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

Date of decision: 4th April, 2018

+ **O.M.P. (ENF)(COMM) 124/2016 & I.A. Nos.12601/2016,
4843/2017, 11752/2017, 15308/2017**

M/S PRAKASH ATLANTA JV Petitioner
Through Ms.Meenakshi Arora, Sr. Adv. with
Mr.Chirag M.Shroff, Ms.Neha
Sangwan and Mr.Nikunj, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA Respondent
Through Mr.Vikas Goel, Mr.Abhishek Kumar
and Ms.Arushi Gupta, Advs.

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed by the petitioner seeking enforcement of the Arbitral Award dated 12.02.2007 read with corrected Award dated 02.04.2007 passed by the Arbitral Tribunal adjudicating the disputes between the parties in relation to the Contract Agreement dated 10.08.2001 for the work of construction of segment of Lucknow Bypass connecting N.H. 25 and N.H. 28 via N.H. 56 passing through Lucknow City in the State of Uttar Pradesh.
2. The only dispute left with respect to the execution of the said Award is in relation to the 19 items covered under the claim no.1. As far as this claim is concerned, the Arbitral Award had directed as under:

“10.1 Claim NO.1

1. The claim of the Claimant is accepted partially. The quantities, of work of viaduct beyond 125% of the BOQ quantities of various items shall be treated as varied work and the rates for such excess quantities should be arrived as per GCC Cl. 40.2 and 40.3.

2. The AT directs the Employer to get the new rates for the above referred excess quantities of various items of work fixed by the Engineer, based on an examination of the Claimant's rate analysis and market rates to determine the balance payment due to the Claimant.”

3. The Award had been challenged by the respondent NHAI by way of OMP 392/2007. The said petition was partially allowed by this Court vide order dated 12.08.2015. In the said order, in relation to claim no.1 and the direction issued by the Arbitral Tribunal, the following observation was made:

“8. I may note that the Arbitration Tribunal has left the issue of calculation in terms of the Award to the employer and though it would have been advisable for the Arbitration Tribunal to determine the amount itself, however, since there are no disputes at present as to the respondent/contractor questioning the calculations to be done by the petitioner/owner, I observe that in case there are any disputes which would remain as regards the calculations made by the petitioner/owner in terms of the portion of this Award, then, the respondent/contractor will always be at liberty to raise any fresh dispute or seek necessary amendment to the Award with respect to the amount which is calculated by the petitioner/owner on the issue of the cost of the viaduct.”

4. The petitioner thereafter filed an application seeking review of the said order being Review Application No.491/2015, *inter-alia* making the

following submissions and prayer:

“5. xxxx

It is further submitted that left to the Petitioner/ NHAI/ owner, the Petitioner is incapable of any decision because the "Engineer", who was casted upon the responsibility to determine the rates and amount for the work of Viaduct done by the Respondent/contractor is no more available, the work having been closed more than 7 years back. Hence this Hon'ble Court should have directed payment of viaduct items to be determined by the Petitioner/owner jointly with the Respondent/ Claimant as per the rates submitted by the Respondent/claimant and not contraverted by the Petitioner/owner as stated in para. 8.4.2 (ix), in spite of opportunity given by the AT to the Petitioner/ Owner. This Hon'ble Court ought to have appreciated that the dispute pertains to the year 2002 and if at this stage, i.e. in 2015, it is left to the Petitioner/employer to determine the rates (which it would never determine fairly), the dispute w.r.t rates would take another decade to get resolved and hence it will be in the fitness of the things, if rates submitted by the Respondent/claimant at the time of execution and which has not been controverted by the Petitioner and directed to be considered for determining amount by the Arbitral Tribunal are considered for arriving at the amounts. It is further respectfully submitted that the Petitioner/ Owner be given a direction to release the payment along with interest in terms with the Award to the Respondent/Client, within 4 weeks.

xxxx

PRAYER

xxxx

i. Review the judgment and order dated 12.08.2015 and pass fresh orders to the extent of giving a finding in respect of the calculation of the cost of the viaduct and with respect to the issue of the reinforcing element as sought for in the present application.”

5. The above review was however dismissed by this Court vide order dated 15.10.2015.
6. Both the parties feeling aggrieved with the order dated 12.08.2015 challenged the same by way of their respective appeals, however, the same were dismissed by the Division Bench of this Court vide order dated 17.03.2016.
7. The petitioner therefore filed an application seeking review of the order dated 17.03.2016 by way of Review Application No.253/2016 *inter-alia* making the following submissions:

“6. xxxx

It is further submitted that the determination of rates shouldn't be placed in the hands of the Respondent/ NHAI because it is incapable to give effect to such a determination. The Engineer, who was entrusted with the responsibility to provide the rates for the work of Viaduct done by the Petitioner/ contractor, is not available any more since the said contract was executed 7 years ago. Hence, it is humbly submitted that this Hon'ble Court should have directed payment of viaduct items to be determined by the Respondent/NHAI jointly with the Petitioner/Claimant as per rates submitted by the Petitioner and not controverted by the NHAI as stated in para 8.4.2 (ix), in spite of opportunity given by the AT to the NHAI.

It is further submitted that this Hon'ble Court ought to have appreciated that the dispute pertains to the year 2002 and at this stage, i.e. in 2016, if the determination of rates is left to the NHAI (which it would never determine fairly), the dispute w.r.t rates would take another decade to get resolved and hence it will be in the fitness of the things if rates submitted by the Petitioner/claimant at the time of execution, which has not been controverted by the Respondent, be considered for determining the amount. It is respectfully submitted that the

Petitioner be given a direction to release the payment for the quantities of viaduct measured and certified as per final bill with applicable price variation in terms of contract with interest in terms of the Award to the Petitioner/Claimant within 4 weeks' time."

8. The review was, however, withdrawn by the petitioner and the review petition was dismissed as not pressed, vide order dated 20.05.2016.

9. The respondent challenged the order dated 17.03.2016 before the Supreme Court, however, the same was dismissed.

10. The above sequence of the orders shows that the Award, in so far as the recalculation of the amount to be paid to the petitioner under claim no.1 by the Engineer, had been upheld.

11. The only dispute that now remains is as to whether the respondent has complied with the direction given by the Arbitrator in the Award.

12. Learned counsel for the respondent submits that in pursuance to the order dated 17.02.2017 passed by this Court, all 19 items covered under claim no.1 were referred by the respondent to the Engineer for his determination of the rates.

13. Though not on record, the learned counsel for the respondent has handed over an affidavit of Mr. Debasish Mishra, Senior Manager with the Engineer i.e. Consulting Engineering Services (India) Private Limited. In the said affidavit, the deponent states that the Engineer considered the rates claimed by the petitioner and found the same to be arbitrary, unreasonable and not as per "Standard Data Book" for Analysis of Rates and Schedules of Rates, Uttar Pradesh Public Works Department, applicable at that period of time. The deponent further states that the final rates payable to the contractor/petitioner for all 19 items were arrived at by the Engineer and

said rates are appropriate and as per industry practice.

14. Learned counsel for the respondent further submits that the rates determined by the Engineer are in fact more than what had been determined by another Arbitral Tribunal with respect to 10 out of the 19 items of work in relation to the same contract.

15. Learned senior counsel for the petitioner submits that a perusal of the above affidavit would also show that the Engineer has arrived at the rates taking into account the Standard Data Book published by the Ministry of Road, Transport & Highways (MoRTH) and the rates issued by the Public Works Department (PWD), State/District wise in the Schedule of Rates (SOR). Drawing reference to paragraph 8.4.2 (ix) of the Award, she submits that the Arbitral Tribunal has already rejected the application of MoRTH's Standard Data Book or the PWD schedule of rates to the 19 items in question and therefore, the Engineer was wrong in again placing reliance on these documents for rejecting the rates proposed by the petitioner.

16. In my view, once the Engineer has determined the rates, this Court in exercise of its power as an Executing Court cannot go behind the same to find that the rates have been properly determined or not. The Arbitrator in the Award has left the exercise of determination of the rates to the Engineer. This Court in its order dated 12.08.2015 had taken note of the above direction and observed that if there is any grievance with respect to the calculation made by the Engineer, the remedy for the petitioner will be to raise a fresh dispute or seek necessary amendment to the Award with respect to the amount which is calculated by the Engineer. As noted above, the Review Petition against the said order was also dismissed by this Court.

The review on the same ground was also dismissed as withdrawn by the Division Bench of this Court.

17. As an Executing Court, the powers of the Court are limited only to ensure that the Decree/Award has been complied with. The Award, as noted above, only directed the Engineer to determine the rates based on an examination of the claimant's rate analysis and market rates to determine the balance payment due to the claimant. The Engineer has done this exercise, though claimant asserts that the same is incorrect as MoRTH's Standard Data Book and PWD rates would not reflect the market rates of the items and cannot be applied. This certainly would be a fresh dispute between the parties and cannot be adjudicated in the present execution petition.

18. There is no other grievance raised with respect to the execution/enforcement of the Award by the petitioner.

19. In view of the same, the execution petition and the pending applications are dismissed with no order as to cost.

NAVIN CHAWLA, J

APRIL 04, 2018/Arya