

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: March 15, 2016
Judgment Delivered on: March 17, 2016

+ FAO(OS) 428/2007

~~IRKSIATNA(V)~~ Appellant
Represented by: M^rKirti Uppl, Sr Advocate instructed by M^rChirag M^rShoff
and M^rShiba Patel, Advocates with M^rUhas M^rBale, Vice
President, Contracts, PAW

versus

~~MINDAHMASATRIYOFNDA....~~ Respondent
Represented by: M^rSkumar Pattjoshi, Sr Advocate instructed by M^rMas Guel
and M^rAbhishek Kumar, Advocates along with M^rP Siva Sakar,
Project Director, NAL, ILO

FAO(OS) 621/2015

~~MSIRKSIATNA(V)~~ Appellant
Represented by: M^rKirti Uppl, Sr Advocate instructed by M^rChirag M^rShoff
and M^rShiba Patel Advocates with M^rUhas M^rBale, Vice
President, Contracts, PAW

versus

~~MINDAHMASATRIYOFNDA....~~ Respondent
Represented by: M^rSkumar Pattjoshi, Sr Advocate instructed by M^rMas Guel
and M^rAbhishek Kumar, Advocates along with M^rP Siva Sakar,
Project Director, NAL, ILO

FAO(OS) 585/2015

~~MINDAHMAS~~
~~ATRIYOFNDA~~ Appellant
Represented by: M^rSkumar Pattjoshi, Sr Advocate instructed by M^rMas Guel
and M^rAbhishek Kumar, Advocates along with M^rP Siva Sakar,
Project Director, NAL, ILO

versus

~~MR. K. S. HANAN~~

Represented by:

..... Respondent

Mr. Kirti Upal, Sr. Advocate instructed by Mr. Chirag Mehta
and Mr. Shiba Patel, Advocates with Mr. Usha Mehta, Vice
President, Contracts, PAV

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. The legal relationship between National Highway Authority of India (NHA) and P. K. S. H. N. (P. K. S. H. N.) was forged as per agreement dated August 10, 2001. The undernoted documents were to be read and construed as part of the agreement:-

- i) Letter of Acceptance;
- ii) Notice to Proceed with the Works;
- iii) Contractor's Bid;
- iv) Contract Data (Volume I)
- v) Conditions of Contract (including Special Conditions of Contract) (Volume I);
- vi) Technical Specifications (Volume II);
- vii) Bill of Materials (Volume III)
- viii) Drawings (Volume IV);
- ix) Documents furnished by the Bidder in Volume V of the Bid Document;
- x) Addendum to Bid Document; and
- xi) Any other document listed in the Contract Data as forming part of the Contract.

2. It is an item rate contract with Bill of Materials specified. For the listed quantities, the amount payable by NHA to P. K. S. H. N. is ₹18,80,243/- (Rupees One Hundred Fifty Eight Crores Eighty Lacs Forty Two Thousand Four Hundred Thirteen only). P. K. S. H. N. had to construct the Ludhiana Bypass connecting NH25 and NH28 via NH56 passing through the City of

Lucknow in the State of Uttar Pradesh. The date of commencement was August 30, 2001 and completion period was 36 months.

3. The Bill of Quantities had specifications pertaining to the different items of work and with respect to *Reinforced Earth Structures*, clause 703(A) of Technical Specifications, the work was described as under:-

“This work shall consist of Reinforced Earth Structures as per patented reinforced Earth Technology and consisting of precast discreet cruciform concrete facing, high adherence galvanized steel strips with accessories/fittings and backfill material in accordance with the specifications and in reasonably close conformity with the lines, grades, design and dimensions shown on the approved drawings.”

4. The relevant item concerning the Bill of Quantities is 541 and it elaborates clause 703(A) of the Technical Specifications by further detailing the materials to be used and the manner of construction, and thus we profitably note item No 541 of the Bill of Quantities. It reads as under:-

“5.41 Construction of reinforced earth structures together with the construction of earthwork in layers, assembly & erection of reinforcing element & placement of facing panels and all associated components as per drawings, Technical specifications and clause 703.

a) Construction of reinforced earth walls with precast panels, reinforcing element, foundation beam, capping beam including ground treatment, if required, complete as per drawings and Technical Specification 700.

b) Earthwork for reinforced earth retaining wall technology reinforced earthwork with approved material including all lead and lifts complete as per Technical Specification Clause 703.

c) Construction of PCC strip level footing (35 cm X 15 cm) in M-15 grade concrete complete as per technical specification and drawing.

- d) *Construction of RCC cast-in situ/precast crash barrier and parapet coping beam with cast in-situ friction slab in M-30 grade concrete as per technical specification and drawing.*
- e) *Construction of Cold formed steel crash barrier as per technical specification and drawing.*
- f) *Construction of catchpits and drainage outlet at intervals with 100 mm dia C.I. Pipes of required length as per drawing.”*

5. ~~With reference to clause 7B(A) of the Technical Specifications, since it was a part of the tender documents and the notice inviting tender required the prospective bidders to submit their offers by filling up the tender documents, it needs to be noted that before the agreement was executed on August 10, 2001, NHA wrote to Prakash on March 15, 2001 that an addendum be treated to clause 7B(A) of the Technical Specifications. Letter dated March 15, 2001 written by NHA to Prakash reads as under:-~~

“To

*M/s Prakash Building Associates Ltd.JV
with Atlanta Infrastructure Ltd.
611/3, V.N.Purav Marg,
Chembur,
Mumbai-400071
Fax: 022-5229699*

Dear Sir,

Sub: Construction of segment of Lucknow Bypass joining NH-25 and NH-28 via NH-56 passing through Lucknow city (Contract Package No.EW-15/UP)-Addendum to Bid Document.

This has reference to the bid for the above mentioned project. It is hereby informed that the following addendum is being issued to Volume-II.

<i>S.No.</i>	<i>Clause/Sub Clause No.</i>	<i>For</i>	<i>Read</i>
<i>1.</i>	<i>Section-5 Clause 703, 1 A- Para 1, Line 2</i>	<i>“high adherence galvanised steel strips with accessories”</i>	<i>“reinforcing element conforming to relevant Indian standards</i>

This is for your information.

Yours faithfully

*B.D.Joshi
General Manager (Tech.)-II”*

6. ~~The words~~ *‘high adherence galvanised steel strips with accessories’ in clause 703(A) were replaced by the words ‘reinforcing element conforming to relevant Indian standards’.* Thus, we take the liberty of rewriting clause 703(A) of the Technical Specifications by superimposing the addendum. So done, the clause would read : *This work shall consist of Reinforced Earth Structures as per patented reinforced Earth Technology and consisting of precast discreet cruciform concrete facing, reinforcing element conforming to relevant Indian standards and backfill material in accordance with the specifications and in reasonably close conformity with the lines, grades, design and dimensions shown on the approved drawings.*

7. ~~Clause 23 of the General Conditions of the Contract gave a priority to the various documents, if read in order, to mean ambiguity and construe the contract between the parties. The clause reads as under:-~~

“The documents forming the Contract shall be interpreted in the following order of priority:

- 1. Agreement*
- 2. Letter of Acceptance, notice to proceed with the works*
- 3. Contractor’s Bid.*

4. *Contract Data*
5. *Conditions of Contract including Special Conditions of Contract*
6. *Specifications*
7. *Drawings*
8. *Bill of quantities and*
9. *Any other document listed in the Contract Data as forming part of the Contract.”*

8. ~~Work of such magnitude could obviously not be quantified with exactness and thus, as we find in all contracts of the kind, there was a clause to deal with the situation as to what happens when the final quantity of the work done differs from the quantity in the Bill of Quantities. It is clause 38.1 of the General Conditions of the Contract. It reads as under:-~~

“If the final quantity of the work done differs from the quantity in the Bill of Quantities for the particular item by more than 25 percent provided the charge exceeds 1% of initial Contract Price, the Engineer shall adjust the rate to allow for the change.”

9. ~~What kept in mind, probably to overcome problems encountered during the execution of the work which could possibly not be in the line of realization when the tender documents were finalized, variations to be made in the work. Said contingency was provided for in clause 40.2 of the General Conditions of the Contract. It reads as under:-~~

“If the work in the Variation corresponds with an item description in the Bill of Quantities and if, in the opinion of the Engineer, the quantity of work above the limit stated in Sub Clause 38.1 or the timing of its execution do not cause the cost per unit of quantity to change, the rate in the Bill of Quantities shall be used to calculate the value of the Variation. If the cost per unit of quantity changes or if the nature or timing of the work in the variation does not correspond with items in the Bill of Quantities, the quotation by the Contractor shall be in the form of new rates for the relevant items of work.”

10. As the work commenced, NHA and Prakash agreed that a reinforced earthwork from segment 1.4 km to 2.92 km would be replaced by a viaduct, and in respect of the same, on December 03, 2003, apart from other issues which were discussed and minuted, at SI No. 11 of the minutes it was agreed as under:-

“Variation Items:

*PAJV agreed that they will not claim viaduct as a new item.
For items, exceeding in quantity by more than 25% from BOQ quantity and their variation is also exceeding 1% of Contract amount, Engineer informed that request of the agency is being considered and the decision will be taken during December 2003.*

Rates for all Non BOQ items ordered so far will be revised by 31.12.2003.

*Rates for ground improvement will be finalized by 15.12.2003.
A meeting between PAJV and CES will be held at Delhi in first week of December 2003.”*

11. Disputes between the parties surfaced when the works were in progress. Prakash claimed that for viaduct, it should be entitled to the price treating the same to be a variation. NHA took a stand that it was not a case of variation. It was a simple case where the final quantity of work executed became more and thus clause 38.1 of the General Conditions of the Contract became applicable. As per the clause, since the price variation did not exceed 1% of the initial contract price, Prakash was not entitled for any price adjustment and would be entitled to the works concerning the viaduct by measuring the quantity of work executed and applying the unit rate as per the bid. As per Prakash the variation had to be with reference to an item of description in the Bill of Quantity and the price quoted in the Bill of Quantity for the quantity of works listed in the Bill of Quantity, meaning thereby the 1% price variation contemplated was not with reference to the total bid amount, which we have already noted was ₹1880,42,413/-. To clarify, if for the particular item of work, as per Bill of Quantity ‘Y’, the price was ₹‘X’ and the work executed was ‘Y’ + 30%Y, being a variation in the work beyond 25%, the price payable would be ₹‘X’ for work ‘Y’ and for 30%Y the rate adjustment has to be made as per market rates of the material input and labour rates.

12. ~~Holding~~ in favour of Paksh, the finding by the Arbitral Tribunal in para 8.4.2 of the award, with the final direction concerning said dispute in para 10.1 of the award, which is dated February 12, 2007, is as under:-

“Para 8.4.2

- (iv) *A closer look at the wording of the Clause No.9 of the Contract data would reveal that the Road works and Bridge works mentioned thereunder were required to be carried out in accordance with the drawings and provisions of the contract. At the stage of signing the contract, the drawings and Bill of Quantities provided in the contract did not envisage construction of a viaduct, but envisaged construction of RES between chainage Km. 1.400 to Km. 2.920. Thus it is clear that the construction of the said viaduct is outside the original scope of the Contract. It could be brought within the scope of the contract by mutual consent of the parties to agree to a variation, which by definition (given in Cl.1.1 of the conditions of contract) is an instruction, given by the Engineer, which varies the works. In fact Team Leader’s Letter dt. 17.05.02 (Exhibit C-1) is an instruction to vary the nature of work between chainage Kms. 1.400 and Km. 2.920 from RES to a Viaduct. The said variation has been accepted and has been implemented by the Claimant.*
- (v) *While evaluating the items of varied work, reliance can be placed on B.O.Q. items, only if the conditions spelt out in the first half of G.C.C. 40.2 fulfilled. But if the original scope of work is varied, GCC clause 38.1 does not remain applicable and the second part of GCC Cl. 40.2 which reads as following becomes relevant.*

“If the cost per unit of quantity changes or if the nature or timing of the work in the variation does not correspond with items in the Bill of Quantities, the quotation of the Contractor shall be in the form of new rates for the relevant items of work”.

In view of the above the AT finds strength in the Claimant’s argument that the basis of his quoted rates

included places and position where the works were to be executed for calculating leads, lifts etc. of major resources and agrees with the Claimant's view that the BOQ rates-per say-would not be applicable in such a situation.

- (vi) The Contract Agreement was signed on 18.08.2001. The period of completion was 36 months. The variation was ordered on 17.05.02 i.e after 9 months of signing the Contract. Under such a situation the cost per unit of quantity would change irrespective of the price adjustment clause because of the timing and location of the work as per variation did not correspond with those of the items in the Bill of Quantities. In fact, a statement of additional resources to be deployed for viaduct work, was indeed furnished by the Claimants with his letter dated 05.07.02 (Exhibit C-6). The Engineer on 16.07.02 (Exhibit C-7) also accepted the need for at least some additional resources. Hence, as per GCC Cl.40.2, the quotation from the Contractor in the form of new rates for the relevant items of work needs to be given due weightage.*
- (vii) The Respondent has relied on the minutes of the meeting held on 29.11.03, wherein the Claimant had stated that they would not claim viaduct as a new item. The circumstances under which such an undertaking was given had been clarified by the Claimants in his letter dated 16.07.04 (Exhibit C-24) to which there was no further reply either from the Engineer or from the Employer. Moreover, the Claimant had agreed not to Claim viaduct as a new item, but had not conceded not to claim it as a varied item of work i.e. as a variation.*
- (x) The AT therefore, is of the opinion that various items in the viaduct portion from Km.1/400 to km. 2/290 need to be treated as varied work under Cl.40.2. However as certain quantities of these items of work in the above stretch, were already covered as per the contract agreement and drawings (i.e.) for the flyovers/grade*

separators etc. planned as per contract agreement drawings), only contract rates with usual escalation should be applicable for the quantities as per the original scope of work in this reach plus 25% and new rates as varied item as per agreement condition should be considered only for quantities beyond it.

Para 10.1

(i) The claim of the Claimant is accepted partially. The quantities of work of viaduct beyond 125% of the BOQ quantities of various items shall be treated as varied work and the rates for such excess quantities should be arrived as per GCC Cl.40.2 and 40.3.

(ii) The AT directs the Employer to get the new rates for the above referred excess quantities of various items of work fixed by the Engineer, based on an examination of the Claimant's rate analysis and market rates to determine the balance payment due to the Claimant"
(underlining ours)

13. Challenge by NAI to said part of the award has been repelled by the learned Single Judge vide decision dated August 12, 2015. The learned Single Judge has held that in view of the law declared by the Supreme Court in the decision reported as (2003) 5 SCC 75 ONGC Vs. Saw Pipes Ltd. and the decision reported as AR 2015 SC 363 Natural Gas Corporation Ltd. vs. Western Geco International Ltd., if clauses of the contract required to be interpreted, and especially when two views were possible, a view taken by the Arbitral Tribunal would not be interdicted by a Court, merely because another view was possible. The award being declaratory, the learned Single Judge has held that any dispute pertaining to calculation would have to be resolved by another round of arbitration, and we only hope and expect that if this issue attains finality against NAI, it would not quibble with numbers because the extent of work done concerning the viaduct has been measured in the measurement books and all what is required is agree to the changed rates.

14. Learned Senior Counsel for NAI argued that it was a variation within the meaning of clause 40.2 of the General

Conditions of the Contract, as rightly held by the learned Arbitrators, but submitted that since it was within the limit prescribed by clause 38.1, the contract rates had to apply. The argument is noted and rejected by us for the reason clause 38.1 contemplates a situation where the final quantity of the work done differs from the quantity in the Bill of Quantities and limits the price adjustment to the contract price where the deviation may be beyond 2% but does not exceed 1% of the initial contract price. The words 'for the particular item' cannot be ignored in the said clause and they make it expressly clear that the deviation has to be with reference to the particular item of work; it has to be for the simple logic that a deviation would always relate to an item of work and cannot be with reference to the entire contract. We clarify. Say if at a crossing on a road, during execution of the works to lay the road it is decided to reinforce only the crossing portion of the road by increasing the depth of the foundation layer by 6 inches, the deviation would relate to the foundation layer alone and percentage variation would be with reference to the foundation layer and not other components of the road. The reasoning by the learned Arbitrators is a little tedious no doubt, but the core idea is as above. After all, the learned Arbitrators were gentlemen with technical background and we must give them the leeway which a human with non-legal background would be entitled to, in the use of words while interpreting a contract. The final direction in sub-para (x) of para 8.4.2 of the award brings this out because the Arbitrators have written : *However as certain quantities of these items of work in the above stretch, were already covered as per the contract agreement and drawings (i.e.) for the flyovers/grade separators etc. planned as per contract agreement drawings), only contract rates with usual escalation should be applicable for the quantities as per the original scope of work in this reach plus 25% and new rates as varied item as per agreement condition should be considered only for quantities beyond it. The*

preceding reasoning by the learned Arbitrators that the minutes of the meeting dated December 03, 2003 only show that Prakash has agreed not to claim the viaduct as a new item and that for items exceeding in quantity by more than 25% from the bill of quantity they would be entitled to price variation is a correct reading of the minutes of the meeting, contents whereof we have reproduced in paragraph 10 above. In this context it assumes importance that the viaduct is an elevated road. On pillars and piers RCC slabs are cast akin to the kind which we see along the metro rail line above the ground. The drawing provided with the tender documents shows that along the segment of the road there were three intersections, with road cutting across, requiring flyovers to be constructed at the three intersections. Thus, for the viaduct the contract had similar items of work to be executed and thus the learned Arbitrators have correctly held that for these items of work, for variations beyond the prescribed limit Prakash would be entitled to price adjustment at varied rates.

15. The second issue of difference between NHAI and Prakash was concerning construction of Reinforced Earth Structures. On the basis that Prakash had used polymeric materials and not simple metallic strips (for purpose of reinforcement of the earth structures) it would be entitled to an extra sum was the claim by Prakash.

16. As noted by us above, clause 703(A) of the Technical Specifications described the work in question i.e Reinforced Earth Structures, with further elaboration (detailing the materials to be used) in item No.5.41 of the Bill of Quantities, which we have already reproduced hereinabove in paragraph 4 above. Argument of Prakash was that the details of the material to be used at item No.5.41 of the Bill of Quantities did not make any reference to polymeric materials and that the general practice in the trade was to use simple metallic strips. NHAI argued before the Arbitral Tribunal that para (a) of item No.5.41 made a reference to '*reinforcing element*'. NHAI further pleaded that clause 703(A) of the Technical Specifications in the original tender, having the words '*high adherence galvanized steel strips*', was replaced vide addendum letter dated March 15, 2001 with the words

‘reinforcing element conforming to relevant Indian standards’ and thus Prakash would not be entitled to any extra price because the contract envisaged not only reinforcing elements but even the specific description thereof i.e. ‘conforming to relevant Indian standards’.

17. The learned Arbitrators have resolved this dispute with reasons given in para 9.4 of the award and the directions in para 10.2 thereof as under:-

“As the work commence NHA and Prakash agreed that a reinforced earth work from segment 1.4 km to 2.92 km would be replaced by a viaduct, and in respect of the same, on December 03, 2003, apart from other issues which were discussed and minuted, at Sl.No.11 of the minutes it was agreed as under:-

“Variation Items:

PAJV agreed that they will not claim viaduct as a new item. For items, exceeding in quantity by more than 25% from BOQ quantity and their variation is also exceeding 1% of Contract amount, Engineer informed that request of the agency is being considered and the decision will be taken during December 2003.

Rates for all Non BOQ items ordered so far will be revised by 31.12.2003.

Rates for ground improvement will be finalized by 15.12.2003. A meeting between PAV and CES will be held at Delhi in first week of December 2003.”

- (i) *The working of B.O.Q. item No.5.41 refers to construction of reinforced earth structures together with construction of earth work in layers, assembly & erection of reinforcing elements & placement of facing panels etc. B.O.Q. item No.5.41 (a) reads construction of reinforced earth walls with precast panels, reinforcing element,*

foundation beams etc. From this wording, it appears that providing reinforcing element has not been specifically mentioned, although assembly and erection of reinforcing elements and placement of facing panels etc. has been mentioned. However, the concept of providing reinforced earth walls with precast panels, reinforcing elements etc. suggests the necessity of providing reinforcing elements.

- (ii) The AT has also noted from the contract agreement that it was the responsibility of the Contractor to design the Reinforced Earth Structure. As such the Claimant was aware of the type and quantity of the reinforcing elements right at the time of submitting its tender.*
- (iii) Considering the preamble to the BOQ and the specification cl.703.6 it is clear that there is a conflict, regarding separate payment for reinforcing elements, between the interpretations of the wording of BOQ item 5.41(a) and the provisions of the specifications. The Respondent Employer failed to modify the specifications to make them in tune with the wording of the BOQ item.*
- (iv) Under this conflicting situation the Claimant ought to have got, the matter about separate payment for the reinforcing elements, clarified from the Employer in the prebid meeting particularly because it knew about the type and quantity of reinforcing elements to be provided. This was not done by the Claimant in spite of the very apparent ambiguity and availability of an opportunity.*
- (v) The ambiguity between the interpretations of the wording of BOQ item 5.41(a) and the provisions of the specification as regards separate payment for reinforcing elements, the possibility of alternative interpretation of the wording of BOQ items 5.41 and 5.41(a) and the failure of the Claimant to seek clarification in the prebid meeting, all need to be considered together.*
- (vi) Under the above circumstances, the AT is of the view that both the Claimant and the Respondent are equally responsible for this conflict and as such they should*

equally share the cost of providing reinforcing elements. The Claimant is, therefore, entitled to 50% of the cost of procurement of reinforcing elements.

Para 10.2

- (i) *This claim of the Claimant is also allowed partially. The Claimant is entitled to additional payment equivalent to 50% of the cost incurred by it for providing the reinforcing elements in the Reinforced Earth Structure plus 10% towards Contractor's overheads and profit. The Respondent should get the amount payable worked out by the Engineer based on duly verified procurement rates of various types of reinforcing elements.*
- (ii) *The claimant is not entitled to relief under price adjustment clause.” (underlining ours)*

18. ~~The 50 : 50 solution~~ find by the learned Arbitrator is on the reasoning that the tender made known to Pkash that there was a reinforcing element in the work and there was some hiatus between clause 7(B)(A) and item No 541(a) of the Technical Specifications. Putting the blame on Pkash for not having got the matter resolved i.e. the conflict resolved, the learned Arbitrator held that it could not be overlooked that NH was equally responsible for this because it was the author of the tender documents. Therefore, both parties had to share the blame 50 : 50.

19. The learned Single Judge has held that this was a ‘Panchayati Solution’. The learned Single Judge is absolutely correct. As per the Arbitration and Conciliation Act, 1996, the mandate of an Arbitral Tribunal is to decide a dispute in terms of a written agreement between the parties, if the dispute relates to the written agreement. If the language of the written agreement is clear, the Arbitral Tribunal has to give effect to the language. If the language is unclear, giving reasons to justify what was held to be unclear, the Arbitral Tribunal would have the mandate to give a meaning to the clause in question. Sub-Section (2) of Section 28 of the Arbitration and Conciliation

Act, 1996 reads as under:-

“28.(2) *The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.*”

20. ~~The phrase~~ *Ex aequo et bono* (Latin for ‘according to the right and good’ or ‘from equity and conscience’) is used as a legal term of art. In the context of arbitration, it refers to the power of arbitrators to dispense with consideration of the law but consider solely what they consider to be fair and equitable in the case at hand. An *amiable compositor* also known as *amiable compositeur* under international law refers to an unbiased third party, often a king or an emperor, who suggests solution to a dispute between countries. Amiable compositor acts as a mediator in a dispute between subjects of international law. The concept of amiable compositor has its historical origins in French law. An amiable compositor acts as a conciliator rather than a decision-maker in a dispute. An amiable compositor is also not bound to apply strict rules of civil procedure and substantive law. An amiable compositor is also authorized to modify the effect of certain non-mandatory legal provisions. Traditionally, amiable compositor provided equity correction to strict rules of law. But today, an amiable compositor has the power to depart from the strict application of rules of law and decide a dispute according to justice and fairness.

21. Concededly, while making the reference to the Arbitral Tribunal NHAI and Prakash did not expressly authorise the Arbitral Tribunal to decide *ex aequo et bono* or as *amiable compositeur*.

22. The second part of the award was challenged by Prakash and its petition was registered as Arbitration Petition No.432/2007. It has been

dismissed by the learned Single Judge vide impugned order dated August 06, 2007 challenged by Prakash in FAO(OS) 428/2007. In another words, the learned Single Judge upheld the 50 : 50 solution given by the learned Arbitral Tribunal. But, challenge to the same part of the award by NHAI which was aggrieved by the 50 : 50 solution has met with success before the learned Single Judge as per decision dated August 12, 2015 whereby OMP No.392/2007 filed by NHAI has been partly allowed. As noted above, challenge by NHAI to the award concerning the viaduct issue has been repelled, but the second limb concerning reinforcement element has succeeded.

23. The reasoning by the learned Single Judge is simple. The award has ignored a material document, being the addendum as per NHAI letter dated March 15, 2001 which replaced the words '*high adherence galvanized steel strips*' with the words '*reinforcing element conforming to relevant Indian standards*'.

24. This explains FAO (OS) 621/2015 filed by Prakash challenging the impugned decision dated August 12, 2015 in so far objections filed by NHAI has succeeded to the second part of the award. It explains FAO (OS) 585/2015 filed by NHAI, which persist with the challenge to the first part of the award which has been upheld by the learned Single Judge.

25. ~~NHAI being happy with the order dated August 12, 2015 insofar the second claim awarded by the Arbitral Tribunal in favour of Prakash has been set aside, argument of learned counsel for Prakash in the two appeals filed by Prakash was that clause 23 of the General Conditions of the Contract listed the priority in which the documents had to be interpreted and used that the Special Conditions of the Contract had priority over the bill of quantities, an argument which was simply to be stated and not carried forward for the reason clause 70A of the Technical Specifications in the Original Tender was amended~~

on March 15, 2001, and the amendments have already been noted by us in paragraph 16 above. It therefore hardly matters that in the bill of quantities pertaining to reinforced earth structure the nature of the reinforcing element was not mentioned. In para (a) of item No 541 of the bill of quantities, with reference to construction of reinforced earth structures it is clearly mentioned that the same would be with precast panels and reinforcing element. Clause 70A of the Technical Specifications, which originally referred to reinforcing element comprising high adherence galvanized steel strips was replaced with reinforcing element conforming to relevant Indian standards and this Indian standard is undoubtedly polymeric material. We therefore concur with the view taken by the learned Single Judge in the order dated August 12, 2015 passed in O.P.N.392/2007.

26. Before concluding an agreement advanced by learned senior counsel for NHA needs to be noted. After the award was pronounced, on an application filed by Paksh on March 06, 2007, with notice sent to NHA on March 12, 2007, the Arbitral Tribunal met on April 02, 2007 and pertaining to claim No.1, corrected para 10.1 of the award, to read as under:-

(i) The claim of the Claimant is accepted partially. The quantities of work of viaduct beyond 125% of the BOQ quantities of various items of work within the reach of the viaduct i.e. from KM 1/400 to KM 2/920 shall be treated as varied work and the rates for such excess quantities should be arrived as per GCC Cl.40.2 and 40.3."

27. The portion in bold and underlined is the insertion in the para 10.1 in the original award. The correction only clarifies what was already implicit in the original award. It only makes express the length of the viaduct, which was already known and was not in dispute. Even if we remove the words of work within the reach of the viaduct i.e. from KM 1/400 to KM 2/920 the direction in the original award is crystal clear and thus nothing turns on the correction made to the award.

28. The net take of our discussion above is that the two appeals filed by Paksh have to be dismissed. FAO(OS) No 621/2015 to be dismissed for the reasons given above and since even 50% of the sum awarded under claim 2 by the Arbitral Tribunal has been set aside by the learned Single Judge, a finding which we affirm, FAO(OS) No 428/2007 filed by Paksh in which the grievance was to the denial of 50% of claim No.2 has to be dismissed. Since the award pertaining to claim No.1

which has been upheld by the learned Single Judge is upheld by us, FAO(S) No.585/2015 filed by NAI has also to be dismissed.

29. All three appeals are dismissed but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

MARCH 17, 2016

skb