

\$~
*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 9th January, 2017
Judgment pronounced on :29th March, 2017

+ **O.M.P. 146/2009**

SOM DATT BUILDERS-NCC-NEC (JV) Petitioner
Through: Mr. S.B. Upadhyay, Senior Advocate
with Ms. Anusuya Salwan, Ms. Anisha
Upadhyay, Ms. Renuka Arora, and Mr. Kunal
Kohli, Advocates

versus

NATIONAL HIGHWAYS AUTHORITY
OF INDIARespondent
Through: Ms. Gunjan Sinha Jain, Advocate

AND

+ **O.M.P. 298/2009**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through: Ms. Gunjan Sinha Jain, Advocate.

versus

ITD-SDB (JV) Respondent
Through: Mr. S.B. Upadhyay, Senior Advocate
with Ms. Anusuya Salwan Ms. Anisha
Upadhyay and Ms. Renuka Arora, Mr. Kunal
Kohli, Advocates.

CORAM: JUSTICE S.MURALIDHAR

JUDGMENT
29.03.2017

%

Introduction

1.These are the two petitions under Section 34 of the Arbitration &
Conciliation Act, 1996 ('the Act') which raise a common question of law
O.M.P. 146/2009 & O.M.P. 298/2009

i.e., the correct interpretation of Sub-Clause 60.7 (c) of the Condition of Particular Application ('COPA') governing the contract between the parties.

2. The short question that arises for consideration is: "Whether the deduction of 30% amount against the mobilization and machinery advance shall be from the 'gross' or the 'net' amount reflected in the Interim Payment Certificate ('IPC')?"

3. OMP No.146/2009 has been filed by Som Datt Builders-NCC-NEC (JV) against National Highways Authority of India ('NHAI') challenging an Award dated 26th November, 2008 of the Arbitral Tribunal ('AT') passed by majority of 2:1 holding that the deduction should be from the gross amount. OMP No.298/2009 has been filed by NHAI against ITD-SDB (JV) challenging an Award dated 17th December, 2008 passed by the another AT, again by majority of 2:1, holding the opposite viz., that the deduction should be from the net amount reflected in the IPC.

Background to the two petitions

4. OMP No.146/2009 concerns the disputes with reference to Contract Package- II B (for the four-laning and strengthening of the existing two-lane section between KM 470 to KM 38 on NH-2 in Uttar Pradesh) whereas OMP No. 298/2009 concerns Package II-A (for the four-laning and strengthening of the existing two-lane highway section from KM 393.00 to KM 470,00 on NH-2 in Uttar Pradesh). In both the contracts, the disputes arose with regard to the mode and manner of recovery of the mobilization and machinery advance extended to the Contractor for the purposes of execution of the works in question. The expression 'Contractor' used in this judgment refers to Som Datt Builders-NCC-NEC

(JV) (the Petitioner in OMP 146/2009) as well as ITD-SDB (JV) (the Respondent in OMP 298/2009).

5. It is pointed out by NHAI that for more than 14 IPCs for Package II-B and 25 IPCs for Package II-A, the Contractor submitted the monthly statement in which deductions were carried out at 30% of the gross value of the IPC. On the other hand, the case of the Contractor is that the format for statement of the monthly bill provided under Clause 60.1 was approved by the Engineer. It was the Engineer and NHAI who insisted that the said format should be followed and that the recovery of the mobilization and machinery advance should be made from the gross amount. Otherwise, the monthly payment was not being made to the Contractor. It is contended that only when the Contractor realized that excess recoveries were being made, it raised the dispute.

6. In both the cases, the Dispute Resolution Board ('DRB') held in favour of NHAI that deduction had to be made from the gross amount of the IPC. The Contractor in each case was dissatisfied with the recommendations of the DRB and invoked the arbitration clause. Two different ATs were constituted. In both ATs, the nominee of the Contractor was the same. While the AT in respect of Contract Package II-B by its majority Award dated 26th November, 2008 rejected the case of the Contractor, the AT which decided the dispute in respect of Contract Package II-A by majority Award dated 17th December, 2008 held against NHAI and in favour of the Contractor.

7. Before both the ATs, the Contractor contended that:

- (i) The recovery of the mobilization and machinery advance may be made based on monthly payment arrived at from the Bill of

Quantity ('BOQ') multiplied by unit rates only without taking into account the escalation, day work, variation orders, and security advances.

- (ii) The end point of recovery would be just before the IPC in which the certification of the 80% of the contract price was done.
- (iii) The recovery of the mobilization and machinery advance should be based on the net amount of monthly payments arrived at after deductions as per Clause 60.1 excluding the recovery advance.

8. Both the ATs held in favour of NHAI as far as the contentions (i) and (ii) above were concerned. It is on contention (iii) that the two majority ATs differed as has been noted hereinbefore.

Submissions on behalf of the Contractor

9. Mr. S.B. Upadhyay, learned Senior Counsel appearing for the Contractor in both the cases submitted as under: 244

- (i) Under Sub-Clause 60.1 of the COPA, the monthly statement has to be submitted by the Contractor to the Engineer in a tabulated format approved by the Engineer. This showed the amount of work done, variations, day work, price adjustment and security advances given against the material at site. This would constitute the gross amount of the monthly statement. From this gross amount, deduction was to be made in respect of the retention money and other statutory deductions.
- (ii) Under Sub-Clause 60.2, the monthly statement had to be approved or amended by the Engineer in such a way that it reflected the amount due to the Contractor in terms of the contract after deduction of any sum which may have become due and payable by

the Contractor to the Employer i.e., NHAI. Under Sub-Clause 60.2, “the Engineer shall determine the amounts due to the Contractor and shall issue to the Employer and the Contractor a certificate” i.e., the IPC certifying the amounts due to the Contractor. The amount due for payment to the Contractor was thus the net amount arrived at after deducting retention money and other statutory deductions from the gross amount because it was the net amount that was due. This was the IPC mentioned in Clause 60.7 (c) for the purpose of recovery of mobilization and machinery advance.

- (iii) A collective and harmonious reading of Clauses 1.1 (e) (iii), 60.2 and 60.7 of the COPA revealed that the amount in the IPC certified by the Engineer was the net amount and not the gross amount. Reference is made to the decision in ***Delhi Development Authority v. Durga Chand Kaushish (1973) 2 SCC 825*** to urge that “in construing instruments you must have regard not to the presumed intention of the parties, but to the meaning of the words which they have used.”
- (iv) As far as deduction of retention money is concerned, Sub-Clause 60.1 states that it is to be made from items provided under (d), (e), (f) and (g) which is the value of the work done, value of variations and days work executed during the month and price adjustment admissible as per Clause 70. Sub-Clause 60.1 (j) on the other hand provides for deduction of the repayment of advance as per Sub-Clause 60.7.
- (v) Reliance is placed on the decision in ***Union of India v. Raman Iron Foundry (1974) 2 SCC 231*** to urge that the expression 'sums

due' would be the sum arrived at after statutory deductions. It is submitted that the majority of the AT which gave the Award (challenged by the Contractor in OMP No.146/2009) was contrary to the contractual provisions. It was contrary to the fundamental policy of Indian law. The 'business efficacy test' as explained in ***Satya Jain v. Anis Ahmed Rushdie Tr. LRs. (2013) 8 SCC 131*** must be applied in the present case while interpreting the relevant clauses. The majority Award challenged by NHAI in OMP No.298/2009 which held that the deductions of mobilization and machinery advance had to be made from the net amount certified by the Engineer in the IPC should be affirmed by the Court.

Submissions on behalf of the NHAI

10. Ms. Gunjan Sinha Jain, learned counsel for NHAI submitted that in the absence of any specific words to that effect, deduction had to be made only from the gross amount in the IPC. The contract cannot be re-written to insert words that do not find place in Sub-Clause 60.2. In terms of the said Sub-Clause, only those amounts that are due and payable to the Employer are required to be deducted for working out the amount of the IPC. The 'amount of the IPC' meant the total amount certified in the IPC on the basis of the work done. On the other hand, the 'net' amount is arrived at after deducting the statutory dues, which are not payable to the Employer. A distinction is drawn between that which is 'due' and that which is 'payable'. While an amount becomes 'due' on account of the work done, the amount 'payable' is arrived at, for instance, by deducting the mandatory statutory taxes, which are not payable as such to the Employer. Such amounts to be deducted may be lesser or higher depending upon the rebates or refunds etc. It is submitted that if the

Contractor's contentions were to be accepted, the Engineer may have to certify amounts in regard to which there may be some discrepancy to be adjusted in the following IPC. If the recovery is sought to be made on the said amount i.e., the amount forming part of the 'net' amount payable, then it may lead to double recovery.

11. By way of illustration, it is pointed out that IPC-33 in package II- B at Column Nos. 14, 15 and 16 include an amount withheld in the previous IPC which also form part of net amount payable. The net amount shown therein – Rs. 10,09,68,141.00 – also formed part of net amount in the previous IPCs. If 30% were to be deducted from the said amount, it would lead to a double recovery/deduction and would, therefore, be illogical.

12. Ms. Sinha Jain points out that the proviso to Sub-Clause 60.2 refers to the 'net' amount i.e., after deductions and retentions. If this net amount is less than the minimum amount of the IPC, then the Engineer can refuse to certify it. It is further submitted that IPC is not a certification only of net amount due but is a complete document verifying the quantum of work done and sums due to the Contractor on the basis of the work done and other eventualities after carrying out deductions of the amount payable to the Employer. It is submitted that the net amount is arrived at after working out the deductions / recoveries in terms of Clause 60 including 60.7(c) and other statutory dues. Thus, the amount of IPC from which recovery of the mobilization amount had to be made was the gross amount of that particular IPC and not the net amount.

13. Ms. Sinha Jain denied that the Contractor was subjected to any coercion into agreeing for the deduction of 30% from the gross amount of

the IPC. The majority AT also rejected the above contention. That factual finding was not amenable to the judicial review under Section 34 of the Act. By their conduct and practice, the Contractor had accepted the monthly recovery from the gross amount of the IPC. When a party had acted on a certain interpretation of the Contract, then that should continue. Reference is made to the decision in ***Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. (1981) 3 All ER 577*** and ***Abdulla Ahmed v. Animendra Kissen Mitter AIR 1950 SC 15***. The parties had, from the very beginning, for more than two years in IPC-4 to IPC-14 and IPC-7 to IPC-33, acted on a certain understanding of the Contract, thus any other construction of the terms of the Contract divorced from the conduct of the parties is clearly unsustainable in law. Reliance is placed on the decision of the Supreme Court in ***Godhra Electricity Co. Ltd. v. State of Gujarat (1975) 1 SCC 199***.

14. Ms. Sinha Jain sought to distinguish the decision in ***Union of India v. Raman Iron Foundry (supra)*** by pointing out that the Court in that case was considering the claims for damages and held that it would fall within the ambit of the 'sums due' since the determination of actual damages required judicial determination. In the present case, NHAI was not making any claims on account of damages.

Analysis and reasons

15. The above submissions have been considered. The Court would like to preface its discussion by recapitulating the legal position as regards the scope of judicial review of an arbitral Award under Section 34 of the Act. In ***National Highways Authority of India v. ITD Cementation (2015) 14 SCC 21***, the Supreme Court observed as under:

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is 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 contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do.”

16. In the present case, however, there are two opposite interpretations given by the majority Awards of two different ATs, with one member being common in both. While the majority Award in the disputes arising out of the Contract Package II-B has held in favour of NHAI i.e., the deductions in terms of Sub-Clause 60.7(c) should be from the gross amount, the majority Award in the disputes that arose from the Contract Package II-A has held in favour of the Contractor i.e., the deductions should be made from the net amount. Obviously, both views cannot be allowed to stand. One has to give way to the other. There is also no possibility of reconciling the two views since it is the same set of clauses that has been interpreted.

17. In matters of interpretation of contract, the intention of the parties has relevance as explained in the following passage in *Abdulla Ahmed v. Animendra Kissen Mitter* (supra):

“The evidence of conduct of the parties in this situation as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties. Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument.”

18. Further, in *Amalgamated Investment & Property Co. Ltd. v Texas Commerce International Bank Ltd.* (*supra*), it was explained that:

“If the parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation of the contract and cannot be allowed to go back on it.”

19. NHAI's submission is that the mode of recovery adopted by it i.e., recoveries being made from the gross amount of the IPC has been adopted by it for years together. In both these petitions, the Contractor appears to have accepted the mode of recoveries made by NHAI for a considerable number of IPCs. The Contractor protested only after the above mode of recovery was adopted for 25 IPCs as regards Package II-A and for 14 IPCs under Package II-B. NHAI is also right in its contention that there is no contemporaneous correspondence exchanged between the parties to indicate that the Contractor was under any duress to accept the deductions from the IPCs on the above basis.

20. Nevertheless, the Court has to decide whether either of the majority Awards has correctly interpreted the governing clause of the Contract between the parties. In other words, irrespective of the consistent practice, it must be determined whether the interpretation in either majority Award is in conformity with the relevant clauses of the Contract. The three clauses that are relevant in the present case are Sub-Clause 60.1

which deals with monthly statements, Sub-Clause 60.2 which deals with monthly payments and Sub-Clause 60.7 which deals with advance payment. The relevant portions of the said three clauses read as under:

Sub-Clause 60.1 : Monthly Statements	The Contractor shall submit a statement in the number of copies specified in the Appendix to Bid to the Engineer at the end of each month, in a tabulated form approved by the Engineer, showing the amounts to which the Contractor considers himself to be entitled. The statement shall include the following items, as applicable, which shall be taken into account in the sequence listed: (a) The estimated Contract value of the Temporary and Permanent Works executed up to the end of the month in question, determined in accordance with Sub-Clause 56.1, at the unit rates and prices included in the Contract, in local currency; (b) the actual value certified for payment for the Temporary and Permanent Works executed up to the end of the previous month, at the unit rates and prices included in the Contract, in local currency; (c) the estimated Contract value at the unit rates and prices included in the Contract, of the Temporary and Permanent Works for the month in question, in local currency, obtained by deducting (b) from (a); (d)... (e) the value of any variations executed up to the end of the month in question, less the amounts certified in the
---	--

	previous Interim Payment Certificate, expressed in the relevant amounts of foreign and local currencies, pursuant to Clause 52; (f) ... (g) ... (h) ... (i) ... (j) any amounts to be deducted as repayment of the Advance under the provisions of Sub-Clause 60.7; and (k) ... (I) the amount to be deducted towards the advance income tax shall be at the rate of 2.2* percent and the advance works contract tax at the rate of 1.0 * percent..
Sub-Clause 60.2 : Monthly Payments	The said statement shall be approved or amended by the Engineer in such a way that, in his opinion, it reflects the amounts in various currencies due to the Contractor in accordance with the Contract, after deduction, other than pursuant to Clause 47, of any sums which may have become due and payable by the Contractor to the Employer. In cases, where I there is difference of opinion as to the value of any item, the Engineer's view shall prevail. Within 14 days of the receipt of the monthly statement referred to in Sub- Clause 60.1, the Engineer shall determine the amounts due to the Contractor and shall issue to the Employer and the Contractor a certificate herein called the "Interim Payment Certificate", certifying the amounts due to the Contractor. In the event of such difference of opinion of

	the employer may release 80% of the disputed amount as certified by the Engineer and instruct the Engineer to respond to the discrepancies within 14 days. Any discrepancy found will be settled in the following Interim Payment Certificate. Provided that the Engineer shall not be bound to certify any payment under this Sub-Clause if the net amount thereof, after all retentions and deductions would be less than the Minimum Amount of Interim Payment Certificates stated in the Appendix to Tender
Sub-Clause 60.7 : Advance Payment	(a) The Employer will make an interest- free advance payment to the Contractor exclusively for the costs of mobilization in respect of works in an amount equivalent to 10 (Ten) percent of the Contract Price named in the letter of acceptance, payable in proportions of foreign and local currencies of the Contract Price. ... (b) ... (c) The advance payment under (a) & (b) above shall be repaid through deductions from the interim payments certified by the Engineer in accordance with this Clause. Deductions shall commence in the next Interim Payment certificate either following that in which the total of all interim payments certified to the Contractor has reached 15 (fifteen) percent of the Contract Price less the provisional sums or after 6 months after payment of first installment whichever period concludes earlier and shall be made at the rate of 30 (thirty) of the amount of all

	Interim payment Certificate in the types and proportionate amounts of currencies of the advance payment until such time as the advance, payment has been repaid; always provided that the advance payment shall be completely repaid prior to the time when 80 percent of the Contract Price has been certified for payment. (d) ...
--	--

21. The expression 'amount' used in the above clauses is not qualified by the words 'gross' or 'net'. For instance, in Sub-Clause 60.1 (e), the expression used is "amounts certified in the previous Interim Payment Certificate". The expressions used Sub-Clause 60.2 are "any sums which may have become due and payable by the Contractor to the Employer" and "the amounts due to the Contractor". The expression used in Sub-Clause 60.7 (c) is "the amount of all Interim Payment Certificates".

22. Under Sub-Clause 60.2, the amount that is due and payable by the Contractor to the Employer is required to be deducted for working out the amount of the IPC. The amount of IPC means the total amount certified in the IPC on the basis of the work done. From the said amount, there would be deductions of statutory dues. These are not the dues payable to the Employer but to the concerned department / government. Therefore, there will be variations in the amount payable under the IPC depending upon such statutory deductions. Interestingly, the proviso to Sub-Clause 60.2 makes a reference to 'the net amount' which, as indicated therein, is "after all retentions and deductions". The contract, therefore, clearly distinguishes 'the net amount' from the 'amount of the IPC'. It is, therefore, indicative that when Clause 60.7 (c) uses the expression "the

amount of all Interim Payment Certificates” it is not referring to the ‘net amount’.

23. IPC is defined under Sub-Clause 1.1 (e) (iii) to mean ‘the certificate of payment issued by the Engineer other than the final payment certificate’. Under Sub-Clause 60.1, the monthly statement is submitted in a tabulated form approved by the Engineer. It is not necessary to examine whether the format was devised by NHAI or the Engineer or the Contractor. The fact remains that this tabulated format contains details of the amount of the work done, variations, day work, price adjustment and secured advance given against the material at site. An example of the monthly statement is to be found in the rejoinder filed by the Petitioner in OMP No. 146/2009. For the present purpose, reference needs to be made only to the description of the item for arriving at the net amount of the monthly statement (the figures are omitted):

NATIONAL HIGHWAY AUTHORITY OF INDIA GRAND TRUNK ROAD IMPROVEMENT PROJECT (GTRIP/4) PACKAGE - IIB ; From Chainage Km.470.000 to Km.38.000 MONTHLY STATEMENT NO. - 04 CONTRACTOR : SOM DATT BUILDERS-NCC-NEC (JV) MONTH/YEAR-,October-02 CONSULTANT: CE5 - BECA (JV) MONTHLY STATEMENT FOR THE PERIOD UPTO OCTOBER' 2002				
SL. NO.	DESCRIPTION	PREVIOUS AMOUNT	CURRENT PERIOD AMOUNT	TOTAL TO DATE AMOUNT
1.	Total Value of all Contract Items excluding day work	-	-	-
2.	Day Works	-	-	-
3.	Variation Orders	-	-	-
4.	Price adjustments (on 1, 2, 3 & 6)	-	-	-

5.	Total (1 + 2 + 3 + 4)	-	-	-
6.	Secured advance against material at site	-	-	-
7.	Up to date value of Statement (5 + 6)	-	-	-
8.	<u>Recoveries:</u>	-	-	-
a)	Retention Money @ 6% (on 5)			
b)	Advance Works Contract Tax @ 1% (on 7)			
c)	Repayment of advance @ 30%(on 7)			
d)	Advance Income Tax @ 2% (on 7 – 8c)			
e)	Surcharge on Income Tax @ 5% (on 8d)			
9.	Total recoveries (8a+8b+8c+8d+8e)			
10.	Net value of Monthly statement (7-9)			
11.	Net amount of this MONTHLY STATEMENT payable in Indian Rupees			

24. However, even this *per se* does not settled the issue. As pointed out by the Supreme Court in ***Delhi Development Authority v Durga Chand Kaushish*** (*supra*), “in construing instruments you must have regard not to the presumed intention of the parties, but to the meaning of the words which they have used.” There is a distinction between the deduction of the retention amount under Sub-Clause 60.1 (d), (e), (f), (g) and (h) and

deduction of the mobilization and machinery advance which is provided under Sub-Clause 60.7(j).

25. There is merit in the contention of NHAI that deductions to be made while arriving at an amount due under the IPC ought not to include the deductions on account of taxes and other statutory dues. The amount of IPC would be the amount prior to such recoveries being effected. NHAI has in support of the above contention placed reliance on IPC-33 for Package II-B which reads as under:

4.	Total value of all contract items excluding day work	Rs. 81840136.00
5.	Daywork	Rs., 51231.00
6 a)	Variation order applicable for price Adjustment	Rs. 12629375.00
6 b)	Variation order not applicable for price adjustment	Rs. 57843.00
7.	Price adjustments on [4, 5, 6 (a) & 9]	Rs. 25611495.00
8.	Total [4 + 5 + 6 (a) + 6 (b) + 7]	Rs. 120190080.00
9.	Secured advance against material at site	Rs. -43636.00
10.	Up to date value of IPC (8 + 9)	Rs. 120146444.00
11.	Recoveries:	
a)	Retention money @ 6% (on 8)	Rs. 7211405.00
b)	Advance works Contract Tax @ 1 % (on 10)	Rs. 1201464.00
c)	Repayment of Advance @ 30% (on 10.)	Rs. 12007004.00
d)	Advance Income Tax @ 2.0.4% (on 10 - 11c)	Rs. 2206045.00
e)	Surcharge on Income Tax @ 10.% (on 11d)	Rs. 220605.00

12.	Total Recoveries (11a + 11b + 11c + 11d + 11e)	Rs. 22846523.00
13.	Total Earned to Date (10-12)	Rs. 97299921.00
14.	Release of 50% of Rs, 4,682,844/- after rectification in RCC retaining wall	Rs. 2341422.00
15.	Release of 20% of Rs. 3,433,061/- after rectification in RE retaining wall	Rs. 686613.00
16.	Release of Withheld Amount of Interest on IPC No. 22	Rs. 640184.00
17.	NET AMOUNT PAYABLE TO THE CONTRACTOR	Rs. 100968141.00

26. Column nos. 14, 15 and 16 pertain to the amount withheld in the previous IPCs which goes into determining the net amount payable. In other words, the amounts in Column nos. 14 to 16 were arrived at after recoveries were made from the previous IPCs. If this is to be included for the purpose of the deduction of 30%, the recovery would be made twice over. This was certainly not intended by the parties when they used the words “the amount of all Interim Payment Certificates” in Sub-Clause 60.7 (c) COPA. It appears from a harmonious reading of the relevant clauses that the deductions have to be made from the gross amount and not from the net amount of the IPC.

27. It was submitted on behalf of the Contractor that the fact that Sub-Clause 60.2 uses the word ‘sums’ in the plural is not of significance for the issue involved in these petitions. This is perhaps correct since that refers to the sums due and payable by the Contractor whereas here the issues concerns the sum due to the Contractor. The expression in question is “the amount of all Interim Payment Certificates” occurring in Clause 60.7(c).

28. In *Union of India v. Raman Iron Foundry* (*supra*), the expression interpreted by the Supreme Court was ‘sums due’. It was interpreted as sums payable ‘*in praesenti*’ i.e., presently payable. There the Supreme Court was concerned with the claim of damages and it was held that the damages would not fall within the ambit of ‘sums due’ since the determination of actual damages would require adjudication. The said decision is, therefore, not of assistance to the Contractors in support of their interpretation of Sub-Clause 60.7 (c) COPA.

Conclusion

29. The Court, therefore, concurs with the interpretation placed on Sub-Clause 60.7 (c) COPA by the majority AT in their Award dated 26th November, 2008 in Package II-B (challenged in OMP No. 146/2009) viz., that the deduction of 30% has to be from the gross amount of the IPC and not the net amount. Resultantly, the majority Award dated 17th December, 2008 in Package II-A (challenged in OMP No. 298/2009) is hereby set aside.

30. OMP No. 146/2009 filed by the Contractor is dismissed and OMP No.298/2009 filed by NHAI is allowed in the above terms. There shall be no orders as to costs.

S. MURALIDHAR, J

MARCH 29, 2017

rd