

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.08.2020

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

O.A.No.731 & 732 of 2013

and A.No.4513 of 2013

M/s.J.S.R Constructions Pvt. Ltd.,
Rep.by its Authorised Signatory
Sri A.Prabhakar Reddy
Having office at No.197, 7th cross
1st stage, Indira Nagar,
Bangalore 560 038.

... Applicant
in all applications

Vs.

National Highways Authority of India,
New Delhi through the Project Director,
NHAI, PIU, Door No.212/3-D3/1
Sri Nagar Colony,
Narasothipatti,
Salem 636 004.

... Respondent
in all applications

PRAYER in OA No.731 of 2013: Original Application filed under order XIV rule 8 of OS Rules r/w Section 9 of Arbitration and Conciliation Act, 1996 praying that this application should not be treated as urgent and should not be pleased to restrain the respondent NHAI from recovering or appropriating the balance variation amounts towards alleged excess payments made under price adjustment.

PRAYER in OA No.732 of 2013: Original Application filed under order XIV rule 8 of OS Rules r/w Section 9 of Arbitration and Conciliation Act, 1996 praying that this application should not be treated as urgent and should not be pleased to restrain

the respondent NHAI from linking the balance variation amounts with those of disputed amounts now settled in arbitration.

PRAYER in A.No.4513 of 2013: Application filed under order XIV Rule 8 of OS rules r/w Section 9 of Arbitration & Conciliation Act, 1996 praying that this application should not be treated as urgent and should not be pleased to direct the respondent NHAI to adhere to the provisions of contract where by the actual work done such as these various already valued be paid through interim payment certificate by releasing the balance variation amount of Rs.2,92,07,288/- and subsequent interest from 21.09.2013 till the date of actual payment at the rate of 10% per annum.

For Applicant : M/s.Aparna Devi

For Respondent : Mr.Richardson Wilson
for M/s.P.Wilson Associates

COMMON ORDER

OA No.731 of 2013: Original Application is filed to restrain the respondent NHAI from recovering or appropriating the balance variation amounts towards alleged excess payments made under price adjustment.

OA No.732 of 2013: Original Application is filed to restrain the respondent NHAI from linking the balance variation amounts with those of disputed amounts now settled in arbitration.

A.No.4513 of 2013: Application is filed to direct the respondent NHAI to adhere to the provisions of contract where by the actual work done such as these various already valued be paid through interim payment certificate by releasing the

balance variation amount of Rs.2,92,07,288/- and subsequent interest from 21.09.2013 till the date of actual payment at the rate of 10% per annum.

2. These application have been filed under Section 9 of Arbitration and Conciliation Act for interim measures. Dispute arose between the parties in respect of contract entered between them in respect of the project in the year 2009. Contract dated 28.04.2005 for a contract price of Rs.49,70,17,005/- after allowing a rebate of 14% on quoted rates in BOQ came into existence. As there was a dispute between the parties earlier an application under Section 9 has been filed before this Court in O.A.No.809 of 2009 and A.Nos.4955 and 5391 of 2009 for interim injunction. This Court passed an order directing the Dispute Review Board to take up the dispute and resolve it normally within a period of two months from the date of receipt of a copy of the order and also directed the applicant contractor to execute the bank guarantee in favour of the NHAI. On such Bank Guarantee the NHAI is directed to release payments sanctioned to the applicant with a further direction that the Bank Guarantee shall be kept alive by the applicant till the Dispute Review Board pronounce its decision. Accordingly four claims have been raised. Three member arbitrators committee by majority has awarded an amount under various heads:-

"1. Claim No.1 - Amount claimed Rs.8,76,592/-, Measurement of BOQ item No.2.05(b) Construction of embankment with fly ash conforming to Table 1 of IRC:SP58-2001

2. Claim No.2 - Amount claimed Rs.48,87,843/- Method adopted for fixing of rates of BOQ and Non BOQ varied quantities.

3. Claim No.3 - Amount claimed Rs.10,52,013/- Application of a wrongful method used by the respondent to recover the Mobilisation Advance.

4. Claim No.4 - Amount claimed Rs.3,82,90,850/- . The method of calculation of X, Y,Z percentages for price adjustment and tempering with the definition of R value."

3. During the arbitral proceedings the respondent has claimed that a sum of Rs.2,11,93,896/-, which is paid in excess to the claimant, has to be recovered from them. Such stand has been negated by the majority arbitrators in the decision at paragraph No.4.10.13 wherein the tribunal has recorded that contention of the NHAI that there has been excess payment of Rs.2,11,93,896/- towards price adjustment is not justified. Having held so, the award has been passed as indicated above. However, in the minority award it is recorded that the said sum has been paid in excess. The respondent by their letters dated 06.02.2013 and 30.08.2013 stated that on the ground that no amount is payable, after taking into account with variation approved by the competitive authority and excess payment of exclamation recovered from the claimant. The same stand is taken by the respondent NHAI by their letter dated 30.08.2013 in this back ground the present application is filed under Section 9 to restrain the respondent from linking the balance variation amounts with those of disputed amounts now settled in arbitration. It is not disputed by both sides that the award has been put in to challenge under Section 34 before this Court in O.P.No.545 of 2013 which was dismissed by this Court as against which the OSA is now pending in OSA No.247 of 2019. It is also not disputed that the applicant herein has also filed an Execution Petition to enforce the award in EP.No.165 of 2018 which is pending adjudication.

It is the contention of the learned counsel Mr.Richard Wilson in the above EP, a

sum of Rs.6,61,47,199/- has been deposited as per the order of this Court. In the above EP, apart from the award amount the disputed amount of price variation to the tune of Rs.2.27 crores claim made by the respondent before the arbitral tribunal also included in the EP amount. In respect of other claims also there was an award passed by the learned arbitrator on 08.05.2014 which is not in dispute before this Court and not the subject matter of the application filed under Section 9.

4. Heard both side and perused the materials available on record.

5. The main contention of the learned counsel for the applicant is that though the respondent has taken a stand that excess amount paid towards price variation has to be recovered, the learned arbitrator majority verdict has recorded that such stand is not justified. When the finding is against the respondent after the majority version of the decision the respondent started recovering the amount, admittedly paid to the applicant. Such action of the respondent is not according to law in fact the award itself is passed taking note of the fact that the contention of the respondent is not justified as far as the alleged excess payment of Rs. 2.27 crores. Therefore, her contention is that unless the respondents are restrained from adjusting this amount to some other price variations they will be put serious trouble and hence sought an order.

6. The learned counsel appearing for the respondent Mr.Richard Wilson, submitted that it is an application filed under section 9 for linking the accounts the amount the above application Nos. 731 and 732 of 2013 become infructuous. According to the learned counsel as early as on 06.02.2013 and 30.08.2013 the respondent has shown their clear intention that they are not liable to pay any amount since the amount also has to be recovered. Therefore already the amount has been linked to other amount. Such view of the matter the application for injunction has become infructuous as far as A.No.4513 of 2013 is concerned. It is his contention that Rs.2,11,93,896/- is excessively paid to the claimant which has to be recovered from them. This is their stand from the very beginning. Therefore it is his contention that the respondent has disputed the excess price variation amount, such a dispute itself is separate. There is a dispute in the year 2013 itself. Therefore it acquired the character of a stale claim which ought to have been claimed within a period of three years. Hence his contention that when the respondent expressed their intention as early as on 06.02.2013 and 30.08.2013 the applicant neither filed any cross appeal nor filed any application to any reference to decide the disputed claim of Rs.2,11,93,896/- hence its contention that A.No.4513 of 2013 is also not maintainable in the eye of law.

7. From the submissions and also particularly going through the majority award though four claims have been raised the NHAI has taken a stand that a sum of Rs.2,11,93,896 which has been paid to the claimant was an excess payment and

the same has to be recovered from the claimant. During the proceedings it was the stand of the NHAI. However the learned arbitrators majority verdict recorded that the contention of the NHAI that there has been excess payment of said sum towards the price adjustment is not justified. From the finding of arbitrators it can be seen that the stand of the NHAI has not been vindicated during the arbitral proceedings. Only taking note of the submissions and claim and the defence the tribunal has recorded its finding and awarded various amounts under various heads as indicated above. In fact the tribunal, after holding that the so called excess payment towards price adjustment claimed by the defendant is not justified, has passed such an order. The majority award which is put in to challenge by NHAI under Section 34 is also in dispute. Such view of the matter the conduct of the NHAI recovering the so called excessive amount which was not accepted by the tribunal, is against the finding of the arbitral tribunal itself. Now it is the contention that the above aspect itself constitutes a separate dispute and it has to be agitated separately. I am afraid of such contention. Having filed the application under Section 34 and same was dismissed, and the matter is pending in OSA the contention of the NHAI that their stand as to the excess payment constitute a separate dispute cannot be countenanced. Since the OSA is very much pending the same stand has to be agitated and canvassed before the Division Bench. This Court is of the view that arbitral tribunal having found that the claim by the NHAI towards excess payment has not been justified the NHAI now cannot take a different stand that it has to be tried as a separate dispute. Having said so now EP

is also pending, the disputed amount of Rs.2,11,93,896/- included in the EP and including that amount it appears that a sum of Rs.6,61,47,199/- is also deposited and it is also brought to the notice of this Court that out of the original award amount, of course the applicant herein was also permitted to withdraw 50% of the amount by order dated 22.01.2020 in A.No.9475 of 2019 in EP.No.165 of 2018 and remaining amount is lying in the credit of the EP. Now the entire amount is secured and lying in the credit of the EP. Therefore, this Court is of view that as the matter is pending in OSA.No.247 of 2019 and the amount is also lying in the Court, no further orders is required in these applications. Accordingly all the applications are closed and it is left out to the parties to canvass their case particularly with regard to the price adjustment amount as claimed by the NHAI in the OSA.

24.08.2020

Index: Yes/No

Internet : Yes/No

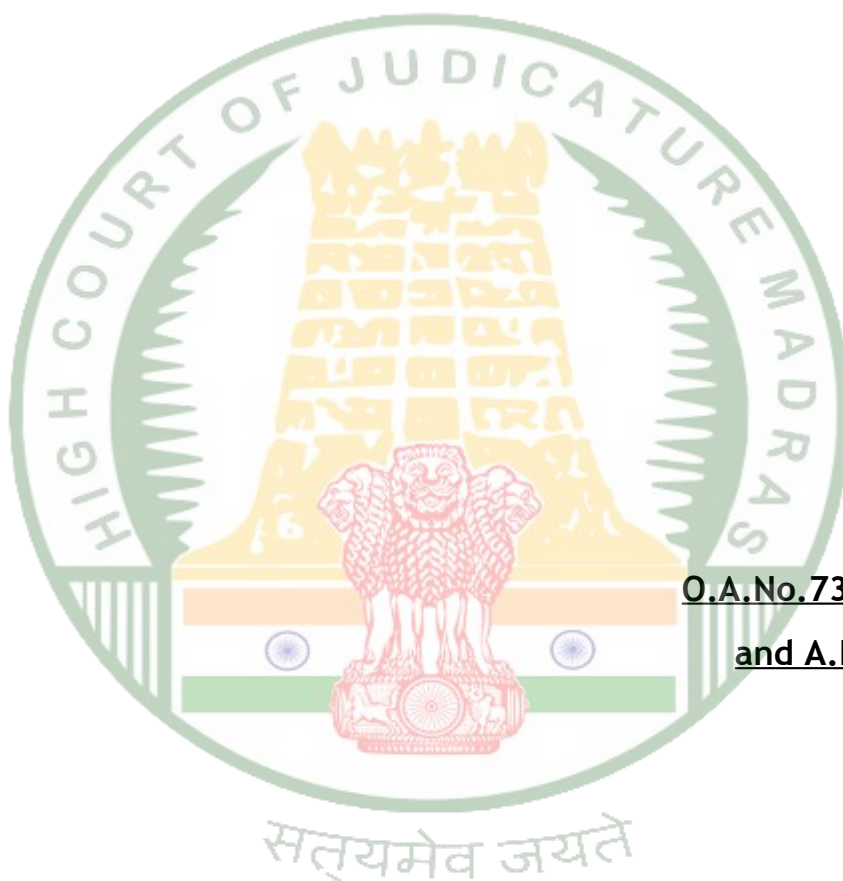
Speaking order/Non speaking order

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N.SATHISH KUMAR, J.

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