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

+ O.M.P. (COMM.) 260/2016

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Mr. Rajiv Kapoor & Mr. Srikant Sharma,
Advocates.

versus

CEC-HCC JOINT VENTURE Respondent

Through: Mr. Dayan Krishnan, Senior Advocate with
Ms. Malavika Lal & Ms. Aakash Lodha,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

20.03.2017

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1. The challenge in this petition, filed by the National Highways Authority of India ('NHAI') under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'), is to an Award dated 31st March, 2014 passed by the Arbitral Tribunal ('AT') by a majority of 2:1 in the disputes between the NHAI and the Respondent CEC-HCC Joint Venture, arising out of a contract agreement for the work of Rehabilitation and Upgrading of KM 253.00 to KM 316.00 of NH-76 to 4 lane configuration in the State of Rajasthan, (EW-II), Construction Package EW-II RJ-7.

Background facts

2. The contract was a unit rate contract. The bidding documents contained the detailed Bill of Quantities ('BOQ'). The parties adopted the terms and

conditions as contained in the General Conditions of Contract ('GCC') and Special Conditions of Contract ('SCC') as well as the Conditions of Particular Application ('COPA'). The stipulated date of completion was 26th April, 2008 whereas the actual date of completion was 5th December, 2008. The total extended period was 7.33 months. The value of the contract was Rs.375,98,48,628.

3. After the completion of the work the Respondent raised an issue of additional payment for the losses suffered by it on account of the delay in the completion of the project. After the Engineer rejected the claim of the Respondent, the matter was referred to the Dispute Review Board ('DRB'), which expressed its inability to decide the disputes. They were then referred to the AT.

The impugned majority Award

4. By the impugned Award, the AT by a majority of 2:1 decided Dispute No.4 i.e., the claim for payment of additional cost for a total sum of Rs.3,143.68 lakh together with interest @ 10% per annum compounded monthly from 16th October, 2009 till the date of Award. Future interest was awarded @ 15% per annum in the event of NHAI's failure to make the payment within 90 days of the Award. Dispute No.5 pertained to amounts withheld due to incorrect base price and method adopted for computation of price adjustments in accordance with Clause 70.3 of the COPA. No Award was made in respect thereof since the Respondent withdrew the said claim as recorded in the AT's order dated 25th January, 2014.

5. The third Arbitrator, who was nominated by NHAI, gave a dissenting

note.

6. This Court has heard the submissions of Mr. Rajiv Kapoor, learned counsel appearing for the NHAI and Mr. Dayan Krishnan, learned Senior Advocate appearing for the Respondent.

Error in the name of the Respondent

7. At the outset it is submitted by Mr. Rajiv Kapoor, learned counsel appearing for the NHAI that the majority Award is *non est* since it has been announced in favour of an entity different from the Respondent. The name of Respondent as shown in the impugned majority Award is 'HCC-CEC Joint Venture' whereas the correct name of the Respondent is 'CEC-HCC Joint Venture'. It is submitted that the Respondent ought to have filed an application for correction of the name in the absence of which the Award is *non est*.

8. The Court finds this objection to be hyper technical. It does not qualify as a valid objection for the purposes of Section 34 of the Act. The Court clarifies that the name in the cause title of the impugned majority Award is in fact a reference to the Respondent i.e. 'CEC-HCC Joint Venture'. The error in naming it as HCC-CEC Joint Venture is typographical. The pleadings before the AT also clearly show that the name of the Respondent was indeed 'CEC-HCC Joint Venture' and should be read as such. There is, therefore, no merit in this objection of the NHAI.

Consultation among the members of the AT

9. The next objection is that from the note of the dissenting Arbitrator it was

apparent that “in all the internal meetings as conducted by the AT, there was no discussion at all as regards the amounts or quantification of the claim, thus, it becomes imperative to conclude that the awarded amount by the majority was never discussed and there being no deliberations on the same, it is not possible for even the two consenting members of the AT to have arrived at a decision mutually OR in the alternative, it is to be taken that the two majority Arbitrators were holding some secret meetings without the knowledge of the third arbitrator, in any case, this being a serious misconduct, the award deserves to be set aside out right.”

10. It is pointed out by Mr. Dayan Krishnan that a similar contention was rejected by this court in several of its decisions. In particular, he referred to the decision dated 17th February, 2016 of the Division Bench (DB) of this Court in FAO (OS) No.502/2015 (*National Highways Authority of India v. Hindustan Construction Co. Ltd.*) and the decision dated 15th July, 2008 in FAO (OS) No. 248/2007 (*Government of India Bharat Sanchar Nigam Limited v. ACOME & Ors.*).

11. Mr Krishnan also pointed out that the majority Award has dealt with this particular aspect by referring to the letter dated 17th March, 2014 written by the Presiding Arbitrator to the dissenting Arbitrator. Indeed in the said letter, the Court finds that the learned Presiding Arbitrator has this to say to the dissenting Member of the AT:

“During these meetings, all three of us have discussed about the admissibility of the Claim as well as on the merits of all the sub claims pertaining to the extended stay cost, in detail with you. Both of us (i.e. myself & Shri. Bahri) arrived at a conclusion for stated reason that the Claim is admissible and all the subheads of the claims are also

permissible subject to some modifications, i.e. deletion/corrections in quantification. Whereas, you were of the view that the claim itself is not tenable and consequently none of the subheads of claims are admissible. The deletions/corrections that were to be made were also discussed amongst all the three of us in detail, which are as follows:”

.....

“After having concluded our discussion during the internal meetings as stated above, and having agreed and intimated to the parties that the award would be published on 31.03.2014, we are in a quandary with regard to your request. I would also like to inform that you have dissented with the majority view and have rejected the claim at the threshold itself for the stated reason. While that being so your request for providing the details on the determination of the amounts under various heads of the Claim by the majority members, to enable you to offer appropriate comments, lacks any acceptable basis legally or otherwise. You may also be well aware that in an Arbitral Proceedings the decision of the majority of Arbitrators is their own and the decision of the other dissenting Arbitrator is his own. No one has any authority to comment on the decision of the other.

In view of the above clarifications which truly reflect the correct position of the discussion and conclusions during internal meeting I hope that this would clear the nebulous in your mind.”

12. Section 31(2) of the Act states that the signatures of the majority of all the members of the AT shall be sufficient. In view of the above letter of the Presiding Arbitrator, it is not possible to accept the plea of NHAI that there was no discussion amongst the members of the AT as regards the claim and sub-claims. The majority was, therefore, within its rights to proceed to issue its Award. The dissenting Arbitrator was not prevented from giving his dissenting opinion. Consequently the Court is unable to accept the plea of the NHAI that the Presiding Arbitrator “was holding some secret meetings” and that there was any “serious misconduct.” This is not a matter which

attracts any of the grounds under Section 34 of the Act and in particular the ground of an Award being invalid for being opposed to the fundamental policy of Indian law.

Responsibility for the delay in completion of the project

13. Mr Kapoor took exception to the finding in the majority Award that it was the NHAI which was responsible for the delay in completion of the project. Mr Kapoor placed reliance on the decision in ***Kailash Nath & Associates v. New Delhi Municipal Committee 2002 (3) Arb. LR 631 (Del) (DB)*** where it was held that merely because EOT was granted by the employer in that case it did not mean that the employer was responsible for the delay or that it had admitted its liability resulting therefrom.

14. The Court finds that there is a detailed assessment of the Extension of Time (EOT) granted from time to time. An EOT assessment table has been set out in para 9.5.5 of the impugned majority Award. The majority Award noted that the EOT determined by the Engineer was accepted by the NHAI. Further, the majority Award noted that whereas the EOT determined by the Engineer was for 255 days, the EOT approved by the NHAI was only for 223 days limiting it to the date of completion of work. The Engineer had only considered those delays that were not attributable to the Respondent herein and had determined the EOT on that basis. The NHAI has also accepted the reasons given by the Engineer for the EOT. Accordingly the majority Award concluded that the extension of the contract period from 27th April, 2008 to 5th December, 2008 was on account of delays/defaults of the NHAI and for reasons not attributable to the Respondent.

15. The Court is unable to discern any legal infirmity in the said factual finding based as it is on a proper appreciation of the evidence before the AT. The reliance placed by the NHAI on the decision in ***Kailash Nath & Associates v. New Delhi Municipal Committee*** (*supra*) is misplaced since in the present case the evidence has been discussed in detail by the majority to arrive at a definite conclusion that the NHAI was responsible for the delay in completion of the project.

Interpretation of the TS Clauses

16. Mr Kapoor submitted that the majority Award erred in shifting the responsibility for removal of the encroachments on to NHAI. It selectively read Clauses 110.3 and 110.6 of the Technical Specifications ('TS'), which when read as a whole gave a different interpretation and meaning. He also referred to the minutes of the pre-bid meetings (PBMs), which showed that the attempts by the Respondent to have the above clauses changed was unsuccessful. This, according to him, distinguished the present case from the one in FAO(OS) No. 402/2014 (***National Highways Authority of India v. Hindustan Construction Company***) in which the DB gave a decision dated 24th February, 2016.

17. As regards the PBMs and the discussions with regard to the Clause 110 of the TS, Mr. Krishnan is right in his contention that the Respondent's responsibility as per this clause was limited only to co-ordinating with the service providers. It was indeed not the responsibility of the Respondent to actually ensure the removal of the encroachments by obtaining the permissions. The above findings of the majority Award are based on an

analysis of the relevant clauses of the contract as well as the evidence on record. It is a plausible view to take. As explained by the Supreme Court in *NHAI v. ITD Cementation India Limited (2015) 14 SCC 21*, where it was 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.”

Assessment of damages

18. It was next contended by Mr. Rajiv Kapoor that damages to the extent of Rs. 47 crore have been awarded which works out to more than 10% of the contract value. This was computed on the basis of a certificate of a Chartered Accountant (‘CA’) engaged by the Respondent. According to Mr Kapoor this was arbitrary and unreasonable. He submitted that in terms of Section 73 of the Indian Contract Act, 1872 (‘ICA’) the burden was on the Respondent to show that there was a breach by the NHAI of its obligations under the contract; that it had actually suffered losses as a result of such breach; and that it had mitigated the losses to the extent possible.

19. Mr Kapoor criticised the decision of the majority not to assign evidentiary value to the internal document (R6) written by the Engineer to NHAI while at the same time accepting the certificate of the CA engaged by the Respondent. This according to him showed the bias of the AT.

20. The Court does not view the majority Award in the manner suggested by Mr Kapoor. The majority Award was based on an appreciation of the evidence. The decision as to the weightage to be given to a document was for the AT to take. The Court does not sit in appeal over an Award. The Court is not expected to re-appreciate the evidence and interfere with the Award only because a different view is possible on an appreciation of the evidence.

21. In this regard the Court finds merit in the contention of Mr. Krishnan that the production of certificate of the CA was consistent with Section 65(g) of the Indian Evidence Act, 1872. It was possible for the Respondent to lead secondary evidence on the aspect of finance and accounts and that is what the Respondent has done by producing the certificate of the CA. The decision of the DB of this Court in ***National Highways Authority of India v. Hindustan Construction Co. Ltd.*** (*supra*) observed as follows in a more or less similar case:

“31. On the subject of additional costs on account of extending stay of plant and equipment at site the argument that the majority and the minority awards are without any evidence is wrong for the reason we find that the manner of proof contemplated by the parties was a certification by the Chartered Accountant of HCC to file compilation with reference to the account books, stock register etc. of HCC. Record of the Arbitral Tribunal shows that the Chartered Accountant did the necessary ground work and filed a tabulation with reference to the books maintained by HCC. The extract of the compilation, summarized by the Chartered Accountant, forms part of the majority award in the form of enclosures to Annexure 1 to the award and we find that the learned Chartered Accountant has extracted the equipment deployed during the extended period of the contract Based on the jointly signed monthly reports. This has been highlighted by the majority award while annexing the tabulation as an Annexure to

the award. The entire equipment used at the site, with reference to the jointly signed monthly reports is reflected in the Annexure. Section 65(g) of the Indian Evidence Act, 1872 reads:

“65. Cases in which Secondary evidence relating to documents may be given:

Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:

(a) – (f)

(g) When the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole connection.

In case (g), evidence may be given as to general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.”

22. The majority has discussed in great detail the substantive Indian law in respect of entitlement for compensation for delay in performance of the contract attributable to one of the parties. The reasons that weighed with the majority to not permit NHAI to rely on the letter (R6) written by the Engineer have been set out in considerable detail in the impugned Award. The following observations of the DB in ***National Highways Authority of India v. Hindustan Construction Co. Ltd.*** (*supra*) apply on all fours to the case on hand:

“24. The majority award is fairly lengthy and written by men with non legal background and thus has a fair amount of diffusion of thoughts, and to a reader does cause some degree of discomfort and one gets the feeling of being taken around the forest and have an experience akin to the one on a safari on a tiger sighting. But, the distillate of the majority opinion could be summarized that for such elements of recompense which are not provided in the contract, if there is breach by a party, the other party would be entitled to remedy the loss

incurred as a direct consequence of the breach.

25. The view taken by the majority Arbitrator conforms to the principles of law relating to damages and we simply note that for a similar contract such damages awarded have been upheld by this Court. The decision is dated January 31, 2013 in FAO (OS) No.461/2012 *NHAI Vs. Oriental Structural Engineers Pvt. Ltd.....*”

23. Consequently the Court rejects the plea of the NHAI that the above findings of the majority are contrary to Section 73 of the ICA or Section 28 of the Act or it is based on an incorrect or incomplete reading of the relevant clauses of the contract.

Non-compliance with requirements of notice

24. As regards the point made by Mr Kapoor on behalf of the NHAI regarding the failure by the Respondent to give a proper notice of its claim for additional payment, there is a detailed discussion in the majority Award in para 9.8.2. The Court finds the reasoning in the majority Award to be consistent with the legal position. It was rightly pointed out by the majority that if the argument of the NHAI that the failure to comply with Clause 53.1 was fatal to the claim were to be accepted, then Clauses 53.4 and 60.11 and 60.14 of the COPA, which permit the contractor to claim any further sums which he considers due to him under the contract, would be rendered otiose. Indeed there is nothing in the contract to indicate that the failure to comply with Clause 53.1 would permanently extinguish the claim of the contractor. The Court is unable to find any legal infirmity in the above analysis of the clauses of the contract and the conclusions reached in that regard by the majority.

Conclusion

25. The Court does not find the majority Award to be perverse, much less to be suffering from any patent illegality or opposed to the fundamental policy of Indian law. None of the grounds under Section 34 or Section 28 (3) of the Act stand attracted.

26. The petition is dismissed but in the circumstances no orders as to costs.

MARCH 20, 2017

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S. MURALIDHAR, J.

