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

Date of Decision: 03rd April, 2019

+ **CS (COMM) 163/2017**

CONTINENTAL CONSTRUCTION LTD. Plaintiff
Through: Mr. Rajesh Chhetri, Mr. Pavan
Upadhyay, Ms. Meenakshi Rawat
and Mr. Rajeev Chhetri, Advocates.
(M:9891675255)

versus

NORTHERN EASTERN RAILWAY Defendant
Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. None has appeared for the Defendant, despite service.
2. The present objections under Sections 30 & 33 of the Arbitration Act, 1940 have been filed challenging the award communicated vide letter dated 23rd January, 2008 passed by the Ld. Arbitral Tribunal, consisting of two Arbitrators, both of whom are technical Arbitrators.
3. The Plaintiff - Continental Construction Ltd. (*hereinafter* 'Contractor') was awarded a contract for construction of sub-structure, including well foundation and pre-stressed concrete box girder for road super structure with contractor's own design on 15th October, 1992. The work was for construction of the sub-structure including well foundation as mentioned in the contract as also construction of Rail-cum-road bridge over river Gandak for restoration of Rail link between Chhitauni (in UP) and Bagaha (in Bihar). Prior to the execution of the contract, correspondence had

taken place between the parties wherein, in response to the order placed by the Railways, certain counter conditions were sought to be insisted upon by the Contractor. In the letter of acceptance sent by the Contractor, these conditions were mentioned, which were, however, not accepted by the Respondent – Northern Eastern Railway. Vide their letter dated 23rd June, 1992, the Respondent merely mentioned that the offer was accepted with certain modifications. Since the modifications themselves were not indicated in the letter dated 23rd June, 1992, the Contractor wrote a letter dated 14th July, 1992 and thereafter, correspondence continued between the parties. Finally, on 15th October 1992 the Contractor communicated to the Railways as under:

“Sir,

While acknowledging receipt of your above referred letter, we regret to point out that it does not in any respect answer our rejoinder given vide our letter No.295 (206)/12 dtd. 16.09.92 in response to your communication No.____/Con/-362/741 (III)W-3 dtd. 11.09.92. As such, we are constrained to consider your letter under reference as an “ad-hoc” rejection of our plea without actually judging the legitimacy of our demand. We, therefore, request you, Sir, to review your decision on the following three issues raised in your above quoted letter and forming part of our tender, and kindly incorporate the same in the contract.

- (i) All advances to be interest free.*
- (ii) Base month for index for price variation to be June 91.*
- (iii) Price variation to be paid to us without any deduction.*

However, as time is running out on the available working season, solely in the interest of timely execution of this work of great National Importance, we are signing this contract, as desired by you vide your letter

*No.W/Con/-362/741/III/W-3 dtd. 08.10.92 in anticipation of our acceptance of the above mentioned three points and corresponding suitable modifications of our contract now being signed.
Thanking you and assuring you of our best services at all times.”*

4. During execution of the works, disputes arose between the parties. The Ld. Arbitral Tribunal was, accordingly, constituted and the following claims were raised by the Contractor:

- A. Claim No.1 – Payment of Rs.12.50 Lac for stopped work at P-12.
- B. Claim No.2 - Payment of Rs.38,58,158.99 for construction of Ring Bund along with bund bridge site.
- C. Claim No.3 - Rs.37,59,000 for construction of island for P-6, P-7 & P-8 well location.
- D. Claim No.4 - Hire charges for survey Instruments - Rs.1,00,000/-.
- E. Claim No.5 – Reimbursement of interest on advances recovered from running bills. - Rs.15,55,384.00
- F. Claim No.6 - Payment of price variation on account of Base month for index to be June 91 instead of Oct 91. - Rs. 71,26,224.88
- G. Claim No.7 - Payment due on account of full adjustment of price Variation. - Rs.43,99,707.00
- H. Claim No.8 – Interest on Claims.

5. In respect of Claim No.1, since there was no joint measurement of the work, which was done between the parties, and since the Contractor had stopped work on 16th February, 1993 itself, the Ld. Tribunal awarded an ad-hoc sum of Rs.2 lakhs. This claim is not challenged in the present petition.

6. Insofar as the claim nos.2 & 3 are concerned, the Ld. Tribunal passed

Nil award.

7. Insofar as the claim no.4 is concerned, the Ld. Tribunal awarded a sum of Rs.55,000/-. Even this claim is not challenged.

8. Insofar as claim nos.5, 6 & 7 are concerned, the Ld. Tribunal held that these claims are based on the three conditions as contained in the letter dated 15th October 1992, none of which were accepted by the Respondent. Accordingly, Nil award was passed.

9. Finally, under Claim No.8, no interest was granted.

10. Mr. Chhetri, Ld. counsel appearing for the Contractor submits that in this petition, challenge is towards the award passed under claim nos.2, 5, 6, 7 & 8. He submits that the Respondent does not dispute the construction of the Ring Bund and hence the amount of Rs.38.5 lakhs is liable to be awarded. He has taken the Court through the written submissions, which were placed on record before the Ld. Arbitral Tribunal to argue that the Ring Bund was, in fact, constructed and it is because of the Ring Bund that the foundation and the sub-structure work could be completed ahead of schedule. The Ld. Tribunal has come to the conclusion that as per clause 2.10.2 of the contract, the construction of the Ring Bund is not to be treated as an extra work as is claimed by the Contractor but in fact is covered by the contract itself. Thus, the said claim was rejected by the Ld. Tribunal. Clause 2.10.2 reads as under:

“2.10.2 The rates for all the items of the schedule shall be inclusive of the cost of all arrangements for crossing frequently all obstructions, in course of the work over land or across water and the cost of providing and maintaining approach/service roads and temporary bridging over channels etc. that may be necessary for bringing and removing the construction plants,

machineries and materials to and from the site of work including rent for use of private land and/or compensation for damage, if any, due to intervening private land traversed by such approach/service roads.”

11. A perusal of the same shows that the cost of providing any bridging and maintaining of all the roads leading up, including making any arrangements, is covered in the contract. As per the written submissions, the Ring Bund was admittedly constructed for the purpose of providing adequate protection for the foundation and the sub-structure work. Clause 2.10.2 is broad enough to cover this particular work and the Ld. Tribunal was right in holding that this is covered by clause 2.10.2 of the general conditions.

12. Insofar claim nos.5, 6 & 7 are concerned, they are based on the three conditions, which were put forth by the Contractor vide letter dated 15th October, 1992, which were clearly not accepted by the Respondent. The Ld. Tribunal has giving the following findings in respect of these claims.

“All the above 3 claims i.e. 5, 6 & 7 claimant have claimed based on the conditions given by them while submitting the original offer. However, their original offer conditions were not accepted as such, but was accepted with some modification/changes and these modified accepted conditions became part of the contract agreement which was signed by the claimant without any rider. It means that the claimant have accepted the modified conditions proposed by respondents. Therefore, to base any claim on the earlier given conditions and not accepted and not incorporated in the contract by claimant is not justified. Therefore, the arbitration tribunal gives award NIL against each of these 3 claims i.e Claim No.5, 6 & 7. ”

13. A perusal of the letter dated 15th October, 1992 itself makes it clear

that it concludes with the Contractor's statement that despite non-acceptance of these three conditions, the Contractor has signed the contract solely in the interest of timely execution of the work due to 'great National Importance' of the project. These claims, on this count, are not maintainable as these were not accepted by the Respondent.

14. Insofar as claim no.8 is concerned, the Ld. Tribunal has awarded a sum of Rs.2,55,000/- in favour of the Contractor. The operative portion of the award relating to Claim 8 reads as under:

"Claim No – 8: Interest on Claim.

After going through all the records and discussion with both the parties and all the more looking to the claims and award declared the arbitration Tribunal do not find any justification in giving any interest before finalization of the arbitration case. However, awarded amount may be paid by 20.02.2008 after which it will carry simple interest of 10% till payment is made. "

15. Thus, the arbitrator has not granted any interest, except future interest on the awarded sum if payment is not made by 20th February 2008. The award is of 2008. No payment has been received by the contractor till date. Contractor is entitled to interest from the date of award. Accordingly, simple interest @ 8% per annum on the said amount is granted to the Contractor from the date of filing of award i.e., 23rd January, 2008 till the date of payment.

16. Objection petition is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

APRIL 03, 2019/dk