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

Date of decision: 30.08.2018

+ O.M.P. (COMM) 369/2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through Ms. Gunjan Sinha Jain and Ms.
Soumya Priyadarshnee, Advs.

versus

ESSEL WALAHJAPET POONAMALLE

TOLL ROAD PVT .LTD.

..... Respondent

Through Mr. Raunak Dhillon, Ms. Gauri
Rasgotra, Mr. Vikash Kumar Jha and
Ms. Nikitha Shenoy, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

I.A. 11577/2018

1. Allowed, subject to just exceptions.

I.A. 11578/2018

2. This is an application seeking condonation of delay of one (1) day in filing the accompanying petition.

3. For the reasons given therein, the delay is condoned.

4. The application is allowed.

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5. This is a petition whereby a challenge is laid to the award dated 9.4.2018.

6. The petitioner seeks to assail the award on two grounds:

- (i) First, qua the rejection of Counter Claim no.5.
- (ii) Second, with respect to the rate and the period for which interest is granted against Counter Claim no.7.

7. Insofar as the rejection of Counter Claim no.5 is concerned, the case of the petitioner is that the Concession Agreement dated 4.6.2012 had to be terminated on account of breaches committed by the respondent.

8. It is further averred that a notice indicating intention to terminate dated 30.6.2016 was served on the respondent.

9. It is the case of the petitioner that the aforementioned Concession Agreement was terminated on 22.7.2016.

10. Furthermore, the petitioner claims that in pursuance of Article 39 of the Concession Agreement, a joint inspection of the subject project was conducted to ascertain as to whether there were in defects its execution and/or performance.

11. According to the petitioner, upon a joint inspection report being submitted, cost estimate for carrying out rectification was sought from the Independent Engineer by the petitioner vide communication dated 18.8.2016. Consequently, cost estimate was furnished by the Independent Engineer vide communication dated 25.8.2016.

12. According to the petitioner, the total estimate given by the Independent Engineer with regard to rectification was a sum of Rs.26,42,61,797/-. It is this input which propelled, it appears, the petitioner to prefer an application to seek amendment of the Counter Claim, *albeit*, in an ongoing arbitration proceeding between itself and the respondent.

13. The Arbitral Tribunal, concededly, vide order the 25.10.2016 permitted the petitioner to prefer the Counter Claim no.5 with respect to claim for rectification work carried qua the subject project.

14. In support of Counter Claim no. 5, the petitioner filed an affidavit of evidence of, one, Mr. M. Reddaiah, Manager (Tech), NHAI.

15. I am informed that a similar amendment was carried out *vis-a-vis* Counter Claim no.7 which, as indicated above, dealt with interest.

16. Ms. Jain, who, appears on behalf of the petitioner, says that the petitioner has, in fact, incurred rectification cost and that the Arbitral Tribunal has wrongly rejected the Counter Claim.

17. It is the learned counsel's submission that the rectification work commenced on 5.8.2016 and was concluded, I am told, on 15.8.2018.

18. Insofar as the Counter Claim no.7 is concerned, Ms. Jain says that the Arbitral Tribunal failed to adhere to the provisions of clause 47.5 of the Concession Agreement which requires the defaulting party, i.e. the respondent herein, to pay the interest at a rate equal to 5% over and above the bank rate.

19. Mr. Dhillon, who, appears for the respondent, argues that the award need not be disturbed as the Arbitral Tribunal in the given circumstances has come to a correct conclusion.

20. It is the counsel's submission that the petitioner failed to adduce evidence with regard to the cost incurred in carrying out rectification work and therefore, the Tribunal correctly rejected Counter Claim no.5.

21. As a matter of fact, learned counsel for the petitioner drew my attention to page 25 of the petition to buttress the submission that the petitioner had, in fact, averred that it was not in a position to place the

relevant evidence before the Arbitral Tribunal as the work was not completed.

22. Insofar as the aspect of interest is concerned, learned counsel for the respondent submits that the petitioner had in fact filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996, on 27.7.2018, in which, the grievance with regard to interest which is sought to be articulated at the bar now was not raised.

23. Learned counsel further submits that it is only when the petition was re-filed after defects had been removed that such a grievance was raised. It is submitted that since the petition was re-filed only on 27.8.2018 the plea for interest as articulated by the learned counsel for the petitioner cannot be entertained as on this aspect the petition is beyond the period of limitation. The argument being that while re-filing the petitioner changed the prayer clause. To be noted, this aspect was not refuted by Ms. Jain

24. I have heard the learned counsel for the parties and perused the record.

25. Insofar as the grievance with regard to the Counter Claim no.5 is concerned, it has been dealt with by the Arbitral Tribunal in paragraph 399 to 404 of the award.

26. The relevant observations made by the Arbitral Tribunal are as follows:

“399. The Counter Claimant contends that as per Article 39 of the CA the Concessionaire shall be responsible for all defects and deficiencies in the project highway for a period of 120 days after the termination and it shall have the obligation to

repair and rectify at its own cost all defects and deficiencies observed by the Independent Engineer.

400. The IE pursuant to the request made by the Counter Claimant in terms of its letter dated 18.8.2016 submitted its cost estimate to the effect that the Claimant is liable to Rs.26,42,61,797/-.

401. The said report dated 25.8.2016 is contained in Annexure R-17.

402. The Claimant, however, does not deny or dispute that it had not carried out the repair of the Highway for a period six months from the date of termination of the Concession Agreement. The obligation on the part of the Claimant to maintain the road in terms of Article 39 is absolute. The

Claimant did not however, participate in the matter of estimation of cost by the IE.

403. The Counter Claimant, however, has not adduced any evidence to show that it had actually made any expenditure by carrying out the repairs. It has also not examined the IE as a witness.

404. The Counter Claimant, therefore, cannot be said to have proved its counter claim. The said Counter Claim is dismissed."

(emphasis is mine)

27. Furthermore, if one were to peruse the Clause 39.1, it enures in the petitioner the right to seek reimbursement of all cost incurred by it. A close perusal of Clause 39.1 would show costs used therein would only mean actual cost. What the petitioner placed before the Arbitral Tribunal, as is evident on reading of the affidavit filed by Mr. M. Reddaiah, was only an estimate of the of costs likely to be incurred.

28. As noted above, rectification work was carried on beyond the date on which the Arbitral Tribunal reserved the matter for rendering the award.

29. I am informed by Ms. Jain that the matter was reserved by the Arbitral Tribunal for rendering the award on 14.10.2017. Even according to the learned counsel, the rectification work which commenced on 5.8.2016, concluded only on 15.8.2018.

30. To my mind, the petitioner, at that stage, had an option not to prefer the Counter claim if it did not have the requisite evidence available readily with it. In the alternative, the petitioner ought to have placed before the Arbitral Tribunal whatever evidence it had available with it which would have established the costs incurred by it in carrying out the rectification work at least till a particular stage.

31. Concededly, neither option was availed of by the petitioner. Therefore, in my view, the Arbitral Tribunal was correct in reaching the conclusion that since the necessary material was not placed before it Counter Claim no.5 could not be sustained. I find no error of the law or fact in the conclusion reached by the Arbitral Tribunal in that behalf.

32. This brings me to other aspect which is as to whether there is any basis in the grievance raised by the petitioner with regard to interest not being granted by the Arbitral Tribunal at the rate provided in Clause 47.5. Concededly, the Arbitral Tribunal has granted interest at the rate of 9% per annum for the period spanning between 30.8.2016 and the date of the award.

33. It is Ms. Jain's submission that the interest ought to have been granted from the date of termination of the Concession Agreement, i.e. the date when the cause of action arose, which is 22.7.2016.

34. I had queried Ms. Jain as to whether any demand for interest had been made in terms of clause 47.5 of the Concession Agreement.

35. Ms. Jain fairly concedes that no specific demand in that behalf was made.

36. Ms. Jain, though, says that it was suggested in the termination notice that they would be raising a demand in terms of the Concession Agreement.

37. Be that as it may, it is not disputed before me by Ms. Jain that no material was placed before the Arbitral Tribunal as to what was the bank rate at the relevant point of time.

38. Ms. Jain says that the prevailing bank rate is common knowledge and, therefore, the Arbitral Tribunal should have applied the measure provided in Clause 47.5 of the Concession Agreement.

39. I tend to disagree with the submission made by the learned counsel in this behalf. What may be common knowledge to one may not be so common to the other. The petitioner was required to, in my view, prove the then prevailing rate of interest.

40. Accordingly, in my view, no case is made out for interference with the award.

41. The petition is consequently dismissed.

RAJIV SHAKDHER
(JUDGE)

AUGUST 30, 2018
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