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

Date of decision: 03.08.2018

+ **FAO(OS) (COMM) 162/2018**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through: Mr. Mukesh Kumar and Ms. Soumya
Priyadarshini, Advocates.

versus

M/S INTERCONTINENTAL CONSULTANT AND
TECHNOCRATS PVT LTD

..... Respondent

Through: Mr. Anil Sapra, Sr. Adv. with
Mr. Siddharth Vaid, Mr. Sarthak
Katyial and Mr. Jaideep 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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CAV 693/2018

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

CM APPL. 30587/2018 *(for exemption)*

Allowed, subject to all just exceptions.

FAO(OS) (COMM) 162/2018 & CM APPL. 30586/2018 *(for stay)*

The appellant-National Highways Authority of India
(hereinafter 'NHAI') is aggrieved by a judgment and order of the

learned Single Judge rejecting its petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter ‘the Act’). That petition has challenged an Arbitration Award dated 10.06.2015. The dispute between the parties arose on account of the payment under a consultancy services agreement entered into by the respondent-M/s Intercontinental Consultant and Technocrats Pvt. Ltd. (hereinafter ‘ICT’) with NHAI on 28.01.2002.

2. The dispute arose sometime in 2012 pertaining to reimbursement of income tax to the tune of ₹66,37,332/-. These were referred to the Arbitral Tribunal under the Act. After considering the rival pleadings and submissions of the parties, the Tribunal accepted the claim of the ICT and awarded a sum of over ₹67 lacs (which was later modified by learned Single Judge) and further sum of ₹25,52,799/- - both with interest @ 10% per annum.

3. NHAI objected to the award primarily on the construction placed by the Tribunal with respect to the two conditions in the Agreement (Clauses 1.10.1 and 1.10.2). They read as follows:

“1.10.1 For domestic Consultants and foreign consultants who are permanent residents in India

‘The Consultants, Sub-consultants and the Personnel shall pay the taxes, duties, fees, levies and other impositions levied under the existing, amended or enacted laws during life of this contract and the client shall perform such duties in regard to the deduction of such tax as may be lawfully imposed.

1.10.2 For foreign Consultants-

The client warrants that the Client shall pay on behalf of the Consultants, Sub-Consultants any taxes, duties, fees,

levies and other impositions imposed in India, under the Applicable Law, on the Consultants and Sub-Consultants in respect of:

(a) any payments whatsoever made directly by the client to the Consultants and sub-consultants (as authorized by the Consultant), in connection with the carrying out of the Services;

(b) any equipment, materials, and supplies brought into India by the Consultants or Sub-consultants for the purpose of carrying out the Services and which, after having been brought into such territories will be subsequently withdrawn therefrom by them.

(c) any equipment imported for the purpose of carrying out the Services and paid for out of funds provided by the Client and which is treated as property, of the Client;

(d) any property brought into India by the Consultants, any Sub-consultants; the Personnel of either of them (other than Indian nationals or permanent residents of India), or the eligible dependents of such Personnel for their personnel use and which will subsequently be withdrawn therefrom by them upon their respective departure from India, provided that;

(1) the Consultants, Sub-consultants and Personnel, or eligible dependents, shall follow the usual customs procedures of the Government in importing property into India; and

(2) if the Consultants, Sub-consultants or Personnel, or their eligible dependents, do not withdraw but dispose of any property in India upon which customs duties and taxes have been exempted, the Consultants, Sub-consultants or Personnel, as the case may be,

(i) shall bear such customs duties and taxes in conformity with the regulations of the Government, or

(ii) shall reimburse them to the Client if they were paid by the Client at the time the property in question was brought into India.”

4. NHAI urges that the learned Single Judge fell into error because the Tribunal proceeded beyond the terms of the contract inasmuch as for domestic consultants it was not liable to pay or refund income tax. That was wholly the liability of consultants. It was urged that thus the personnel employed by ICT were not covered by either of the conditions (Clauses 1.10.1 or 1.10.2).

5. After considering the submissions and the award, the learned Single Judge held as follows:-

“12. A perusal of Clause 1.10.2. of GCC clearly shows that under the said clause, the petitioner had agreed to pay on behalf of its consultants/sub-consultant any taxes, duties etc. imposed in India on the consultant or sub-consultant in respect of any payment made directly by the petitioner to the consultants/sub-consultants in connection with carrying out the services. Merely, because the word 'personnel' is not used in the said clause, in my opinion would not make any material difference. The petitioner admits that foreign personnel engaged by foreign consultants would under Clause 1.10.2 of the GCC be eligible for reimbursement of the tax paid to the Government on account of the remuneration received by such foreign personnel. To interpret this clause, to mean that the same contention would also be applicable to foreign personnel based

abroad who are engaged by Indian consultants appears to be a plausible and a possible interpretation of Clause 1.10.2.

13. I have already noted above, the grounds on which the learned Arbitrator has taken the above noted view. He has on facts concluded that the project in question is a world bank project and the world bank norm is to reimburse the consultants for taxes that have been reimbursed to foreign personnel. There were no cogent reasons given by the petitioner as to why the same system is not to be followed for the present agreement.

14. The learned Arbitrator has also noted the plea of the petitioner that clause 1.10.2 of the agreement applies only to foreign consultants and the foreign personnel whom they engage and does not apply to foreign personnel engaged by Indian consultants. It was noted that the tender was a global tender and it could not have been intended by the parties to discriminate between Indian bidders and foreign bidders. If the interpretation sought to be proposed by the petitioner was accepted, it would mean that an Indian bidder, namely, an Indian Consultant would have to pay for the tax liability for the foreign personnel whereas a foreign consultant would not have any such liability. Clearly, no such intent could be possible.

15. The third ground given by the learned Arbitrator was the difference in the wording of Appendix G and H of the agreement. Annexure H deals with summary of costs in local currency. The said appendix describes the cost net of tax. Appendix G deals with costs in foreign currency and includes remuneration for Expatriate Staff. The said appendix leaves the column of 'taxes and duties' blank in view of the fact that they may vary in future. The columns state that the duties and taxes will be payable by the

petitioner as per applicable law and as per clause 1.10 of the Special Conditions of the agreement. Implicit in this was that it was the liability of the petitioner to pay for the tax liability of foreign consultants/personnel.”

6. The learned Single Judge also relied upon the judgment of the Supreme Court in *‘Mcdermott International Inc vs. Burn Standard Co. Ltd. & Ors.’*, (2006) 11 SCC 181 and the later judgment in *‘Associate Builders vs. Delhi Development Authority’*, (2015) 3 SCC 49 in both of which the Court held that the decision as to the construction or interpretation of the terms of the contract fall within the exclusive domain of the Arbitrator and that the error, if any, cannot, in our opinion, of such interpretation ordinarily ought not to be corrected or interfered with. The NHAI has more or less reiterated its submissions. Before this Court it was argued that the difference between two conditions meant that the personnel covered by Clause 1.10.1 could not avail the benefit of refund of tax and that the absence of the term personnel or employee precluded the Tribunal from awarding the amounts which did not relate to consultants. This Court is of the opinion that there is no merit in that argument. Besides the same argument and submissions were gone into by the Tribunal which gave proper justifications for its conclusions. Learned Single Judge also, after careful scrutiny, endorsed that view. Given the limited scope of the Appellate jurisdiction under Section 37 of the Act, interference is not called for. Besides the distinction pointed out by the NHAI, to our mind, is entirely unsustainable. The distinction between the two Clauses 1.10.1 and Clause 1.10.2 lies as the difference between the nature of residents and whereas the former covers those permanent

residents in India, the latter covers those who have foreign residence. A foreign consultant, by whatever name called, as long as it functions in relation to the project, regardless of such labour, would ordinarily fall within Clause 1.10.2 as was held in this case.

7. For the above reasons, the appeal has to fail and is consequently dismissed along with the pending application.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

AUGUST 03, 2018

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