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

+ **O.M.P. 274 of 2015**

Reserved on: May 27, 2015

Decided on: June 29, 2015

**NATIONAL HIGHWAYS AUTHORITY OF
INDIA**

.... Petitioner

Through: Mr. Jos Chiramel and Ms. Iti
Johri, Advocates

versus

HINDUSTAN CONSTRUCTION CO LTD Respondent

Through: Ms. Malavika Lal, Advocate

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
29.06.2015

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1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 by the National Highways Authority of India (NHAI) is to an Award dated 30th December, 2014 passed by the Arbitral Tribunal (AT) by a majority of 2:1 in Dispute Nos. 6, 7, 8 and 9 between the parties.

2. The NHAI entered into Contract Agreement (CA) dated 26th February, 2005 with the Respondent Hindustan Construction Company Limited (HCC) for construction of the Chennai Bypass Phase II (Connecting NH-4 and NH-5) and widening of the Chennai

Bypass I (connecting NH-45 and NH-4), for a contract price of Rs. 404,97,93,145.00. The works under the CA were to be carried out in 30 months. The entire work under the CA was divided into various items forming part of the Bill of Quantities (BoQ). The payment of work done was to be released by NHAI to HCC on the basis of measurement of the various BoQ items as certified by the Engineer/Supervisory Consultant.

3. The disputes that arose between the parties were referred to arbitration. Relevant to the present case, the disputes referred to the AT for adjudication were Dispute Nos. 6, 7, 8 and 9. The majority of the AT, comprising the Presiding Arbitrator Mr. D. Sree Rama Murthy and the nominee Arbitrator of HCC Mr. P. Sridharan pronounced their Award at Chennai on 30th December 2014. The other Arbitrator Mr. Pawan Sharma, nominee of NHAI, sent his note of dissent through an email attachment on 29th December 2014.

4. One of the grounds on which NHAI assails the impugned majority Award is on account of the non-participation of Mr. Pawan Kumar, in the internal meeting of the AT at Chennai on 30th December, 2014 at which the majority Award was published.

5. The facts relevant to the above issue are that in terms of the CA, the arbitration was to take place in Delhi. 18 hearings took place in Delhi. Three internal meetings of the AT took place in Chennai on 21st November, 2014, 8th December, 2014 and 9th December, 2014 at the

GRT Hotel. These internal meetings were attended by all three members of the AT i.e. the Presiding Arbitrator Mr. Sree Rama Murthy, the nominee Arbitrator of HCC Mr. Sridharan, and the nominee Arbitrator of NHAI Mr. Pawan Kumar. A decision was taken at the meeting on 9th December 2014 that the Award would be pronounced at New Delhi on 30th December 2014.

6. On 19th December, 2014 the Presiding Arbitrator Mr. Sree Rama Murthy informed Mr. Pawan Kumar over phone about the serious illness that Mr. Sridharan was suffering from. He requested that the venue be shifted from Delhi to Chennai on 29th and 30th December, 2014 as the doctor had advised Mr. Sridharan complete bed rest and had permitted him to attend the meeting for only about an hour.

7. Mr. Rama Murthy with the consent of Mr. Sridharan notified the parties by letter dated 22nd December, 2014 about the shifting of the venue for meeting of AT on 29th and 30th December, 2014 from Delhi to Chennai.

8. Mr. Pawan Kumar however claimed subsequently that he never received a copy of the above letter and came to know about the change of venue only from HCC's letter dated 24th December 2014 informing about the arrangements made for the arbitration meeting on 29th and 30th December, 2014 at the GRT Hotel in Chennai. Mr. Pawan Kumar stated that he informed Mr. Rama Murthy about his inability to attend the meeting at Chennai on the said dates due to prior commitments at

Delhi. He however confirmed his availability for meetings on those dates at Delhi. He further stated that on 23rd December, 2014 he suggested to Mr. Sree Rama Murthy to postpone the date of the meetings by two to three weeks so that Mr. Sridharan may recover from his illness. He stated that he was prepared to attend meetings at Chennai on dates other than 29th and 30th December, 2014.

9. On 24th December, 2014 Mr. Sree Rama Murthy informed Mr. Pawan Kumar that Mr. Sridharan was now fine and would be attending the meetings at Chennai on the proposed dates. He was against any postponement as the parties had already been notified of the changed venue and date.

10. Mr. Pawan Kumar protested in an e-mail dated 27th December, 2014 [sent at the e-mail id of the Project Director (PD), NHAI] that the majority Award was being declared and published on 29th and 30th December, 2014 at Chennai “with unnecessary haste without valid reasons” and without giving him an adequate opportunity to include his dissenting opinion. Mr. Pawan Kumar termed it a “serious procedural lapse devoid of principles of natural justice”. On 29th December 2014, Mr. Pawan Kumar forwarded to the PD, NHAI an email enclosing his dissent note and stating that the same should be handed over to Mr. Sree Rama Murthy and Mr. Sridharan. He further requested that “they should be prevailed upon not to conclude the award in my absence as third member of AT.”

11. The majority finalized their Award in respect of Dispute Nos. 6, 7, 8 and 9 (subject matter of the present petition) and pronounced it on 30th December, 2014 at Chennai. After a copy thereof was seen by Mr. Pawan Kumar, he on 3rd January, 2015 addressed an e-mail to the Presiding Arbitrator (sent at the e-mail id of a relative of the Presiding Arbitrator with a copy sent to the email id of the PD, NHAI) protesting that the Award written by two members, preventing the dissent by the third member, was null and void and not an Award enforceable by law. He also protested that a few select SMSs exchanged between the Arbitrators had been reproduced loosely along with the majority Award “for convenience to support unjustified stand taken by you”. He referred to the SMSs that had been left out which found no mention in the Presiding Arbitrator's note. He suggested that the majority Award be withdrawn and an appropriate Award be issued as per provisions of the Act.

12. It is submitted by Mr. Jos Chiramel, learned counsel appearing for the NHAI, that the procedure followed by the majority of the AT was erroneous. He submitted that in terms of Section 20 (3) of the Act, the terms and conditions of the CA regarding the place of arbitration could not be ignored by the two Arbitrators comprising the majority. They did this despite the objection by the third Arbitrator, who had only sought a change in the date of the internal meeting at Chennai. He also referred to Section 29 of the Act and submitted that since the parties had specifically agreed that the place of arbitration would be Delhi, the majority could not unilaterally have changed it.

13. Section 20 of the Act reads as under:

Section 20:

(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

14. The other relevant provisions are Section 29 and Section 31 (1) and (2) which read as under:

29: Decision making by panel of arbitrators.

1. Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

2. Notwithstanding sub-section (1), if authorised by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the presiding arbitrator.

31. Form and contents of arbitral award.

1. An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

2. For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

15. The major premise on which the above provisions proceed appears to be the possibility of lack of unanimity among the members of an AT on both substantive and procedural. This could even include a decision on the place of arbitration. Section 29 (1) states that, unless the parties have otherwise agreed, “any decision” of the AT, which might include decisions on the applications filed by parties, or the place of sitting, shall be made by a majority. Section 29 (2) is a proviso to Section 29 (1) when it is a question of procedure. It states that if all the members of the AT authorise him, the Presiding Arbitrator can decide questions of procedure.

16. Where the parties do not agree on the place of arbitration, it shall be determined by the AT having regard to the circumstances of the case, including the convenience of the parties. Section 20 (3) expands upon the above power vested in AT. It states that the AT may, unless otherwise agreed by the parties, meet at any place considered appropriate for, *inter alia*, “consultation amongst its members”. In other words, unless the parties have agreed that the AT should meet only at one place, the AT can decide where it should sit, even for an the internal meeting of the AT.

17. Section 31 (1) states that the Award in writing shall be signed by “the members” of the AT. Yet, the legislature anticipated that there may be situations where all members may not sign the Award. To overcome that difficulty Section 31 (2) provides that it would be sufficient if the majority members sign the Award, “so long as the

reason for any omitted signature is stated.” In other words, if there is a difference as to the Award itself, the fact that the majority members (and not the dissenting Member) sign the Award will not make it invalid as long as the reason for the omitted signature of the dissenting member is stated.

18. The sum total of the above discussion is that it is possible that on issues as to where the AT should sit or hold its internal meetings, there may be a difference of views between Arbitrators and in such event the decision of the majority will prevail.

19. Turning to the facts of the instant case, it is seen that what has been agreed by the parties is set out in the arbitration clause which forms part of the CA. It states that the place of arbitration is Delhi. However, the AT may meet at other places to hold the hearings. There is no doubt that hearings in respect of Dispute Nos. 6, 7, 8 and 9 took place in Delhi. Internal meetings of the learned Arbitrator took place on 5 dates i.e. 21st November, 2014 and 8th, 9th, 29th and 30th December 2014. According to the majority since Mr. Sridharan was advised on health grounds not to travel to Delhi, a request was made to Mr. Pawan Kumar for shifting of venue from Delhi to Chennai for the internal meetings on 29th and 30th December, 2015 and the publication of the Award. There were discussions and consultations between the presiding Arbitrator and Mr. Pawan Kumar through mobile and e-mails. The majority noted that Mr. Pawan Kumar did not agree that the Award should be published at Chennai. However, since the parties

had already been informed of date of publication of the Award, the majority decided to go ahead and publish their Award at Chennai. The majority noted that since Mr. Pawan Kumar was not present at the meetings on 29th and 30th December, 2014, the Award was signed only by the majority.

20. From the records placed before the Court, it does not appear that any of the parties expressed reservations about the majority Award being published at Chennai. There was nothing in the CA that barred the internal meetings of the AT being held at a place of their choice. As already noted, such decisions could be taken by the majority of the AT. There was, therefore, no illegality attached to the decision of the majority to shift the venue of publication of the majority Award to Chennai. The opposition to that decision expressed by Mr. Pawan Sharma, the third Arbitrator, was duly noted by the majority in its Award. The correspondence between the Arbitrators shows that the request of Mr. Pawan Kumar for postponing the dates was not agreed to by the majority. Section 29 (1) of the Act provides that “any decision” of the AT could be taken by a majority of the members and that is what has happened here.

21. Even as regards the signing of the Award, what the majority has done is in consonance with Section 31 (2) of the Act. In the covering letter to the majority Award, the reasons for omission of signatures of Mr. Pawan Kumar, third Member of the AT under Section 29 of the Act have been set out. There is no illegality attached to the majority

Award on that score either. The Court is not prepared to conclude that only because there was no unanimity among the members of the AT on the venue for pronouncement of the majority Award, or on the substantive issues, the impugned majority Award is arbitrary or whimsical as alleged by NHAI.

22. The second major ground of challenge by the NHAI to the impugned majority Award is on merits. As already noted, the impugned Award relates to Dispute Nos. 6 to 9. Dispute No. 6 was in relation to BoQ Item No. 7.04 (f) and (g) i.e. M25 Concrete, Item No. 7.04 (f) @ Rs.5,501.00 per Cum and varied works of HYSD steel, Item No. 7.04(g) for Retaining Wall/Toe Wall. The case of the HCC was that the quantity of work executed in respect of two BoQ item Nos. 7.04 (f), (i) and (g) (M-25 Concrete and the reinforcement for retaining wall / toe wall) had exceeded the quantity set out in the BoQ by more than 25% and the cost of additional quantity at the BoQ rate exceeded by 1% of the Contract Value. Therefore, in terms of Clause 52 of GCC/CoPA of the contract, the rates for these items were to be revised. It is stated that initially the Engineer had determined the rates for BoQ items and this was accepted by HCC. The Engineer continued to certify the varied quantities on the above basis till Interim Payment Certificate No. 55 (IPC-55). Subsequently the Engineer revised the certification of the varied quantities by adopting new rates and declared that the rates certified for payments and payment made till IPC 55 were only provisional. He stated that the final rates would be after determination by the Competent Authority (NHAI). The

Engineer certified the varied quantities adopting the BoQ rates. This led HCC to approach the Disputes Redressal Board (DRB). The NHAI's stand was accepted by the DRB and it recommended that the new rates fixed would not become final in the absence of approval by the NHAI. Being dissatisfied with the DRB's decision, HCC invoked arbitration. In the impugned majority Award, it was noted that subsequent to the submission of Statement of Claims (SOC), there were revisions in the certification of variations in Statement at Completion, which led to the submission of amendment applications.

23. The submission of Mr. Jos Chiramel, as far as Dispute No. 6 is concerned, is that in terms of the CA the Engineer was duty bound to take prior approval of the NHAI before determining the rates on various items of quantities beyond the limit prescribed therein. The Engineer having not complied with the procedure, NHAI was not bound by the rates determined by him. It is submitted that the majority of the AT erred in holding that once the rates were determined and agreed to by the Engineer there was no provision in the CA which the Engineer the authority to change the rates on the insistence of one of the parties. In dealing with Dispute No. 6, the AT framed the following issues for determination:

- i) Who is the competent authority in terms of CA for determining/ fixing the revised rates for variations in quantities, which are in excess of 125% and 1% of Contract Price?
- ii) Is it the Engineer or the NHAI?

24. The majority analyzed Clauses 51.1, 52.1, 52.2 of GCC/CoPA and concluded that only in the event of disagreement between the Contractor and the Engineer, the Engineer shall fix appropriate rate based on his opinion and notify Contractor with a copy to the NHAI. Till the process is completed, the Engineer shall adopt a provisional rate. Once the rate is determined and agreed with the Contractor, the Engineer is bound to certify based on the rates agreed with the Contractor and the provisional rates would lose its significance thereafter.

25. The contention of the NHAI that the Engineer was bound to take prior permission and specific approval of the NHAI before issuing the variation order beyond 25% of the value of the individual BoQ item or 1% of the contract value, does not flow from a plain reading of Clause 51.1 and 52.1 of the GCC. As pointed out by the AT itself, Clause 52.2 envisaged the Engineer fixing new rates since the quantities were in excess of the BoQ quantity of more than 125%. Even the Engineer had not accepted this stand of the NHAI. Clause 2.1 (f) of the CoPA did not affect Clause 6.1 of the GCC which empowers the Engineer to form an independent opinion and instruct the Contractor in respect of variations in the form of quality and quantity of the works.

26. It is further seen any variation was required to be valued in accordance with Clause 52.1. The procedure under this clause is exactly what has been noticed by the AT. Clause 52.2 required the

Engineer to fix rates in consultation with the Contractor. Where no agreement is able to be reached with the Contractor, a copy of the Engineer's decision has to be marked to the employer i.e. NHAI. The question was whether the variations were themselves validly permitted by the Engineer and whether the valuation fixed for the variations was justified. The ground is urged before this Court that for a variation order, prior approval had to be taken of the NHAI was not an issue before the AT or even the DRB.

27. The Court finds that the AT has analyzed the relevant clauses of the CA in great detail and correctly come to the conclusion that the procedure followed initially by the Engineer i.e. in consultation with HCC, for fixing the rates was correct. The AT rightly found that the mechanism stipulated in the CA was followed by the Engineer till IPC-55. However, from IPC 56 to IPC 72 he reverted to the BoQ rates for which there was no agreement of consultation with HCC. The Court agrees with the majority of the AT that the approval stipulated in Clause 2.1 of the CoPA was distinct and different from the approval as regards the rates. There was no requirement of approval from the NHAI as far as the rates are concerned. The interpretation of the word 'before' in Clause 2.1 as to connoting a stage before issuing the variation order under Clause 51 and not before proceeding to fix the rate for such variation, was a possible view to take. The approval of NHAI was required only to the extent as to whether to allow or disallow the Engineer's action i.e. proceeding to fix rates and not as regards the rate fixed by the Engineer. Even if under Clause 67.1,

there was disagreement with the Engineer regarding his certification, valuation, determination by any party to the contract, such dispute was to be referred to DRB for adjudication. Therefore, there was no scope for the NHAI to unilaterally decide on the rates fixed by the Engineer under the shelter of "approval".

28. The Court also finds no legal error in the AT interpreting clause 70.3 of the CoPA as entitling HCC to Rs. 28,17,06/- as balance amount due towards varied works for items 7.04 (f) (i) and (g). The award of interest @ 10% from 17th January, 2014 onwards and if the said amount was not paid within 90 days, 15% from the date of Award till the date of payment also suffers from no legal infirmity.

29. As far as Dispute No. 7 is concerned, the rates determined by the Engineer in relation to variation orders 2, 3, 7 and 15 were initially the ones agreed to by HCC but were subsequently reversed by the Engineer. There was no dispute as to the works so instructed on variation and that HCC was entitled to a new rate. Here again an application of the procedure envisaged by Clause 52.1 of the GCC would apply. Once the Engineer fixed the rates in consultation with HCC then he could not have unilaterally changed the rates thereafter on the instructions of the NHAI. The issue between the parties was with regard to the percentage overheads adopted in deriving a new rate and the percentage of service tax. What had been agreed between the Engineer and HCC was based on 16.5% overheads. This was reduced

by the Engineer to 8%. The majority of the AT considered each variation order and examined what would be the appropriate rate.

30. Under Clause 67 of CoPA in case of a dispute between NHAI and HCC regarding valuation the matter was to be first placed before the DRB, and only thereafter could it be referred to the AT. The DRB's determination of the new rates for the varied works was not accepted and this gave rise to a dispute that was referred to arbitration. Consequently, the AT was justified in coming to the conclusion that the Dispute no. 7 was arbitrable.

31. Dispute No. 8 pertained to canal crossing at suitable locations of project area at the request of PWD, (Irrigation Department) of Tamil Nadu. The issue was whether the rates were to be the ones determined by the Engineer or the ones claimed by HCC. The value of the contract work excluded the cost of work on items for which the rates were fixed under variation clauses 51 and 52. Since these variations were not originally envisaged, new rates had to be fixed. The AT has analyzed the various provisions of the contract and determined the correctness of the rates as claimed by the HCC. Nothing has been shown to the court to persuade it to hold that the analysis of the clauses and the conclusion of the AT are perverse and irrational.

28. Dispute No. 9 pertained to the method of calculation of the price adjustment. This again involved the analysis of Clause 70.3 of the CA relating to 'Price Adjustment'. While certifying the amount due to HCC, the Engineer was to calculate and certify the price adjustment.

The issues framed by the majority of the AT in this regard were as under:

- a) What was the correct method for determination of price adjustment?
- b) Whether HCC's method of determining the percentage components in the IPCs by applying the factum of 0.85 in the price adjustment formula was justified in terms of the provisions of the contract?

32. The AT observed that there was no provision in the CA which stipulated that the rate after application of rebate was to be used as the base value. It was noted that Summary of Cost (BoQ) was on the quoted bid and not on the quoted rates. There was no change made to the terms of contract pursuant to the offer of rebate. NHAI having accepted the offer made by the HCC without changing the terms and conditions which were not affected by the rebate, could have sought modification of the relevant terms and conditions regarding to price adjustment. There was a difference between the expression 'base unit rate' and 'rebated rate'. It was therefore not permissible for the NHAI to unilaterally change the terms and conditions of contract to apply 'rebated rate', instead of 'base unit rate'.

33. The AT analyzed Clause 70.3 (viii) of CoPA and held that the value of the work done shall be equal to "cost to contractor + contractor's overheads and profit" and that the value was split in seven parts i.e. components as stated above. The aggregate of these percentages was 100% and there was no separate component of "Overheads & Profit". In the formula for price adjustment, 85% of the

value of work done was subject to price adjustment and 15% is a fixed component which is not subject to price adjustment. The AT held that the 15% fixed /Non-adjustable portion was to allow for overheads and profits. 85% or 0.85 was to be applied while calculating the escalation for each of the 7 components. In other words, overheads and profits are not subject to price adjustment and only "pure cost" was subject to price adjustment. The AT thus found that NHAI was liable to pay Rs. 14,75,78,143 together with simple interest @ 10%.

34. As far as the majority Award in respect of Dispute No. 9 is concerned, the Court finds that a detailed analysis had been undertaken of the relevant clauses of the contract. The majority has also analyzed Clauses 14.1, 14.4, 30.3 of the Instructions to Bidders. Clause 14.4 stipulated that the rates and prices quoted by the bidder were subject to adjustment during performance of the contract in accordance with Clause 70 of the CoPA. Clause 70.1 stated that the amount payable to the contractor and valued at base rates and prices (IPCs) pursuant to Clause 60.1 shall be adjusted in respect of rise or fall in the indexed costs for labour, Contractors Equipment, etc. The interpretation placed by the majority of the AT on Clauses 60.1 to 70.1 of the CoPA was a plausible one. In the light of the law explained by the Supreme Court in *Associated Builders v. DDA (2015) 3 SCC 49*, even the interpretation of Clauses or the contract by the AT has to be taken as final as long as it is not perverse or irrational.

35. For the aforementioned reasons, the Court finds no ground to interfere in the impugned majority Award of the AT. The petition is dismissed with costs of Rs.10,000 which will be paid by NHAI to HCC within four weeks.

S. MURALIDHAR, J

JUNE 29, 2015

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