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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **OMP (COMM) No. 156/2016**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Mr. Adarsh B. Dial, Sr.
Advocate with Mr.
Mukesh Kumar,
Advocate

versus

HINDUSTAN CONSTRUCTION CO. LTD. Respondent

Through: Mr. Dayan Krishnan, Sr.
Advocate with Mr. Rishi
Agrawala and Ms.
Malvika, Advocates

CORAM:

JUSTICE S. MURALIDHAR

ORDER

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11.05.2018

Review Petition No. 200/2018 & I.A. 6545/2018 (delay)

1. The Court is not entirely convinced by the reasons adduced for the inordinate delay of 333 days in filing the present review petition. The Court is, therefore, not inclined to condone the delay.

2. Nevertheless, the Court proceeds to consider the review petition on merits as well.

3. The submissions of Mr. Adarsh B. Dial, learned Senior counsel for the Review Petitioner, National Highways Authority of India (NHAI) and Mr. Dayan Krishnan, learned Senior counsel for the Respondent, have been heard.

4. The present review petition has been filed following an order dated 4th December 2017 passed by the Division Bench in FAO (OS) (Comm) No. 154/2017, which was an appeal by the NHAI against the judgement under review dated 20th April 2017 passed by this Court in OMP (Comm) No.156/2016.

5. Mr. Dial himself appeared before this Court on behalf of the NHAI when the above OMP (Comm) No. 156/2016 was heard. In para 16 of the said judgment dated 20th April 2017, this Court noted *inter alia* that the issue in relation to Claim No.2, which concerned the “reimbursement of the additional cost incurred by the Respondent/Claimant on account of subsequent legislation in respect of imposition of levy of cess in the State of U.P.” was covered in favour of the Respondent/Claimant and against the NHAI by the decision of the Supreme Court in ***NHAI v. ITD Cementation India Limited (2015) 14 SCC 21***. The Court further noted in para 16 that Mr. Dial "very fairly stated that he did not press this part of the challenge to the impugned Award."

6. Now Mr. Dial refers to para 4.5 of NHAI's written synopsis dated 21st April, 2016 wherein on the claim relating to Cess it was stated:

“said issue has been decided by the Division Bench of this Hon’ble Court against the Applicant Authority, however, the same is now pending before the Hon’ble Supreme Court in Special Leave Petition No. 36693/2013 titled as *National Highways Authority of India v. Gammon Atlanta (JV)*, wherein the Respondent herein has also filed intervention application seeking to be heard by the Hon’ble Supreme Court on the issue.”

7. Mr. Dial accordingly contends that even if he had wrongly made a concession it should not be held against the NHAI. He submits that this Court should now clarify that it will be open to NHAI to urge before the Division Bench that it did not give up its case relating to Claim No.2.

8. The Court finds that the reference in para 4.5 of NHAI's written synopsis is to the decision of the Division Bench of this Court in *National Highways Authority of India v. Gammon Atlanta (JV) 2013 SCC Online Delhi 3149* which in turn referred to another decision of the Supreme Court in *Dewan Chand Builders & Contractors v. Union of India (2012) 1 SCC 101* and decided issue against the NHAI. Therefore, the issue concerning cess indeed stands decided against the NHAI as far as this Court is concerned.

9. Further, the Supreme Court in para 33.1 of its decision in *NHAI v. ITD Cementation (supra)* noted as under:

“With respect to a claim for reimbursement as a result of imposition of fresh “cess” with effect from 29-1-2004 i.e. after the formal agreement was executed in 2001. The claim was subject-matter of the arbitral award dated 13-11-2006 which was affirmed by the Single Judge and later by the Division Bench of the High Court vide judgments dated 2-7-2008 and 17-8-2009 respectively. **The decision was accepted and the appellant paid to the respondent sum of Rs.28,49,503 on 28-7-2010.** We are not concerned with this issue.” (emphasis supplied)

10. Since the NHAI, as noted by the Supreme Court in *NHAI v. ITD*

Cementation India Limited (*supra*), accepted the Award in that case insofar as the issue of cess was concerned, and the Division Bench of this Court held against the NHAI on the same issue in ***NHAI v. M/s Gammon Atlanta (JV)*** (*supra*), the concession by Mr. Dial as recorded by this Court is understandable. Therefore, contrary to what Mr. Dial might say today, it does appear that when the case was heard by this Court the concession made by him on behalf of NHAI was on account of the above legal position.

11. Interestingly, the same Division Bench (which is seized of the appeal against the order under review) on 23rd March 2018 decided the issue of cess against the NHAI in FAO (OS) Nos. 192 and 195/2017 by referring to the decision in ***NHAI v. Gammon Atlanta (JV)*** (*supra*). The net result is that the issue concerning cess stands decided against the NHAI.

12. Consequently, the Court finds no reason to issue any clarification with regard to the concession made by Mr. Dial as recorded in its order dated 20th April, 2017.

13. The review petition is dismissed both on grounds of delay and merits. The application IA No. 6545/2018 for condonation of delay is dismissed.

S.MURALIDHAR, J.

MAY 11, 2018

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