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

% Judgment delivered on: 18.01.2017

\+ **FAO(OS) 16/2017**

NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI) .... Petitioner

versus

M/S PROGRESSIE - MVR (JV) ..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr S. Nanda Kumar with Mr Parivesh Singh & Mr P. Sriniwasan.

For the Respondent : Dr Amit George & Mr Swaroop George.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No.1911/2017

Allowed subject to all just exceptions.

CM Nos.1912-1913/2017

These applications for condoning the delay in filing and re-filing have been heard. After considering the arguments of the learned counsel for the parties, we are of the view that this is a fit case where delay ought to be condoned.

The applications are allowed.

FAO(OS) 16/2017 & CM No.1910/2017 (Stay)

The present appeal has been preferred against the order dated

17.06.2016 passed by a learned single Judge of this Court in OMP No.1003/2013 which, in turn, was a petition under Section 34 of the Arbitration & Conciliation Act, 1996 challenging the award dated 01.06.2013 (pronounced earlier on 09.05.2013). The learned single Judge has rejected the application under Section 34 of the said Act on the ground that the subject matter of challenge was entirely covered by a decision of a learned single Judge on identical issues which was rendered on 17.12.2014 and the appeal against which was also dismissed by a Division Bench of this Court by virtue of the judgment dated 10.03.2015 delivered in FAO (OS) 93/2015. The learned single Judge has also noted that the Special Leave Petition preferred by the appellant (NHAI) being SLP(C) No.19526/2015 was also dismissed by the Supreme Court by virtue of the order dated 31.08.2015. It is in this backdrop, since the matter was entirely covered by the earlier decision, that the learned Single Judge has rejected the petition under Section 34 of the said Act.

We have heard the learned counsel for the parties. The learned counsel for the appellant sought to draw a distinction between the issues decided by this Court in FAO(OS) 93/2015, against which the Special Leave Petition has also been dismissed, and the issues in the present case. The distinction that is sought to be drawn by the learned counsel for the appellant is in connection with the note following sub-para (xi) of sub-clause 70.3 of the Conditions Of Particular Application (COPA). It has been submitted that in the earlier decision, the expression used was as under:-

> *"(Note: X, Y, Z are the actual percentage of cost of bitumen, cement and steel respectively used for execution of work as*

per the interim payment Certificate for the month.)"

Whereas the note in the present contract is as under:-

> *"(Note: X, Y, Z are the actual percentage of bitumen, cement and steel respectively used for execution of work as per the interim payment Certificate for the month.)"*

In the above context, it has been submitted by the learned counsel for the appellant that the words 'of cost' appearing in the note in the earlier case are absent from the note in the present case. According to him, this makes a material difference. However, we find that this very aspect was placed before the learned single Judge who has considered the same and concluded that this would not amount to any material difference for the reasons that the parties were *ad idem* in the present case that the actual percentage of the components X, Y and Z were to be arrived at by employing the cost or rate of the said elements respectively. Paragraph 28 of the impugned judgment brings out the rival contentions of the parties and the same is reproduced herein below:-

> "28. The stand of the respondent is that while computing the percentage of the components of X, Y and Z i.e. bitumen, cement and steel respectively, the percentage has to be calculated by multiplying the quantities of these items in a bill for that particular month, with the 'current cost' or landed cost of these items in the market. The stand of the petitioner on the other hand is that while computing the percentage of the components of X, Y and Z the percentage has to be calculated by multiplying the quantities of these items in a bill with their 'base cost' i.e. the cost prevailing at the time of submitting the bid."

It is evident that the controversy before the learned single Judge was once again whether the current cost would be employed or whether it would be the base rate that would be taken into consideration for arriving at components X, Y and Z. The conclusions of the learned single Judge on this aspect are as under:-

> "33. It appears form the above that the Arbitral Tribunal has come to a conclusion that since the 'actual percentage' was to be calculated in reference to the 'work done' for a 'particular month', it is the usage of the current cost that is contemplated by the price adjustment formula in as much as it is the current cost that would be representative of the work done in a particular month rather than an alleged base cost of several months or years prior.
> 34. The Arbitral Tribunal has also observed that the 'Note' appended below the price adjustment clause nowhere stipulates the usage of the base cost, though the petitioner, being the drafter of the contract, could have explicitly provided for the same when it drafted the Note. It appears to the Court that the Arbitral Tribunal has taken a plausible view; it is to be considered as to whether this can be interfered with in exercise of the limited jurisdiction under Section 34 of the Act.
> 35. In the present case, the petitioner is not able to show any explicit stipulation in the 'Note' appended about the price adjustment clause that it is the base rate which is to be utilized. Therefore, it cannot be concluded that the Arbitral Tribunal has construed the contract in unfair manner; it could be interpreted totally in a different way by a reasonable person. Therefore, the challenge under Section 34 of the Act is without any valid basis (Reference was made on behalf of the respondent to the judgment of the Supreme Court in the case of ***National Highways Authority of India v. ITD Cementation India Limited,*** 2015(5) SCALE 554)."

It is, therefore, clear that the controversy in the present case also to whether the 'cost' at 'base rate' or the 'current cost' is to be taken. This was the very issue which was before the Court in FAO (OS) 93/2015. In that case the Court clearly held that the current cost was to be taken into account in determining the components X, Y and Z and not the base rate.

Consequently, we are of the view that the learned single Judge was absolutely correct in observing that the present matter is entirely covered by the decision of the Division Bench in FAO(OS) 93/2015 against which the Special Leave Petition has also been dismissed. The learned single Judge has also held that the interpretation given by the Arbitral Tribunal was one of the possible interpretations and therefore there was, in any event, no question of interfering with that interpretation. Consequently, there is no merit in this appeal, the same is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

JANUARY 18, 2017/ns