, Ms.Prachi
V. Sharma & Ms. Sanya Talwar, Advs.

versus

M/S SUNWAY CONSTRUCTION SDN BHD Respondent

Through: Mr.Arun Kathpalia, Sr. Adv. with
Mr.Angad Mehta, Mr.Samaksh Goyal &
Ms.Bani Brar, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 18.03.2015 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Contract for Rehabilitation and upgrading of NH-25 from Kms. 104.00 to Kms. 170.00 to 4-lane configuration in the State of Uttar Pradesh-Package No. EW II, UP-4 executed between the parties.

2. Though the petition challenges the Arbitral Award on both

claim no. 1 as well as claim no. 2 awarded by the Arbitral Tribunal in favour of the respondent, the learned counsels for the parties submit that as far as claim no. 2, which was a claim for reimbursement of enhanced royalty including interest under Clause 70.7 of COPA, the parties have entered into a settlement and full payment has been made by the petitioner to the respondent, therefore this issue need not be decided by this Court.

3. Claim no. 1 of the respondent was for reimbursement of Construction Workers' Welfare Cess deducted by Engineer/Employer including interest under Clause 70.7 of COPA. The Arbitral Tribunal has allowed the said claim in favour of the respondent by holding that the said Cess liability came into operation after entering into the Contract and only with the notification of the UP BOCW Rules, 2009 by the State of U.P on 04.02.2009 and therefore, was covered under Clause 70.7 of COPA being a subsequent legislation.

4. Learned counsel for the petitioner submits that the Arbitral Award is liable to be set aside as it has failed to consider that the Building and other Construction Workers' Welfare Cess Act, 1996 in terms of Section 1(3) of the said Act had come into force on 03.11.1995. Further, placing reliance on the judgment of the Division Bench of this Court in **Delhi Metro Rail Corporation Limited v. Simplex Infrastructures Limited**, 2011 (6) RAJ 208 (Del), he submits that this Court has also taken the view that the said Act came into force on 03.11.1995 and a deduction of 2% has to be made from the date the Act came into force, that is, 03.11.1995 and of 1% from 26.09.1996, in terms of the Notification issued by Ministry of Labour.

He submits that the Special Leave Petition, being SLP (Civil) No. 33486-33488/2011 (*M/s Simplex Infrastructure Ltd. v. M/s Delhi Metro Rail Corp. Ltd.*), has been dismissed by the Supreme Court vide its order dated 02.01.2012 again relying upon Section 1(3) of the Building and other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996.

5. On the other hand, the learned senior counsel for the respondent, placing reliance on the judgment of the Division Bench of this Court in *M/s National Highways Authority of India v. M/s Gammon-Atlanta (JV)* [judgment dated 14.08.2013 passed in FAO (OS) 366/2013] submits that the Division Bench of this Court has distinguished the judgment in *Simplex Infrastructures Limited* (Supra) and relying upon the judgment of the Supreme Court in *Dewan Chand Builders & Contractors v. Union of India & Ors.*, (2012) 1 SCC 101, has held that the Act would come into force only when the Rules are made. He has further placed reliance on the following orders passed by this Court relying upon the judgment of the Division Bench in *M/s Gammon-Atlanta (JV)*, (Supra):- *National Highways Authority of India vs. M/s Gayatri Projects Ltd.-ECI Engineering & Construction Co. Ltd. (JV)*, OMP 111/2014, decided on 18.01.2016 and *National Highways Authority of India vs. M/s Gayatri Project Ltd.-ECI Engineering & Construction Co. Ltd.*, FAO(OS) 165/2016, decided on 27.05.2016.

6. He places reliance on the order dated 03.02.2012 passed by the Supreme Court in SLP (Civil) No. 34831/2011 titled *Gammon Rizzani (JV) v. Delhi Metro Rail Corp. Ltd.* and submits that in spite

of dismissal of the SLP in the case of *Simplex Infrastructures Limited* (Supra), the Supreme Court has issued notice on the said Special Leave Petition relying upon its decision in *Dewan Chand Builders & Contractors* (Supra). He submits that the said SLP is still pending before the Supreme Court.

7. He further submits that in any case, the view expressed by the Arbitral Tribunal being a plausible view, the Court in exercise of its power under Section 34 of the Act cannot interfere with the same. For this he places reliance on the judgment of the Supreme Court in *Associate Builders v. DDA*, (2015) 3 SCC 49.

8. I have considered the submissions made by the learned counsels for the parties. The Arbitral Tribunal in its Impugned Award has held as under:-

“4.14 From the detailed analysis made hereinabove (Para 4.4 to 4.7), the AT finds that even though the BOCW Cess Act, 1996 cess came into being in 1996 followed by BOCW Cess Rules, 1998, the actual implementation of the deduction of labour cess came into effect only after the promulgation of U.P. Government Notification No. 143/26-2-2008-251(SM) 95 published in the U.P. Gazette dated 04.02.2009. The above observation of AT is articulated from the communication issued to NHAI by the Chief Development Officer(CDO), Lucknow Vide his Letter No. 3246/ LR Dated 17.02.2010 pointing out that the BOCW Act, 1996 has come into effect on 04.02.2009(Exh.C 4)(Page 21 to Page 22).

4.15 During the AT's thirteenth hearing on 20.09.2014, the Respondent was specially asked, Vide Para 7 of the proceedings of the AT, to furnish a list of works executed between the date of Labour Cess Act of 1996

and the U.P. State Government's Notification dated 04.02.2009, on which labour cess was collected by the U.P. Govt. The Respondent could not furnish any details on this issue.

4.16 It is well established that the deduction of 1% labour cess was effective from 04.02.2009. Since the stipulated date 28 days prior to the submission of bid was 28.01.2005, it would not have been possible for any bidder to have contemplated for inclusion of the labour cess in his bid price before the relevant notification of Govt. of U.P. Therefore, AT holds that the levy of labour cess is not payable by the Contractor.

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4.19 Further, in response to a reference made by the Engineer (Exh C-12), the Deputy Labour Commissioner, Jhansi also confirmed through letter dated 26.11.2010 (Exh. C-13) that BOCW Act, 1996 is effective from 04.02.2009. In spite of that, the Engineer effected recovery of labour cess on the instructions from the Respondent violating his own opinion/decision. Later on, the claim of the Claimant for reimbursement of recovered amount was also denied I rejected by the Engineer against the natural justice.”

9. In view of the judgment of this Court in **Gammon-Atlanta (JV)** (Supra), the view taken by the Arbitral Tribunal cannot be said to be perverse or unreasonable so as to warrant any interference of this Court in exercise of its power under Section 34 of the Act.

10. The Supreme Court in **M/s Sudarsan Trading Co. v. Government of Kerala and Another**, (1989) 2 SCC 38 has outlined

the scope of interference by the Court in an arbitral award and has held as under:

“31..... But, in the instant case the court had examined the different claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decision, the arbitrator had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. It has to be determined that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy. See Commercial Arbitration by Sir N.J. Mustill and Stewart C. Boyd, p. 84.”

11. In ***Associate Builders v. Delhi Development Authority*** (2015) 3 SCC 49 the Supreme Court expounded on Arbitrator's jurisdiction to interpret terms of the Contract as as under:-

“42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

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42.3. (c) *Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*

“28. Rules applicable to substance of dispute. (1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd.,(2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)*

“112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives

rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593; 2003 Supp (4) SCR 561 and D.D.Sharma v. Union of India.] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award.”

12. This principle has been reiterated in ***National Highways Authority of India v. ITD Cementation India Ltd.*** (2015) 14 SCC 21 in the following words:-

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do.”

13. In view of the above, the present petition is dismissed, with no order as to cost.

NAVIN CHAWLA, J

DECEMBER 05, 2018/rv