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

+ **O.M.P. 711/2011**

% **Date of Decision: 01st December, 2015**

NATIONAL HIGHWAY AUTHORITY OF INDIA Petitioner

Through: Mr. Kunal Dutta, Adv.

versus

ITD-SDV (JV)

..... Respondent

Through: Ms. Anusuya Salwan, Ms. Renuka
Arora, Mr. Vikas Sood, Mr. Kunal
Kohli, Advs.

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT (ORAL)

1. The petitioner has challenged the award dated 6th May, 2011 whereby the arbitral tribunal awarded Rs.1,77,61,907/- towards the reimbursement of increase in royalty and Entry Tax on cement to the respondent.
2. The petitioner awarded a contract for four laning and strengthening of the existing two lane section from Km. 393 to Km. 470 on NH-2 to the respondent on 7th February, 2001. Clause 14.3 of the 'Instructions to Bidders' provides that the bid price would include of duties, taxes and other levies payable by the contractor as of 28 days prior to the deadline for submission of bids. The bid was submitted on 10th November, 2000 and the base date was 12th October, 2000. Clause 73.2 provides that the liability of the respondent was limited to bear only statutory levies/taxes including royalty applicable/payable on the base rate. Clause 70.8 provides that in the event of increase in statutory levy after the base rate, the respondent shall be

entitled to such increase.

3. The UP Government increased the royalty from Rs.20 per cu.m. to Rs.30 per cu.m. w.e.f. 1st April, 2001 and from Rs.30 per cu.m. to Rs.45 per cu.m. from 16th December, 2004. The State Government also levied Entry Tax on cement on 9th May, 2003. The respondent claimed the increase in royalty and Entry Tax on account of the said levy due after the base rate.

4. The learned arbitral tribunal upheld the respondent's claim for increase in royalty and the Entry Tax which is under challenge in this petition.

5. Learned counsel for the respondent submits that the Supreme Court, in recent judgment dated 24th April, 2015 in Civil Appeal No.9799/2010, titled ***National Highways Authority of India v. M/s. ITD Cementation India Ltd.***, has upheld the claim of increase in royalty and Entry Tax in similar matters. Relevant portions of the said judgment are as under:

“6. The aforesaid stipulation dealt with the impact and inclusion of duties, taxes and other levies, as of the date 28 days prior to the deadline for submission of bids and clarified that the same shall stand included in the rates and prices and the total bid price submitted by the Contractor. Any subsequent variation in Prices on account of variety of reasons or factors after such date was dealt with in Clauses 70 to 70.8 of the COPA...

“21. We now turn to the reasoning given by the Arbitral Tribunal in paras 21 to 23 of the award, as quoted above. The award considers the impact of sub-clauses 70.1 to 70.7 and agrees with the contention that the provision for cost escalation based on the agreed price adjustment formulae falls in one compartment while the compensation for additional cost resulting from a subsequent legislation falls in a separate category. In other words, the contention that stands accepted was, that the escalation in price premised on fluctuation in market value of the inputs stands on one

footing, while the additional cost resulting from the impact of any statute, decree, ordinance, law etc as referred to in sub-clause 70.8 stands on the other. Resultantly the governing clauses in the instant case were held not to be sub-clauses 70.1 to 70.7 but the substantive part of sub-clause 70.8. The award also considered whether minor minerals in question were or were not included in the basket of materials whose cost variation was taken into account as an input while arriving at WPI. It also considered that the WPI is an index applicable uniformly in all states while the increase in Seigniorage Fee would vary from state to state. It further dealt with the aspect that NHAI itself was of the opinion that the additional impact as a result of subsequent legislation was admissible separately, as signified by the letter dated 03.09.2003 to the Economic Advisor. In the backdrop of the law laid down by this court, the construction of the terms of the contract by the Arbitral Tribunal is completely consistent with the principles laid down by this court. Upon construing the terms and the material on record it concluded that the instant matter would be covered by substantive part of Sub-Clause 70.8 of COPA. It also noted that NHAI itself was of such opinion. The view so taken by the Arbitral Tribunal after considering the material on record and the terms of the contract is certainly a possible view, to say the least. We do not see any reason to interfere. The Division Bench in our considered view, was completely right and justified in dismissing the challenge.”

6. Learned counsel for the respondent further submits that the petitioner has raised the objection to the authority of Mr. H.G. Advani to file the statement of claim. It is submitted that this issue is also covered by the judgment of this Court in OMP 40/2011 titled ***National Highways Authority of India v. Som Datt Builders-NCC-NEV(JV)*** decided on 25th April, 2014 in which the similar objection of the petitioner had been rejected. The relevant portion of the said judgment is reproduced hereunder:

“8. Validity of Authority of Mr. H.G. Advani:

8.1 Both parties have referred various documents on this issue. Admittedly, the contract has been signed by Mr.H.G. Advani as authorized signatory of Som Dutt Builder-NCC-NEC Joint Venture. The same has OMP No.40/2011 Page 11 of 18 been continued and operated on the authority and approval of the JV partners in favour of Mr.H.G. Advani. The word ‘contractor’ is defined in clause 1.1 of the GCC to mean the joint venture and the joint venture is being represented in the contract by Mr.H.G. Advani. Clause 67.1 and 67.3 of the agreement provides for settlement of disputes by arbitration which can be invoked by the contractor, Mr. Advani’s position has been approved by the petitioner as well as by other two partners of the JV as contractor. His signatures accepted as binding signatures of the contractor on behalf of the JV as per contract agreement which is annexed as Annexure RH-15. Mr. H.G. Advani has signed the contract agreement including the arbitration clause 67 which is part and parcel of the contract as authorized signatory of the Joint venture. The arbitral tribunal during pendency of Arbitration proceeding also passed an order dated 31st July, 2008, rejecting the objections with respect to the authority of Mr.H.G. Advani. The said order was further not challenged by the petitioner. It was held in the said order if Mr.H.G. Advani can bind parties to other Clauses of the contract, he can also bind parties to the arbitration clause. It is not denied by the petitioner that the objection was not raised at the time of referring of the dispute to the dispute review board (DRB).

8.2 Clause 5.2(c) and clause 5.2(d) of the Instructions to Bidders, requires the Joint Venture to nominate one of the partners as being in-charge. The authorization shall be evidenced by submitting a power of attorney signed by legally authorized signatories of all the partners. Mr. H.G. Advani, Director of the Som Dutt Builders was nominated as being Company in-charge who was authorised to incur liabilities and receive instructions for and on behalf of any and all partners of the Joint Venture.

It is alleged by the respondent which is also denied by the petitioner that entire executions of the contract including payment were to be done exclusively with the partner in

charge. The impugned claim arises from non-payment/denial of payment of entry tax. As per requirements of ITB all the joint venture partners have signed Power of Attorney. Therefore, the plea raised by the petitioner has no merit after the work had been executed and the authority of Mr.H.G. Advani has been accepted by the petitioner. It is also a matter of fact that in other two cases of Arbitral Awards of the same contract relating to claim of payment of reinforcement of drain and ground improvement, the petitioner accepted the authority of Mr. H.G. Advani and has already made payment of the decretal amount of the award.

8.3 Similar issue has been decided by this Court in the matter reported in **Powergrid Corporation of India vs. Siemens Ltd.**, 2013 (4) RAJ 469 (Delhi) had held in para 28, 29, 33 and finally at para 35 that “the mere fact that POA did not contain a clause specifically empowering Siemens to sue on behalf of the JV would not make a difference to the legal position as was explained in the **Syndicate Bank, Bangalore vs. I.K.Amitha**, AIR 1985 Kar 213. The Division Bench of the Karnataka High Court held that “one has to look at the manner in which the power is given to the agent by the principal and the purpose for which it is given in order to ascertain the extent of power”. The above principal was reiterated in the subsequent decision in **Doddarajappa vs. Venkoba Rao**, AIR 1986 Kar. 70. The wording of the POA in the present case indicates that the power given was neither restricted nor qualified. Once the power to receive payments and “execute the contract for and on behalf of the JV” was given to the lead partner i.e. Siemens, those OMP No.40/2011 Page 13 of 18 words must be held to be wide enough to include the power to bring forth an action on behalf of the JV to recover amounts due to the JV”.

8.4 The judgment referred by the petitioner i.e. **Apple Valley Resort vs. H.P. State Electricity Board and Anr.**, 2004 (118) Company Cases 328 has no bearing in the facts and circumstances of the present case since it relates to power of Board of Directors of a company under the Companies Act, 1956. The respondent joint venture is neither a company incorporated under the Companies Act, 1956 nor a registered partnership firm, rather it is a separate entity where the rights and obligations of the parties to the JV are governed by the

*Joint venture agreement and not by the provisions of either Companies Act, 1956. Similarly, another decision in **Nibro Ltd. vs. National Insurance Company Ltd.**, AIR 1991 Delhi 25, does not help the case of the petitioner as the said case pertains to the provisions of Section 291 of the Companies Act, 1956. Thus the petitioner has accepted the authority of Mr.H.G. Advani for the purpose of settlement of dispute.”*

7. This case is squarely covered by the principles laid down in **National Highways Authority of India v. M/s. ITD Cementation India Ltd.**, (supra) and **National Highways Authority of India v. Som Datt Builders-NCC-NEV(JV)** (supra).

8. There is no merit in this petition. The petition is therefore dismissed.

J.R. MIDHA, J.

DECEMBER 01, 2015

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