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

% *Date of Decision: 03.04.2024*

+ **FAO(OS) (COMM) 291/2022 & CM Appl.44221/2022**

SARADA CONSTRUCTION

..... Appellant

Through: Mr Abhishek Kaushik with Mr A K
Singh, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF
INDIA

..... Respondent

Through: Mr Alok Kumar Jain, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE AMIT BANSAL

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. This appeal is directed against the judgment dated 28.03.2022 [hereafter referred to as “impugned judgment”] passed by the learned Single Judge in O.M.P. (COMM.) 133/2021.

2. The appeal is accompanied by an application [i.e., CM Appl.44221/2022] for condonation of delay in filing the appeal.

2.1 Concededly, even according to the appellant, there is a delay of 104 days.

3. On 15.02.2023, the coordinate Bench issued notice in the application for condonation of delay.

3.1 The record shows that the notice in the appeal has not been issued as



yet.

4. We may also note that Mr Alok Kumar Jain, learned counsel, who appears on behalf of respondent/NHAI, says that although a reply was lodged with the Registry, the same is not on record, perhaps, because it was not filed in time.

4.1 However, this should not detain us as the reasons for delay in filing the appeal do not appear to be *bonafide*.

5. The sum and substance of the averments made in the application to explain the delay of 104 days in filing the appeal are the following:

5.1 One of the partners of the appellant had taken ill.

5.2 Another partner of the firm, i.e, the son of the partner who had taken ill, was in West Bengal.

5.3 The son was taking care of his father.

6. The medical record of the partner has not been placed on record. The explanation, to say the least, seems to be deficient and therefore, does not impress us.

6.1 Since counsel for the appellant presses the matter on merits as well, we have examined the same.

7. The record shows that the arbitral tribunal comprised two members and a presiding arbitrator. In total, it was a three-member Tribunal.

8. The appellant had raised four (4) claims before the arbitral tribunal. For convenience, a tabular representation of the claims is set out hereafter:

Claim	Amount claimed
Claim no 1: The sum due towards extra works executed during the pendency of the agreement and the Defect Liability Period	Rs.2,85,96,218/-
Claim no. 2: Refund for forfeiture of bank guarantee	Rs.47,07,951/-



Claim no. 3: Payment of interest at the rate of 18% per annum with effect from 07.02.2019 till date of realization on sums due under claims no. 1 and 2	As Accrued
Claim no. 4: Costs of arbitration proceedings	As Accrued

8.1 The plurality of the members of the arbitral tribunal rejected claims no. 1 and 4.

9. Aggrieved by this, by way of a petition under Section 34 of the Arbitration and Conciliation Act, 1996 [in short, “1996 Act”], the appellant/claimant assailed the award to the extent that it rejected claim 1 [payment for extra work executed] and claim 4 [costs of arbitral proceedings].

9.1 However, the learned Single Judge dismissed the petition preferred under Section 34 of the 1996 Act.

10. It is against this backdrop that the instant appeal has been instituted.

11. At the outset, counsel for the appellant/claimant submits that the only aspect which is sought to be agitated before this Court concerns the denial of claim for payment towards extra work.

12. According to counsel for the appellant/claimant, the appellant/claimant had executed extra work based on oral instructions by the Independent Engineer [in short, “I.E.”], appointed by the respondent/NHAI, and therefore, it ought to receive compensation *qua* the same.

13. Before we proceed further concerning this aspect of the matter, the following broad facts are required to be noticed:

13.1 On 09.03.2016, the appellant/claimant submitted its bid for execution of the work concerning “Repair & Maintenance work of remaining stretches of NH-34 from Km 51 to Km 115 by BM, SDBC and Mastic Asphalt in the



State of West Bengal (Contract Pkg-Maintenance workIPkg-1/2016)” [hereafter referred to as the “subject work”].

13.2 *Via* a Letter of Acceptance (LOA) dated 27.05.2016, the appellant/claimant was awarded the contract for the subject work, for a consideration of Rs.5,78,87,054.25/-.

13.3 Pursuant to the LOA, issued in favour of the appellant/claimant, a formal agreement dated 20.06.2016 was executed between the disputants.

13.4 Concededly, as per the aforementioned agreement, the appellant/claimant was granted ninety days (90) to complete the subject work. Thus, according to the agreement, the appellant/claimant was required to complete the subject work on or before 19.09.2016, having regard to the fact that the period commenced on 20.06.2016.

13.5 Besides this, the agreement, admittedly, also provided for a Defect Liability Period [in short, “DLP”]. The DLP extended to twenty-four (24) months commencing from the date of completion of the subject work.

13.6 Significantly, even according to the appellant/claimant, the subject work was completed on 11.10.2016. Therefore, as per the agreement, DLP would have expired on 10.10.2018.

14. The record also discloses that the respondent/NHAI, with effect from 14.03.2017, pre-closed the agreement obtaining between the disputants in respect of a certain stretch of the subject highway, i.e., KM 51.00 to KM 52.400. The appellant/claimant was informed about this decision on 04.01.2018.

15. Likewise, certain other stretches of the subject highway were pre-closed with effect from 27.07.2018 and 14.10.2018.

15.1 One of the contentions that the appellant/claimant appears to have put



forth before the learned Single Judge was that the DLP certificate dated 11.10.2018, issued by the I.E., did not advert to any pre-closure.

16. Furthermore, it is evident from a perusal of the record that the respondent/NHAI had encashed the bank guarantee submitted by the appellant/claimant worth Rs.57,88,710/-.

16.1 Admittedly, upon encashment of the said bank guarantee, the respondent/NHAI appropriated Rs.47,07,951/- and remitted the balance amount i.e., Rs.10,80,759/- to the appellant's/claimant's account. Out of the sum retained, i.e., Rs.47,07,951/-, the respondent/NHAI appropriated Rs.71,191/- towards penalty for pre-closure of the DLP while Rs.46,36,760/- was retained for the execution of the balance works at the risk and cost of the appellant/claimant.

16.2 The stand taken by respondent/NHAI before the learned Single Judge was that the remainder of the repair work was carried out by the Public Works Department (PWD) since the appellant/claimant failed to execute the same during the DLP.

16.3 Costs incurred by the respondent/NHAI towards repair work were pegged at Rs.46,36,760/-.

17. There is no dispute that the arbitral tribunal ruled in favour of the appellant/claimant concerning the claim for reimbursement of that part of the amount, i.e., Rs.47,07,951/- [Rs.71,191/- + Rs.46,36,760/-], which was retained upon encashment of the bank guarantee.

17.1 As far as Rs.71,191/- was concerned, the arbitral tribunal held that there was no provision in the contract for deduction of money towards the penalty. For the remaining amount, i.e., Rs.46,36,760/-, the arbitral tribunal concluded that the respondent/NHAI had failed to furnish details of the work



executed by PWD.

18. Therefore, as indicated at the very beginning, the aspect that was agitated by the appellant/claimant before the learned Single Judge concerned the payment claimed towards extra work carried out during the tenure of the agreement and the DLP.

19. As noticed above, counsel for the appellant/claimant has conceded that the work was carried out based on oral instructions of the I.E. There is no quarrel that the respondent/NHAI did not issue a written confirmation concerning the purported oral instructions given by the I.E.

20. The agreement between the parties required that if any orders were issued by the I.E. for variation in the scope of work, they were to be followed up by a written confirmation. If oral instructions were not followed up by writing confirmation, such oral instructions were not to be “taken into account”.

21. The relevant condition obtaining in the agreement [Conditions of Contract] executed between the parties concerning variation in scope of work is contained in Clause 28.1. For convenience, the same is set forth hereafter:

“28. *Variations*

28.1 *The Engineer shall, having regard to the scope of the Works has power to order Variations he considers necessary or advisable during the progress of the Works. Such Variations shall form part of the Contract and the Contractor shall carry them out. **Oral orders of the Engineer for Variations, unless followed by written confirmation, shall not be taken into account.***”

[Emphasis is ours]

22. The plain text of clause 28.1 would show that oral instructions of the I.E. involving variations in the scope of work required written confirmation.



22.1 Concededly, nothing was placed which would establish that written confirmation of the respondent's/NHAI's I.E. was obtained to vary the scope of work.

22.1 An attempt was made to get over the lacuna concerning the absence of written confirmation by placing reliance on a communication dated 26.07.2016. Based on the contents of the communication dated 26.07.2016, learned counsel for the appellant/claimant urged that the I.E. had made the respondent/NHAI aware that additional work was required on the subject highway to make it "traffic worthy" and "safe".

23. In our view, what comes to the fore upon perusal of the aforesaid communication is that it constituted a recommendation by the I.E. to the respondent/NHAI to vary the scope of work. Undoubtedly, the I.E. did not order variation in the scope of work that the appellant/claimant had to undertake. For convenience, the relevant parts of the said communication that substantiate this position are extracted hereafter:

*"It is necessary to keep the highway section traffic worthy. The estimates submitted vide our letter no. Our Ref LASA/BK/IE/73426/2016-1117 dated 21.01.2016 will not be sufficient in present road condition, **so proposal for extra works other than awarded by Ms. Sarada construction is proposed.** It is necessary to do following additional Repair and Maintenance work immediately to keep the road traffic worthy and safe.*

...The rates for repair and maintenance work are derived from schedule of Rates and Bridge works for F.Y. 2015-2016 published by government of west Bengal, public works (Roads) Department, and National Highway wing.

Total Estimate Variation Amount is Rs. 55,99,087.00

The estimate is submitted with recommendation from our end for information and immediate action."

[Emphasis is ours]

23.1 Thus, the appellant's/claimant's contention that it ought to be paid for



the extra work carried out, based on the oral instructions of the I.E., is not in sync with either the terms of the agreement obtaining between the parties or the communication dated 26.07.2016 written by the I.E. to the respondent/NHAI.

24. The respondent/NHAI, in our view, was right in not paying for the extra work carried out by the appellant/claimant.

25. Therefore, in our opinion, the impugned judgment requires no interference.

26. Accordingly, the appeal as well as the application for condonation of delay are dismissed.

RAJIV SHAKDHER, J

AMIT BANSAL, J

APRIL 3, 2024/pmc