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

+ **O.M.P. 474/2008 & IA No.10922/2008**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Plaintiff
Through: Mr. Ramesh Kumar, Advocate.

versus

HINDUSTAN CONSTRUCTION COMPANY LIMITED Respondent
Through: Mr. E.R. Kumar, Mr. D.P. Mohanty &
Ms. Raveena Rai, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER
18.11.2016

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1. The challenge in this petition is to a majority Award dated 6th June, 2007 passed by the Arbitral Tribunal in the disputes arising between the parties out of a contract awarded by the National Highways Authority of India ('NHAI') in favour of the Respondent for the work of widening of 4/6 lanes and strengthening of existing two-lane carriageway of NH-6 in the State of West Bengal from Kolaghat to Kharagpur (from KM 72 to KM 136) Contract package WB-II.

2. NHAI is aggrieved by the determination of Claim No. 3, preferred by the Respondent for loss of overheads and profit due to omission of BOQ item No.13.01(a) for cutting and stacking of trees of girth above 300 mm. This was, admittedly, part of the work awarded to the Respondent. However, it is not in dispute that the trees in question were already cut down by *Panchayats* in the area during the period that the contract was

being executed. The Respondent then raised a dispute that NHAI ought not to have allowed the *panchayats* to cut the trees when that work, in fact, had been awarded to the Respondent. Claim No. 3 was for a sum of Rs. 92,10,044 including the price adjustment together with interest at 18 per cent towards loss of overheads and profits suffered by the Respondent.

3. NHAI resisted the above claim by referring to Clause 51.1(b) of the GCC, which permitted NHAI to omit any work as long as it was not carried out either by NHAI or any other agency employed by NHAI.

4. An exception is taken by the NHAI to the finding in the majority Award that NHAI ought not to have allowed the *Gram Panchayats* to cut the trees in question. It is submitted that NHAI did not actually allow the *Panchayats* to cut the trees. It was done by the *Panchayats* themselves without any reference to the NHAI.

5. The majority Award noticed that NHAI had also contended before it that the trees were cut by the *Gram Panchayats* under orders of the Green Bench of the Calcutta High Court. A perusal of the order revealed that it nowhere provided that only the *Panchayats* could cut the trees. Only permissions from the *Panchayats* and forest Department were necessary for that purpose. Actually, it was found that NHAI was aware of the trees being cut by the *Panchayats* in August 2000, even prior to receiving the bids. In the circumstances, it was held that the failure to omit the said BOQ item resulted in a breach of contract. It appears that NHAI did get the trees in the KTPS, which is not under any *Panchayat*, cut through another agency.

6. The crucial aspect of the matter, which has been unable to be countered by NHAI, is that the fact that trees having been cut by the *Panchayats* was known to NHAI even prior to receiving of the bids. There was, therefore, no justification for NHAI to have continued with the BoQ item.

7. The Court is unable to find any error in the majority Award of the Arbitral Tribunal and in particular its reasoning and conclusion in respect of Claim No. 3. The price variation was inherent in the clause itself and, therefore, admissible.

8. Learned counsel for the Respondent points out that as against a claim of Rs.92,10,044, the Arbitral Tribunal by the majority Award has awarded Rs.59,48,956 together with interest at 10% from 7th June, 2007 i.e., the date of the Award.

9. Consequently, there is no merit in the petition and the application and the same are dismissed as such but in the circumstances no orders as to costs.

NOVEMBER 18, 2016
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S. MURALIDHAR, J.