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

+ **O.M.P. (COMM) 375/2016**

**M/S SSANGYONG ENGINEERING &
CONSTRUCTION CO. LTD.**

..... Petitioner

Through: Mr Arvind K. Nigam, Senior
Advocate with Mr Navin Kumar,
Ms Rashmeet Kaur and Ms Manalisha
Chaudhary, Advocates.

versus

**NATIONAL HIGHWAYS AUTHORITY OF
INDIA (NHAI)**

..... Respondent

Through: Mr Yaman Kumar, Advocate.

**CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU**

VIBHU BAKHRU, J

IA No.9572/2016

1. Allowed, subject to all just exceptions.

O.M.P. (COMM) 375/2016

2. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'Act') impugning the Arbitral Award (by majority) dated 02.05.2016 (hereinafter referred to as the 'impugned award').

3. The respondent (NHAI) invited tenders for construction of Highway Contract being Four-Lane of Jhansi-Lakhanadon Section between km. 297

to km. 351 of NH-26 in the state of Madhya Pradesh. The petitioner submitted its bid in response to the invitation to tender on 27.10.2005. This was accepted on 30.12.2005 and the contract between the parties was signed on 12.04.2006. NHAI issued the notice to commence work on 28.04.2006 and the petitioner commenced work on 28.05.2006.

4. The dispute involves between the parties relate to the calculation of the price adjustment as per Sub-clause 70.3 of the Agreement between the parties – Conditions of Particular Application (hereinafter the ‘COPA’).

5. Sub-clause 70.3 of COPA is a price adjustment clause and specifies a formula for adjustment of the contract price for increase or decrease in rates and price of labour, materials, fuels and lubricants. In terms of item (ii) of the aforesaid Sub-clause the price adjustment for increase or decrease in the cost of cement procured is to be computed as per the formula specified therein. Clause 70.3(ii) of COPA reads as under:-

“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:

$$V_c = 0.85 \times \frac{P_c}{100} \times R_1 \times \frac{(C_1 - C_0)}{C_0}$$

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

C_0 = the all India average wholesale price index for cement on the day 28 days prior to the closing date of submission of Bids as published by Ministry of Industrial Development, Government of India, New Delhi.”

C_1 = the all India average wholesale price index for cement on

the day 28 days prior to the last day of the period to which a particular interim payment certificate is related, as published by Ministry of Industrial Development, Government of India, New Delhi.

P_c = Percentage of Cement component of the work.”

6. The controversy arose between the parties in connection with calculation of the base Wholesale Price Index (hereinafter the ‘WPI’)—referred to as C_0 and Current WPI, referred to C_1 , the formula as quoted above. This was consequent to the change in WPI series published by the Ministry of Industrial Development, Government of India.

7. Admittedly, the purposes of computing the price variation in terms of Sub-clause 70.3(ii) of COPA the base date is as 29.05.2005, which is 28 days prior to the last date submission of the bid. Admittedly as on the base date the Wholesale Price Index published by the Ministry of Industrial Development, Government of India was a WPI Series with 1993-94 as its commencement base year; in other words, the WPI was 100 in the base year 1993-94 and the WPI was adjusted on the said base periodically. For the convenience in reference the WPI series with 1993-94 as base and which were published on the base date are referred to as “Old Series”.

8. The Government of India launched a new WPI series on 14.09.2009 which came into effect on 14.09.2010; apparently, this was done to capture the structural changes in the economy. For convenience, the WPI series launched on 14.09.2009 is referred to as “New Series”. The basket of commodities as well as the weightage accorded to different commodities on which the Old Series and New Series are based, are materially different.

Although, the New Series came into effect from August, 2010, the base year for the new series is 2004-05 (WPI of the New Series is 100 in 2004-2005). The Government of India has also provided the data of the New Series from 2004-05.

9. From December, 2005 to August, 2010, the petitioner raised bills on the basis of the price adjustment clause and for the purposes of calculation, used the Old Series WPI. After September, 2010 till February, 2013, the petitioner raised bills based on the New Series.

10. NHAI was of the view that an anomaly had crept in due to change in the WPI Series during the tenure of the contract. Accordingly, on 15.02.2013, NHAI issued a circular to provide a linking factor. The purpose of the linking factor was to link the Old Series to the New Series. Further, NHAI also sought to apply the linking factor from September, 2010 and recover certain payments already made. This led to disputes between the parties, which were subsequently referred to the Arbitral Tribunal.

11. It is apparent from the plain reading of the formulae provided in Sub-clause 70.3 of COPA (as quoted above) that the base index for working the formulae, that is C_0 , is WPI as on 28 days prior to the closing date of submission of bids, that is on 29.09.2005. Clearly, the current WPI index to be used for making the price adjustment, that is, C_1 in the formula would for purposes of integrity have to be from the same WPI Series. It is difficult to accept that the said formulae would use the base index from another WPI Series and the current WPI index (that is, as on 28 days prior to the last day of the period to which the Interim Payment Certificate relates) from a

different series.

12. The above controversy was considered by the Arbitral Tribunal and the majority of the arbitrators were of the view that it was necessary to use a linking factor for working the formula as provided under Sub-clause 70.3 of COPA. The Arbitral Tribunal also determined the linking factor to be used. However, one of the arbitrators, Mr Dilip Namdeo Potdukhe, recorded a dissenting note. In his view, the New Series was applicable with effect from September, 2010 and, thereafter, only the New Series was to be applied for working the formulae as provided under Sub-clause 70.3 of COPA. According to him, even though the New Series came into effect from September, 2010, the base index of the New Series (which was the base year 2004-05) could be used for determination of price variation after September, 2010.

13. This would mean that the base index i.e. the index WPI (C_0) in the formula would have to be a WPI index as on 29.09.2005 from the New Series which admittedly was not in force as on that date. It is also relevant to note that although the New Series could be applied in the case of the petitioner - as the base index as on 2004-05 under the New Series was available - the same would not work for contracts that were bid for prior to 2004.

14. It is apparent from the above that both the views - that of the majority Arbitrators as well as the view expressed by Mr Potdukhe in his dissenting note - are plausible views; each method throws up separate issues. However it is apparent that the controversy relates to interpreting the manner in which

the formula specified in the Contract has to be worked, given the change in the WPI Series. This is purely a question in the realm of interpretation of the Contract and is within the jurisdiction of the Arbitral Tribunal. Even though the view expressed in the dissenting note may seem more appealing and I prefer that view but that does not mean that the view expressed by the majority arbitrators is not a plausible one. It is now well settled that this court while considering a challenge to an arbitral award does not substitute its view over that of the arbitrators. It is not permissible for a court to examine the correctness of the findings of the Arbitral Tribunal as if it were sitting in appeal over its findings.

15. In **Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.:** (2009) 10 SCC 63, the Supreme Court had expressly stated that “*an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award*”. The Court further held that “*If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award*”.

16. In **Sumitomo Heavy Industries Limited v Oil and Natural Gas Commission of India:** (2010) 11 SCC 296, the Supreme Court held as under:-

“.....The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire,

which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

17. The aforesaid view was reiterated by the Supreme Court in **Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran**: (2012) 5 SCC 306. In that case the Supreme Court held as under:-

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.”

18. Although the decisions in ***Steel Authority of India Ltd.***(*supra*) and ***Sumitomo Heavy Industries Limited*** (*supra*) have been delivered in the context of the Arbitration Act, 1940, the view expressed therein is still good law and the scope of interference under the Act has not been widened but considerably narrowed.

19. The parties have agreed to accept the opinion of the Arbitral Tribunal as binding and once the Arbitral Tribunal has decided the dispute, the matter must rest there; unless of course the award is required to be set aside on any

of the grounds as spelt out under Section 34 of the Act.

20. In the present case, the petitioner has endeavoured to place its challenge within the scope of section 34(2)(b)(ii) of the Act. However, in the given circumstances, I am unable to accept that the impugned Award is in conflict with the public policy of India.

21. The petition is, accordingly, dismissed.

AUGUST 09, 2016
MK/pkv

VIBHU BAKHRU, J

