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

+ **FAO (OS) (COMM.) 148/2019 & CM 29421/2019 (stay)**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant

Through: Mr Siddharth Pandey and Mr Gaurav
Mishra, Advocates.

versus

M/S BHAGHEERATHA ENGINEERING LIMITED Respondent

Through: Dr Amit George, Mr Amol Acharya,
Mr Swaroop George and Ms Rajsree
Ajay, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER
05.07.2019

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Dr. S. Muralidhar, J.:

1. This appeal by the National Highways Authority of India ('NHAI') is directed against the order dated 26th March, 2019 passed by the learned Single Judge dismissing NHAI's petition being OMP (COMM.) No. 88/2019 under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') challenging an award dated 22nd October, 2018 passed by the Arbitral Tribunal ('AT') adjudicating the disputes between the NHAI and the Respondent arising from an Agreement dated 15th June, 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. There were three broad pleas urged by Mr Siddharth Pandey, the learned counsel for the Appellant, before this Court. He first questioned the rejection by the learned Single Judge of the plea of the NHAI that Claim No.1 of the Respondent regarding payment of the Final Account Bill certified by the Engineer was barred by limitation. He submitted that the final bill had been certified by the Engineer on 25th February, 2011 whereas the Respondent invoked the Dispute Resolution Expert ('DRE') Procedure only on 10th October, 2012. Even without waiting for the report of the DRE, the Respondent proceeded to invoke the arbitration clause. Mr. Pandey submitted that it was incumbent on the Respondent to have exhausted the DRE Procedure and that it had to be invoked within a reasonable time.

3. On the other hand, it is pointed out by Dr. Amit George, learned counsel appearing on behalf of the Respondent, that Clause 24.1 which requires the invocation of DRE Procedure within 14 days of the notification of the Engineer's decision on the final account did not also stipulate that their failure to invoke such DRE Procedure would entail the foreclosure of any claim arising therefrom.

4. Clause 24.1 of the Agreement reads as under:

“24.1 If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Dispute Review Expert within 14 days of the notification of the Engineer's decision;”

5. Indeed, as pointed out by Dr. George, the language of the said clause does

not appear to make it mandatory. Further, if such a requirement was mandatory, it would render the clause invalid. A clause of a similar nature which required the Claimant to issue a notice of its intention to make a claim to an Engineer within 28 days after the event, failing which the claim would be time-barred, was held to be hit by Section 28 of the Contract Act, 1872 by this Court in ***National Highways Authority of India v. Mecom-Gea Energy Systems Authority India 199 (2013) DLT 397***. It was held that:

“After the 1997 amendment to Section 28 of the Indian Contract Act, 1872, not only the curtailment of the period of limitation is void, but also the extinction of right, if sought to be brought by the agreement within a specific period, which period is less than the period of limitation prescribed for the suit under the Contract in question, is also rendered void. In other words, after the amendment to Section 28 of the Indian Contract Act, 1872 by Act 1 of 1997, the distinction between curtailing of the period of limitation and extinction of the right itself, after the specified period, no longer exists.”

6. The above legal position was reiterated in ***National Highways Authority of India v. PCL–Suncon (JV) 2017 II AD (Del) 469***. Consequently, merely because the Respondent did not invoke the DRE Procedure in a reasonable time, would not render Claim No.1 time barred. Claim No.1, in any event, was invoked well within the limitation period of 3 years since, as noted by the AT in paragraph 170 of the Award, the cause of action arose on 29th December 2010 (the date of submission of the final bill) and the arbitration process admittedly commenced on 19th November 2012, within three years thereafter. Accordingly, the Court finds no merit in the first ground raised by the Appellant.

7. The next ground was regarding the apportionment of the delay in completion of the project between the NHAI and the Respondent. According to the Appellant, of the 76 months of delay, 45 months of delay was apportioned by the AT to the NHAI and 31 months to the Respondent, but the AT failed to explain the basis for such a conclusion. According to Mr. Pandey, the learned counsel for the NHAI, the learned Single Judge misconstrued the letter dated 24th August, 2010 of the Engineer that there was “concurrent delay of 31 months attributable to the Claimant.” He submitted that the AT had ignored the fact that prior to 24th August 2010, the Engineer had pointed out that the delays were attributable solely to the Respondent on account of their fund crisis and consequent non-deployment of machinery and manpower.

8. The Court finds that throughout the project, extension of time (‘EOT’) was granted by NHAI to the Respondent without imposition of the liquidated damages (‘LD’). The clear finding in this regard of the AT is that the scheduled two-year construction period was to expire on 30th August, 2003. Just 24 days prior thereto, the Engineer noted that the required lands had not been made available to the contractor in time and therefore there was no reason to impose LD on the contractor for the delay in completion. The Project Director (PD) too had agreed to the recommendations of the Engineer.

9. The Court finds that there is a detailed discussion on the clauses of the Agreement and the relevant correspondence between the parties, in the impugned Award. In the circumstances, the disinclination of the learned

Single Judge to re-appreciate the evidence only to come to a different point of view is perfectly understandable. The conclusions drawn by the AT in paragraph 160.47 on the 'governing delays', and its finding that it was not for the reasons attributable to the contractor cannot be said to be perverse and did not call for the interference by the learned Single Judge. This ground of challenge is also, therefore, rejected.

10. The last ground of challenge was that the learned Single Judge was in error in rejecting the plea of the Appellant that Claim Nos. 2 and 3 raised by the Respondent had been wrongly allowed. Claim No.2 was towards additional cost incurred by the Respondent for deployment of machinery in the prolonged period of contract. Claim No.3 was in respect of the additional costs on overhead expenses in the prolonged period. The submission of Mr. Pandey, the learned counsel for the Appellant, is that these claims were not backed by any documentary evidence.

11. As rightly pointed out by the learned Single Judge, there were monthly progress reports of the Engineer for the extended period from August, 2003 to December, 2009. The AT had called upon the NHAI to verify the charts produced by the Respondent. A joint report was asked to be prepared by both parties. The said report dated 9th September, 2015 was filed before the AT. The AT thereafter applied the Standard Data Book for analysis of Rates-2003 issued by the Ministry of Shipping Road Transport and Highways, Government of India and arrived at the final figure payable under the claim.

12. Of the claim of Rs.30.76 crores, the AT awarded only Rs.20.38 crores to

the Respondent. Therefore, it is not as if the entire claim was allowed. Likewise, Claim No.3 was allowed only in part. The Court is unable to find any perversity in the impugned award with regard to Claim Nos. 2 and 3. The learned Single Judge was justified in not interfering with the Award in the facts and circumstances of the case.

13. There is no merit in this appeal. It is accordingly dismissed. The pending application is also disposed of. No costs.

CM 29420/2019 (exemption)

14. Allowed, subject to all just exceptions.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JULY 05, 2019

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