IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 15.09.2016

\+ **OMP. (COMM) 93/2016**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner

versus

M/S GAYATRI – ECI (JV) ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Ms Gunjan Sinha Jain and Mr Mukesh Kumar, Advocates.

For the Respondent : Mr Angad Mehta, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. National Highway Authority of India (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that the Award dated 17.12.2015 (hereafter 'the impugned award') passed by the Arbitral Tribunal (hereafter 'the AT') be set aside.

2. The impugned award was rendered in respect of the disputes raised by M/s Gayatri - ECI (JV)(hereafter 'GEJV') - a joint venture between M/s

Gayatri Projects Ltd and M/s ECI Engineering & Construction Co. Ltd.- in relation to the Contract Agreement dated 19.08.2005 (hereafter 'the Agreement') entered into between the parties for "*the work of widening of existing two lane to four from Km 93.00 to Km 60.00 of Bijni to Assam, West Bengal NH-31C on section of East West Corridor under Phase-II Contract Package*"(hereafter 'the Works').

3. NHAI invited tenders for the Works and GEJV's bid, submitted on 18.04.2005, in response to the invitation to tender was accepted and Acceptance letter was issued on 27.06.2005.

4. The disputes between the parties relates to reimbursement of the additional expenditure claimed by GEJV - under sub clause 70.6 of Conditions Of Particular Application (hereafter 'COPA') of the Agreement - on account of increase in the rate of Value Added Tax (hereafter 'VAT'). The rate of VAT in the State of Assam was increased from 4% to 5% by virtue of Assam Gazette Notification (hereafter 'the Notification') dated 31.03.2012.

5. GEJV requested the Team Leader of NHAI for reimbursement of 1% additional VAT incurred by it on account of the Notification. This was followed by a similar request to the Project Director of NHAI. Since GEJV

did not receive a satisfactory response, it referred the matter to Dispute Resolution Board (DRB) on 23.10.2013. Finally, GEJV invoked the arbitration by a letter dated 04.01.2014, calling upon the NHAI to nominate its arbitrator. In the meanwhile, DRB submitted its recommendation directing reimbursement of 1% additional expenditure incurred by GEJV on account of increase in VAT.

6. In accordance with Clause 67 of COPA, Maj. Gen. S.K. Sahijpal (Retd.) was appointed as an arbitrator by NHAI and Mr V.S. Karandikar was appointed by GEJV. Both the said arbitrators nominated Mr N.K. Bahri as the presiding arbitrator.

Proceedings before the Arbitral Tribunal

7. M/s GEJV submitted its Statement of Claims before the AT, claiming a sum of ₹1,30,26,781/- including interest.

8. It was GEJV's case that the twin conditions as mentioned in sub clause 70.6 of COPA, namely, that subsequent legislation must have been passed after the base date (22.11.2004) and that such legislation must have caused the contractor (GEJV) to incur an additional cost, were satisfied; and, therefore, GEJV was entitled to be reimbursed additional cost by NHAI. Before the AT, GEJV claimed that sub clause 73.2 of COPA

provided that Contract Price bid submitted by the Contractor is inclusive of all taxes payable by the Contractor as on base date and therefore, the very purpose of incorporating sub clause 70.6 of COPA was to account for any change in the Contract Price due to a subsequent legislation.

9. NHAI contested the claims made by GEJV before the AT; it was NHAI's case that obligation to pay VAT under Works Contract was based on the contractor's turnover and was the sole responsibility/ personal liability of GEJV and NHAI had no role in it. Although, no such defence was taken in the Statement of Defence, it was urged on behalf of NHAI that the increase on account of VAT was factored in the variation in the prices of inputs - such as Fuel, Bitumen and Labour - as the same were indexed on the basis of Consumer Price Index/Wholesale Price Index which, according to NHAI, factored in the increase in the cost of inputs on account of VAT. It was also contended that the retail price of some inputs was inclusive of tax. And, therefore in terms of sub clause 70.6, no separate cost was payable to GEJV, which had already been taken into account while indexing of any input under the price adjustment formulae in accordance with sub clause (1) to (5) of Clause 70.

10. After the conclusion of arguments before the AT, written submissions were filed on behalf of NHAI, also enclosing a letter dated

22.06.2015 from Indian Oil Corporation, confirming the maximum retail price of MS and HSD in Bongaigaon, Assam.

11. After examining the relevant facts and circumstances and after considering the rival contentions, the AT accepted the claims made by GEJV and awarded a sum of ₹1,51,42,692/- including *pendente lite* interest and past interest in favor of GEJV. The AT also awarded future interest at the rate of 14% in favor of GEJV.

12. The AT held that NHAI had failed to adduce even an iota of evidence to show as to what indexed inputs in the Price Adjustment formulae are inclusive of VAT. The AT rejected NHAI's contention that VAT was a personal liability of GEJV and NHAI was not liable to reimburse the additional expenditure incurred by GEJV and held that the very purpose for which sub clause 70.6 was inserted into the Agreement was to prevent the Contractor (GEJV in this case) from being put to loss. The AT also held that VAT is collected at retail sale point and VAT is not taken into account while working out the WPI and therefore, additional expenditure on account of VAT is to be reimbursed to GEJV.

13. The AT held that NHAI had not been able to substantiate as to why governing portion of sub clause 70.6 of COPA has no operation and concluded as under:

> "After going through the pleadings and evidence, the Arbitral Tribunal finds that the Claimant had incurred additional cost because of the change in rate of VAT pursuant to change in legislation and that the said increase in the rate had not been taken into account in the indexing of any inputs to the Price Adjustment formula in general materials and therefore unanimously rules that there is no merit in the Respondent's contentions."

Submissions

14. The learned Counsel for NHAI, Ms Gunjan Sinha Jain submitted that the impugned award is liable to be set aside as it is opposed to the express terms of the Agreement. She submitted that AT had accepted that any variation in the costs on account of subsequent legislation would not be separately paid if the same had been taken into account in indexing of any input to the price adjustment formula. However, the AT had rejected NHAI's claim that increase in VAT had been accounted for in indexing of inputs on the ground that NHAI had not produced any evidence in support thereof. She contended that this was palpably erroneous as NHAI had submitted a letter dated 22.06.2015 from Indian Oil Corporation Limited

(IOC) clearly indicating that the retail price of HSD and MS was inclusive of VAT. She submitted that the said letter clearly evidenced that the increase in VAT had been factored while indexing the input of fuel as per the specified formula.

15. Mr Angad Mehta, learned counsel appearing for GEJV countered the submissions advanced by Ms Jain. He submitted that NHAI had not taken any defence that the increase in VAT, as claimed by GEJV, had been factored in the price adjustment of fuel in its statement of defence. He submitted that the said contention was advanced orally at the stage of final arguments before the AT and this ought to have been rejected on that ground alone. He further contended that the IOC's letter dated 22.06.2015 was neither a part of the documents filed by NHAI before the AT, nor was the said letter referred to at the time of oral arguments. The said letter had been annexed with the written submissions filed after conclusion of the hearing. He submitted that in the aforesaid circumstances, the AT had rightly held that no evidence was produced by NHAI to indicate that the additional cost claimed by GEJV had been factored in any input; first of all, for the reason that the aforesaid letter could not be considered as part of the record as GEJV had no opportunity to test its veracity or to make submissions as to its relevance. Secondly, the said letter did not establish

that additional cost claimed by GEJV had been factored in any price adjustment formula under clause 70.3 of COPA.

16. Lastly, Mr Mehta contended that the additional cost claimed by GEJV was on account of increase in VAT, which was payable on the entire value of works and no part of that VAT had been factored in any of the inputs as claimed by GEJV.

Reasoning and Conclusion

17. At the outset, it is necessary to refer to the relevant clauses of COPA, which are set out below:

> "Sub Clause 70.1.
> The amounts payable to the Contractor and valued at base rates and prices in the Interim Payment Certificates issued by the Engineer pursuant to Sub-Clause 60.1 shall be adjusted in respect of the rise or fall in the index cost for labour. Contractor's Equipment, Plant, materials, and other inputs to the Works, by the addition or subtraction of the amounts determined by the formulae prescribed in this Clause.
>
> Sub Clause 70.2
> To the extent that full compensation for any rise or fall in costs to the Contractor is not covered by the provisions of this or other Clauses in the Contract, the unit rates and prices included in the Contract shall be deemed to include amounts to cover the contingency of such other rise or fall of costs.
>
> Sub Clause 70.3

Contract Price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures as per formula given below. The amount certified in each payment certificate is adjusted by applying the respective price adjustment factor to the payment amounts due:

(a) Price adjustment shall apply only for work carried out within the stipulated time or extensions granted by the Employer and shall not apply to work carried out beyond the stipulated time; price adjustment for extensions for reasons attributable to the Contractor, shall be paid in accordance with Sub-Clause 70.5;

Price adjustment shall be calculated as per the formula given below:

(b) Following expressions and meanings are assigned to the value of the work done during each month:

R = Total of work done during the month. It would include the value of materials on which secured advance has been granted, if any during the month less the value of materials in respect of which the secured advance has been recovered, if any during the month. This will exclude cost of work on items for which rates were fixed under variations Clause 51 and 52 for which the escalation will be regulated as mutually agreed at the time of fixation of rate.

(i) Adjustment for Labour Component.

Price adjustment for increase or decrease in the cost due to labour shall be paid in accordance with the following formula:

$V_L = 0.85 \times P_l/100 \times R \times (L_i - L_o)/ L_o$

V_L = increase or decrease in the cost of work during the month under consideration due to changes in rates for local labour.

L_O = the average consumer price index for industrial workers for the place as defined in the Appendix to Bid, in the previous month prior to the closing date of submission of bids as published by Labour Bureau, Ministry of Labour, Government of India.

Li = The average consumer price index for industrial workers for the place as defined in the Appendix to Bid, in the previous month prior to the last day of the period to which a particular interim Payment Certificate is related as published by Labour Bureau, Ministry of Labour, Government of India.

P_1 = Percentage of labour component of the work.

Note: For the application of this Clause, index of Industrial Workers has been chosen to represent the labour component.

(ii) Adjustment for Cement Component

Price adjustment for increase or decrease in the cost of cement procured by the Contractor shall be paid in accordance with the following formula:

V_c = $0.85 \times P_c/100 \times R \times (C_i - C_0)/C_0$

V_c = increase or decrease in the cost of work during the month under consideration due to changes in rates for cement

C_0 = The all India average wholesale price index for cement in the previous month prior to the closing date of submission of bids as published by the Ministry of Commerce & Industry, Government of India.

C_i = The all India average wholesale price index for cement in the previous month prior to the last day of the period to which a particular Interim Payment Certificate is related as published by Ministry of Commerce & Industry, Government of India.

P_C = Percentage of cement component of the work.

(iii) Adjustment for steel component

Price adjustment for increase or decrease in the cost of steel procured by the Contractor shall be paid in accordance with the following formula:

$V_s = 0.85 \times P_s/100 \times R \times (S_i - S_0)/S_0$

V_s = increase or decrease in the cost of work during the month under consideration due to changes in the rates for steel.

S_0 = The all India average wholesale price index for steel (Bars and Rods) in the previous month prior to the closing date of submission of bids as published by the Ministry of Commerce & Industry, Government of India.

S_i = The all India average wholesale price index for steel (Bars and Rods) in the previous month prior to the last day of the period to which a particular Interim Payment Certificate is related as published by the Ministry of Commerce & Industry, Government of India.

P_s = Percentage of steel component of the work.

Note:- For the application of this Clause, index of Bars and Rods has been chosen to represent steel component.

(iv) Adjustment for Plant and machinery spares component

Price adjustment for increase or decrease in the cost of Plant and machinery spares procured by the Contractor shall be paid in accordance with the following formula:

$V_p = 0.85 \times P_p/100 \times R \times (P_i - P_o)/P_o$

V_p = Increase or decrease in the cost of work during the month under consideration due to changes in the rates for Plant and machinery spares

P_o = The all India wholesale price index for heavy machinery and parts in the previous month prior to the closing date of submission of bids as published by the Ministry of Commerce & Industry, Government of India.

P_i = The all India average wholesale price index for heavy machinery and parts in the previous month prior to the last day of the period to which a particular Interim Payment Certificate is related as published by the Ministry of Commerce & Industry, Government of India.

P_p = Percentage of Plant and machinery spares component of the work

Note: For the application of this clause, index of heavy machinery and parts has been chosen to represent the Plant and Machinery spares component.

(v) Adjustment of Bitumen Component

Price adjustment for increase or decrease in the cost of bitumen shall be paid in accordance with the following formula:

$V_b = 0.85 \times P_b/100 \times R \times (B_i - B_0) / B_0$

V_b = Increase or decrease in the cost of work during the month under consideration due to changes in rates for bitumen.

B_0 = The average official retail price of bitumen at the nearest refinery for the place as defined in

Appendix to Bid, in the previous month prior to the date of submission of Bids.

B_i = The average official retail price of bitumen at nearest refinery for the place as defined in Appendix to Bid, in the previous month prior to the last day of the period to which a particular Interim Payment Certificate is related.

P_b = Percentage of bitumen component of the work.

(vi) Adjustment for Fuel and Lubricants (POL)

Price adjustment for increase or decrease in the cost of POL (fuel and lubricant) shall be paid in accordance with the following formula:

$V_f = 0.85 \text{ x } P_f/100 \text{ x } R \text{ x } (F_i - F_0)/F_0$

V_f = Increase or decrease in the cost of work during the month under consideration due to changes in rates for fuel and lubricants.

F_0 = The average official retail price of High Speed Diesel (HSD) oil at the existing consumer pumps of IOC for the place defined in the Appendix to Bid in the previous month prior to date of submission of bids.

F_i = The average official retail price of HSD at the existing consumer pumps of IOC for the place defined in the Appendix to Bid in the previous month prior to the last date of the period to which a particular Interim Payment Certificate is related.

P_f = Percentage of fuel and lubricants component of the work.

Note: - For the application of this clause, the price of High Speed Diesel oil at the IOC pumps has been chosen to represent fuel and lubricants component.

* Based price index for Industrial Workers to be published by Labour Bureau, Ministry of Labour, Govt. of India be checked.

(vii) Adjustment of Other Local Materials

Price adjustment for increase or decrease in cost of local materials other than cement, steel, bitumen, plant spares and POL procured by the Contractor shall be paid in accordance with the following formula:

$V_m = 0.85 \times P_m / 100 \times R \times (M_i - M_0)/M_0$

V_m = Increase or decrease in the cost of work during the month under consideration due to changes in rates for local materials other than cement, steel, bitumen, plant spares and POL.

M_0 = The all India average wholesale price index (all commodities) in the previous month prior to date of submission of bids, as published by the Ministry of Commerce & Industry, Government of India.

M_i = The all India average wholesale price index (all commodities) in the previous month prior to the last day of the period to which a particular Interim Payment Certificate is related as published by the Ministry of Commerce & Industry, Government of India.

P_m = Percentage of local material component (other than cement, steel, bitumen, plant spares and POL) of the work.

(viii) The following percentages will govern the price adjustment of the entire contract:

1. Labour – P_l	20%
2. Plant & Machinery Spares – P_p	20%
3. POL – P_f	10%
4. Bitumen – P_b	x%
5. Cement – P_C	y%
6. Steel – P_S	z%
7. Other materials – P_m	50-(x+v+z)%
Total	100%

(Note: x, y, z are the actual percentage of material of bitumen, cement and steel respectively used for execution of work as per the Interim Payment Certificate for the month.)

xxxx xxxx xxxx xxxx

Sub Clause 70.6

If, after the date 28 days prior to the latest date for submission of tenders for the Contract, there occur changes to any National or State Statute, Ordinance, Decree or other Law or any regulation or by-law of any local or other duly constituted authority or the introduction of any such State Statute, Ordinance, Decree, Law, regulation or by-law which causes additional or reduced cost to the Contractor, other than under the preceding Sub-Clauses of this Clause, in the execution of the contract, such additional or reduced cost shall, after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be added to or deducted from the Contract Price and the Engineer shall notify the Contractor accordingly, with a copy to the Employer.

Notwithstanding the foregoing, such additional or reduced cost, shall not be separately paid or credited if the same shall already have been taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of Sub-Clauses (1) to (5) of this Clause."

18. Sub clause 70.1 of COPA provides for adjustment in respect of rise or fall in the index cost for labour, contractor's equipment, plant, materials and other inputs in accordance with the formula as prescribed.

19. Sub clause 70.2 of COPA expressly provides that to the extent of full compensation for any rise and fall in costs is not covered under any of the clauses, the unit rates and prices would be deemed to have included the amounts to cover the contingency of rise and fall in costs. In other words, the increase and decrease in costs are to be compensated only to the extent as expressly provided under the contract.

20. Sub clause 70.3 prescribes the formula for determining the price variation in various inputs, that is, the amount to be added or subtracted from the value of work done on account of price variation in inputs. In terms of the formula, the variation in the value of labour component is to be indexed on the basis of average consumer price index for industrial workers; the price adjustment for cement and steel components is to be adjusted on the basis of the all India average wholesale price index for cement and steel respectively; adjustment for plant and machinery and spare component is to be computed on the basis of all India average wholesale price index for heavy machinery and parts; adjustment for

bitumen component is to be computed on the basis of average official retail price of Bitumen at the nearest refinery for the place defined in the appendix to the Bid; adjustment for fuel and lubricants (POL) is to be computed on the basis of average official retail price of HSD at the existing consumer pumps of IOC; and adjustment for other local materials is to be computed on the basis of all India average wholesale price index (all commodities) in the previous month prior to date of submission of bids.

21. Sub clause 70.6 provides for adjustment in costs, *inter alia,* on account of change in national or state statutes.

22. The dispute in the present case concerns the interpretation of sub clause 70.6 of COPA. There is no dispute that by virtue of the Notification, the rate of VAT was increased from 4% to 5%. GEJV had claimed an additional 1% on "*the aggregate value of works contract*". In other words, the GEJV had claimed for additional costs on account of increase in the rate of VAT imposed on aggregate value of work done. The annexure to the written submissions filed by GEJV before the AT clearly indicates the manner in which the additional costs have been computed. The said annexure indicates that GEJV had sought reimbursement at the rate of 1% on the gross value of the work done. Thus, it is amply clear that the additional costs on account of VAT sought to be recovered were not on

account of any increase or partial increase in the cost of inputs resulting from increase in the rate of VAT, but on account of levy of VAT on the value of gross work done.

23. It is necessary to understand the basic scheme of VAT. VAT is levied at different stages on the value of goods including as incorporated in the Works. Undisputedly, VAT is levied on sale of goods at every point in a series of sale as is expressly provided under Section 2(56) of the Assam VAT Act, 2003. However, a dealer is entitled to claim credit for the VAT imposed on some of the inputs - subject to the prescribed conditions being met - while determining the liability to pay VAT on the output. GEJV's claim for additional costs on increase in the cost of inputs on account of increase in the rate of VAT must be understood in the aforesaid context.

24. As indicated earlier, GEJV had claimed 1% of the gross value of work done as additional cost; this was on account of increase in the levy of VAT on the aggregate value of the work done. The point in issue before the Arbitral Tribunal - albeit raised at a belated stage - was whether any part of this cost taken into account while indexing any input.

25. The applicability of the second sub-paragraph of sub clause 70.6 of COPA has to be considered in the context of the claim made by GEJV.

Thus, if NHAI had shown that value of any input had increased on account of increase in the rate of VAT and the same was accounted for in the formula as prescribed under sub clause 70.3 and for which any credit was available to GEJV to mitigate the cost on account of increase in VAT levied on the gross value of work done, then, it may have been open for NHAI to contend that by virtue of the second sub-para to sub clause 70.6 of COPA, no further adjustment on account of increase in cost resulting from increase in the rate of VAT was payable. Admittedly, no such evidence was produced by NHAI.

26. Clearly, there is no evidence on record that any part of increase in cost on account of levy of VAT on "gross value of work done" was recovered or was accounted for in the price adjustment of any input. The finding of the AT in paragraph 4.3(iii) of the impugned award must be understood in the aforesaid context. Thus, in my view, the AT's finding that NHAI had not provided any evidence to show that increase in VAT was taken into account in indexing of any inputs cannot be faulted.

27. It is also necessary to observe that the intent and purpose of sub-para 70.6 of COPA is to eliminate the effect of double benefit. The clear import of sub-para is that if an increase in cost has been taken into account while

effecting the price adjustment, the same can, for obvious reasons, not be reimbursed again to the contractor.

28. In the facts of the present case, there is no material to indicate that the additional costs as claimed by GEJV on account of additional levy on the value of the contract had been taken into account while giving the benefit of price indexation of inputs to GEJV.

29. In ***National Highways Authority of India v. ITD Cementation India Ltd.***: **2015 (6) SCJ 313**, the Supreme Court considered the challenge to an arbitral award wherein the AT had examined the similar clauses (in that case sub clause 70.8 of COPA was identically worded as sub clause 70.6 of COPA in the present case). The AT had held that price adjustments as per sub clauses 70.2 to 70.7 of COPA (which are more or less similar to sub clauses 70.1 to 70.5 of COPA in this case) did not assure full compensation for rise or fall in the prices; but, in terms of sub clause 70.8 of COPA (in this case sub clause 70.6), the additional cost on account of subsequent legislation was stipulated to be paid in full. The Supreme Court declined to interfere with the aforesaid interpretation as it held that the same was reasonable and did not fall within the scope of Section 34(2) of the Act.

30. Additionally, it is admitted that IOC's letter dated 22.06.2015 which is relied upon by the NHAI in these proceedings to assail the impugned award, was never produced before the AT at the relevant stage and was submitted only as an annexure to the written submissions filed by NHAI. Admittedly, the statement of defence filed by NHAI contained no averment to the effect that the claim made by GEJV should be rejected on the ground that the part of the increased cost claimed had been taken into account while indexing the value of input of fuel. In these circumstances, even if it is accepted that the said letter is relevant - which, as discussed earlier, it is not - it is difficult to fault the AT's decision to ignore the same.

31. It is settled law that when it comes to arbitration awards, the court's approach is one of non-interference. The grounds on which an award can be set aside are highly restricted. Even if an arbitrator has interpreted the agreement erroneously, the same is an error within his jurisdiction and it cannot be interfered with (See: ***McDermott International Inc v. Burn Standard Co. Ltd. and Ors.*** : **(2006) 11 SCC 181**)except in cases where the decision is perverse or so irrational so as to render the award unreasonable on the touchstone of the *Wednesbury's* principle; that is, that no reasonable person could have possibly arrived at such a

conclusion.(See: ***Oil and Natural Gas Corporation Ltd v. Western Geco International Ltd***.: **(2014) 9 SCC 263**).

32. In view of the above, this Court is unable to accept that any interference is warranted with the impugned award.

33. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

SEPTEMBER 15, 2016
RK