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

% *Judgment Pronounced on: 20.08.2018*

+ O.M.P. (COMM) 252/2017

NATIONAL HIGHWAYS AUTHORITY OF INDIA.... Petitioner
Through Ms.Bhavana, Advocate

versus

SOM DUTT BUILDERS -NCC(JV) Respondent
Through Mr.Milenka Chaudhary, Mr.Abhishek
Sharma & Mr.Vineet Dwivedi,
Advocates

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present petition is filed under section 34 of the Arbitration and Conciliation Act, 1996 to impugn the award passed by the learned arbitral tribunal dated 14.02.2017. The majority award has been passed by the presiding arbitrator and the co-arbitrator rejecting the claims of the respondent except claim Nos.1 and 3. The second co-arbitrator Sh.Puran Chand has passed a separate award also rejecting all the claims of the respondent other than claim Nos.1 and 3. However, in the separate award, the quantification of the claims have been reduced.

2. The brief facts are that pursuant to the issuance of a notice inviting tenders, the respondent emerged as the highest successful bidder regarding

the work of four laning and strengthening of existing two lanes between Km. 110 to Km.140 on NH-2 in the State of Bihar. Letter of acceptance was issued to the respondent on 23.02.2002. A contract agreement was executed on 27.03.2002. The stipulated date of commencement was 31.03.2002 and the entire project was to be completed within 36 months.

3. The project was divided into two sections. Section 1- New and Old Carriageway Bridge Km 130.500 to Km 140.00 (period of completion 24 months). Section 2 - New Carriageway (Bypass) Km 110.00 to Km 130.500 (period of completion 36 months).

4. A supplementary agreement dated 31.03.2004 was entered into between the petitioner and respondent wherein time for completion of Section 1 was amended. The scheduled date for completion of Section 1A was 30.3.2004, for Section 1B was 30.03.2005 and Section 2 was 30.03.2005. The work was however completed on 30.11.2007, 03.09.2007 and 10.07.2008, respectively. Taking over certificate was issued by the Engineer on 24.12.2007 for Section 1A, on 12.10.2007 for Section 1B and on 09.07.2008 for Section 2. The disputes having been arisen between the parties, the matter was referred to arbitration.

5. The respondent raised 8 claims before the learned Arbitral Tribunal. Details of the claims and the awarded amounts are as follows:

Sl.No	Description of the Claim	Amount Claimed	Amount Awarded
1.	The losses incurred/suffered due to deployment of plant and machinery during the extended period of the Contract	Rs.77,54,28,747	Rs.6,37,71,803
2.	The losses incurred/suffered due to deployment of	Rs.5,50,74,139	NIL

	manpower during the extended period of the Contract		
3.	The losses due to overheads incurred/suffered during the extended period of the Contract	Rs.34,96,97,908	Rs.5,10,17,227
4.	The loss of contractor's profit during the extended period of the Contract	Rs.25,91,18,255	NIL
5.	Claim against losses incurred/ suffered on account of additional expenditure due to extension of BGs towards performance security, mobilization advance and key construction equipment advance and also extra interest liability on advance drawn due to extension of period of the contract	Rs.11,32,65,338	NIL
6.	Loss on account Additional Expenditure on Insurance charges (CAR Policy)	Rs.1,13,09,282	NIL
7.	Losses due unprecedented and phenomenally abnormal rise in price of steel	Rs.3,20,00,125	NIL
8.	Extra cost incurred due to change of foundation of Sone Bridge from Pile foundation of Well foundation	Rs.3,51,78,894	NIL

6. In addition, the learned arbitral tribunal awarded interest @ 12% per annum compounded monthly on the awarded amount from 01.12.2011 till the date of award and 8% simple interest from the date of award to the date of actual payment.

7. A perusal of the award would show that the learned arbitral tribunal has first adjudicated the two preliminary objections raised by the petitioner, namely, that the statement of claim has not been signed and verified by a duly authorized person and that the claims are barred by limitation. Regarding the first objection, the learned arbitral tribunal held that the respondent has filed a copy of power of attorney in favour of Sh. R.S. Mahalaha and rejected the said contention of the petitioner. Regarding the second preliminary objection of limitation, the learned arbitral tribunal held that the claims were actually rejected by the Engineers on 31.01.2011 and the notice of reference to arbitration has been issued by the respondent to the petitioner on 26.07.2011. Accordingly, the learned arbitral tribunal concluded that the claim petition is within time.

8. As noticed above, claim No.1 related to losses incurred/suffered due to deployment of plant & machinery during the extended period of the contract. The learned arbitral tribunal awarded Rs.6,37,71,831/- to the respondent on account of the said claim. The learned arbitral tribunal came to a finding of fact that the delay in completion of the contract was on account of the breach of contract by the petitioner. It noted various facts, documents, correspondences and events on record to come to the aforementioned conclusions. Some of the salient facts, documents and events taken into account are as follows:

- (i) The learned arbitral tribunal noted that there has been a delay of 1340 days in completion of Section 1A, 1252 days in completion of Section 1B, 1198 days in completion of Section 2 individually and in all delay of 1198 days in completion of the whole project. The award also notes that the petitioner had

granted extension of time for full duration/extra time taken to complete the project.

- (ii) The learned arbitral tribunal noted the observations of the Engineers who recommended the extension of time. The Engineers had mentioned various aspects including rehabilitation/reconstruction of the Old Sone Bridge which could not have been completed till the traffic on the Bridge was stopped. It is only after completion of the New Sone Bridge that the traffic could be diverted and thereafter the work for rehabilitation/ reconstruction of approaches to the Old Sone Bridge alongwith the repair and rehabilitation could commence.
- (iii) The learned arbitral tribunal noted the delay due to incidents like Nexalite menace, stoppage of work by the local mafia/miscreants, law and order problem etc. It also noted the delay due to flood in the year 2005. Various other such facts were noted by the learned arbitral tribunal, which have also been noted by the Engineer concerned.
- (iv) The learned arbitral tribunal also noted the minutes of the Variation Committee of the petitioner and the decision of the High Power committee of the petitioner which throws light on the various events which delayed the project. It also noted the comments of the Variation Committee regarding some of the reasons for delay such as additional huge pipe culvert of 1 m-dia at Km.311.100, delay in approval of tree cutting, delay due to additional work of making service ramps and toll plaza, delay due to additional work of making service ramp at Tarachandi

Temple etc. It also noted that extension of time was approved by the Variation Committee after the recommendation of the Engineers and endorsement of the Engineers' recommendation by the respondent's project director.

- (v) The learned tribunal further concluded that giving possession of the site does not mean just issuing a letter but the petitioner had to ensure that the respondent could physically carry out the work at site and that handing over of the site in piecemeal delayed the project. The learned arbitral tribunal also noted that the petitioner has admitted that there has been a delay due to delay in land, forest and environmental clearance.

9. On the quantification of damages, the learned arbitral tribunal noted the submission of the petitioner that the respondent has not produced any contemporary record in approving of additional expenditure including log book, wages register, date of purchase of machinery etc. The Tribunal noted that the monthly progress report filed by the claimant shows the monthly deployment of manpower and plant & machinery which negates the contention of the petitioner about the losses suffered during the extended period of the contract. The Tribunal also noted that the respondent has considered idle charges for all plants and equipment during the extended period of contract from April, 2004 to July, 2008 which is the period of idling for which the plant and equipment were compelled to remain at site due to delay in project. It noted that as per Standard Data Book, usage charges include ownership charges, cost of repair and maintenance and operating charges like cost of crew, fuel and lubricants. It also noted that

percentage of overheads has been considered as 8% for road works, 20% for minor bridges and 25% for major bridges as per Standard Data Book. It also noted the submission of the petitioner that calculations based on Standard Data Book were wrong and could not be accepted. This plea was rejected as these guidelines were followed by the Engineers extensively. It also noted that the quantum of loss assessment is required to be judiciously worked out from the settled methods available including Hudson's formula being one such method to evaluate loss of overheads which has been upheld by various courts.

Accordingly, based on the conclusions as culled out from the record and the Standard Data Book, the learned arbitral tribunal has awarded a sum of Rs.6,37,71,803/- in favour of the respondent for claim No.1.

10. Claim No.3 pertains to losses due to overheads incurred/suffered due to the extended period of the contract. A claim of Rs.5,10,17,227/- has been awarded on this account. All other claims filed by the respondent have been rejected.

11. In addition, the learned arbitral tribunal has awarded interest @ 12% per annum compounded monthly on the amounts claimed from 01.12.2011 as the respondent submitted quantified claim to the arbitral tribunal vide letter dated 30.11.2011. The respondent has been awarded simple interest @ 8% per annum from the date of award to the date of actual payment.

12. I have heard the learned counsel for the parties.

13. The learned counsel for the petitioner has vehemently argued as follows:

- (i) She submits that the mass of evidence filed by the petitioner, namely correspondences which comprises of 200 pages have

been brushed aside by the learned arbitral tribunal, as routine documents. It is urged that there was considerable delay in carrying out the contract by both sides and this argument is completely ignored by the learned arbitral tribunal.

- (ii) It is urged that no evidence has been led by the respondent to show the extent of damages. The learned arbitral tribunal has wrongly given a finding based on the Standard Data Book, which is totally incorrect and cannot be a correct quantification of the alleged damages suffered by the respondent.
- (iii) It is further urged that exorbitant interest has been awarded to the respondent contrary to the judgment of the Supreme Court in the case of *State of Rajasthan & Anr. v. M/s Ferro Concrete Constructions Pvt. Ltd., 2009 (8) SCALE 753*.

14. I will now deal with the submissions of the learned counsel for the petitioner. So far as the first plea is concerned about overlooking of evidence, a perusal of the record as noted above shows that the learned arbitral tribunal has relied upon heavily on internal documents of the petitioner including the comments of officers of the petitioner while dealing with the issue of grant of extension of time to the respondent for the delay in completion of the project. Though the petitioner had sought to argue that the extension of time was granted purely in the interest of work, the record shows that the Engineer concerned had given various reasons as to why the extension of time ought to be extended as noted above.

15. The reasons given by the Engineer have been accepted by the petitioner's project director. These have also been approved by the Variation

Committee of the petitioner and by the High Power committee. The learned arbitral tribunal has concluded that these documents throw light on various events due to which the project got delayed. Admittedly, these are documents signed by officers of the petitioner. The learned arbitral tribunal has accepted these documents as authenticated proof of the facts which led to delay in completion of the project. The learned Tribunal also noted that the petitioner had granted extension of time up to the date of actual completion of the contract without levy of liquidated damages.

16. The learned arbitral tribunal also relied upon the monthly progress report submitted by the Engineer. It also noted that cross-examination of Sh. Anupam Gupta, Executive Director of Supervision Consultant, who had said that monthly progress reports are authenticated documents submitted by the consultant to the petitioner. It also noted that details of manpower and plant and equipment deployed have been extracted by the petitioner from the said monthly progress reports. The said reports being authenticated documents can be taken as contemporary record which can be deemed to be admitted by the Engineer.

It is not for this court to sit in appeal over the said finding of fact recorded by the learned arbitral tribunal.

17. The Supreme Court in *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49 held as follows:

“12The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. a finding is based on no evidence, or

2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
3. ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse. A good working test of perversity is contained in two judgments. In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons**, 1992 Supp (2) SCC 312 at p.317, it was held:

7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

In **Kuldeep Singh v. Commr. of Police**, (1999) 2 SCC 10 at para 10, it was held:

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon

when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In **P.R.Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd.**(2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

.....”

18. Hence, merely because while passing the award the learned Arbitral Tribunal has not referred to the correspondence placed on record by the petitioner does not vitiate the award. As noted, the learned Arbitral Tribunal has instead given greater weightage to the reports prepared by the petitioner's officials when granting extension of time to arrive at a finding of facts. The

arbitrator is the master of quality and quantity of evidence. No fault can be found in this approach.

19. I may now deal with the second contention of the learned counsel for the petitioner, namely, that no evidence was led by the respondent regarding the quantification of damages. The Arbitral Tribunal noted the contention of the petitioner that the respondent had failed to produce log books, wage register, date of purchase of machinery.

20. A perusal of the award shows that the learned arbitral tribunal has relied upon the monthly progress reports. The learned arbitral tribunal noted the cross-examination of Sh. Anupam Gupta, Executive Director of Supervision Consultant who stated as follows:

Question 1: Are you aware that Team Leader and his supporting staff were required to compile and submit monthly progress report based on the information available at site to the Project Director and to the Consultant's Head Office.

Answer: To Project Director, yes, as a contractual requirement.

Question 2: Copies of MPR for the months of March 2007, April 2007 and June 2007 among others as filed by the Project Director which are now shown to you are the ones referred to in Question No. 1.

Answer: If these Reports are provided by the PD office then these are the authenticated documents submitted by the Consultant to NHAI.

The details of manpower and Plant & Equipment deployment have been extracted by the Claimant from the MPRs. As confirmed by the Engineer, MPRs are authenticated documents and can be taken as contemporary records which are deemed to have been admitted by the Engineer.”

21. Hence, the learned arbitral tribunal noted that the monthly progress reports were submitted to the project director and to the consultant head office. It also noted that these are authenticated documents. The learned arbitral tribunal noted that the details of manpower, plant and equipment have been extracted by the respondent from these monthly reports. Hence, the Tribunal concluded that this was sufficient evidence regarding deployment of machinery and manpower.

22. On claim No.1 i.e. losses suffered due to deployment of plant and machinery during the extended period, the Tribunal noted that the basic issue is that the respondent was not able to perform the contract within the original completion period on account of delays attributable to the petitioner. Hence, the respondent was forced to retain plant and machinery in the project for extended period and suffered losses. The Tribunal noted that no procedure or formula has been prescribed in the contract for working out compensation. Relying upon judgments of the Supreme Court, it sought to rely upon the Hudson's formula as an alternative method and assessed the damages at Rs.6,37,71,803/- based on the same. No damages were awarded to the respondent for the extended period of the contract in respect of Section 1B in view of the Supplementary Agreement dated 31.03.2014.

23. Claim No. 3 pertained to loss due to overheads incurred/suffered during the extended period of contract. The Tribunal noted the plea of the petitioner that there are no records proving actual expenditure on overheads which have been proved by the respondent. The learned Tribunal held that the said submissions of the petitioner are erroneous as calculations based on Standard Data Book are accepted guidelines and are being followed by the

petitioner and its engineers extensively. Even the rate analysis of various items is being worked out based on the format given in the Standard Data Book. The Tribunal noted that the monthly progress reports filed by the petitioner show details of monthly deployment of manpower which negate the argument of the petitioner that the respondent did not suffer any loss during the extended period of contract due to overheads. Adopting the Hudson's Formula, the Arbitral Tribunal awarded an amount of Rs. 5,10,17,227/- for claim No.3. No error can be found in the methodology adopted by the learned arbitral tribunal to compute the overhead charges and the award of compensation to the respondent under claim No.3.

24. It may be noted that there can be no quarrel with the Arbitral Tribunal using the Standard Data Book or the Hudson's formula to compute damages. The Supreme Court in *McDermott International Inc. vs. Burn Standard Co.Ltd. and Ors. (2006) 11 SCC 181* held as follows:-

“104.We may at this juncture notice the different formulas applicable in this behalf.

(a) *Hudson Formula*: In *Hudson's Building and Engineering Contracts*, Hudson Formula is stated in the following terms:

“Contract head × $\frac{\text{Contract sum}}{\text{Contract period}}$ × Period
office overhead Contract period of
and profit delay”
percentage

In the Hudson Formula, the head office overhead percentage is taken from the contract. Although the Hudson Formula has received judicial support in many cases, it has been criticised principally because it adopts the head office overhead percentage from the contract as the factor for calculating the costs, and this may bear little or no relation to the actual head office costs of the contractor.....

.....

106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.”

25. Next plea raised by the learned counsel for the petitioner related to the award of interest by the learned arbitrator @ 12% per annum compounded monthly on the awarded amount w.e.f. 01.12.2011 till the date of award. A perusal of the award would show that the learned arbitral tribunal noted that Sub-Clause 60.8(b) of the agreement dated 27.05.2002 read with the Appendix to the Bid stipulates payment of interest for delayed payment @ 12% per annum compounded monthly. The learned Arbitral Tribunal also relied upon section 31(7) of the Arbitration Act.

26. Sub-Clause 60.8(b) of the said agreement read as follows:

“Sub-Clause 60.8

(a).....

Time of

Payment and

Interest

(b) In the event of the failure of the Employer to make payment within the times stated, the Employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid in the currencies in which the payments are due. The provisions of this Sub-Clause are without prejudice to the

Contractor's entitlement under Clause 69 or otherwise.”

27. The above provision of the Agreement clearly provides that the petitioner shall pay to the Contractor interest compounded at rates stated in the Appendix to Bid upon all such sums unpaid from the date upon which the sum should have been paid. Under section 31(7) of the Arbitration Act where an Award is for payment of money the Arbitral Tribunal may include interest at such rate which it may deem reasonable, unless otherwise agreed by the parties.

Keeping in view the above clause of the agreement and the statutory provision there appears to be no basis to challenge the Award of interest as granted by the learned Arbitral Tribunal.

28. The learned counsel appearing for the petitioner has relied upon the judgment of Rajasthan High Court in the case of *State of Rajasthan & Anr. v. M/s Ferro Concrete Constructions Pvt. Ltd.* (supra). The reliance on the said judgment by the learned counsel for the petitioner is misplaced. That is a judgment relating to the Arbitration Act, 1940. The Court was interpreting the provisions of Interest Act, 1978. The court held that rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest be paid on different classes of deposits by different classes of scheduled banks. The present case is not a case relating to Arbitration Act, 1940.

29. In the present case, the learned arbitrator has relied upon the contractual provisions. Further, the interest rate awarded cannot be said to be unduly harsh or illegal or warrant any interference of this court.

30. There is accordingly no merit in the present petition and the same is dismissed.

(JAYANT NATH)
JUDGE

AUGUST 20, 2018/v/n

