



2024:DHC:7828



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

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Reserved on: 3rd January, 2024

Pronounced on: 30th September, 2024

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O.M.P. (COMM) 454/2018, I.A. 14993/2018

NATIONAL HIGHWAY AUTHORITY OF INDIA (NHAI)

..... Petitioner

Through: Mr. Balendu Shekhar, Mr. Ravi Gopal,
Mr. Raj Kumar Maurya and Mr. Krishna
Chaitanya, Advocates.

versus

ROADWAYS SOLUTION INDIA PRIVATE LTD. Respondent

Through: Mr. Sandeep Sharma, Mr. Sarthak Manan
and Ms. Konika Metra, Advocates.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. A **Petition under Section 34** of the Arbitration & Conciliation Act, 1996 (*hereinafter referred to as "Act, 1996"*) has been filed against the impugned Arbitration Award dated 30.06.2018 in regard to disputes pertaining to short term improvement and routine maintenance of Haveri-Hubli Section from KM.340 to KM.404 of NH-4 in the State of Karnataka, under the Contract Agreement dated 18.12.2013.
2. ***Briefly stated***, a Bid was submitted by the respondent on 22.10.2013 in compliance of bidding document of petitioner NHAI, for execution of the work

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By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08



Page 1 of 29



2024:DHC:7828



of “Short term improvement and routine maintenance of Haveri-Hubli Section from KM.340 to KM.404 of NH-4 in the State of Karnataka”. The respondent/s bid for contract price of Rs.4,11,83,741/- which was executed by the NHAI vide Letter of Acceptance dated 11.12.2013. The respondent submitted the Bank Guarantee of Rs.41,81,374/-for performance security along with its letter dated 12.12.2013 in compliance of the directions issued under Letter of Acceptance and as a pre-requisite for execution of Agreement between the parties. A formal Agreement was executed between the parties on 18.12.2013. Thereafter, the petitioner vide its Letter No.NHAI/CM/Haveri-Hubli/2013/46966 issued Notice to the respondent to commence the work and hand over the possession of the site without hindrances as per Clause 21 of Conditions of Contract.

3. The petitioner has asserted that *Clause 8.6 of the Contract Agreement* related to the work schedule. The maintenance and rehabilitation work under the Project was highly unpredictable in nature. Therefore, quantities shown against each item was only representative in nature and any variance in the same was not a compensation event for either party to the Contract. The respondent is claimed to have remained highly ill prepared since inception of Contract Agreement and did not do the requisite acts for implementation of the Contractual obligations. In terms of *Clause 106(a) of Section VII of the Contract Agreement*, the respondent was required to furnish to the Engineer the detailed technical literature and other documents regarding the performance of

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Digitally Signed
By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08



Page 2 of 29



2024:DHC:7828



the equipment for approval prior to its purchase or mobilization on site. However, no documents were submitted by the respondent to the Engineer for approval in terms of the Contract. The number of vehicles which were required to be deployed at site to do “*Route Patrol*” in consonance with agreed terms, were also not deployed at site which made entire stretch of road highly vulnerable in the absence of effective redressal measures in case of any vehicular accident on the Contractual road stretch.

4. The petitioner asserts that the respondent was required to do “*Route Petrol*” 24 hours every day at least with two Petrol Vehicles, two Ambulances, and the availability of Tow-trucks, Cranes and the equipment required for this purpose to ensure obstruction free traffic throughout the stretch as per the agreed terms, was maintained. However, the respondent had mobilized only one Patrol Vehicle, 1 No. of Ambulance and 1 Crane on site.

5. The petitioner has asserted that the respondent furnished a wrong list of machinery purchased by utilizing the Mobilization advance. Based on the Claimant’s furnished Invoices details, the petitioner made enquiry wherein it was revealed that the Invoices submitted by the respondent were not for the machinery mobilized for the Contractual Agreement works, and no such machinery was ever mobilized on ground. The machinery was stationed on Pune-Bangalore Highway, as evasively stated by the respondent in its Letter dated 10.06.2014 which is highly ambiguous, as Pune-Bangalore Highway is

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Digitally Signed
By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08



Page 3 of 29



2024:DHC:7828



having a length of 750 Km and Haveri-Hubli Section is just a part of Pune-Bangalore Highway. The machinery could have been stationed at any corner of 750 Km of Pune-Bangalore Highway, but was not present on Haveri-Hubli Section which was a breach of Contract.

6. The respondent during the subsistence of the Contract, tried to misrepresent by furnishing wrong and incorrect Invoices of equipment/machinery allegedly purchased for execution of the Contractual obligations. The documents revealed that the equipment/machinery was brought to the respondent/RSPILs store on or before June, 2012 i.e. almost two years prior to the signing of the Contract Agreement which is contrary to the terms and conditions of the Agreement as an advance was taken for purchase of required machinery. The respondent also failed to produce the list of machinery employed in the Project.

7. Furthermore, the respondent was required to furnish a monthly Report of its actions to the Engineer, but this obligation was not fulfilled. To supervise and look after the respondent's work, the Engineer was empowered to issue Indent specifying the exact nature of work as and when required, apart from the contractual obligations mentioned under the Agreement. Various Indent Letters were issued by the Engineer to the respondent, but its performance remained abysmal. The respondent did not bother to file compliances of the Indents in proper manner. The Competent Authority of NHAI had nominated

Signature Not Verified

Digitally Signed
By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08

**M.P. (COMM) 454/2018****Page 4 of 29**



2024:DHC:7828



Mr. P.D.Dharwad as an Engineer for the subject work at the very inception of the execution of work. The relevant Indents were immediately issued by the Engineer in accordance with the specifications of the Contract Agreement. Thereafter, M/s Lions Engineering consultants were appointed as Engineer and mobilized on 17.06.2014.

8. The petitioner was not serious in implementing their contractual obligations for which reasons they never felt the need to comply with the Indents that were issued immediately within one month of handing over of the hindrance free site i.e. from 01.01.2014. Several warnings were issued by the Engineer for slow progress of work and other issues, but to no avail.

9. The petitioner has further referred to *Clause 27.1(A) of Contract Data*, whereby the respondent was required to submit the programme for approval of Engineer within 30 days from the issue of letter of Commencement i.e. on or before 17.01.2014. The Work Programme was essential to avoid any disruption in the cash flow to the respondent. The petitioner by that time had already issued Indent No.2 vide Letter No.1728 dated 01.01.2014 well in advance, clearly indicating the type of work and location. The Engineer in terms of Clause 27.1, was required to issue the Indent of work in stages specifying the time limit for the same as and when required. The petitioner had diligently issued the Indents. Regular timely intimation to the Engineer at site was essentially required so that verification could have been done. The respondent





2024:DHC:7828



willingly accepted the Indents issued and never raised any question or observation in regard to the Indents.

10. The respondent failed to amend their work and methodology which necessitated the petitioner to give Notice vide Letter dated 11.08.2014. As a counter-blast the respondent wrote a Letter dated 21.08.2014 and it is only then that for the first time the respondent alleged about non-explanatory Indents issued by Engineer which shows the malafide behind the allegations made by the respondent. Infact, the Indents issued by the Engineer were in accordance with the contractual provisions till the end of the contractual period of 12 months and there was no ambiguity therein. The respondent during the arbitral proceedings tried to weave a story of non-issuance of Indents since they failed to do the work. In fact, the stand taken by the respondent was self-contradictory as it had made the admission that the work had not progressed at the desire pace.

11. *Clause 8.3.1 of the Contract Agreement* provided for joint inspections by the respondent with the technical staff of the petitioner which was essential for issuing the Indents. The respondent, however, never requested nor came forward for the joint inspections. Such non-cooperative attitude of the respondent constrained the Engineer to issue Indents as per site inspection done by the Engineer.

Signature Not Verified

Digitally Signed
By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08

**M.P. (COMM) 454/2018****Page 6 of 29**



2024:DHC:7828



12. The respondent also never informed the petitioner about the disruption in the cash flow. The petitioner has claimed that it extended financial support to the respondent by releasing the mobilization advance of Rs.41,18,374/- (i.e. 10% of the Contract Price) to the respondent but subsequently, it was found to have been misused. The petitioner also released all the IPC payments within the specified period in accordance with Clause 40.1 of the Contract Agreement.

13. The petitioner has claimed that the respondent in breach of its contractual obligations, failed to submit the requisite documents or finish the intended work on time. It failed to submit the monthly progress reports and Bills on time which led to further complication. The respondent had provided several compensation events to the petitioner which after due Notice and approval from the Competent Authority, levied liquidated damages as per terms and conditions of the Contract. The respondent has not denied the happening of Compensation events, but has only taken an objection in respect of the quantum of liquidated damages. The respondent had also not protested about the Notice that was issued. The parties had agreed in the Contract to pre-determine rate of liquidated damages in case of Compensation Events. There was no prohibition to impose the liquidated damages at the IPC payment or thereafter, to include it at the stage of Final Bill.

14. In the present case, the petitioner had rightly imposed liquidated damages to which the respondent never protested at the requisite time. Without prejudice

Signature Not Verified

Digitally Signed
By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08

**M.P. (COMM) 454/2018****Page 7 of 29**



2024:DHC:7828



due to overlap of submission of Bills and delay thereof caused by the respondent, *the petitioner has imposed the liquidated damages as and when the situation arose.*

15. The petitioner has further explained that IPC-6 for the period 01.06.2014 to 30.06.2014 and IPC-7 for the period 01.07.2014 to 31.07.2014 were received after a delay of 2 months, on 22.08.2014 which made it difficult for the Petitioner to examine and certify the work carried out. As per *Clause 39.2* of Contract Agreement, the Engineer was required to check the Contractor's monthly statement within 14 days and to certify the amount to be paid to the Contractor after taking into account the debit/credit for the month in question. *Clause 40.1* obligated the petitioner to pay the Contractor the amount in 28 days after certification by the Engineer. Because of the delay, submission of IPC-6 and IPC-7, the payments got released only on 04.10.2014 i.e. within 20 days of submission of the Bills. The petitioner has asserted that it suffered a lot because of various non-compliances within the stipulated time frame.

16. The IPC 9 was for the period 01.11.2014 to 15.12.2014. The respondent in its Letter dated 22.11.2014 had not correctly mentioned the date of IPC 9 as it was not possible for the IPC to be raised before the completion of work i.e. 15.12.2014. The IPC 9 was submitted to the Engineer on 23.12.2014 who after certification forwarded it to the petitioner, who received it on 07.01.2015. The payment was accordingly released on 07.01.2015 i.e. within one day. The

Signature Not Verified

Digitally Signed
By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08



M.P. (COMM) 454/2018

Page 8 of 29



2024:DHC:7828



respondent has relied on Letter dated 06.12.2014 of the Engineer regarding Certification of IPC 9, but the same was never received by the petitioner. Moreover, the letter is claimed to be apparently fabricated as it is dated 06.12.2014, but contains no outward reference, whereas in the Reference No.2 of the same letter, the Engineer has referred to the Letter as dated 23.12.2014 of the respondent, which implies that the Engineer had referred a future event in his letter which is not possible.

17. The petitioner has further challenged the amounts paid to the variation in the BOQ items. It is submitted that the Engineer vide letter No.421 dated 17.12.2015 had informed that *“no items of works had been executed under variation for which the rate quoted by the Contractor 25%(+) above the estimated rate and the remarks for which rate quoted by the Contractor below 25(-) is herewith enclosed”*. The Engineer thus, in this Letter referred only to BOQ items and its variations. The variation approved vide Letter dated 26.11.2015 was in respect of non BOQ items whereas the respondent has claimed all the items as part of BOQ.

18. The petitioner has further asserted that the *variation items* were only those which were not part of Bill of Quantities (BOQ) Items, as specified in Clause 37.2 of the Conditions of Contract. The Respondent allegedly furnished highly inflated variation Bills showing the quantity executed on the site as 19642 sq. mt., but as per measurement recorded in the Measurement Book, the

Signature Not Verified

Digitally Signed
By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08



M.P. (COMM) 454/2018

Page 9 of 29



2024:DHC:7828



actual quantity executed was only 17325 sq. mtrs. @ Rs.92.82 amounting to Rs.16,08,106/-. The variation items are claimed to have been duly approved by the petitioner and the said amount was released on 13.06.2016 through RTGS in its bank account.

19. The next ground agitated by the petitioner is in regard to *extension of the Contract by three months*. It is asserted that even though the work of respondent was highly abysmal, but because of time exigency as an interregnum measure, the petitioner vide its letter No.1398 dated 26.12.2014 requested the respondent to consent to continue O&M Contract for a further period of three months i.e. till 27.03.2015. However, no consent was forthcoming from the respondent who in its Letter No.84 dated 26.12.2014 informed the petitioner about the completion of the work. The respondent never withdrew this Letter or express its willingness to contract for additional three months. The petitioner also did not write any further request or follow up its Letter dated 26.12.2014. The petitioner has asserted that respondent has not been able to show any evidence about the work having been undertaken by it during this extended period of three months. Neither any Indent has been brought on record, nor is there any other corroborative evidence led by the respondent. The petitioner had produced the notings, letters and affidavits of the concerned sub-Contractor to establish that respondent had not performed after completing its original contractual period.





2024:DHC:7828



20. The petitioner has referred to the Affidavit of M/s Pylon Ex.R-45, but has asserted that the respondent never expressed any intention to file any documentary evidence to establish that M/s Pylon was working for the respondent during this extended period. It is asserted that respondent did not challenge the contents of the documents at the stage of admission/denial or thereafter. However, during the rebuttal Final Arguments, the respondent challenged the contents of the affidavit of M/s Pylon, submitted by the petitioner as Ex.R-45. Ample opportunity was provided to the respondent to file any documents in support of its claim during the proceedings, but the respondent failed to do so. The opportunity to file documents was closed by the learned Tribunal on 19.09.2017. However, the respondent on 18.11.2017, at the time of Final Arguments again filed Ex.C-37, C-38 and C-39 along with written submissions dated 09.11.2017 to which an objection was taken by the petitioner as is also recorded in the Order dated 18.11.2017 by the learned Arbitral Tribunal. Only Ex.C-37 was taken on record by the learned Tribunal.

21. Despite the aforesaid facts, the learned Tribunal on the oral request of the respondent, allowed it to file documentary evidence of the payment to M/s Pylon during the extended period despite the objection taken by the petitioner. Certain fresh documents were also filed by the respondent on 15.03.2018, the hard copies of which were received by the concerned Project Director of the petitioner on 19.03.2018. It is claimed that these documents were an attempt to





2024:DHC:7828



improve the pleadings under the garb of vagueness and misrepresentation. These documents do not establish that any payment was made to M/s Pylon for the extended period between 01.01.2015 to 31.03.2015. Moreover, all the documents produced are vague, false and do not specify the period of execution of the work or the payments made during this period. These documents are not signed and properly executed as is evident from the mere perusal of these documents.

22. The petitioner has claimed that it is merely an attempt on the part of the respondent to gain undue benefits for the alleged work, which was never executed by the respondent. In fact, despite opportunity being provided by the learned Tribunal to establish the payments made to M/s Pylon during the proceedings, the respondent had failed to produce the requisite documents.

23. The *next aspect* on which the Award has been challenged is that the *respondent did not submit the Final Bill in terms of Clause 39.7 of the Contract Agreement*. Engineer had requested the respondent multiple times to submit the Final Bill on completion of contract period vide Letters dated 28.04.4.2015, 11.05.2015 and 01.06.2015, but the respondent deliberately opted not to submit the Final Bills. Ultimately, the Engineer had to prepare the Final Bills in the sum of Rs.1,54,278/- which were submitted to the petitioner vide letter dated 05.06.2015. The Engineer clearly indicated the liquidated documents towards non-completion of work, which were assessed at Rs.30,10,000/-. *The liquidated*

Signature Not Verified

Digitally Signed
By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08



M.P. (COMM) 454/2018

Page 12 of 29



2024:DHC:7828



damages were calculated as per Clause 45.1 of the Contract Data. The Final Bill had negative net amount to be released to the respondent. Therefore, the petitioner vide its letter No.839 dated 07.08.2015 asked the respondent to deposit the liquidated damages by 20.08.2015 failing which the petitioner would be constrained to recover the amount from the Performance Security.

24. The respondent thereafter, for the first time informed about the non-receipt of the Final Bill. It is claimed that because the respondent was not sure about the work completed by them which work/items to raise the Final Bill, it failed to do so. The respondent was well aware about the mobilization of O&M Contractor on site who had commenced the activities and routine maintenance.

25. The respondent insisted upon a joint site inspection i.e. after 8 months of completion of Contract Agreement and demobilization. A joint inspection as per the request of the respondent, was carried out on 05.10.2015 in the presence of Mr. Arun C. Choudhary the respondent's representative, but to the utter shock and surprise when Mr. Choudhary was requested by the Engineer to sign the Inspection Note, he quietly disappeared from the office to be uncontactable thereafter.

26. On the second request of the respondent, the joint inspection was again carried out on 09.10.2015 and 10.10.2015 in the presence of Mr. Navajeet Gadhoke, the representative of the respondent. The Engineer vide email dated 03.12.2015, had informed that he tried to contact Mr. Navajeet Gadhoke via





2024:DHC:7828



phone and emails, but he had received no response. The petitioner then informed the respondent that based on telephonic discussion with Mr. Navajeet Gadhoke and Mr. P. D. Dharawad, the meeting was scheduled on 11.12.2015 to finalize the Bill. Thereafter, once again the Final Bill was prepared by the Engineer. The Engineer had extended full cooperation to the respondent at all stages for successful completion and management of the Contract Agreement while the conduct of the respondent was to the contrary.

27. The *Final Bill* was submitted by the Engineer vide letter dated 421 dated 17.12.2015 amounting to Rs.23,12,710/- along with liquidated damages of RS.9,11,492/-.

28. The petitioner has asserted that as per the *Clause 39.7 of the Contract Agreement*, the time period for payment of Final Bill was 60 days. In the meanwhile, the respondent conveyed its intention to invoke arbitration for claims arising out of the Contract Agreement including the Final Bill. Since the matter became sub-judice, the petitioner was not able to release the Final Bill. The Security amount/retention money in terms of Clause 44.2 of the Contract Agreement and the Performance Security was to be released to the Contractor after the Defect Liability Period was over and the Engineer certified that the defects, if any, were corrected before the end of this period. The Completion Certificate was issued on 30.01.2017 and the Performance Security was released





2024:DHC:7828



on 02.02.2017. However, the retention money could not be released because of invocation of arbitration.

29. *The other ground mentioned by the petitioner is in respect of issuance of appropriate Insurance Cover which it is claimed were not furnished by the respondent.* In terms of Clause 13.1 of Conditions of Contract, it was obligatory of the respondent to provide Insurance Cover at its own cost in the joint names of the petitioner and the respondent from the start date till the end of the defect liability period. These Insurance Certificates were required to be submitted for Engineer's approval before the start date. The respondent was grossly negligent and failed to comply with the obligations. The petitioner in good faith issued Letter No.1809 dated 21.01.2014 requesting the respondent to fulfil its obligations so that the petitioner could have avoided invoking Clause 13.3 of the Contract.

30. *The petitioner has further alleged that the respondent failed to undertake the plantation work.* The Engineer in his letter dated 22.07.2014 had referred to the earlier Indents of July and July, 2014 issued vide Indent No.25 for the month of June, 2015 according to which the time limit for plantation was specified, but was not achieved by the respondent. The Engineer was thus, forced to issue Letter dated 22.07.2014 asking the respondent to take the plantation work on priority.



2024:DHC:7828



31. *The petitioner has then contested about the consent of the respondent to continue the Project for additional three months.* The petitioner has referred to his letter dated 26.12.2014 vide which the respondent was requested to submit its consent to continue O&M Contract for further period of three months. However, the consent of the respondent was never communicated and it never gave any approval for continuation of services of O&M work for further three months. The respondent itself had given a Letter dated 26.12.2014 of having successfully completed the Project O&M work and it wanted to handed over the Project site to the petitioner. The respondent had subsequently demobilized from the site on 27.12.2014. It is claimed that the respondent never assented the extension by three months and it was never conveyed to the petitioner. There is no record regarding continuation of services by the respondent till 27.03.2015. The Final Bill prepared by the Engineer after conducting joint site inspection, also states that the services of Indent Management was performed last on 27.12.2014. It is proved that the respondent never continued any services towards Indent Management work till 27.03.2015.

32. *The petitioner is also aggrieved by the grant of interest.* It is asserted that there was no occasion for the respondent to claim any interest as Petitioner was not in breach of its contractual obligation. Furthermore, the respondent failed to issue Notice as per the Interest Act, for its claims in regard to the interest.



2024:DHC:7828



33. In the end, the Award is challenged on the ground that the learned Arbitral Tribunal has wrongly appreciated the facts on record and also the arguments addressed on behalf of the petitioner. The findings are beyond the pleadings of the parties and is based on assumptions and presumptions. The non-admissibility of the documents filed by the respondent during the proceedings has not been considered despite an objection taken on behalf of the petitioner. The reasonings given by the learned Arbitral Tribunal are not sustainable in law. The respondent had failed to adduce any positive evidence in support of its claim, but the learned Arbitral Tribunal has shifted the burden of proof upon the petitioner and has wrongly awarded the claims.

34. The learned Arbitral Tribunal in its Award dated 30.06.2018 has erroneously held that the petitioner has to pay a sum of Rs.1,09,15,573/- to the respondent along with interest @ 12% per annum on the aforesaid awarded amount from 01.07.2018 till the date of payment. The petitioner has thus, sought the Award to be set aside.

35. The *respondent in its written synopsis* has asserted that essentially it is only *Claim No.5 in regard to non-payment of Rs.13,48,930/- towards the extra work done during the extension period and Claim No.8 towards the refund of Liquidated Damages in the sum of Rs.9,11,492/-*, have been challenged by the petitioner.





2024:DHC:7828



36. In regard to *Claim No.5 pertaining to extension of Contract period for three months*, the respondent has asserted that the stipulated Contract period was to expire on 26.12.2014, but the respondent was asked to execute the work till 27.03.2015 or till new Agency is deployed at site, whichever is earlier, as is evident from the noting of GM and PD marked to NHAI dated 26.12.2014. These Notings were subsequent to letter dated 26.12.2014 issued by the petitioner asking for the approval of the respondent to continue the work for the extended period. The Notings corroborate the email dated 07.02.2015 sent by Regional Office, NHAI to the Project Director, wherein he had been directed to continue the work with the existing Agency till the deployment of new Agency as the finalizing of new O&M Agency was still under process. M/s Pylon (Sub Contractor) had also sent an email dated 16.03.2015 to the petitioner enclosing the Incident Management Report for the period 01.12.2014 to 28.02.2015. The respondent had also filed the documents namely, email dated 27.04.2015 from M/s Pylon to the respondent giving details of "*Payment released from RSIPL to PYLON*" for the period 28.12.2014 to 15.02.2015 and the other emails dated 01.01.2015, 02.02.2015 and 15.01.2015 written by the petitioner to the respondent in this regard. Further reliance is placed on email dated 04.01.2015 and 02.02.2025 of M/s Pylon to petitioner enclosing the Incident Management Report for the month of December, 2014 and January, 2015 respectively. Also,





2024:DHC:7828



the *No Claim Certificate* was issued by M/s Pylon Construction in full and final settlement in favour of the respondent.

37. It is contended that the petitioner has failed to place on record any document to show that any other Agency was carrying out the work of Incident Management aside from the respondent. The Incident Management Services are necessary on all National Highways as in the present case; the services in regard to NH-4 could not have been suspended even for a day. *It is therefore, contended that Claim No.5 has been rightly decided by the learned Arbitral Tribunal.*

38. In regard to *Claim No.8 pertaining to liquidated damages*, it has been explained that the respondent had not accepted the Final Bill for the gross amount of Rs.1,91,86,231.50 with net payment amount of Rs.(-)2909255.65 dated 23.06.2015 along with recovery of Rs.30,10,000/- towards the liquidated damages, as the work had been short measured by the Engineer and the respondent protested the recovery of liquidated damages. The second Final Bill after joint measurements, was prepared by the Engineer for a gross amount of Rs.2,13,44,664/- with net amount payable of Rs.18,56,431.16. However, while submitting this Bill to the PD, Engineer recommended recovery of Rs.9,11,492/- as revised liquidated damages. The petitioner for the first time in its Letter dated 07.08.2015 informed about the levy of the damages in the sum of Rs.30,10,000/- which was refuted by the respondent in its Letter dated

Signature Not Verified

Digitally Signed
By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08



M.P. (COMM) 454/2018

Page 19 of 29



2024:DHC:7828



17.08.2015 pointing out that the alleged amount of liquidated damages was totally wrong and biased. The liquidated damages had been worked out in respect of the work allegedly delayed and pertained to Indents at Sr. No.3, 4, 6, 7, 9 and 10.

39. *Clause 27.1(B) of the Contract Agreement* lays down the lead time for identified work which is 3 days before start of work, 7 days before start of month and 28 days before bi-annual period concerned. For the Emergent Indents, it is within 24 hours. The respondent had asserted that the delay in respect of the aforementioned Indents has been duly explained. Admittedly, no Show Cause Notice was ever issued to the respondent; only letter relied upon by the petitioner is dated 11.08.2014, wherein the petitioner alleged about the delay. The Letter was duly replied by the respondent on 21.08.2014 to which there was no rebuttal by the petitioner meaning thereby that its contents were accepted by the petitioner.

40. It is admitted that *no Show Cause Notice* was ever issued and the alleged liquidated damages have been imposed only along with the Final Bill. It is alleged to be nothing but an afterthought. This is evident from the fact that the initial LD amount was Rs.30,10,000/- while it was reduced to Rs.9,11,492/-. The alleged liquidated damages had been levied by the petitioner against Clause 41.5 of the Contract Agreement. The Tribunal has rightly held that the letter dated 11.08.2014 relied upon by the petitioner for imposition of LD, was only to





2024:DHC:7828



cover its own contractual failures which is evident from the fact that this Letter was issued after 8 months from the date of start of the Contract, which was to be executed for stipulated time period of 12 months and the imposition of liquidated damages was done after the work was completed to the satisfaction of all concerned.

41. It is submitted that no other claim has been challenged and the objections filed by the petitioner are liable to be dismissed.

42. *The petitioner has submitted the brief synopsis of arguments with the List of dates and events and essentially reiterated the grounds as stated in the petition.* The reliance has been placed on the judgment of Bharat Coking Coal Ltd. vs. Annapurna Construction AIR 2003 SC 3660; ONGC vs. SAW Pipes Ltd.

It is also contended that the Tribunal has ignored Section 74 of the Contract Act which does not confer any special benefit upon any party and it does not justify the award of compensation when in consequence of the breach no legal injury has resulted. Reliance has also been placed on Maharashtra State Electricity Board vs. Sterlite Industries (India) and Anr. AIR 2001 SC 2933, wherein it was held that “*Party claiming compensation must prove the loss suffered by it.*” Reliance has also been placed on KSS KSSIPL Consortium vs. GAIL (INDIA) Ltd. (2015) 4 SCC 210; Som Mittal vs. Govt. of Karnataka (2008) 2 SCC 574 and Nikantan and Sons Private Ltd., Chennai vs. Chennai Port Trust 2010 (7) MLJ 101, wherein it has been observed that if the Award is made without





2024:DHC:7828



evidence or merely based on statement, such Award would be invalid and beyond the jurisdiction of the Tribunal.

43. The learned counsel for the Petitioner has sought to argue that deviation from the terms of the contract is not permissible and for the same he has placed reliance on Steel Authority of India Ltd. Vs. J. C. Budhiraja, Government and Mining Contractor, (1999) 8 SCC 122, and State of Chhattisgarh Vs. SAL Udyog Private Limited, (2022) 2 SCC 275. Further, he has sought to argue that where there is an express term then the court cannot find on construction of the contract an implied term inconsistent with such express terms and in this respect reliance has been placed on Bharathi Knitting Company Vs. DHL Worldwide Express Courier, (1996) 4 SCC 704, Food Corporation of India v. Chandu Constructions, 2007 (4) SCC 697, South East Asia Marine Vs Oil India Limited; (2020) 5 SCC 164, National Highway Authority of India Vs. M/s Suresh Chandra, [2023:DHC:4068], and National Highways Authority of India v IRB Pathankot Amritsar Toll Road Ltd. [2023 : DHC : 4352- DB].

44. The Petitioner has further sought to argue that respondent failed to substantiate the claim with any contemporary records and no evidence was led by the claimant in support of its claim. It is a settled principle of law that to substantiate a claim, evidence needs to be produced before the adjudicating Authority. In this regards reliance has been placed on Associate Builders (Supra), Ssangyong Engineering (Supra), Rajasthan and Others Vs Ferro

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Digitally Signed
By: VIKAS ARORA
Signing Date: 08.10.2024
18:21:08



M.P. (COMM) 454/2018

Page 22 of 29



2024:DHC:7828



Concrete Construction Private Limited, (2009) 12 SCC 1, Union of Indian Vs. Om Construction, 2019 SCC Online 9037, Aneja Construction (India) Ltd Vs. Grim - Tech Projects, 2022 SCC Online Del 452, National Highway Authority of India v. Shree Jagannath Expressways, 2022 SCC Online Del 706, and National Highway Authority of India v. Shree Jagannath Expressways, 2022 SCC Online Del 706.

45. The respondent has argued and also submitted their synopsis to assert that it has been proved from the evidence that the work had been executed by the respondent during the extended period and thus, was entitled to the payment as awarded by the learned Arbitral Tribunal. The respondent had continued to work till 27.03.2015 as is evident from the Office Noting of NHAI. Learned counsel for the respondent has reiterated in his written submissions the same grounds as have been stated in the reply. Reliance has been placed on Delhi Airport Metro Express Pvt. Ltd. vs. Delhi Metro Rail Corporation Ltd. (2022) 1 SCC 131 and Government of NCT of Delhi vs. R.S. Sharma Contractors Pvt. Ltd. MANU/DE/5439/2023.

46. **Arguments heard and record perused.**

47. The petitioner has challenged the impugned Award essentially on the ground of rejection of liquidated damages and granting Award amount for the extended period of work. It is asserted that the Award is in contravention of





2024:DHC:7828



basic notions of morality and justice which falls under the term Public Policy mentioned in Section 34 and 48 of the Act, 1996.

48. The scope of a challenge under Section 34 of the Arbitration and Conciliation Act, 1996 is limited to the grounds stipulated in Section 34 as held in MMTC Limited v. Vedanta Ltd., (2019) 4 SCC 163. Comprehensive judicial literature on the scope of interference on the ground of Public Policy under Section 34 was postulated in Associate Builders v. DDA, (2015) 3 SCC 49. The Apex Court placed reliance on the judgment of ONGC v. Saw Pipes, (2003) 5 SCC 705 to determine the contours of Public Policy wherein an award can be set aside if it is violative of '*the fundamental policy of Indian law*', '*the interest of India*', '*Justice or morality*' or leads to a '*Patent Illegality*'.

49. For an Award to be in line with the '*The fundamental policy of Indian law*', the Tribunal should have adopted a judicial approach which implies that the Award must be fair reasonable and objective and in accordance with the law of the land. The ground of '*patent illegality*' is applied when there is a contravention of the substantive law of India, the Act, 1996 or the rules applicable to the substance of the dispute.

50. In Hindustan Zinc Limited v. Friends Coal Carbonisation, (2006) 4 SCC 445, the Apex Court referred to the principles laid down in *Saw Pipes* (supra) and clarified that it is open to the court to consider whether an Award is against





2024:DHC:7828



the specific terms of the contract, and if so, does it interfere with the ground that it is patently illegal and opposed to the public policy of India.

51. The Apex Court in the case of Ssangyong Engineering & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, has exhaustively dealt with the expression “*patent illegality*” and which acts of the Arbitral Tribunal would come within the purview of patent illegality. The only correct interpretation of a contract would be if no reasonable person could have arrived at a different conclusion while interpreting the relevant clauses of the contract and that any other interpretation would be irrational and in defiance of all logic, however, the findings would suffer from the vice of irrationality and perversity if the Tribunal arrived at his findings by taking irrelevant factors into account and by ignoring vital clauses of the contract. Hence, the Apex Court held that the court could intervene and review the merits of an award if it is found to be on wrong interpretation of the Contract and thus, ‘*patently illegal*’.

52. Applying the aforesaid Principles, the facts of the present case may now be considered. The *first major challenge is to Claim No.5* vide which a sum of Rs.13,48,930/- has been awarded for the work done by the respondent during the extended period. The learned Tribunal considered the documents namely email dated 04.01.2015 written by M/s Pylon Construction along with Incident Management Report from 01.12.2014 to PD i.e. including RSIPL. It confirmed that M/s Pylon was working on behalf of the respondent till December, 2014.

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Page 25 of 29



2024:DHC:7828



PD informed the respondent through its email dated 15.01.2015 that it would be visiting the site on 17.01.2015 and to remain present along with the latest status of the Project. PD also sent an email dated 02.02.2015 to respondent to furnish Incident Management Data for the period 01.01.2015 to 31.01.2015. Email dated 07.02.2015 was sent by NHAI, Regional Office, Bangalore to PIU-Dharwad and others on 07.02.2015 proving that no other agency had been appointed till 07.02.2015 and PD was asked to continue with the existing agency for O&M work till February end or till the new agency was engaged. M/s Pylon Construction sent an email dated 01.03.2015 sending Incident Management Report of 01.02.2015 till 28.02.2015. The affidavit of M/s Pylon Constructions (Sub-Contractor), on which reliance had been placed by the petitioner to establish that the work during the extended period was not done by the claimant was discarded for the simple reason that it was found to have been prepared on the dictation of the petitioner. The email dated 07.02.2015 of the Petitioner issued directions to continue with the existing Agency till a new agency was appointed.

53. The argument of the petitioner that no Indent was issued for the period 28.12.2014 to 27.03.2015 was held to be not relevant as the claim was based on the work actually done during the extended period which was only on account of Incident Management and not on account of improvement and maintenance





2024:DHC:7828



of route which could have been undertaken only in accordance with the Indents issued by the petitioner which were admittedly not issued.

54. The learned Arbitral Tribunal, therefore, rightly concluded that the Incident Management Work was conducted by the respondent and accordingly awarded the amount of Rs.11,31,341/-.

55. The challenge to this Claim is essentially on re-appreciation of the documents and the facts of the case which is not within the scope of Section 34 of the Act. Cogent explanation and reasons have been given by the learned Tribunal after referring to all the documents which were duly proved and/or admitted during the arbitral proceedings, while allowing this Claim.

56. There is no merit in the challenge to Claim 5 as raised by the petitioner.

57. The *second claim* which has been challenged is *Claim No.8 towards refund of Liquidated Damages* in the sum of Rs.9,11,492/-. However, learned Arbitral Tribunal found the computing of amount of Liquidated Damages as arbitrary. For this, the reference was made to the Indents that were placed during the currency of the Contract. It was observed that had there been any delay in the completion of work as per these Indents, it would have been reckoned from the respective due dates of completion thereof, which happened to be much prior to the stipulated date of completion of the work as a whole.

58. However, as per the statement relied upon by the petitioner, the delay has been reckoned from 27.12.2014 by which date admittedly the work had been





2024:DHC:7828



declared to be complete by the petitioner. The delay as worked out by the petitioner related to various Indents which did not make any sense and could not be the basis to levy liquidated damages. Reference was also made in respect of Indents at Sr. No.1 and 2 the value of balance work of which was shown as zero.

59. The petitioner had claimed a delay of 173 delays in respect of Indent mentioned at Sr.No.1 and Indent at Sr. No.2. In respect of Indent at Sr. No.3 which was for the work done in August, 2014, but due date of completion thereof has been taken as 31.07.2014 i.e. prior to August, 2014 and accordingly LD of Rs.9,11,492 has been imposed. After making a reference to these Indents, it was sufficiently proved that liquidated damages as imposed by the petitioner were not based on merits.

60. The Ld. Tribunal held that it was a product of whims and fancies of the petitioner herein and was without application of mind, which is further fortified by the fact that the amount of liquidated damages was reduced from Rs.30,10,000/- to Rs.9,11,492/-. The defence of the petitioner herein that the amount was reviewed taking into consideration the second revised Bill, was held to have no weight as the revised computed liquidated damages had nothing to do with the gross value of the work done as a whole.

61. The letter dated 11.08.2014 on which reliance was placed by the petitioner to claim that respondent herein was responsible for slow progress and





2024:DHC:7828



was put to Notice that corrective measures be taken immediately or else action shall be taken by the petitioner herein under Clause 45.1, 53.2 (J) and 27.3 of Contract Agreement, was comprehensively refuted by the respondent in its Letter dated 21.08.2014 to which there was no rebuttal. Ld. Tribunal rightly observed that this letter of petitioner which was written merely after 8 months of the date of start, could not be considered as a basis to levy the liquidated damages.

62. Ld. Tribunal further observed that no Show Cause Notice was given to the respondent before levy of LD, to give an opportunity to explain its case and consequently, the conduct of the petitioner herein was violative of principles of Natural Justice. It was thus, concluded that the action of the petitioner to levy LD of Rs.9,11,492/- was wrong and illegal.

63. From the detailed discussion and the reasons given by the learned Tribunal it is evident that the conclusion to imposition of liquidated damages was based on documents which have been correctly interpreted and relied.

64. Learned counsel on behalf of the petitioner had heavily contended that the documents were submitted on behalf of the respondent along with written submissions dated 09.11.2017 after the conclusion of final arguments and were exhibited as C-37, C-38 and C-39. Though the original Noting sheets had been shown to the learned Arbitral Tribunal on their direction, but even then the respondent had not sought the permission to file any further documents in





2024:DHC:7828



support of its claim qua extension of time. However, the documents had been duly exhibited by the learned Tribunal after seeing the original Noting. The learned Tribunal has given cogent explanation and interpretations of the documents. Further, essentially the challenge in the present petition appears to be on merits, which is not within the scope of jurisdiction available under Section 34 of the Act.

65. The finding on interest had also been challenged, but there is no illegality in the grant of interest.

66. The challenges raised by the Petitioner are more in the nature of ‘castles in air’ than anything concrete rooted in facts. Such challenges, especially by government organisations, are anti-thetical to the objective of arbitration. On the one hand, the government aspires to reduce litigation while seeking to promote alternative modes of dispute resolution such as arbitration and mediation, and on the other hand, the Courts are filled with litigations being pursued by Government Undertakings against well-reasoned Award given by a three member Arbitral Tribunal, as in this case.

67. It is thus, held that the Award given by the learned Tribunal is well reasoned after thorough consideration of the evidence after recording the due consideration of the case of both the parties. There is no violation of the Fundamental principles of Indian law or Public Policy of India nor does the Award suffers from any patent illegality. The challenges are essentially on





2024:DHC:7828



merits which are not tenable. The petition under Section 34 of the Act challenging the award is without merit and the petition is hereby dismissed.

NEENA BANSAL KRISHNA, J

SEPTEMBER 30, 2024

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M.P. (COMM) 454/2018

Page 31 of 29