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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision : 26th March, 2019

+ O.M.P. (COMM) 85/2019
BHAGHEERATHA ENGINEERING LTD.

..... Petitioner
Through: Dr.Amit George, Mr.V.M.
Vishnu, Mr.Rishabh Dheer &
Mr.Amol Acharya, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA
..... Respondent
Through: Mr.Siddharth Pandey &
Ms.Isha Bansal, Advs.

+ O.M.P. (COMM) 88/2019
NATIONAL HIGHWAYS AUTHORITY OF INDIA
..... Petitioner
Through: Mr.Siddharth Pandey &
Ms.Isha Bansal, Advs.

versus

M/S BHAGHEERATHA ENGINEERING LIMITED
..... Respondent
Through: Dr.Amit George, Mr.V.M.
Vishnu, Mr.Rishabh Dheer &
Mr.Amol Acharya, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

IA No. 2962/2019 (Exemption) in O.M.P. (COMM) 85/2019
IA No. 3058/2019 (Exemption) in O.M.P. (COMM) 88/2019

Allowed, subject to all just exceptions.

O.M.P. (COMM) 85/2019 &
O.M.P. (COMM) 88/2019 & IA No. 3059/2019 (Stay)

1. These two petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 22.10.2018 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 15.06.2001 for Four Laning of Km 180.000 to 199.200 of Bangalore-Salem-Madurai Section of NH-7 in the State of Tamil Nadu.

2. In this order National Highways Authority of India shall be referred to as the petitioner and M/s Bhagheeratha Engineering Limited shall be referred to as the respondent.

3. The Arbitral Tribunal has given the time line relevant to the award of Contract and completion thereof, some of the relevant dates of which are taken as under:-

<i>"Date of Issue of notice to commence the work</i>	<i>10.08.2001</i>
<i>Date of Commencement the work</i>	<i>31.08.2001</i>
<i>Period of completion of work</i>	<i>24 Months</i>
<i>Stipulated date of completion of work</i>	<i>30.08.2003</i>
<i>Actual date of Completion</i>	<i>31.12.2009</i>
<i>Total Period taken to complete the work</i>	<i>100 Months"</i>

4. The primary dispute between the parties is to the responsibility for causing delay in execution of the work. The Arbitral Tribunal, relying heavily on the recommendation of the Engineer and the Project Director for grant of extension of time to the respondent till 31.12.2009, that is the actual date of completion of work, without levy

of liquidated damages, has held that out of the total delay of 76 months, while 45 months delay was attributable solely to the petitioner, the delay of 31 months was attributable jointly to the petitioner and the respondent.

5. The learned counsel for the petitioner submits that the Arbitral Tribunal has erred in placing reliance on the recommendations of the Engineer and the Project Director. He submits that the recommendations of the Engineer and the Project Director were not accepted by the Executive Committee of the petitioner as it was found that the reasons for delay were attributable to the respondents financial constraints and, infact, stoppage of work was attributable completely to such constraints.

6. He further submits that in terms of Clause 44.4 of the General Conditions of Contract (GCC), the Contractor, that is the respondent, was not entitled to compensation incase it did not give early warning of a Compensation Event to the petitioner. In the present case, the respondent for the first time informed the petitioner of Compensation Events only by the letter dated 18.03.2003, that is almost on the expiry of the scheduled completion period. The respondent, therefore, should have been held ineligible to grant of any compensation for its failure to comply with Clause 44.4 of the GCC.

7. On the other hand, the learned counsel for the respondent submits that the Engineer and the Project Director had infact recommended extension of time for the full period of 76 months to be granted to the respondent. This was after taking into account the delay

which was stated to be attributable to the respondent. The Arbitral Tribunal has, upon analyzing the causes for delay, concluded that 45 months delay was attributable solely to the petitioner and 31 months delay was attributable concurrently to both the parties. This being a finding of fact, cannot be interfered with by this Court in exercise of its power under Section 34 of the Act.

8. As far as Clause 44.4 is concerned, the learned counsel for the respondent submits that as the delay was mainly on ground of failure of the petitioner to hand over the complete land required for the project, it was fully known to the petitioner and required no further warning. Without prejudice, he submits that even otherwise, the respondent, by its repeated communications, had been repeatedly bringing this cause of delay to the notice of the Engineer and the concerned Authority. It is for that reason that even the Engineer never took a plea of non compliance with Clause 44.4 while recommending extension of time.

9. I have considered the submissions made by the counsels for the parties.

10. The Arbitral Tribunal has considered the issue of delay and has held as under:-

“160.50 The total length of service road is 19.825 kms in cumulative (LHS+RHS). Even though the last bit of land was handed over to the Contractor in April 2005, the Engineer has stated that the land owner at this particular stretch from Km 196.850 to km 198.000 had put up resistance to the Contractor

to do the work and the problem was resolved only in June, 2008. Also, after the completion of the pipe line work and testing with TWAD Board authorities, the Contractor had completed balance service road by September, 2009.

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160.56 The Engineer determined Extension of Time for a total of 76 months under Clause 28.1, 44.1(a) and 44.2 on account of delays attributable to the Respondent and other causes as spelt out in his letter.

As per Annexure-II (Pg 203-205, CD-5) of the Engineer's letter dated 24.08.2010, there was a concurrent delay of 29.03 months by the Contractor. There was a period of about one or two months near July 2006 when some machinery of the Claimant was taken away by L& T which was brought back subsequently. Therefore, in our view, there was concurrent delay of 31 months attributable to the Claimant.

Delay for the remaining 45 months is found to be attributable solely to the Respondent.

On the basis of documentary evidence as brought out above, the AT holds that the Claimant is entitled to Extension of Time for the overall delay of 76 months under Clause 28.1, 44.1 and 44.2. However, out of the total delay of 76 months, 45 months are compensable and 31 months are non-compensable and under Cl. 44.2 of CA.”

11. Clause 21 of the GCC reads as under:-

“21. Possession of the Site

21.1 The Employer shall give possession of all parts of the Site to the Contractor. If possession of a part is not given by the date stated in the Contract Data the Employer is deemed to have

delayed the start of the relevant activities and this will be Compensation Event.”

12. A reading of the above Clause would show that even if the possession of a part of the site is not given by the petitioner to the respondent by the date stated in the Contract data, the petitioner is deemed to have delayed the start of the relevant activities and it shall be considered to be a Compensation Event.

13. Compensation Events are defined in Clause 44 of the GCC. Clause 44.1(a) reads as under:-

“44. Compensation Events

44.1 The following are Compensation Events unless they are caused by the Contractor:

(a) The Employer does not give access to a part of the Site by the Site Possession Date stated in the Contract Data. In case the Employer or service provider organisation is restrained by a Court Order from cutting of trees/ shifting of utilities/removal of encroachment etc., it shall be Compensation Event.”

14. Therefore, the above Clause reiterated that incase access to part of site is not given by the petitioner till the site possession date stated under the Contract Data, the same shall amount to a Compensation Event.

15. As found by the Arbitral Tribunal, in the present case, the land was handed over to the respondent in piecemeal manner right till June 2008, that is beyond the contractual period.

16. Clause 44.4, which is being relied upon by the petitioner is reproduced as under:-

“44.4The Contractor shall not be entitled to compensation to the extent that the Employer’s interests are adversely affected by the Contractor not having given early warning or not having cooperated with the Engineer.”

17. A reading of the above Clause clearly shows that incase the Contractor is to rely upon the Compensation Event which would also have an effect on the employer’s interest, the Contractor must give an early warning to the petitioner of such events. The extent of land that is being handed over by the petitioner to the respondent is well known to both the parties. This would not be an event which required further notice to be given by the respondent to the petitioner. Infact, Clauses 21 and 44.1(a) contemplate that failure of the petitioner to hand over the complete land to the respondent would itself be a Compensation Event without further notice.

18. In any case, I do not find the findings of the Arbitral Tribunal on this aspect to be unreasonable or perverse so as to warrant any interference of this Court in exercise of its power under Section 34 of the Act.

19. This now takes me to the specific claims and Counter Claims under challenge in the two respective petitions.

20. First challenge by the petitioner is to the grant of Claim no. 1 in favour of the respondent. Claim no. 1 of the respondent was towards

the payment of the Final Account stated to be certified by the Engineer.

21. The counsel for the petitioner submits that this Claim of the respondent was barred by limitation. He submits that the Final Bill has been certified by the Engineer on 25.02.2011. The respondent invoked the Dispute Resolution Expert (DRE) Procedure on 10.10.2012. In terms of the Agreement between the parties, DRE was supposed to give its report within a period of 28 days from the date of such invocation, failing which the aggrieved party was to invoke arbitration within a period of 28 days thereafter. However, in the present case the respondent appointed its nominee Arbitrator only on 19.09.2014 and therefore, even excluding the period of 28 days for the DRE procedure, claim of the respondent was barred by Law of Limitation.

22. I do not find any merit in the said objection. The respondent had admittedly invoked the Arbitration Agreement between the parties on 19.11.2012. In terms of Section 21 of the Act, therefore, the arbitration proceedings commenced on that date. Thereafter there was delay in appointment of the nominee Arbitrators by both the parties, with the petitioner appointing its nominee Arbitrator on 22.08.2014 and the respondent appointing its nominee Arbitrator on 19.09.2014. Mere delay in appointment of the Arbitrators, however, would not result in recommencement of the period of limitation. The Arbitral Tribunal has also considered this issue and based on the date of invocation of arbitration, has held the same to be within the period of limitation. I do

not find the said finding of the Arbitral Tribunal to be incorrect in any manner.

23. The next challenge to the award of Claim no. 1 in favour of the respondent is on account of the Arbitral Tribunal not allowing the petitioner to retain another sum of Rs. 24,31,732/- towards royalty from the Final Bill. It is the case of the petitioner that the Deputy Director, Mines has assessed the amount of royalty as Rs. 1,73,88,995/-. Though the Engineer and the Project Director had accepted the submission of the respondent that an amount of Rs. 24,31,732/- out of the said amount was not payable, the Deputy Director, Mines had not accepted the said plea. Though the respondent had challenged the said order, it is submitted that the Arbitral Tribunal has, therefore, erred in allowing the retention of only Rs. 1,49,57,263/- from the Final Bill payable to the respondent, instead of the whole amount of Rs. 1,73,88,995.

24. On the other hand, the learned counsel for the respondent submits that as the Engineer and the Project Director had accepted the submission of the respondent that the said amount of Rs. 24,31,732/- was not payable as royalty, between the petitioner and the respondent this was a final determination. He submits that the Arbitral Tribunal has, therefore, rightly disallowed the claim of the petitioner for retention of the said amount.

25. I have considered the submission of the counsels for the parties. Admittedly, the liability of royalty is to be determined by the Director, Mines. The said authority has determined such liability as Rs.

1,73,88,995/-. The respondent is in challenge against the said determination. As long as the said determination stands, the petitioner was entitled to the retention of the said amount. Merely because the Engineer and the Project Director found merit in the plea raised by the respondent towards the amount of Rs. 24,31,732, as they are not the competent authority under the relevant statute, their acceptance would not be of any consequence. I, therefore, set aside this portion of the Award and hold that the petitioner shall be liable to pay to the respondent an amount of Rs. 2,91,86,906 – Rs. 1,73,88,995= 1,17,97,911. It goes without saying that the direction of the Arbitral Tribunal that the amount so allowed to be recovered shall be refunded to the respondent incase the matter is decided in its favour by the appellate authority stands for the full amount of Rs. 1,73,88,995. It also goes without saying that interest payable on Claim no. 1 shall be on the amount now determined in this order.

26. The next challenge of the petitioner is to the award of Claim no. 2 in favour of the respondent. Claim no. 2 was towards additional cost stated to have been incurred by the respondent for deployment of machinery in the prolonged period of Contract.

27. The learned counsel for the petitioner submits that this Claim could not have been granted in favour of the respondent as the respondent had failed to produce any cogent evidence in support of such Claim. The respondent had merely produced certain charts, which remained unproved as the respondent did not lead any oral evidence in support thereof.

28. I do not find any merit in the said contention. As recorded by the Arbitral Tribunal, the charts filed by the respondent were stated to be based on the Engineer's monthly progress reports during the extended period from August 2003 to December 2009. The respondent had pleaded that as these reports were voluminous in nature, instead of filing of the same, the petitioner should be called upon to verify the contents of the chart from the record available with it. The Arbitral Tribunal accepted the said prayer and called upon the petitioner to verify the chart from the document available with it. Thereafter a joint report of the parties was also directed to be prepared by the Arbitral Tribunal. The said report dated 09.09.2015 was filed before the Arbitral Tribunal. The Arbitral Tribunal has passed its Award on the findings given in the said joint report. Therefore, the deployment of the machinery during this extended period was duly proved by way of the joint report of the parties.

29. The Arbitral Tribunal thereafter applied the Standard Data Book for analysis of rates 2003 by Ministry of Shipping, Road Transport and Highways, GOI (MOSRT & H) to arrive at the final figure that was payable under the said Claim of the respondent. It assessed this Claim at Rs. 30,76,31,552/-. The Arbitral Tribunal, however, awarded a sum of only Rs. 20,38,22,729/- towards this claim in favour of the respondent as this was the amount claimed by the respondent itself in its Final Account Bill vide letter dated 29.12.2010. I do not find the approach adopted by the Arbitral Tribunal to be incorrect in any manner.

30. At this stage, I shall deal with the objection filed by the respondent towards award of Claim no. 2.

31. The counsel for the respondent submits that the Arbitral Tribunal having assessed the claim at Rs. 30,76,31,552/-, has erred in restricting the Award only to the sum of Rs. 20,38,22,729 relying solely on the Final Account Bill raised by the respondent. He submits that the Final Account Bill was raised on an incorrect basis which even the Arbitral Tribunal found to be old and not considered appropriate for highway projects. Therefore, the Arbitral Tribunal should have awarded the full amount assessed by it towards Claim no. 2.

32. I do not find any merit in the said submission of the respondent. Admittedly, the Final Account Bill was raised by the respondent only on 29.12.2010. The work had been completed on 31.12.2009. The respondent, therefore, had a period of one year to assess its claim on this head. The respondent having itself assessed its claim and raised the same alongwith its Final Account Bill, has rightly been held by the Arbitral Tribunal to be not entitled to any further claim. I may only note that whether by adoption of MOSRT & H Standard Data Book or by the “Guidelines for Working out Unit Rate Cost of the Construction Equipment used for River Valley Projects”, the assessment remained theoretical in nature. I, therefore, find no merit in the objection raised by the respondent on this Claim.

33. The next challenge of the petitioner is to the grant of Claim no. 3 in favour of the respondent. Claim No. 3 was towards additional cost

stated to have been incurred on overhead expenses in the prolonged period of Contract.

34. The counsel for the petitioner submits that the respondent had failed to lead any cogent evidence in support of this Claim. He submits that mere production of certain certificates from the auditors cannot take place of evidence, especially when these auditors were not produced as witnesses in support of this Claim.

35. I have considered the submission made by the counsel for the petitioner, however, find no merit in the same. The Arbitral Tribunal in awarding this claim has again relied upon the MOSRT & H Standard Data Book and certificates from the two Chartered Accountants produced by the respondent. The Arbitral Tribunal ignored the overhead expenses of site and office incurred by the respondent during the original Contract period and apportioned the overhead expenses of Head Office and Regional Office for the project. The Arbitral Tribunal thereafter relied on the certificates issued by the Chartered Accountants and also restricted the claim to 45 months of delay that was attributable solely to the petitioner. I do not find the approach of the Arbitral Tribunal to be perverse or unreasonable in any manner so as to warrant any interference of this Court in exercise of its power under Section 34 of the Act.

36. The next challenge of the petitioner is to the rejection of Counter Claim no. 1 of the petitioner. Counter Claim no. 1 of the petitioner was towards alleged loss of revenue alongwith interest on account of delay stated to be attributable to the respondent.

37. The question of delay has already been considered hereinabove and need not be repeated.

38. The Arbitral Tribunal has further held as under:-

“344.5 It is also noted by the AT that as per the strip plan (RD-16) submitted by the Respondent, the tolling stretch was from km 180.000 to Km 248.628. As seen from Annexure A-5 of RD-16, the subject reach of Thumbipadi-Salem (NS-26) lies between km 180.000 and km 199.200. The toll was to be levied on completed road section along with the completed sections on either side of this Project road. The Respondent could have taken over the completed reach except 800 m length under ROB and its approaches and levied the toll.

344.6 Further, the toll in this section was levied from 14.06.2010 whereas the Project had been completed on 31.12.2009. The Respondent was free to levy toll w.e.f. 01.01.2010. Levying of the toll w.e.f. 14.06.2010 i.e. about 6 months after the completion of subject project, shows that the Respondent was not ready to levy the toll before 14.06.2010.”

39. I again do not find the approach of the Arbitral Tribunal to be unreasonable so as to warrant any interference of this Court.

40. The petitioner has further challenged the rejection of Counter Claim no. 2, which was for extra expenditure incurred on supervision consultancy charges, Counter Claim No. 4, which was for excess of price adjustment paid to the respondent, and Counter Claim No. 5, which was for the liquidated damages for delay in execution of work.

41. These Counter Claims are again premised on the plea of the petitioner that the respondent was responsible for the delay in

execution of the work. I have already considered the said plea hereinabove. For the reasons recorded by the Arbitral Tribunal and the findings on the question of delay discussed hereinabove, the rejection of these Counter Claims cannot be assailed by the petitioner.

42. The petitioner further challenges the rejection of Counter Claim no. 6, which was for the tentative cost of balance pipeline work. Here again, the Arbitral Tribunal has rejected the Counter Claim on the ground that the joining of connection of the pipeline had not been done till the date of the Award and that the petitioner had not incurred any cost on this account. As noted hereinabove, the project was completed on 31.12.2009. The Award has been passed on 22.10.2018, that is after an expiry of nine years from the completion of the project. The petitioner did not show to the Arbitral Tribunal that it had incurred any additional cost on this account for this period of nine years. Therefore, rejection of this Counter Claim no. 6 cannot be assailed by the petitioner.

43. This now brings me to the other challenge of the respondent to the Impugned Award. The learned counsel for the respondent has drawn my attention to the finding of the Arbitral Tribunal in paragraph 312.6 which is reproduced hereinbelow:-

“312.6 For Claims No. 2 and 3, the losses had been suffered by the Claimant during the execution period of the Project prior to 31.12.2009. The Final Account Bill was submitted by the Claimant on 29.12.2010. The Clearance/information was submitted by the Claimant on 06.05.2011. Therefore, by adding 28 days to 06.05.2011, the interest on the amounts awarded

under Claims no. 2 and 3 also becomes due from 04.06.2011.”
(Emphasis supplied)

44. He submits that the Arbitral Tribunal having concluded that the respondent was entitled to interest on Claim nos. 2 and 3 with effect from 04.06.2011, has erred in finally awarding interest only from 19.11.2012, which was the date of invocation of arbitration. He submits that in the entire Award there is no other contrary finding given by the Arbitral Tribunal for having differed from its finding in paragraph 312.6. He submits that this amount being due and payable to the respondent as on 31.12.2009, interest was rightly found to be payable with effect from 04.06.2011 and there is no reason for further restricting the same only from 19.11.2012.

45. On the other hand, the learned counsel for the petitioner submits that for the plea of the respondent that there is a typographical error in the final Award or that the Award requires any interpretation due to inconsistency, the proper remedy for the respondent was only in the form of an application under Section 33 of the Act. The Award cannot be challenged on this ground under Section 34 of the Act.

46. I do not find any merit in the submission made by the learned counsel for the petitioner. Section 33 of the Act ofcourse gives a remedy to an aggrieved party to seek correction of a clerical error or typographical error in the Award or seek interpretation of a specific point or part of the Award. However, incase a party fails to seek such clarification or correction of error, it cannot be said that such party

would be deprived of its remedy under Section 34 of the Act if it otherwise can show that the Award is liable to be interfered with on the grounds mentioned in the said Section.

47. In the present case, the Arbitral Tribunal having found that the losses that were claimed under Claim nos. 2 and 3 had been incurred and expended by the respondent prior to 31.12.2009 and having itself concluded that interest would become payable on this amount with effect from 04.06.2011, has given no reason whatsoever for restricting it thereafter, only from 19.11.2012.

48. In terms of Section 31(7) of the Act, though award of interest is at the discretion of the Arbitral Tribunal, such discretion cannot be exercised by the Arbitral Tribunal in an arbitrary manner. It is clear from the Award that in the final direction the Arbitral Tribunal has committed a clerical error in granting such interest only from 19.11.2012. I, therefore, hold that the interest on claim awarded under Claim nos. 2 and 3 in favour of the respondent would be payable with effect from 04.06.2011.

49. The petitions are disposed of in the above terms, leaving the parties to bear their own costs.

NAVIN CHAWLA, J

MARCH 26, 2019/rv