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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Decided on: 6th May, 2024

+ O.M.P. (COMM) 202/2024

MINISTRY OF ROAD TRANSPORT
AND HIGHWAYS

..... Petitioner

Through: Ms. Neetika Sharma & Ms.
Akshada Mukwar, Advocates.

versus

M/S A K SHIVHARE
INFRASTRUCTURE PVT LTD

..... Respondent

Through: Ms. Kiran Suri, Senior Advocate
with Mr. Hitendra Rath, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

I.A. 10178/2024 (Exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

O.M.P. (COMM) 202/2024 & I.A. 10177/2024 (stay), 10179-10180/2024 (condonation of delay)

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner - Ministry of Road Transport and Highways [“MoRTH”] assails an arbitral award dated 23.11.2023, arising out of an agreement dated 26.02.2018, for rehabilitation and upgradation of intermediate lane flexible pavement on the Khilchipur Jeerapur road in the State of Madhya Pradesh [“the



Contract”]. By the impugned award, a three-member Arbitral Tribunal has awarded the sum of ₹7,72,05,133/- to the respondent on account of reimbursement of Goods and Services Tax [“GST”] paid, interest thereupon of ₹2,54,77,694/- and costs. The counter claim of MoRTH, which was only for costs, has consequently been rejected.

2. The Contract was entered into pursuant to a tender issued by MoRTH’s implementing agency, Madhya Pradesh Road Development Corporation Limited [“MPRDC”] on 08.09.2017. The respondent’s bid, which was for a sum of ₹65.62 crores was accepted and a Letter of Acceptance was issued by MPRDC on 05.12.2017. The parties entered into the Contract on 26.02.2018 and a Work Order was issued to the respondent two days thereafter i.e. on 28.02.2018.

3. The respondent herein contended that it was entitled to GST on the contract amount, which had not been paid by MoRTH. After some correspondence between the parties, the dispute on this account was referred to arbitration, which culminated in the impugned award.

4. I have heard Ms. Neetika Sharma, learned counsel for the petitioner, and Ms. Kiran Suri, learned Senior Counsel for the respondent.

5. Ms. Sharma raises two objections to the award:-

- i. She submits that the pre-arbitration conciliation procedure provided in Article 26 of the Contract was not undergone, and the disputes were therefore not arbitrable.
- ii. On merits, she submits that the Contract was based upon a Schedule of Rates [“SOR”] published by Government of Madhya Pradesh, Public Works Department on 06.06.2016, which specifically provided that the rates quoted by the contractor would



be inclusive of all taxes. According to Ms. Sharma, the Arbitral Tribunal has committed a manifest error in relying upon the SOR of 2017, wherein GST was specially excluded.

6. The detailed submissions of the parties, contractual clauses, and finding of this Court on each of these issues are recorded below.

A. Preliminary objection with regard to conciliation

7. Ms. Sharma relied upon the dispute resolution clause [Article 26 of the Contract] to submit that the disputes were non-arbitrable for want of pre-arbitral remedies having been exhausted.

8. The clause, to the extent that it is relevant, is set out below:-

“ARTICLE 26

DISPUTE RESOLUTION

26.1 Dispute Resolution

26.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the “**Dispute**”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

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26.2 Conciliation

*In the event of any Dispute between the Parties, either Party may call upon the Authority’s Engineer, or such other person as the Parties may mutually agree upon (the “**Conciliator**”) to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take*



place within the 7 (seven) business day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.

26.3 Arbitration

26.3.1 *Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally finally settled by arbitration in accordance with the rules of arbitration of the SOCIETY FOR AFFORDABLE REDRESSAL OF DISPUTES (SAROD).*

xxxx xxx xxx”

9. Based upon this clause, Ms. Sharma submits that the respondent was required to invoke the procedure of conciliation under Clause 26.2 before it could proceed to the stage of arbitration under Clause 26.3. She submits that Clause 26.2, in fact, provides for two stages of conciliation, one before the “*Authority’s Engineer*” and the second before the “*Chairman of the Authority and the Chairman of the Board of Directors of the Contractor*”. It is undisputed that MoRTH is described as the “*Authority*” in the recitals to the Contract.

10. Factually, it is undisputed that the respondent invoked arbitration by a communication dated 18.05.2022. As the said communication failed to elicit a response, it filed a petition under Section 11 of the Act before the Madhya Pradesh High Court. The said petition was rejected by an order dated 14.03.2023, referring the parties to Society for Affordable Redressal of Disputes [“SAROD”] in terms of their agreement. The arbitral tribunal was constituted in terms of SAROD Rules, and the



petitioner filed an application under Section 16 of the Act contending that the dispute was non-arbitrable due to non-compliance with the pre-arbitration conciliation proceedings.

11. The Arbitral Tribunal has rejected this submission on the following reasoning:-

“18.17 Approaching for arbitration without complying clause 26 of the agreement concerning conciliation, has never been objected by the respondent, so section 4 of the amended arbitration and conciliation act forfeits the respondent's right to object for it. Moreover clause 26 on conciliation is a directory requirement and not a mandatory requirement.”

12. Ms. Sharma submits that the Arbitral Tribunal has erroneously found that MoRTH had not raised an objection on this ground. She states that such an objection was raised before the Madhya Pradesh High Court and in the application under Section 16 of the Act.

13. The objection is, in my view, unsustainable for two reasons:-

i. First, Ms. Suri has handed over in Court a copy of the letter dated 18.05.2022 by which arbitration was invoked on behalf of the respondent. It is undisputed that said letter was part of the petition before the Madhya Pradesh High Court, which was placed before the Arbitral Tribunal. The letter dated 18.05.2022 is taken on record. In the said communication, the respondent referred to its demand for GST and specifically stated as follows:-

“...The appointed Authority's Engineer has also disappeared and not in function and so the task of conciliation by him is not possible; however the Authority's subordinate office could have done the conciliation on demand of above referred letter but it didn't work.

As such we are left with alone alternative to go for arbitration and for this purpose we do hereby appoint Mr. Uday G. Palnitkar, Advocate, E-2/98, Arera Colony, Bhopal 462016



(Mob. 9827015050) as arbitrator on our behalf. We have obtained written consent of Mr. Uday G. Palnitkar, Advocate in advance for the purpose....”¹

This communication did not elicit a response from MoRTH. In these circumstances, the Arbitral Tribunal’s conclusion that MoRTH had forfeited its right to raise an objection on this ground is a plausible conclusion.

ii. The second ground upon which this submission is liable to be rejected flows from the order of the Madhya Pradesh High Court in the Section 11 petition. As pointed out, this ground was raised before the Madhya Pradesh High Court and has been dealt with in the order dated 14.03.2023 as follows:-

*“[8] It is clear from the aforesaid arbitration clause that the parties did agree that in case of any dispute which is not resolved amicably by conciliation as provided in Clause 26.2 same shall be finally settled by way of conciliation and thereafter by way of the arbitration in accordance with the Rules of Arbitration of society for affordable redressal of dispute (SAROD). **Even if the parties did not enter in the conciliation proceedings, the dispute is liable to be settled by arbitration in accordance with the rules of arbitration of the SAROD.**”²*

The aforesaid observation of the Madhya Pradesh High Court was accepted by MoRTH. This finding, from which these very arbitral proceedings arose, supports the conclusion of the Arbitral Tribunal, that the clause was directory and not mandatory.

14. In view of the aforesaid, the challenge to the rejection of the preliminary objection raised by MoRTH is rejected.

¹ Emphasis supplied.

² Emphasis supplied.



B. On merits - regarding the respondent's claim for GST

15. The question which required adjudication by the Arbitral Tribunal on merits is whether the contract amount of ₹65.62 crores quoted by the respondent was to be construed as exclusive of GST, as claimed by the respondent, or was inclusive of GST, as claimed by MoRTH.

16. The tender in the present case was issued on 08.09.2017. Although this was after the enactment of the GST regime, which came into force on 01.07.2017, the tender document admittedly did not contain any specific provision with regard to payment of GST. The estimated amount of the work was stated to be ₹77.30 crores. The respondent's bid was for the substantially lower sum of ₹65.62 crores, which was accepted and the Letter of Award was issued on 05.12.2017. The respondent sought a clarification with regard to the payment of GST by a letter dated 20.12.2017, relying upon an amendment to the SOR issued by Government of Madhya Pradesh on 16.10.2017 with effect from 29.08.2017. The amendment provided that the SOR would be exclusive of GST. Although no reply was sent by MoRTH to this letter, the parties entered into the Contract on 26.02.2018 for the contractual sum of ₹65.62 crores.

17. Clause 19.1.2 of the Contract reads as follows:-

“19.1.2 The Contract Price includes all duties, taxes, royalty, and fees that may be levied in accordance with the laws and regulations in force as on the Base Date on the Contractor's equipment, Plant, Materials and supplies acquired for the purpose of this Agreement and on the services performed under this Agreement. Nothing in this Agreement shall relieve the Contractor from its responsibility to pay any tax



including any tax that may be levied in India on profits made by it in respect of this Agreement.”

18. Two days thereafter, on 28.02.2018, MPRDC, which was the implementing agency of MoRTH, issued a Work Order to the respondent, the Work Order contained a provision regarding the “Contract Amount”, which reads as follows:-

“2. Contract Amount : Rs. 65,62,00,000/- (Rupees sixty five crores sixty two lakhs only) excluding GST.”

19. Work under the Contract was completed on 25.09.2019. Interim payments were made in the meantime without GST, but the respondent’s final bill was submitted on 18.08.2020, raising a claim of ₹8,30,25,083/- on account of GST. MoRTH made the payment on 15.12.2020, but did not pay the GST amount. The respondent raised claims for GST by letters dated 05.01.2022 and 09.02.2022, and ultimately invoked arbitration by the aforesaid communication dated 18.05.2022.

20. The principal contention of Ms. Sharma is that the tender documents and the estimated value of the tender of ₹77.30 crores were based upon the SOR issued by Government of Madhya Pradesh in 2016. The said SOR expressly provided that the rates were inclusive of all taxes. She submits that the Arbitral Tribunal has erroneously come to the conclusion that the rates submitted by the respondent were exclusive of GST, relying only upon the Work Order dated 28.02.2018, which contained a typographical error to this effect.

21. The findings in the impugned award on this aspect are that the SOR was revised by the Public Works Department with effect from



29.08.2017, before the bids were called on 08.09.2017 with an estimated value of ₹77.30 crores. The Arbitral Tribunal has held that the “Base Date” was 26.09.2017, being 28 days prior to last date for submission of bids, when GST was already in force. The Arbitral Tribunal has also noticed the contents of the Work Order, wherein it has been expressly stated that the contract amount was fixed at ₹65.62 crores excluding GST. The respondent’s request for clarification dated 20.12.2017 was not answered until the issuance of the Work Order, which expressly stipulated that GST would be payable upon the contract value. The conclusions of the Arbitral Tribunal are contained in paragraphs 18.14 and 18.15 of the award, which read as follows:-

“18.14 All the above sequences clearly lead to the interpretation that GST was not included in the rates quoted by the claimant which the respondent has himself subsequently clarified clearly in the work order dated 28 Feb 2018, issued under the signatures of the Chief Engineer who himself signed the contract and knows clearly the contention/interpretation of the contract that the quoted rates of the claimant are without GST. This cannot be treated as clerical and topographically error as being slated by the respondent in his counter arguments now before the AT. The respondent remained silent on this issue and submitted such reply in the SOD only.

18.15 GST is on the completed finished work and has to be paid by the one who availed the final services which in this case is the respondent for whom the claimant was working. The provisions on all taxes liability of the claimant under clause 19.1.2 (page 255 of the SOC) is limited to payment of taxes on materials, machines, services availed by the claimant. So GST payment liability by the claimant does not exist which has clearly been stated in MP PWD SOR 2017 stating rates are without GST. So taking shelter by the respondent that all tax provision in the contract made in the contract based on June 2016 SOR when GST did not exist at all, is absurd, hence GST is not included in the quoted rates of the claimant and GST payment is not the liability of the claimant. Moreover, as per GST provisions, GST has to be paid by the one



who availed the final services which in this case is the respondent. So all taxes provisions in the contract and GST provisions are totally different. That is why the Chief Engineer, who signed the contract clearly specified that GST is not included in the accepted amount in the work order issued by him to commence the work after acceptance of the contract. Even the respondent stated in his arguments that as per Schedule 2 of GST Act, work contract is supply of services and the person who has been given services is liable to pay GST. In the present case the claimant has given services to the respondent, so the respondent who has been given the services by the claimant, has to pay the entire GST amount due and not by the claimant as now wrongly being interpreted by the respondent while rejecting the rightful due claim on GST of the claimant.”³

22. The aforesaid analysis proceeds on an interpretation of the contractual terms, which is a matter within the domain of the Arbitral Tribunal. The interference of the Court under Section 34 of the Act is warranted only if such interpretation is found to be arbitrary, perverse or irrational. In the present case, the Arbitral Tribunal’s conclusion that the tender document, issued after the amendment to the SOR on 29.08.2017 was based upon the said SOR, cannot be held to be arbitrary or perverse. This conclusion of the Arbitral Tribunal is fortified by the reference to the Work Order issued contemporaneously with the Contract, wherein the Chief Engineer of MPRDC, has clearly stated that the contract amount is exclusive of GST.

23. Having regard to these facts, I did not find any case for interference with the award on merits also.

24. This being the only substantive claim raised before the Arbitral Tribunal, in addition to claims for interest and costs, no other issue requires adjudication. MoRTH’s counter claim was also only for costs,

³ Emphasis supplied.



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which has been consequently rejected by the Arbitral Tribunal.

Conclusion

25. In view of the aforesaid, the petition is dismissed, but with no order as costs. All pending applications also stand disposed of.

MAY 6, 2024
'pv'/

PRATEEK JALAN, J