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

\+ O.M.P. (COMM) 508/2019 & IAs. 17037/2019 and 17038/2019

M/S. S & P INFRASTRUCTURE DEVELOPERS PVT. LTD. ..... Petitioner

Through: Mr. M. Dutta, Mr.Pavan Chaturvedi and Mr. Aditya Guha, Advs.

versus

EXECUTIVE ENGINEER, NATIONAL HIGHWAY DIVISION ROAD CONSTRUCTION DEPARTMENT, BHAGALPUR. & ANR. ..... Respondents

Through: Ms.Monika Arora, Mr.Akash Deep Gupta and Mr.Kushal Kumar, Advs. for R-2/UOI

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% **04.12.2019**

I.A. 17037/2019 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

O.M.P. (COMM) 508/2019

1. This petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act' in short) challenging the award dated September 1, 2019 of the Arbitral Tribunal rejecting claim nos. 1, 2 and 9 of the petitioner. The said claims were made under the following heads:

(1) Dispute pertaining to the uncompensated maintenance of project

highway due to force majeure conditions.

(2) Dispute pertaining to compensation of losses of further business due to delay in completion and interest.

(9) Dispute pertaining to excess Regional Office and Head Office expenses due to heavy delay in sanction of revised estimate.

2. In so far as Claim no.1 is concerned, petitioner had before the Arbitral Tribunal submitted a claim of ₹60,20,310/- and a further claim of interest of ₹33,63,721/- till March 31, 2018. It was pleaded by the petitioner that it was continuously maintaining the stretch, while the respondent was busy in getting sanction of 3rd Revised Cost Estimate from Ministry of Road Transport and Highway (‘MORTH’ in short) due to deficiency in the crust thickness executed under the agreement. The petitioner contested that the disputes are regarding maintenance of road stretch by it providing WBM Gr.-II material for filling potholes and repairing the patches in the road surface formed due to deficient crust thickness and multi-fold increase of traffic. It was also the case of the petitioner that the departmental officials were present at the site at the time of execution of maintenance work done by the petitioner, but there was no objection from their side to use WBM Gr.-II material for filling up the potholes and patch repair works. However, when the petitioner requested the respondent to make the payment of the bills of the maintenance along with previously executed unpaid works, respondent tried to force the petitioner to execute the works as per 3rd Revised Estimate sanctioned by MORTH, whereas the petitioner had already expressed reservation about the technical insufficiency of the specifications sanctioned under the 3rd Revised Estimate and in order to avoid premature failure of the works, the petitioner did not want to execute

the works as per the sanctioned 3rd Revised Estimate.

3. It was the case of the petitioner that even after submissions of bills by the petitioner for the payment of maintenance works, the respondent did not pay for the work quantities executed by the petitioner for maintenance of road stretch at the time of foreclosure of the work project. In so far as the interest is concerned, it is the case of the petitioner that the interest is payable by the respondent on the amount of uncompensated maintenance cost inasmuch as the petitioner submitted that the maintenance work was done by the petitioner from time to time from October, 2013 to November, 2014. Therefore on an average the payment became due to the petitioner 7 months after October, 2013 and accordingly, the petitioner had claimed the interest.

4. On the other hand, the case of the respondent with regard to this claim was that the GSB material should have been used by the petitioner in place of WBM-II. For repair of shoulders / flanks earth work was used by the petitioner, about which there was no dispute between the parties. It was also the case of the respondent that the petitioner is not entitled to the claim and it was rightly rejected by the Arbitral Tribunal. In fact, it was the case of the respondent that the quantities claimed by the petitioner under the maintenance were already paid to the petitioner by it and whatever quantity of work was done by the petitioner has already been paid to the petitioner under the 7th and final bill submitted to the Regional office of MORTH, Patna vide letter dated July 20, 2016 for payment incorporating all measurement done on September 9, 2015 and nothing remains to be paid by the respondent to the petitioner. That apart, it was also stated by the respondent that the work in question was under the defect liability period of

three years till July, 2016 during which the petitioner was to maintain the road. However, the petitioner stopped further execution of the work on July 18, 2013 and therefore did not perform any work except PQC in 76 meters and hence on account of inaction of the petitioner, the road in question got damaged subsequently and in result thereof, respondent had to incur extra amount and suffered financial loss. It is also stated by the respondent that the petitioner itself stopped opted for the foreclosure of the work and on the basis of the requests made by the petitioner, permission for foreclosure was accorded by the respondent and thereafter final measurement was done on September 9, 2015 and 7th and final bill incorporating all the quantities of the work done by the petitioner was prepared and final payment had already been made to the petitioner and nothing remains to be paid. The Arbitral Tribunal on this claim has held as under:

> ***"The Tribunal considered pleadings made by the parties and referred to the provisions of Clause 54 of the Agreement, wherein the Contractor is liable to bear the cost of repairs during the 'Defect Liability Period'. The Clause 54 of the Agreement is quoted below:***
>
> > ***"54. Cost of Repairs.***
> > *54.1 Loss or damage to the Works or Materials to be incorporated in the Works between the Start Date and the end of the Defects Correction periods shall be remedied by the Contractor at the Contractor's cost if the loss or damage arises from the Contractor's acts or omissions".*
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> ***Further the arbitral Tribunal notes that the Respondent has pleaded that whatever quantity of work was done by the Claimant has already been paid by it to the Claimant under the 7th and final bill and nothing remains to be paid by the Respondents, and during the arguments***

before the arbitral Tribunal the Claimant was unable to dispute this contention of the Respondent, except to plead that the payment for maintenance works was made by the Respondent to the Claimant 2 times previously.

<u>The Tribunal after considering the provisions of the Agreement and pleadings of the Respondent, rejects the Claim No.1 of the Claimant.</u>

5. Even before this Court, it is submitted by Mr. M. Dutta, learned counsel for the petitioner by drawing my attention to the conclusion drawn by the Tribunal with regard to Claim no.8 which is for damages due to idling of plants and equipments that the work was to be completed within a period of 13 months, but it overshot by a further period of 16 months, in total 29 months and the fact that the Arbitral Tribunal has granted damages for idling of plants and equipment for the remaining 16 months under Claim No.8, the issue no.1 also needs to be proceeded on the premise that the repair work carried out by the petitioner was during the period when the contract had overshot. Having done the work, the petitioner is entitled to the maintenance charges. He also states that the Arbitral Tribunal has wrongly rejected the claim by citing Clause 54.1 of the Contract as according to him, the aforesaid clause becomes redundant and inapplicable in view of the fact that the project was foreclosed on the basis of its technical insufficiency and inadequacy and not for any construction defects, because the project has been terminated and not foreclosed, if there had been any construction defects in the execution of the project. In other words, it is his submission that the question of maintaining the project during defect liability period arises only in case of technically viable and successfully completed /

executed project when some defects have been discovered in the construction of the project and not in the said project as it was foreclosed on the ground of technical viability. I am afraid that such a submission of Mr. Datta cannot be accepted. There is no dispute that the contract consisted of defect liability period of three years. There is also no dispute that the petitioner had worked on the project till August, 2013. If that be so, Clause 54 of the agreement which clearly stipulates that the loss or damage to the works or materials to be incorporated in the works between the start date and the end of the defects correction periods shall be remedied by the contractor. The Tribunal was justified in denying the claim on the ground that the obligation was of the contractor to maintain the defects between the start date and the defects correction period. It is not the case of the petitioner that even beyond the defects correction period, the petitioner has carried out the maintenance for which it has not been paid. In fact, there is a finding of fact by the Tribunal that whatever quantity of work has been done by the petitioner, has already been paid to it under the 7th and the final bill up-to September 09, 2015 and nothing remains to be paid by the respondent. Such finding of fact surely cannot be interfered by this Court in exercise of its power under Section 34 of the Arbitration and Conciliation Act, 1996.

6. In so far as Claim no.2 is concerned, the same is for claim of ₹1,13,67,737.6/- for loss of further business of ₹11,36,77,376/- @ 10% of the amount of lost business. The case of the petitioner was that its resources remained engaged on the work under agreement for 29 months whereas these resources were committed for a maximum 13 months corresponding to the scheduled completion period. The petitioner has pleaded that at the rated efficiency of the resources deployed by it to execute the works amounting to

₹7,81,71,805/- during a maximum of 13 months at the same rated efficiency, the petitioner would have executed the works of ₹1,13,67,737.6/- during 16 months of prolongation which being the difference of the total output of ₹19,18,49,181/- during the 29 months less the contract price of ₹7,81,71,805/-. Therefore, the petitioner claimed that it would have earned a profit of ₹1,13,67,737.6/- @ 10% of ₹11,36,77,376/- by deploying due to the delays caused by the respondent and the petitioner therefore had made a claim that consequential loss of profit of ₹1,13,67,737.6/- is payable by the respondent. The petitioner had also claimed interest amounting to ₹75,62,459/- for 54 months till March 31, 2018 @10% per annum compounding basis. The Tribunal rejected this claim by holding as under:-

> ***"The Arbitral Tribunal has considered the pleadings of the parties and the arguments made by the Ld. Counsel of the parties during the proceedings, and come to the conclusion that the pleadings and arguments made by the Respondent to defend the claim of the claimant are not relevant to the facts and circumstances of the Claim.***
>
> ***On other hand, the arbitral Tribunal finds that the claim of the Claimant is for the remote and indirect losses. The Claimant has not been able to establish that it had the alternative work to execute, which it foregone only due to its firm commitments under the Agreement in dispute.***
>
> ***In view of the above conclusions, <u>the arbitral Tribunal rejects the Claim No.2 of the claimant</u>."***

7. I agree with the conclusion arrived at by the Arbitral Tribunal. In fact on a specific query to Mr. Datta whether the Tribunal has awarded the claim of the petitioner with regard to idling charges of the equipment and manpower, the answer was in the affirmative. In fact, I also find that claim

no. 8 of the petitioner having been allowed by the Arbitral Tribunal, this claim of the petitioner for loss of profit cannot be granted. That apart, on a specific query to Mr. Datta, whether the petitioner had a separate contract with a third party, which remained unexecuted because of manpower and the equipment being held up at the site in the present case, the answer was in the negative. If that be so, the Tribunal is right in stating that the claim of the petitioner is for remote and indirect loss, which cannot be paid. I do not see any infirmity in this conclusion. Accordingly, I uphold the conclusion arrived at by the Arbitral Tribunal in this regard.

8. In so far as Claim no. 9 is concerned as stated above, the petitioner had claimed a sum of ₹34,12,000/- on additional expenses incurred by it on maintaining its Regional Office and Head Office which was caused due to the delay. The petitioner had also claimed a sum of ₹19,56,848/- as interest on the above amount of the claim for 48 months from April, 2014 to January 31, 2018. The Tribunal rejected the claim by holding as under:

> *"After considering the pleadings and arguments of the Parties, the arbitral Tribunal notes that there is no separate case for compensating the idling of the Regional Office and Head Office resources, if any, since such unit of Regional office or Head Office did not find any place of recognition in the Contract Agreement and under the documents relating to formation of the Contraction, and therefore these offices are difficult to be distinguished as separate unit.* ***<u>Therefore, the arbitral Tribunal rejects the Claim no. 9 of the claimant in toto."</u>***

9. I agree with the aforesaid conclusion of the Arbitral Tribunal. The Regional Office and the Head Office are not concerned with the execution of the contract, but it is the site on which the manpower and the equipment

were lying idle having been compensated, the petitioner is not entitled to the claim under this head.

10. That apart, it is the settled position of law that in view of ***P.R. Shah, Shares and Stock Broker (P) Ltd. v. B.H.H Securities (P) Ltd. and Ors. (2012) 1 SCC 594,*** the court will not sit in appeal over award of an Arbitral Tribunal by reassessing or re-appreciating evidence. It is also held by this Court in the case of ***Devika Builders Pvt. Ltd. an Ors. v. National Cooperative Consumers and Ors. 2015 (3) ARBLR 448 (Delhi)*** that court will not interfere with finding of fact and plausible reasoning rendered by the Arbitral Tribunal.

11. The petition is dismissed.

IA 17038/2019

Dismissed as infructuous.

V. KAMESWAR RAO, J

DECEMBER 04, 2019/*jg*