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

Reserved on: March 6, 2017
Date of decision: April 20, 2017

+ **O.M.P. 1165/2014**
+ **O.M.P. 1556/2014**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through: Mr. Mukesh Kumar & Ms. Gunjan Sinha
Jain, Advocates.

versus

HINDUSTAN CONSTRUCTION CO. LTD. Respondent
Through: Mr. Dayan Krishnan, Senior Advocate with
Ms. Malavika Lal, Advocate.

+ **O.M.P. (COMM.) 156/2016**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through: Mr. A.B. Dial, Senior Advocate with Mr.
Mukesh Kumar & Ms. Gunjan Sinha Jain,
Advocates.

versus

HINDUSTAN CONSTRUCTION CO. LTD. Respondent
Through: Mr. Dayan Krishnan, Senior Advocate with
Ms. Malavika Lal, Advocate.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T
20.04.2017

1. These are three petitions under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') filed by the National Highways Authority of

India ('NHAI') which give rise to common questions and, therefore, are being disposed of by this common judgment.

2. OMP (Comm.) No. 156/2016 is directed against an impugned majority Award dated 13th June, 2015 passed by the majority of the Arbitral Tribunal ('AT') in the disputes between NHAI and the Respondent, Hindustan Construction Company Limited ('HCCL') (also referred to as 'Contractor') arising out of the award by the NHAI in favour of HCCL of a Contract Package for four-laning from KM 45 to KM 92 of Lucknow-Ayodhya Section of NH-28 in Uttar Pradesh (U.P.) – Contract Package LMNHP-EWII-WB-2.

3. OMP No. 1165/2014 is directed against an Award dated 28th May, 2014 passed by the majority of the AT in the disputes arising between the parties out of the Contract Package for four laning from KM 9 to KM 45 of Lucknow to Ayodhya Section of NH-28 in U.P. – Contract Package LMNHP EX-II WB-1.

4. OMP No. 1556/2014 is directed against an Award dated 22nd July, 2014 passed by the majority of the AT in the disputes between the parties arising out of the Contract Package four-laning from KM 92 to KM 135 of Lucknow to Ayodhya Section of NH-28 in U.P. – Contract Package LMNHP EX-II WB-3.

OMP (Comm.) No.156/2016

5. The Court proceeds to first deal with the issues that have arisen in OMP (Comm.) No. 156/2016 as that was what was argued first. The submissions

on behalf of NHAI were advanced by Mr. A.B. Dial, learned Senior Advocate and on behalf of HCCL by Mr. Dayan Krishnan, learned Senior Advocate.

6. Claim No. 1 was for fixation of new/appropriate rate for varied work of construction of embankment at Ramsnehighat Bypass with earth obtained from the Contractor's borrow areas, in place of flyash embankment as provided for in the Contract. The case of NHAI was that the said claim by HCCL was not maintainable. The Bill of Quantities ('BOQ') provided for item Nos. 2.02, 2.03 and 2.08 for construction of embankment. Item No. 2.02 was for construction with borrow pit soil, Item 2.03 with excavated earth obtained from drains, foundations, etc. and Item 2.08 with flyash from thermal power stations. Out of the total quantity of 5,00,336 cubic metres (cum) for all the three items above, the quantity of Item No. 2.08 was only 33,170 cum, which worked out to about 7% of the total quantity. On being brought to its notice by HCCL by the letter dated 4th December, 2006, the Engineer realised that the quantity of Item No. 2.08 for embankment with flyash was inadequate. In consultation with NHAI, the Engineer instructed HCCL to restrict the quantity of Item No. 2.08 to 33,170 cum and to carry out the further work of embankment with earth obtained from HCCL's borrow areas.

7. NHAI contends that Clause 51.1 of the General Conditions of Contract ('GCC') permits the Engineer to vary both the quality and quantity of the work as may be necessary in his opinion and accordingly instruct the Contractor. Clause 52.1 of the GCC provides that variations under Clause 51

are required to be determined in terms of Clause 52 and valued at rates set out in the Contract, if in the opinion of the Engineer, the same shall be applicable. The Engineer valued the work in terms of the said clauses. It is stated that under Clause 52.2 of the GCC, the Engineer was empowered to fix rates.

8. According to NHAI, no new item had been introduced and the increase in the quantity had to be considered as an increase in BOQ Item No. 2.02. The payment for such increased quantity was admissible in terms of Clause 52.1 of the GCC subject to further adjustment in terms of Clause 52.2. In terms of the proviso to Clause 52.2 of the Conditions of Particular Application ('COPA'), no change in rate or price of any item was admissible unless such an item accounted for more than 2% of the contract price and the actual quantity of work executed exceeded the quantity of BOQ by more than 25%. Admittedly, the quantity of BOQ Item No. 2.02 increased by more than 25%. However, the total cost of the item executed was only 1.696% of the contract price, which was less than 2% of the contract price. Accordingly, it was contended by NHAI that no revision in the rate was called for and that the Engineer was right in rejecting the request of HCCL for fixing new rates.

9. The case of HCCL, on the other hand, was that the above instructions of the Engineer were against the provisions of the Contract and were carried out purely to commercially and economically benefit NHAI at the cost of HCCL. It is submitted that the Contract did not provide for the construction of the embankment at Ramsnehighat Bypass with borrow earth. As per the bidding data, the embankment at Ramsnehighat Bypass was to be

constructed with flyash. Consequently, the rate for BOQ Item No.2.02 was inapplicable to the Ramsnehighat embankment. Alternatively, it was submitted by HCCL that Clause 52.2 of COPA envisages fixing of new rates when the stipulated quantity is abnormally increased during execution and the BOQ rate is rendered inappropriate. It was pointed out that the Dispute Resolution Board ('DRB') recommended the fixation of a new rate. Pursuant thereto, the Engineer fixed the new rate at Rs. 123.02 per cum.

10. The majority of the AT accepted the plea of HCCL and held that the instructions to use borrow earth instead of flyash by the Engineer amounted to change in scope of work, which in turn required fixation of a new rate. The majority Award fixed the new rate by taking the rate fixed by the Engineer as the base rate and thereafter correcting it for discrepancies in the working/computation. It fixed the rate at Rs. 143.80 per cum. The majority AT did not accept the HCCL's claim of Rs. 163.68 per cubic metre. It is pointed out by HCCL that NHAI did not challenge the Engineer's fixation of rates after the DRB's recommendation. Therefore, it was now not open for NHAI to insist that the rates as per Item 2.02 BOQ ought to be applied.

11. In this context, the Court would like to refer to the following findings of the impugned majority Award:

- a. The substitution of earth embankment in place of flyash embankment was a change in the scope of work. This change was required to be regularised by a variation order.
- b. The Engineer was not correct in certifying the quantities of embankment

at Ramsnehighat Bypass with earth obtained from the Contractor's borrow area at the rates agreed against Item No. 2.02 of the BOQ.

c. The action of the Engineer in directing the use of borrow earth instead of flyash to complete the construction of the Ramsnehighat bypass embankment was driven by economic considerations in the interest of NHAI. It was a change in the scope of work and called for the fixation of a new rate.

12. After accounting for the payment made in Interim Payment Certificates ('IPCs'), a sum of Rs. 3,43,77,450 was found by the majority Award to be payable by NHAI to HCCL. In addition, HCCL was held entitled to interest at 12% per annum compounded monthly on all the amounts due from the date of cause of action till the date of payment in terms of Sub-Clause 60.8 of the COPA read with Appendix to Bid.

13. It must be noted at the outset that the settled legal position is that the scope of interference by the Court with an arbitral Award under Section 34 of the Act is extremely limited. In *NHAI v. ITD Cementation (2015) 14 SCC 21*, the Supreme Court explained:

“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.”

14. The majority Award came to a definite conclusion that the decision of

the Engineer by his letter dated 20th March, 2007 instructing HCCL to use borrow earth instead of flyash would result in a saving of additional cost of Rs. 6 crore by NHAI. It was for this reason that the majority concluded that this decision was for the commercial and economic benefit of NHAI. Indeed, the original scope of the work envisaged the embankment at the Ramsnehighat Bypass being constructed entirely of flyash. Therefore, the above instruction of the Engineer could not be considered as a mere variation in the quantity of work.

15. The submission that the total cost of the item executed was only 1.696% of the contract price, which was less than 2% of the contract price and, therefore, no revision in the rate was called for overlooks the fact that this was not a mere change in the quantity and, correspondingly, a change in the price but a change in the scope of the work itself. The view taken by the majority AT was an entirely plausible one and cannot be said to be perverse warranting interference under Section 34(2)(b)(ii) of the Act.

16. Claim No. 2 concerned reimbursement of 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. with effect from 4th February, 2009. This aspect of the impugned Award stands covered entirely in favour of the HCCL and against the NHAI by the decision of the Supreme Court in **NHAI v. ITD Cementation** (*supra*). Mr. Dial very fairly did not press this part of the challenge to the impugned Award.

17. Dispute/Claim No. 3 concerned withholding of part payment due towards price adjustment on foreign currency portion from IPC. As per

Clause 72.2 of the GCC, the payments were to be made in proportion of 87.5% in Indian Rupees and 12.5% in Euros. Clause 70.3(c)(viii) provided for the total value of the work to be expressed as the total value of work in Indian Rupees and value of work in Euro. The Contract stipulated with 15% of the foreign currency portion is fixed and not liable for price adjustment. Accordingly, the adjustable portion towards salaries of expatriate staff and labour, and plant machinery and spares was adjustable being 85% of the foreign currency payment.

18. HCCL submitted its bills after accounting for the 15% non-adjustable portion which was certified by the Engineer till IPC-20. However from IPC 21 onwards, the Engineer revised the certification after applying a factor of 85% over and above the adjustable portion of foreign currency payment corresponding to only 72% of Euro component being adjustable as compared to 85% as permitted by the contract. The AT, on the analysis of the above clauses, held that since both parties had agreed that HCCL would receive payments both in Indian Rupees and in Euros, HCCL was entitled for payment of price adjustment on 85% of foreign currency component and the balance 15% of the foreign currency component was non-adjustable. This non-adjustable foreign currency part has no relation with the reduction factor of 0.85 applicable in the formula for working out the price. It is pointed out that even the Engineer had accepted HCCL's case up to IPC 20 and thereafter unilaterally changed without any basis.

19. According to NHAI, the factor 0.85 was common to all the formula for price adjustment. In other words, it is submitted that the provisions of the

Contract are very clear that whatsoever be the value/amount of the price adjustment on the basis of other inputs in the formula, it is to be multiplied by a constant factor of 0.85 to arrive at the net amount payable for the price adjustment in any currency.

20. The view taken by the majority AT that the non-adjustable foreign currency has no relation with the reduction factor of 0.85 applicable in the formula for working out the price adjustment appears to be an entirely plausible view. In fact, the Engineer himself had agreed with this view till IPC 20. NHAI is unable to show on what basis it can be said that the above view of the majority AT is perverse or shocking to the judicial conscience. Going by the settled legal position as explained in *NHAI v. ITD Cementation* (*supra*) and *Associate Builders v. DDA (2015) 3 SCC 49*, the Court is not inclined to hold that the above determination of the majority attracts any of the grounds set out under Section 34(2)(b)(ii) of the Act. Consequently, there is no merit in the challenge to the impugned majority Award as far as Claim No. 3 is concerned.

21. Claim No. 4 was for fixation of appropriate rate for additional work of construction of viaduct at KM 83.275. As against the amount of Rs. 21,81,16,732 claimed by HCCL, the AT has awarded Rs. 18,07,21,000. It is pointed out by NHAI that the construction of the viaduct in place of retaining wall and underpass with a total length of 937 metres was a variation order and instructions for this variation were issued by NHAI and the Engineer. The case of HCCL was that since no rates were available in the Contract, suitable new rates had to be fixed. The case of NHAI and the

Engineer was that the rate of construction of viaduct was available in the Contract Agreement. In terms of Clause 52.1 of the GCC, HCCL was entitled to BOQ rates.

22. The question before the AT was whether HCCL would be entitled to BOQ rates as adopted by the Engineer or rates derived on the basis of actual cost of input or price as claimed by HCCL. The case of HCCL was that it was also entitled to new rates of the viaduct on account of change in the physical conditions referred to in Clause 12.2 of the GCC. NHAI submitted that the change in structural arrangement of the work from KM 82.6 to KM 84.13 was on account of technical requirement due to low bearing capacity of soil. This, according to NHAI, was a known phenomenon. A contractor as experienced as HCCL could not be held to be unaware of such situations. Consequently, treating it as a variation under Clause 12.2 and asking for new rates to be fixed was not tenable.

23. The majority accepted the plea of HCCL that in the category of works referred to in Bill No. 6 of BOQ, there was no nomenclature of viaduct. The majority did not accept the plea of NHAI that a viaduct “is a bridge like structure” or was “similar to road over bridge (ROB)” so far as the nature of work, methodology of design and construction, technical specifications and other activities were concerned. What has been found by the majority of the AT is that due to poor ground conditions at site, which were found unsuitable for construction of retaining walls beyond 7 metres, NHAI decided to adopt a viaduct in place of high embankment. The Contract did not envisage such change in construction. The Engineer by letters dated 23rd

August, 2008 and 8th September, 2008 directed HCCL to carry out the construction of viaduct in place of retaining walls. Thus, the original scope of work allotted to HCCL was totally modified. In order to demonstrate that viaduct and embankment are different types of constructions, reliance was placed on the decision in *Union of India v. Tania Constructions Private Limited* (decision dated 18th April, 2011).

24. Further, the majority has referred to the Engineer's letter dated 24th May, 2010 where he admitted that the viaduct work was a variation and change in the scope of work. The majority accepted the plea of HCCL that:

"The viaduct structure compared to Bridge/Underpass structure involves intricate construction. In that it comprises RCC/PSC girders totaling 56 spans. Also the nature, construction and input requirements are different. In case the Claimant had known before hand he would have planned execution differently. In that case such huge number of PSC girders, he would have precast the same instead of cast-*insitu*. This would have been economical. Also the shuttering and temporary structures required including the method of launching would have been less time consuming and different."

25. It is for this reason that the majority rejected NHAI's contentions. It was the responsibility of the HCCL to ensure sufficiency of physical conditions. However, this was limited to the extent of designs provided and the scope of work indicated in the tender. HCCL was neither the designer nor was it assigned the work of soil exploration. An entirely different situation arose during the course of construction. The inappropriateness of the soil for the construction of the retaining wall was unforeseen. This would fall for consideration under Sub-Clause 12.2 of the GCC and was independent of Sub-Clause 51.1 and other sub-clauses. The view taken by the majority AT

again appears to be on the basis of the correct interpretation of the various clauses and it was a plausible view to take. It has not been shown to be perverse or shocking to judicial conscience. The majority's views are reasonable and based on contemporaneous evidence. Consequently, no ground has been made out under Section 34(2)(b)(ii) of the Act to persuade the Court to interfere with the impugned majority Award in relation to Claim No. 4.

26. The net result of the above discussion is that the impugned majority Award dated 13th June, 2015 in the disputes arising out of Contract Package for four-laning from KM 45 to KM 92 of Lucknow-Ayodhya Section of NH-28 in Uttar Pradesh (U.P.) - Contract package LMNHP-EWII-WB-2 is hereby upheld and OMP (Comm.) No. 156/2016 is dismissed with costs of Rs. 20,000 which would be paid by the NHAI to HCCL within four weeks.

OMP No. 1165/2014

27. It may be recalled that this petition by NHAI challenges the impugned majority Award dated 28th May, 2014 in the disputes arising out of the Contract Package for four-laning from K.M. 9 to K.M. 45 of Lucknow to Ayodhya Section of NH-28 in U.P. – Contract package LMNHP EX-II WB-1.

28. Claim No. 1 was for fixation of appropriate rates for the new/varied work of construction of embankment at Faizabad bypass with earth in place of flyash embankment as provided for in the Contract. Claim No. 1 was allowed in favour of HCCL by the majority of the AT.

29. The challenge to this part of the impugned Award must fail in view of what has been held hereinbefore by this Court in respect of an identical claim in OMP (Comm.) No. 156/2016.

30. Claim No. 2 concerns reimbursement of additional costs on account of implementation of the provisions of cess. This too stands covered against NHAI and in favour of HCCL in view of the decision of the Supreme Court in *NHAI v. ITD Cementation* (supra).

31. Claim No. 3 pertains to less payment of escalation on foreign currency. In view of the decision of this Court in OMP (Comm.) No. 156/2016, this challenge, too, must fail.

32. The impugned majority Award dated 28th May, 2014 of the AT is upheld in its entirety. The petition is dismissed with costs of Rs. 20,000, which would be paid by NHAI to HCCL within four weeks.

OMP No. 1556/2014

33. The challenge in this petition by NHAI is to the impugned majority Award dated 22nd July, 2014 in the disputes between the parties arising out of Contract Package for four-laning from K.M. 92 to K.M. 135 of Lucknow to Ayodhya Section of NH-28 in U.P. – Contract Package LMNHP EX-II WB-3.

34. Claim No. 1 is for fixation of new/appropriate rates for the varied work of construction of embankment at Faizabad Bypass with earth in place of flyash embankment as provided for in the Contract. This issue stands

completely covered against NHAI and in favour of HCCL in view of the decision hereinbefore in OMP (Comm.) No. 156/2016.

35. Claim No. 2 was for payment for construction of embankment with flyash as per additional technical specification clause A-8. This issue, too, stands covered by the decision hereinbefore in OMP(Comm.) No. 156/2016 against NHAI and in favour of HCCL.

36. Claim No. 3 is for reimbursement of additional cost incurred on account of subsequent legislation in respect of levy of cess in the State of U.P. This issue stands covered against NHAI by the decision of the Supreme Court in *NHAI v. ITD Cementation* (*supra*).

37. Claim No. 4 is for withholding the part payment due to price adjustment on foreign currency portion from IPC. This issue stands covered in favour of HCCL and against NHAI in view of the decision of this Court in OMP (Comm.) No. 156/2016.

38. The net result is that the impugned majority Award dated 22nd July, 2014 is upheld and OMP No. 1556/2014 is dismissed with costs of Rs. 20,000 which would be paid by NHAI to HCCL within four weeks.

39. The three petitions are dismissed in the above terms.

S. MURALIDHAR, J

APRIL 20, 2017

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