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

Date of Decision: 03.05.2023

+ O.M.P. (COMM) 358/2019 & I.A. 12303/2019

NATIONAL HIGHWAYS AUTHORITY OF
INDIA

..... Petitioner

Through: Mr. Rajiv Kapoor, Mr. Srikant
Sharma, Advocates (Enrolment
No. D/3604/15, Mobile No.
9899198374).

versus

PROGRESSIVE CONSTRUCTIONS
LIMITED

..... Respondents

Through: Dr. Swaroop George, Mr.
Tanmay Cheema, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner- National Highways Authority of India [“NHAI”], challenges an award dated 21.02.2019, by which a learned arbitral tribunal has adjudicated disputes between the parties under agreement dated 08.09.2005.

2. By the order dated 26.04.2023, the statement of Mr. Rajiv Kapoor, learned counsel for NHAI, was recorded to the effect that he presses the challenge in the petition only with regard to claim Nos. 5,

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6 and 8. The challenge to claim Nos. 6 and 8 was rejected, and notice was issued only with regard to claim No. 5.

3. Mr. Kapoor today submits that he wishes to challenge the award also on three other claims, of relatively less significant amounts, in respect of which (akin to the challenge in claim No. 5) the learned arbitral tribunal has made an award in the absence of evidence. The aforesaid claims are claim Nos. 10, 14 and 19.

4. Dr. Swaroop George, learned counsel for the respondent, states that he was informed in advance that the petitioner intended to press the petition with regard to these three additional claims, and that he has taken instructions in respect of all four claims.

5. With the consent of Dr. George, notice is issued with regard to claim Nos. 10, 14 and 19 also, returnable *forthwith*.

6. The challenge in all these four claims [claim Nos. 5, 10, 14 and 19] is predicated on a single ground i.e., that the arbitral tribunal has noticed that there was no material led by the claimant [the respondent herein] in support of quantification of these claims, but has awarded various sums without any evidence.

7. The relevant extracts of the arbitral award in this regard are reproduced below:-

**CLAIM NO.5: CLAIM FOR EXTRA AMOUNT PAID TO THE
BANKS FOR EXTENDING BANK GUARANTEES-RS.
3,40,69,195/-**

*“E-5. A reference to Annexure CA-3 on pages 204 to 209 of SOC shows the details of commission paid by the Claimant to the bank for the extension of BGs from time to time. **However, no evidence***

for the various figures of the commission allegedly paid by the Claimant has been filed.

E-7. AT is convinced that some commission has to be paid to the bank for extending the BGs. The claim cannot be denied simply on the plea of absence of evidence for the same by the Claimant. In the absence of the appropriate evidence filed by the Claimant, the AT restricts the claimed amount to 90% of the claim i.e. Rs. 2,93,43,847/- and considers it would be fair and reasonable to award a sum of Rs. 2,64,09,462/- (Rupees Two Crores Sixty Four Lakh Nine Thousand Four Hundred Sixty Two only) in favour of the Claimant.

[Emphasis supplied]

CLAIM NO.10: CLAIM FOR EXTRA CHARGES DUE TO CONTINUATION OF BASE CAMP FOR AN AMOUNT OF RS. 50,00,000/-

“J-2. The Claimant has made a claim of Rs. 50,00,000/- on account of alleged expenses towards land lease and other related costs in maintaining its base camp up to the date of termination. However, it has not given any details for the claim.

J-5. In the absence of any details filed by the Claimant, the AT is inclined to make only a fair assessment and considers that it would be fair and reasonable to award a sum of Rs. 10,00,000/- (Rupees Ten Lakhs).

[Emphasis supplied]

CLAIM NO.14: CLAIM FOR LOSS DUE TO UNAUTHORIZED DEDUCTION FOR ENTRY TAX FOR AN AMOUNT OF RS. 51,66,398/-

“N-6. Although no evidence about the figures shown in CA-8 has been given by the Claimant, the fact about imposition of Entry Tax by the State Govt. of Assam subsequent to 28 days prior to date of submission of the bid cannot be denied. Further, the Respondent has not denied the alleged deduction of Entry Tax by it from 2005 to 2014. In view of above, the AT is inclined to come to conclusion that the claim is admissible and considers it as fair and reasonable to award a sum of Rs. 51,66,398/- (Rupees Fifty One Lacs Sixty Six Thousand Three Hundred Ninety Eight Only) in favour of the Claimant.

[Emphasis supplied]

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CLAIM NO.19: CLAIM FOR PAYMENT FOR NON-BOQ ITEM OF GABION WALL FOR EROSION CONTROL, RIVER TRAINING WORKS AND PROTECTION WORK AT CHAINAGE 12+860 (LHS) AND CHAINAGE 25+150 TO 25+970 (LHS) ALONG WITH ESCALATION.

“S-2. The Claimant has made a claim for non BOQ item of Gabion Wall for Erosion Control, River Training Works and Protection Work. **However, he has not given any details regarding the quantification of the claim in its SOC.** It is clear from the SOC that some payment for the work done has already been made by the Respondent to the Claimant. The Claimant is claiming a higher rate for the same. However, no details have been filed by the Claimant for the claim made.

S-4. **The Claimant has reiterated its claim in its Rejoinder but he has still not filed any details about the amount claimed.** He has mentioned that DRB has already given its recommendations on 05.07.2016 in favour of the Claimant and the said recommendation has not been challenged by the Respondent till then. He has further mentioned that in case there is no dispute on this issue, the amount should be released to the Claimant at the earliest. **However, no details for the said amount have been filed.**

S-5. It is noted from the written submission of oral arguments of the Claimant that he has given some basis on which he has claimed an amount of Rs. 17,41,241/-. The AT notes that the said basis was not argued by the Claimant even during the arguments. The Respondent has not been provided any opportunity to comment on the said basis/ amount. However, as the admissibility of the claim has not been disputed by the Respondent, the AT feels that it may not be fair not to make any award in favour of the Claimant. The AT therefore, assesses that an award of Rs. 8,00,000/- (Rupees Eight Lakh only) in this matter in favour of the Claimant will be fair and reasonable.”

[Emphasis supplied]

8. Mr. Kapoor is right in submitting that, in the case of all the four claims enumerated above, the arbitral tribunal has recorded a clear finding that there is no evidence or material to support the claims, but has, nevertheless, awarded certain amounts to respondent/claimant. The case, therefore, falls within the narrow scope of jurisdiction under

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Section 34 of the Act, as the award has been made in the absence of any evidence.

9. Dr. George also states on instructions that the respondent consents to setting aside of the impugned award with regard to these four claims.

10. For the reasons stated hereinabove, and with the consent of learned counsel for the parties, the impugned award dated 21.02.2019, is set aside, with regard to claim Nos. 5, 10, 14 and 19.

11. The petition, alongwith the pending application, is disposed of in these terms.

PRATEEK JALAN, J

MAY 3, 2023/‘vp’/

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