

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 455/2010

Reserved on: November 17, 2011

Decision on: November 30, 2011

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Sandeep Sethi, Senior
Advocate with Mr. Krishan
Kumar, Advocate.

versus

HINDUSTAN CONSTRUCTION COMPANY LIMITED

..... Respondent

Through: Mr. Pravin H. Parekh, Senior
Advocate with Mr. Sameer
Parekh, Mr. D. P. Mohanty,
Ms. Rukhmini Bobde,
Mr. Vishal Prasad, Ms. Ritika
Sethi, Ms. Suman Yadav,
Ms. Paula Ghose and
Ms. Sarabjot Walia, Advocates.

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CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
30.11.2011

1. The National Highways Authority of India ('NHAI') has filed O.M.P. No. 455 of 2010 and O.M.P. No. 456 of 2010 under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging two Awards dated 30th March 2010 passed by the Arbitral Tribunal in relation to disputes between NHAI and the Respondent Hindustan Construction Corporation Ltd. (HCC) arising out of the contract dated 2nd June 2004 concerning the Construction Package-ABP-2 in the State of Uttar Pradesh ('UP') for the work of Allahabad Bypass Project – Construction of Road from Km 158 to Km 198 (except Ganga Bridge). There were two references in relation to the disputes that arose from the said contract. Reference No. 1 related to Dispute Nos. 1, 2 and 3 and Reference No. 2 related to Dispute Nos. 4, 5, 6 & 7.

2. By the first Award dated 30th March 2010 in relation to Reference No.1, the three-member Arbitral Tribunal allowed the claims of HCC under Disputes 1, 2 and 3. There was a dissenting note of one of the learned Arbitrators in respect to Dispute No. 2. The said first Award dated 30th March 2011 allowing HCC's claims in Dispute Nos. 1, 2 and 3 has been challenged by NHAI in O.M. P. No. 455 of 2011.

3. By the second Award dated 30th March 2011 in relation to Reference No. 2, HCC's claims under Dispute Nos. 4, 5 & 7 were allowed by the

Arbitral Tribunal with a dissenting note of one of the learned Arbitrators in relation to Dispute No. 4. Dispute No.6 was withdrawn by HCC before the Arbitral Tribunal. The said second Award dated 30th March 2011 allowing HCC's claims in Dispute Nos. 4, 5 and 7 has been challenged by NHAI in O.M. P. No. 456 of 2011.

4. Dispute No. 1 related to reimbursement of additional costs incurred due to increase in the rates of royalty and associated sales tax on soil, sand and crushed stone aggregates. The Arbitral Tribunal allowed this claim and directed NHAI to reimburse HCC Rs. 2,69,91,248/- as additional cost till 31st December 2008 along with interest and also make payment of the additional cost incurred by the HCC for the period beyond December 2008 on account of the increase in Royalty and associated sales tax along with interest @ 12% per annum compounded monthly on the said amounts from the respective dates/months from which they were due. The Arbitral Tribunal also awarded future interest in the vent of failure by NHAI to pay the amounts within 90 days @ 12% per annum compounded annually.

5. Dispute No. 2 related to non payment for executed work of embankment with Soil/Pond ash for the initial 150 mm depth stripped in accordance with the requirements of the contract. The Arbitral Tribunal allowed this claim and directed NHAI to pay HCC Rs. 3,77,74,427/- towards formation of embankment for initial 150 mm, to pay the price adjustment of the above sum in terms of Clause 70.3 of the 'Conditions of Particular Application' ('COPA') using the price adjustment formulae and indices for the respective months as have been used by the Engineer in the certification of respective Interim Payment

Certificates ('IPCs'). The Arbitral Tribunal also awarded 12% interest compounded monthly on the above amount and also directed NHAI to release payment for the period beyond December 2008 together with price adjustment and interest together with future interest for delay in payment by NHAI beyond 90 days @ 12% per annum compounded monthly. The dissenting note of one member of the Arbitral Tribunal held HCC not to be entitled to any amount under this claim.

6. Dispute No. 3 related to reimbursement of additional costs incurred due to increase in the rates of Forest Transit Fee due to subsequent legislation/notification. The Arbitral Tribunal held that NHAI should pay HCC Rs. 3,77,74,427.39/- together with interest till 31st July 2008, make the payment of additional costs incurred by HCC for the period beyond July 2008 on account of increase in forest transit fee along with interest together with future interest for delay in payment beyond 90 days @ 12% per annum compounded monthly.

7. Dispute No. 4 related to outstanding amount on account of "construction of embankment with pond ash in accordance with BOQ Item No. 2.02(b) read with Clause 305.2.2.3 of technical specifications". The Arbitral Tribunal directed NHAI to pay HCC a total sum of Rs. 21,92,02,495/-, to pay HCC the price adjustment on the above sum in terms of Clause 70.3 of COPA using the price adjustment formulae and the indices applicable for the month of March 2009 as have been used by Engineer in the certification of IPCs, interest @ 12% per annum compounded monthly on the aforementioned amount from 1st April 2009 till the date of the Award and for embankment construction work with pond ash if any executed

for the period beyond March 2009 by adopting the above principles. Future interest @ 12% per annum compounded monthly was awarded for the period of delay of over 90 days in NHAI making the payment. The dissenting note of one member held that NHAI did not have to pay any sum to HCC as regards this claim

8. Dispute No. 5 related to the claim for additional cost due to introduction of toll charges/tax on the new Naini Bridge under subsequent legislation in terms of Clause 70.8 of COPA. The Arbitral Tribunal allowed HCC's claim and directed NHAI to pay HCC Rs. 20,49,924/- together with interest @ 12% per annum compounded annually from the respective periods when the amounts were due till the date of the Award and additional cost if any towards the toll charges for use of Naini Bridge for the period beyond 28th February 2009. Future interest @ 12 % per annum compounded monthly was held payable by NHAI for payment beyond the period of 90 days from the date of the Award.

9. Dispute No. 7 was the claim towards the additional cost due to introduction of service tax on transportation of goods under subsequent legislation in terms of Clause 70.8 of COPA. NHAI was directed by the Arbitral Tribunal to pay HCC a sum of Rs. 49,29,411/- together with interest @ 12 % per annum compounded monthly from the respective periods when the amounts were deposited by the claimant and the additional cost if any towards the service tax for the period beyond 31st May 2009 and future interest @ 12 % per annum compounded annually.

10. At the first hearing of these cases on 3rd August 2010, it was submitted by Mr. Sandeep Sethi, learned Senior counsel appearing for the NHAI that Dispute Nos. 1 & 3 in O.M.P. No. 455 of 2010 and Dispute Nos. 5 & 7 in O.M.P. No. 456 of 2010 were covered in favour of NHAI by two judgments of this Court in ***Larsen and Toubro Limited v. National Highways Authority of India*** (O.M.P. No. 514 of 2009 decided on 9th September 2009) and ***National Highways Authority of India v. M/s OSE-GIL J.V.*** (O.M.P. No. 613 of 2009 decided on 11th March 2010). At the subsequent hearing on 8th July 2011, it was pointed out by learned counsel for the HCC that both the above judgments had been reversed by the Division Bench of this Court. Mr. Pravin H. Parekh, learned Senior counsel appearing for HCC has produced a copy of the judgment dated 9th February 2011 of the Division Bench of this Court in FAO (OS) No. 347 of 2010 (***M/s OSE-GIL J.V. v. National Highways Authority of India***) in which the Division Bench held the case to be covered by an earlier decision of the Division Bench in ***National Highways Authority of India v. ITD Cementation India Ltd. 2008 (100) DRJ 431 (DB)*** and reversed the judgment of the learned Single Judge. By a judgment dated 3rd June 2011 in FAO (OS) No. 345 of 2010 (***Larsen & Toubro Limited v. National Highways Authority of India***) the Division Bench again allowed the appeal on the basis of the judgment of the Division Bench in ***National Highways Authority of India v. ITD Cementation India Ltd.*** The said judgment recorded the submission of the counsel for the NHAI that S.L.P. (C) No. 10070 of 2008 against the judgment of the Division Bench in ***National Highways Authority of India v. ITD Cementation India Ltd.*** was pending in the Supreme Court. The Division Bench in ***Larsen & Toubro Limited v. National Highways***

Authority of India observed that “instead of keeping the Appeals pending, awaiting the decision in the SLP, the Division Benches disposed of those Appeals in terms of **ITD Cementation**. . . The course of action which commends itself to us in the present Appeal is to allow the Appeal as well in the light of **ITD Cementation**. Any other course of action would amount to inconsistency in views of the Division Benches”.

11. Mr. Sandeep Sethi, learned Senior counsel for the NHAI submitted that this Court should await the decision of the Supreme Court in the S.L.P. filed against the judgment of the Division Bench in **National Highways Authority of India v. ITD Cementation**. Considering that the Division Bench in **Larsen & Toubro Limited v. National Highways Authority of India** did not consider it appropriate to keep the said appeal pending, this Court rejects the said submission.

12. Mr. Sethi then submitted that there were certain aspects of Disputes 1, 3, 5 and 7 that would not be covered by the decision in **National Highways Authority of India v. ITD Cementation**. He submitted that the NHAI did not furnish actual documentary or other proof of having incurred the additional costs under the said heads of claims. The circular dated 1st December 2004 referred to by HCC was not a notification and therefore did not qualify as ‘subsequent legislation’ within the meaning of Clause 70.8 of COPA. Even as regards the royalty, there had to be a contemporaneous claim by the HCC as and when the additional cost was incurred. The Engineer had to verify the payments so made at that very stage. He referred to clause 53.1 of the General Conditions of Contract (‘GCC’) for this purpose. He

submitted that not only the said procedure was not followed but the Arbitral Tribunal undertook a random sample check of the documents placed on record belatedly by HCC along with its written submissions. He further submitted that any increase in toll charges or an increase in any statutory levy was already accounted for in the price adjustment clause. It was set as an objective standard based on the Wholesale Price Index ('WPI'). Any sum directed to be paid by the impugned Awards would be contrary to the express terms of the contract.

13. As regards Dispute No. 2, Mr. Sethi referred to the relevant clauses regarding Clearing and Grubbing and submitted that backfilling was included in the work. The Dispute Review Board ('DRB') had held back-filling to be a part of clearing and grubbing. Mr. Sethi invited the attention of the court to the relevant clauses of the Technical Specifications ('TS') which had to be read in conjunction with Clauses 201.1 and 201.3 of the GCC. He submitted that there could not be a separate claim for back filling. The Arbitral Tribunal had erred in referring only to the TS not to the modified form of the said clause as far as the GCC was concerned. The finding on this aspect, according to Mr. Sethi was contrary to the express terms of the contract.

14. As regards Dispute No. 3, it was submitted that there is nothing to show that the goods had passed through the area of reserved forest and this could not be determined without their being a notification under Section 20 of the Forest Conservation Act, 1980 (FCA). Referring to the judgment of the Allahabad High Court in ***Subhash Stone Products v. State of U.P.*** 2007 (3) ADJ 635, it was submitted that the said judgment would apply only where the transit of goods was through a

reserved forest and not otherwise. There was no question, therefore, of HCC being compensated for any additional cost incurred on this account.

15. As regards Dispute No. 4, Mr. Sethi submitted that as per clause 305.8 of the TS, a compensation for use of pond ash was separate from compensation for use of soil/earth. Each had to be paid for in terms of their corresponding rates. Referring to the decision in ***Abdulla Ahmed v. Animendra Kissen Mitter AIR 1950 SC 15***, it is submitted that the conduct of parties was only an external aid in the interpretation of the relevant clause and cannot change its meaning. As regards Dispute No. No. 5, it was submitted that Mr. Sethi that HCC did not submit any actual proof of payment of additional toll charges on account of the goods having to pass through the Naini Bridge. Further, HCC did not demonstrate that there was no alternative route. Lastly, as regards Dispute No. 7, it was again submitted that there was no proof of having incurred additional costs on account of service tax on the transportation of goods.

16. Countering the above submissions, Mr. Pravin H. Parekh, learned Senior counsel for the HCC drew the attention of this Court to the fact that there are two types of contract, one known as EPC (Engineering, Procurement & Construction) contract and the other the BOQ (Bill of Quantities) contract. In the former, no provision is made for future increases either on account of the costs or on account of the specific legislation. However in BOQ contracts, the contractor is expected to bid on the basis of legislation as it existed 28 days prior to the last date of submission of the bid. In BOQ contracts, the subsequent taxes and

levies are sought to be compensated. Consequently, in BOQ contracts parties usually quote a lower price in the expectation of the reimbursement of the additional costs.

17. As regards increase in rates of Royalty and associated sales tax on soil, sand and crushed stone aggregates, Mr. Parekh states that there was a specific notification dated 24th November 2011 issued by the Government of Uttar Pradesh which increased the sales tax and royalty with effect from 21st December 2004. There was also a notification dated 15th December 2004 whereby the U.P. Mine & Minerals (Concession) Rules, 1963 were amended to increase the rate of royalty on various constructions materials like sand, aggregates and earth with effect from 16th December 2004. These two notifications constituted a change in legislation within the meaning of Clause 70.8 of COPA. IN any event claims in Disputes 1, 3, 5 and 7 were covered by the judgment of the Division Bench in ***National Highways Authority of India v. ITD Cementation Ltd.***

18. It is further submitted by Mr.Parekh that HCC immediately notified the Engineer by a letter dated 5th January 2005 claiming the difference in the royalty rates. The Engineer's representative, however, did not respond and the additional costs incurred by HCC was neither certified nor paid. HCC had kept the month-wise details of the costs incurred along with documentary proof and also provided the exact figure of the additional cost to the NHAI and the Engineer. It is submitted that throughout HCC has been providing detailed information to the Engineer. These were, however, never examined. As regards the payment for embankment construction work, it is submitted that this is

a factual dispute. The Arbitrators were retired highway engineers having considerable experience. The factual determination by them did not call for interference within the scope of the powers of this Court under Section 34 of the Act. It is further submitted that the measurement for payment of earth work in embankment should be made before the work of embankment starts (i.e., after the work of clearing and grubbing/removal of the top soil up to 150 mm is completed) and after its completion in accordance with Clause 305.8 of TS. The Arbitral Tribunal, by a majority of 2:1, found that the activity of back filling was liable to be paid for under the BOQ items and no deduction could be made while measuring the embankment work. It is submitted that the factual finding that the removal of top soil of specified thickness of 150 mm was an essential activity to be carried out before the commencement of embankment work did not call for interference. It could not be classified as associated or ancillary activity when there was no separate provision for back filling. Reliance was placed on the decisions in *Mcdermott International Inc. v. Burn Standard Co. Ltd. & Ors. (2006) 11 SCC 181* and *Steel Authority of India Limited v. Gupta Brother Steel Tubes Limited (2009) 10 SCC 63*.

19. As regards Dispute No. 3 Mr. Parekh submitted that there was a clear change in law concerning the forest transit fee. The Government of U.P. amended the U.P. Transit of Timber and other Forest Produce Rules, 1978 and provided for increase in the rate of Forest Transit Fee of Rs. 5/- per MT to Rs. 38/- per MT on forest produce by notification dated 14th June 2004. According to him, all additional costs arising from such an increase were liable to be paid within the purview of

Clause 70.8 of COPA. There was no alternate route to the passage through reserved forests or the Naini Bridge. HCC notified the Engineer's representative of such additional costs with the detailed break up. The DRB recommended for reimbursement of the additional costs but the NHAI had rejected this recommendation. The decision of the Arbitral Tribunal on additional costs was based on appreciation of evidence and was unanimous. It was submitted that HCC in fact furnished the details of payment to the NHAI but this was never verified. There were voluminous documents available with HCC and it was prepared to provide these to NHAI for verification.

20. As regards Dispute No.4 concerning construction of embankment and pond ash, it is submitted that the pond ash could not be constructed without the use of the soil. The measurements were to be strictly in accordance with the TS (MORTH specifications) and Clause 305.8 thereof was relevant. The method of measurement had to be the same whether the embankment construction was in terms of item No. 2.02 (a) or 2.02 (b). There was no provision in the contract for separate measurement of the earth cover and the pond ash core.

21. As regards Dispute No. 5 about reimbursement of additional cost of introduction of toll charges/tax on the new Naini Bridge, it is pointed out by Mr.Parekh that the dispute was referred initially to the Engineer who rejected the claim. The DRB failed to give its decision and thereafter the matter was referred to the Arbitral Tribunal. It is pointed out that when the work commenced, HCC was using the existing old bridge over the river Yamuna for the transport of aggregates and boulders. The old bridge was restricted, after the construction of the

new bridge, to light vehicles. Therefore, there was no alternate route available. HCC had notified the Engineer that toll was being collected as a consequence of the Gazette notification and was covered under Clause 70.8 of COPA. The Engineer rejected the claim of the HCC.

22. As regards Dispute No. 7, the Engineer himself had recommended that HCC should be reimbursed for the introduction of service tax on transportation of goods by the Government of India notification with effect from 1st January 2005.

23. The above submissions have been considered. Disputes 1,3 , 5 and 7 regarding reimbursement of additional costs do appear to be covered by the decision in ***National Highways Authority of India v. ITD Cementation***. If and when the Supreme Court allows the said special leave petition and reverses or modifies the said judgment, it would be open to NHAI to seek appropriate remedies as may be permissible in law to revive its challenge to the impugned Awards as regards the said items of claim. However, as of now this Court is bound by the decision of the Division Bench in ***National Highways Authority of India v. ITD Cementation***. Therefore the contention of NHAI that the claims for additional costs under the above heads are inadmissible as they have been accounted for in the price adjustment clause in the contract is hereby rejected.

24. This Court finds merit in the contention of HCC that the claim for each item of additional cost was covered by Clause 70.8 of the COPA. In other words, the additional costs had to be incurred by HCC on these heads of claims on account of subsequent statutory/legislative changes.

HCC has been able to demonstrate that the changes were brought about as a result of gazette notifications or amendments to the relevant rules. As regards HCC having to submit documentary proof of having actually incurred additional costs, it is seen that the Arbitral Tribunal first sought the assistance of the Engineer of NHAI to verify the documents submitted by HCC. The Engineer however appears to have declined. The Arbitral Tribunal thereafter took upon itself the task of verifying a sampling of the documents. The Arbitral Tribunal cannot be faulted for adopting the approach that it did.

25. NHAI has failed to satisfactorily counter the contention of HCC that it had lodged claims for additional costs contemporaneously and had also provided the requisite documentation to the Engineers who declined to examine such claims for some reason. It cannot, therefore, be said that HCC failed to submit any proof in support of its claim for reimbursement of additional costs incurred by it. The unanimous finding of the Arbitral Tribunal is that as a result of the subsequent legislative change the additional cost on account of change in royalty and sales tax HCC was entitled to be reimbursed by the NHAI. Considering that this was a BOQ contract, such claim was admissible and rightly allowed by the Arbitral Tribunal.

26. As regards non-payment for executed work of embankment which forms the subject matter of Disputes 2 and 4, this is purely a question of fact based on the measurement. There is no dispute in relation to the construction of the embankment that is covered under item 2.02 (a) of the BOQ. In fact NHAI has already paid HCC for the said construction. Clause 305.8 of the MORTH TS provides for measurement of the cross

section of the embankment as one whole composite section and paid under item No. 2.02 (b). The decision of the majority members of the Arbitral Tribunal based on an analysis of the material before them was a possible view to take. Merely because another view as evidenced by the dissenting opinion is possible interference by this Court under Section 34 of the Act is not warranted.

27. As regards reimbursement of the additional costs due to the increase in the forest transit fee, HCC proved to the satisfaction of the Arbitral Tribunal that this was as a result of legislative change attracting Clause 70.8 of COPA. Likewise the decision as regards the claim for reimbursement of additional costs on account of the introduction of toll charges on the new Naini Bridge and account of the service tax were supported by notifications. The decision of the Arbitral Tribunal on these claims was based on an appreciation of evidence and does not call for interference.

28. The impugned Awards dated 30th March 2011 of the Arbitral Tribunal cannot be said to be vitiated by patent illegality in terms of Section 34 of the Act. The petitions are accordingly dismissed with costs of Rs. 25,000/- each which will be paid by NHAI to HCC within a period of four weeks from today.

S. MURALIDHAR, J

NOVEMBER 30, 2011

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