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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
F-349.

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O.M.P. 441/2010

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

versus

SSANGYONG ENGINEERING AND CONSTRUCTION
CO. LTD. ...Respondent
Through: Mr. Anil Airi, Senior Advocate with Mr.
Ravi Krishan Chandna, Ms. Bindiya Logawney,
Ms. Sadhana Sharma and Mr. Aman Madan,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
31.01.2017

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Introduction

1. National Highways Authority of India ('NHAI') has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging the impugned Award dated 19th February 2010 passed by the Arbitral Tribunal ('AT') in the disputes between the NHAI and the Respondent Ssangyong Engineering and Construction Co. Ltd.-Oriental Structural Engineers Ltd (JV) arising out a contract agreement ('CA') dated 12th January 2001 whereby the work of four laning and strengthening of the existing two lane sections between Km. 140 and Km. 180 on NH-2 in Bihar (Contract No. TNHP 16) was awarded to the Respondent.

Background facts

2. The Respondent had undertaken to execute the contract as per the

Technical Specifications ('TS') and against the rates indicated by them in the Bill of Quantities ('BOQ') both of which formed an integral part of the CA.

3. The project was to be completed in three sections as under:

“Section I Km.162 to Km. 180 - First 15 months - 10th May, 2002

Section II Km. 154 to Km. 162 - Next 11 months - 10th April, 2003

Section III Km. 140 to Km. 154 - Next 10 months - 10th February, 2004.”

4. The date of commencement was 10th February 2001. All three sections were to be completed by 10th February 2004. The actual completion dates for the three sections were as under:

Section	Original Completion Date	Last EOT granted upto	Actual completion date
Section I	01.05.2002	15.01.2004	22.01.2004
Section II	10.04.2003	26.08.2004	22.08.2004
Section III	10.02.2004	15.12.2005	30.11.2005

5. Thus the project stood completed on 30th November 2005. It is stated by NHAI that the Respondent could execute only 45.08% of the value of work as against the target of 88.46%. The case of the Respondent was that the delay in progress of the work from 16th October 2001 onwards was for the following reasons:

(i) Delayed handing over/possession of the site including the stretch from km.163 to km. 164.

(ii) Physical obstructions leading to Extension of Time ('EOT') and additional cost compensation under sub-clause 12.2 and 42.2 as well as clauses 44 and 53 of the general conditions of contract ('GCC').

(iii) Stoppage of Karbanda quarry operations, leading to EOT and additional cost compensation under sub-Clauses 12.2 and 20.4 as well as Clauses 44, 53 and 65 of the GCC.

(iv) Adverse law and order conditions leading to EOT, and additional cost compensation under sub-Clauses 12.2, 20.3 and 20.4 as well as Clauses 44, 53 and 65 of the GCC.

(v) Delay in approval of the ROB works.

(vi) Introduction of additional works.

(vii) Other reasons leading to EOT.

6. The claim of the Respondent pertained to the period from 16th October 2001 to 30th November 2005. EOT was granted for 180 days for Section-I by AT i.e. up to 15th October 2001 by an Award, a copy of which was received by the Respondent on 18th April 2006. Compensation was claimed at 49.04% of the actual expenditure incurred by the Respondent towards staff salaries, workman wages, site overheads, head office overheads, JV expenses and plant & machinery fixed costs for the period from 16th October 2001 to 29th February 2004 and 100% of the actual expenditure incurred on the above heads from 1st March 2004 to 30th November 2005. It is pointed

out by the Respondent that EOT was granted without imposing any liquidated damages ('LDs'). This according to the Respondent showed that the delay in prolongation of the project was attributable to NHAI and not to the Respondent.

Claims before the AT

7. The following claims were preferred by the Respondent before the AT:

Claim No.1

Claim for payment of compensation due to delays in the sum of Rs. 93,66,75,892 with interest @ 12% p.a. from 30th November 2005 till actual payment.

Claim No.2

Claim for payment of additional amount towards security measures in the sum of Rs. 7,33,68,237 with interest @ 12% p.a. from 30th November 2005 till actual payment.

Claim No.3

Claim for payment on account of stoppage of quarrying and crushing operation due to terrorist attack in the sum of Rs. 14,40,62,626 with interest @ 12% p.a. from 15th August 2003 till actual payment, and interest @ 12% p.a. from 30th November 2005 till actual payment.

Claim No.4

Claim for payment of additional cost due to introduction of service tax and Education cess amounting to Rs. 6,39,942 with interest @ 12% p.a. from 30th November 2005 till actual payment.

Claim No. 5

Claim for payment of additional cost due to introduction of value added tax amounting to Rs. 85,12,777 with interest @ 12% p.a. from 30th November 2005 till actual payment.”

8. The AT decided Claim Nos. 1 to 4 partly in favour of the Respondent. Claim No. 5 was rejected. There were no counter-claims by NHAI. The challenge in this petition is, therefore, to the impugned Award insofar as it has allowed in part Claim Nos. 1 to 4 of the Respondent.

Submissions of counsel

9. This Court has heard the submissions of Ms. Gunjan Sinha Jain, learned counsel for the NHAI and Mr. Anil Airi, learned Senior counsel appearing for the Respondent.

10. Ms. Sinha reiterated the points urged by NHAI before the AT as regards Claims 1 and 3. It was submitted that the claims were barred by limitation. To begin with, it was contended that notice to invoke arbitration was issued by the Respondent only on 6th November 2006 and, therefore, any claim pertaining to a period three years prior to 7th December 2003 would be barred by limitation. It is submitted, therefore, that inasmuch as some part of the claims pertain to the period from 16th October 2001 onwards and prior to 7th December 2003, they would be barred by limitation.

11. It was then contended that under Clause 53.1, the Respondent had to give notice of its intention to claim additional payment within 28 days after the event giving rise to the claim first arose. Since the Respondent failed to give such notice, it was estopped from raising a claim.

12. As regards the merits of Claims 1 and 3 Ms. Sinha submitted that cost compensation would be admissible under only some of the clauses viz., Clauses 6.4, 12.2 and 42.2 of the GCC. If the Respondent failed to satisfy

the requirements under the said clauses or prove the extra cost incurred, it would not be entitled to cost compensation even though it might be entitled to EOT under Clause 44. It was further contended that the mere grant of EOT without levy of LD would not automatically mean that the NHAI was responsible for the delay. She also assailed the impugned Award in respect of Claim Nos. 2 and 4 by reiterating the submissions of NHAI before the AT.

13. In reply, it is pointed out by Mr. Anil Airi, learned Senior counsel appearing for the Respondent that Claim No.4 concerning payment of additional cost due to introduction of service tax and education cess amounting to Rs. 6,39,942 together with interest @ 12% per annum from 30th November 2005 till the date of actual payment stands covered against NHAI by the decision of the Supreme Court in ***National Highways Authority of India v. ITD Cementation India Limited*** 2015(5) SCALE 554. As regards the Claim No.2 regarding payment of additional amount towards security measures in the sum of Rs. 7,33,68,237 together with interest @ 12% per annum, it is submitted that the issue stands covered against the NHAI by the decision of the Division Bench (DB) of this Court in ***NHAI v. Hindustan Construction Company*** (decision dated 24th February 2016 in FAO (OS) Nos. 402/2014 & 437/2014). Reliance is also placed by Mr. Airi on the decisions of this Court in ***National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd.-Gammon India Ltd. (JV)*** 2013 (4) R.A.J. 507 (Del) and ***National Highways Authority of India v. Prakash Atlanta*** decision dated 8th November 2016 in JV (OMP (Comm.) 84/2016 & OMP No. 103/2015).

14. Mr. Airi defended the impugned Award, which was unanimous. He submitted that NHAI failed to make out any ground under Section 34 of the Act to challenge the impugned Award, which according to him was a reasoned one consistent with the clauses of the CA, the GCC and the COPA.

Issue of limitation

15. At the outset it requires to be noticed that the project as originally planned was in three sections with separate periods of completion as noticed hereinbefore. However, NHAI issued a circular on 11th July 2003 in which the sectional completion of projects was given up. During the visit of the Chairman of the NHAI to the project site on 24th March 2004, he informed that NHAI had decided to accept “equivalent length of completion” instead of a sectional one.

16. In the present case, the AT noted that there was spill over of work from one section to another and also overlapping of delays and hindrances from one section to other. Therefore, the dates of actual completion and extension granted were for the equivalent length of work and did not conform to the actual date of completion and extension. This was the running theme of the impugned Award which requires to be kept in view while examining the claims of the Respondent. These findings of the AT have not been questioned by NHAI.

17. The question of limitation has been specifically dealt with by the AT in para 6.7 of the impugned Award. Although it was contended by NHAI that the claims pertain to periods earlier than three years prior to the date of

filing of the claims, the AT noted that the tabulation of the claims which showed the dates of section-wise completion over three periods i.e. October 2001 to February 2004, March 2004 to March 2005 and April 2005 to November 2005 actually showed completion of equivalent lengths of the road. The work from one section spilt over to the other and, therefore, it was concluded that “no particular date can be fixed for sectional completion from which the limitation period can be said to start running for that section.”

18. The AT also referred to Clauses 60.10 and 60.11 of the COPA. Clause 60.10 stipulated that the contractor would submit, not later than 84 days after the issue of the taking over certificate by the Engineer, a statement of completion with supporting documents showing details of the final value of the work done, any further sum which the Contractor considered to be due and any estimate of the amount which the Contractor considered would become due. Clause 60.11 stipulated that not later than 56 days from the issue of the contingent liability certificate, the Contractor would submit to the Engineer for its consideration a draft statement with supporting documents showing the above details.

19. In the present case the entire work was completed on 30th November 2005 and the taking over certificate was issued by NHAI on that day. The 84 days' period from the said date expired on 22nd February 2006. The Respondent submitted the claim on 23rd January 2006 which was well within the stipulated period. Later this claim was updated on 10th May 2006 and a reminder was sent on 8th July 2006. After rejection of the claim, the

Respondent notified the disputes under Clause 67.1 of the GCC on 15th September 2006.

20. Thereafter, the Respondent went before the DRB on 3rd October 2006. With the DRB not making any recommendation within the stipulated period of 56 days, the Respondent invoked the arbitration clause on 6th December 2006. It is on the above basis that the AT concluded that the claim could not be said to be barred by limitation.

21. A point is sought to be made by NHAI by contending that the period of limitation had to be computed from the date on which the cause of action arose which is the date in respect of each claim when a particular breach is alleged. However, as rightly pointed out by the AT with e NHAI itself giving up the need for a section-wise completion of the project, it was not possible to fix a particular date for sectional completion from which the limitation period could be said to have commenced running for that particular section.

22. The second important factor was that the AT noted that the causes of delay due to which the claims have arisen were continuing causes of action. This again has been unable to be refuted by NHAI. The AT then considered whether the failure to give notice within 28 days of the event giving rise to the claim having first arisen, in terms of Clause 53.1, would result in the rejection of the claim. Here, factually, the AT found that the Respondent had in fact given notices under Clause 53.1 of GCC at various points of time. The first of these notices was dated 11th November 2002; thereafter on 7th October 2003 and three letters of dated 28th January 2004. There were

further letters by which the Engineer notified for EOT. Further the Respondent pointed out that apart from submitting various documents and contemporary records with the Engineer, the Respondent also offered verification and review of the record by inspection to the Engineer in terms of Clause 53.2 of the GCC. However, the Engineer declined to verify the record. On perusing the correspondence, the AT was satisfied that the requirement of Clause 53.1 of GCC had sufficiently been met by the Respondent.

23. The above are factual findings and NHAI has been unable to demonstrate that they are either contrary to the record or perverse. The Court fails to appreciate how it can reevaluate the evidence and review a factual finding of the AT. That would clearly be beyond its scope of powers under Section 34 of the Act.

Claim Nos. 1 and 3

24. The next ground on which the impugned Award is sought to be assailed is that the AT wrongly allowed Claim Nos. 1 and 3. Claim No.1 was for payment of compensation due to delays in the sum of Rs. 93,66,75,892 together with interest @ 12% per annum from 30th November 2005 till the date of actual payment. Claim No. 3 was for a sum of Rs. 14,40,62,626 together with interest @ 12% per annum from 15th August 2003 till the date of actual payment and interest @ 12% per annum from 30th November 2005 till the date of actual payment on account of stoppage of quarrying and crushing operation due to terrorist attack.

25. The Respondent claimed losses under the following heads:

(a) manpower costs, salaries and wages (b) site overhead costs (c) corporate and JV overhead costs (d) plant and machinery costs (e) losses of profit and opportunity costs (f) interest.

26. As per the approved programme, 88.46% of the value of the work was to be executed between 16th October 2001 and 10th February 2004. Against the above target, only 45.08% of the value of the work could be executed. There was a shortfall in the progress to the extent of 49.94%. Accordingly, the Respondent claimed compensation only to the extent of 49.94% of the expenditure incurred by the Respondent on the above heads for the aforementioned period. For the period from 1st March 2004 to 30th November 2005, 100% of the actual expenditure incurred by the Respondent was claimed. Reliance was placed by the Respondent on the decision in ***McDermott International v. Burn Standard Co. Ltd. 2006 Arb.W.L.J. 625 (SC)*** where the Supreme Court had discussed the Hudson Formula, Emden Formula and Eichleay Formula.

27. The significant aspect of the above claim was that it was based on the fact that EOT claimed by the Respondent had in fact been approved by the Engineer and also ordered by the NHAI. However, the Engineer refused to entertain the plea for cost compensation due to the delays.

28. It was noted at the outset by the AT that while the EOT had been granted up to 15th December 2015, the project was completed on 30th November 2005 itself. The AT has found after examining the records thoroughly that the work had been completed in a total of 1507 days and the extent of the extension was 658 days. 70 days of EOT had been granted for reasons such

as elections, strikes and bandhs and opening of diversions etc. which could not be attributed to the NHAI. Respondent was found entitled to compensation for additional costs for 588 days alone.

29. The manner of calculation of cost compensation has been set out in detail by the AT. It worked out the time related cost per day as Rs.4,60,460 and multiplying the above period of 588 days arrived at a figure of Rs.27,07,50,480.

30. One of the principal criticisms of the impugned Award by the NHAI is that the Respondents was unable to relate the claim for compensation to Clauses 6.4, 12.2 and 42.2 of the contract. A perusal of the impugned Award reveals that this particular contention was dealt with by the AT in sufficient detail in para 15.11. These clauses stipulate that the Engineers would after due consultation with the NHAI and the Contractor determined any EOT to which the Respondent was entitled under Clause 44. The AT has set out in elaborate detail the manner of granting EOT at every stage. In para 15.12 of the impugned Award, the AT has concluded that EOT was granted for the reasons contemplated under Clauses 6.4, 12.2 and 42.2 . The NHAI was unable to demonstrate before the AT, as well as this Court, that EOT was granted for any other reasons under Clause 44. The AT also noted that the Respondent's claim for compensation was only for those reasons which admitted cost compensation. For instance, the Respondent in fact, did not claim any compensation on account of the closure of the Karbanda quarry.

31. As regards Clause 12.2 which envisaged EOT for physical obstructions and physical conditions, the contention of the NHAI was that the

Respondent ought to have covered the claim under the insurance policy under Clause 20.4(a)(v) of COPA. The point urged before this Court was also urged before the AT namely that Clause 21.4 of COPA dispenses with insurance under Clause 21.1 of the GCC only in respect of the reasons mentioned in Clause 20.4(a)(i) to (iv) and not in respect of risk in Clause 20.4(a)(v) covering risk and commotion or disorder.

32. In specifically dealing with this particular contention, the AT returned the following findings:

“This contention of the Respondent is difficult to be accepted. The Engineer and the Employer had considered the law and order problem good enough for extension of time resulting into the prolongation of the contract but do not find it reasonable enough to determine the additional cost which the contractor would have suffered in this prolongation period. The Contractor vide his letter dt. 10.11.2004 had forwarded correspondence, Newspaper clippings, District Magistrate letters etc., totalling 18 nos. to highlight the adverse law and order problem prevailing at site. After the murder of NHAI Engineer concerned with the NHDP project, the problem law and order had echoed in the Parliament and even NHAI had to put up advertisement in Newspapers highlighting the law and order problem on this project. The Engineer's report which was considered by the valuation committee of NHAI (C-13/CD-2) stated that for the effect of general law and order 25% reduced efficiency/progress of work was considered under this event of law and order problem-restricted working-loss of time. The Project Director (PD), NHAI while recommending the extension of time stated that going strictly by the records one can argue there is no loss of any time on account of law and order as no major event has been placed effecting the progress of the work, yet it is an undisputed fact that there is in fact a threat perception to the people of the Contractor, Consultant and even NHAI working at site, which certainly retarded the

progress of work. The PD further recommended that due to the threat perception at site, the contractor is not able to deploy required level of resources, he had to build up the safety aspect while scheduling/planning his works which brings down the speed of the execution. The PD further recommends that the loss of efficiency @ 25%, which has been recommended by the Engineer, may be accepted.”

33. The AT further pointed out as under:

“The insurance cover as envisaged in the contract is available for the damage done to the life and property. No insurance covers the threat perception due to law and order problem and resultant prolongation of the contract period, which further reduces the utilization of resources man, material and machinery. The Respondents’ contention in this respect also deserves rejection.”

34. The Court is unable to discern any legal infirmity in the above reasoning and conclusion of the AT. It was certainly a plausible view to take and cannot be held to be perverse. It is based on the correct analysis of the governing clauses of the contract. In this context, the Court would like to refer to the following observations of the Supreme Court in *National Highways Authority of India v. ITD Cementation India Limited* (supra) where after noticing the decisions in *McDermott International v. Burn Standard Co. Ltd.* (supra), *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram* (2012) 5 SCC 306, *Sumitomo Heavy Industries Ltd. v. ONGC* (2010) 11 SCC 296 and *Associate Builders v. DDA* (2015) 3 SCC 49, the Supreme Court held as under:

“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.”

35. Therefore both as regards Claims 1 and 3, the AT has undertaken a very detailed analysis of not only the facts on record but also the governing clauses. In this context it must be noted that the claim for cost compensation under Clause 1.1 (g)(i) has been held to be permissible to a Contractor by the DB this Court in *NHAI v. Hindustan Construction Company (supra)* and *National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd.-Gammon India Ltd. (JV) (supra)*. There is, therefore, no scope for interference with the above determination by the AT.

Claims 2 and 4

36. Claim No.2 was for additional payment towards security measures in the sum of Rs.7,33,68,237 along with interest @ 12% p.a. from 30.11.2005 to the actual payment. The case of the Respondent was that the nature of the law and order problem was unprecedented and unforeseeable at the time of submission of the bid. This qualified for EOT as well as additional cost under Clause 12.2 of the contract. The fact of there being adverse effect of the law and order problem was acknowledged by the Engineer as well as the Project Director (‘PD’).

37. The AT noted that sufficient material has been placed before it by the Respondent to establish that additional security measures had to be taken at the site for completion of the work. The PD had also admitted that “due to the threat perception at the site the contractor is not able to deploy required

level of resources, he had to build up the safety aspect while scheduling/planning his works which brings down the speed of the execution.” The terrorist attack on the Madan Pur Camp on 31st January 2003 required deployment of additional forces by the Respondent as well as armed police by the State of Bihar.

38. The details of the amounts spent by the Respondent for the facilities of accommodation, touring and conveyance of the armed forces provided from 1st January 2002 to 30th November 2005 were examined carefully by the AT. As regards the coverage of the risk by insurance, the AT observed that the insurance would only indemnify loss of life and property and not threat perception. Further the Respondent had been submitting the contemporary record both to Engineer as well as NHAI regularly including the details of the persons employed through muster rolls and payments received for verification. However, the Engineer did not indicate any exercise of verification.

39. The details submitted by the Respondent in support of the claim made were examined carefully by the AT. As against the claimed amount, the AT awarded Rs.17,88,360.

40. Apart from repeating the submissions of the NHAI before the AT that there was an obligation on the Respondent to get the risk leading to provision for additional security also covered under the insurance policy, nothing has been shown to the Court by the NHAI to contest the actual figures of the expenditure incurred by the Respondent. These were unforeseeable obstructions in the form of a threat perception which was

accepted both by the Engineer as well as the NHAI itself through its PD. The AT has very carefully analysed the documents placed on record by the Respondent and granted only a relatively small percentage of claim.

41. The Court is unable to find any error having been committed by the AT in arriving at the above conclusion and in partly allowing Claim No.2.

42. Claim No.4 was for payment of additional cost due to service tax and Education cess amounting to Rs.6,39,942.00 with interest @ 12% p.a.

43. It was noted by the AT that the liability arose on account of the imposition of education cess and service tax by the Finance (No.2) Bill, 2004 enacted by the Parliament on 26th August 2004. 2% education cess on all taxes and duties was introduced and service tax was increased from 8 to 10% with effect from 30th July 2004. The said legislation was enacted after the bids were submitted and the claim, therefore, had to be considered under Clause 70.8. It was further found that subsequent legislation did place an additional burden which could not have been anticipated. It is on that basis that the claim has been allowed. The Court finds that this issue stands covered against NHAI and in favour of the Respondent by the decision in ***National Highways Authority of India v. ITD Cementation India Limited*** (*supra*).

44. Further, the award of interest at 12% (simple) p.a. *pendente lite* and 10% p.a. future simple interest cannot be said to be unreasonable.

Conclusion

45. No grounds have been made out, therefore, for interference with the

impugned Award dated 19th February 2010. The petition is dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

JANUARY 31, 2017

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