

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

**DECIDED ON: 02<sup>nd</sup> August, 2013**

+ **FAO(OS) 348/2013**

**NATIONAL HIGHWAYS AUTHORITY OF INDIA**

..... Appellant

Through : Ms. Taru Priya Gupta, Mr. Mukesh  
Kumar Verma and Ms. Meenakshi  
Sood, Advs.

versus

**SOMDUTT BUILDERS-NCC-(JV) (JOINT VENTURE)**

..... Respondent

Through : None.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE NAJMI WAZIRI**

% **MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)**

**CM 11711/2013(exemption)**

Allowed, subject to all just exceptions.

The application stands disposed off.

**FAO(OS) 348/2013 & CM 11710/2013(stay)**

This appeal is directed against the judgment and order made by learned Single Judge on 10<sup>th</sup> May, 2013 in OMP No. 105/2010. The respondent Contractor had made certain claims in arbitration which were referred in accordance with the contract between the parties to the arbitral tribunal. The latter by its award dated 3<sup>rd</sup> October, 2009 granted two claims; at the same time, rejected appellant NHAI's counter-claims. The Contractor

was successful in respect of two claims. The award of the arbitral tribunal dated 3<sup>rd</sup> October, 2009 was challenged by the appellant, i.e. National Highway Authority of India (NHAI). The impugned judgment rejected that petition under Section 34.

2. At the outset, this Court notices that both the claims, which the respondent Contractor successfully agitated before the arbitral tribunal, (the determination of which were affirmed by the learned Single Judge), were identical about the subject matter of similar claims urged before this Court in certain other appeals. The first claim pertains to clearing and grubbing of removal of stumps and roots of trees and allied works, such claims were held to be with the scope of original work and consequently, the decisions of the arbitrators concerned were upheld by various judgments. For instance, in *National Highways Authority of India v. PCL-SUNCON J.V.* decided on 27<sup>th</sup> April, 2013, it was stated as follows:-

*“In our view the real issue, thus, is not whether the work of back filling after removal of top soil forms part of clearing and grubbing activity as, admittedly, there was no back filling carried out. The real controversy is as to whether if back filling had been done, that work is liable to be excluded from the work of embankment construction by the respondent. There is nothing shown to us whereby the construction of embankment can be said to have been done in the manner where effectively, the lower part of the embankment is made only by carrying out the activity of back filling. The embankment being separate item, it has to be fully paid for. Had there*

*been any force in the appellant's submission, the appellant would have placed before the arbitral tribunal evidence to show that the engineer had required the contractor to carry out back filling with soil up to a particular level (i.e., up to 150 mm or less), and that the design of the embankment was such as to be constructed over such back filled soil surface. No such material was placed before the arbitral tribunal. The appellant sought to make deductions, after having initially paid the amounts for making of embankment, by claiming that the initial 150 mm of the embankment work should be considered/deemed as work covered by the activity of clearing and grubbing. This, obviously, was impermissible.”*

3. The Court notices that in para 18 of the impugned order, the learned Single Judge had adverted to decisions of the FAO(OS) 123/2011(*National Highway Authority of India v. Oriental Structure Engineers Ltd*) and another connected appeal FAO(OS) No.136/2012, FAO(OS) No.47/2012 (*National Highway Authority of India v. Hindustan Constructions Co. Ltd.*) decided on 22<sup>nd</sup> November, 2012 and FAO(OS) No.424/2010 (*National Highways Authority of India v. PCL-SUNCON J.V.*) decided on 27<sup>th</sup> April, 2013, all of which held that such claims have been validly granted by the arbitral tribunals. This position is not disputed. All that the learned counsel urges is that those judgments have since been impugned in Special Leave Petitions are pending in the Supreme Court. This Court sees no reason to differ from the earlier view expressed in the said appeals (FAO(OS) 123/2011, 136/2012, 47/2012 & 424/2010). Consequently, the appeal so far as it

pertains to claim No. 1 is rejected.

4. The second claim pertains to non-payment for removal of tree stumps and roots. The learned senior counsel for NHAI had contended that such claims are not maintainable and has given four reasons in support of its submission which are recorded in para 20 of the impugned judgment. The impugned judgment has analysed the relevant clauses and further noticed as follows:-

*26. An identical issue involving the same question has been decided by this Court in the case of **The National Highways Authority of India Vs. Agrawal - JMC (JV)** in OMP No.640 and 641/2009 reported in 2011 VII AD (Delhi) 11 which has been discussed in para 21 to 23. The same reads as under :*

*“21. A perusal of Section 201.5 supports the contention of the Respondent that the activity of not only the cutting and removing of trees of girth more than 300 mm was excluded from the scope of the work detailed in Section 201.1, but even the work of removal of stumps and roots of such trees and of backfilling to required compaction was not covered by Section 201.1. It is precisely for this reason that the said activity is to be paid for not on hector age basis, but on the basis of individual cases, depending on the girth of the trees.*

*22. Even a reading of Section 201.1 does not support the submission of the Petitioner. The said section uses the expression “....It shall include excavation....backfilling....resulting from uprooting of trees and stumps....”. Therefore, the process of excavation, backfilling and compaction is a process which is to accompany the process of cutting and removal of the trees. Since Section 201.1 talks of cutting and removal of trees of girth up to 300 mm*

*only, the process of excavation, filling and compaction provided in Section 201.1 would only pertain to those trees and not to trees having girth more than 300 mm. The process of excavation, filling and compaction in relation to stumps and roots of trees, for it to be covered by Section 201.1 has to relate to those trees which have girth up to 300 mm and No. more.*

*23. I also find force in the Respondents submission that Clause (viii) of Clause 2.1 of COPA-II entitles the Engineer, in emergency situations - which affect the safety of life or of the works, to instruct the contractor to carry out works as may be necessary to reduce or abate the risk. Such instructions do not require the approval of the employer. The correspondence shows that the Petitioner invoked the said clause while requiring the Respondent to carry out the work of cutting and removal of trees of girth more than 300 mm. The Respondent accepted the said work while making it clear that the Respondent would be entitled to be paid extra for carrying out the work of removal of stumps, excavation, backfilling and compaction. The Petitioner did not question this stand of the Respondent by placing reliance of Section 201.1 of MOST specifications as applicable. The Respondent was entitled to be paid extra in accordance with Clause 52. The view taken by the arbitral tribunal appears to be a perfectly plausible view and it cannot be said that its view does not take into account the contractual terms and conditions.”*

*27. The Division Bench of this Court has dismissed the appeals being FAO(OS) Nos.551/2011 & 552/2011 filed by the petitioner on 17th November, 2011 by confirming the above said order passed by the learned Single Judge.”*

5. In view of the above reasons, this Court is of the opinion that the previous rulings of the Division Bench in FAO(OS) 551/2011 and 552/2011

are binding upon this Court. Consequently, there is no merit in the appeal as far as it pertains to claim No.2.

6. For the foregoing reasons, the appeal is devoid of merit and is, therefore, dismissed.

**S. RAVINDRA BHAT, J  
(JUDGE)**

**NAJMI WAZIRI, J  
(JUDGE)**

**AUGUST 02, 2013  
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