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

Judgment reserved on 26th July 2017

Judgment delivered on 1st September 2017

+ FAO (OS) 141/2017

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Mr.Abhijat,
Dr.Maurya Vijay Chandra,
Mr.Nikhil Parikshit Advs.

versus

BBEL-MIPL (JV)

..... Respondent

Through: Ms.Kiran Suri, Sr. Adv. with
Mr.Hitendra Nath Rath, Adv.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

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01.09.2017

C. HARI SHANKAR, J.

1. This appeal, under clause (c) of Section 37(i) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the Act”) impugns order, dated 23rd November, 2016, whereby the learned Single Judge has dismissed OMP 350/2015, filed by the appellant herein under Section 34 of the Act, per consequence affirming award, dated 27th February, 2015, passed by the learned Arbitral Tribunal adjudicating the dispute between the appellant and the respondent.

2. The challenge, before the learned Single Judge, as well as before this Court in appeal therefrom, is limited to the issue of whether price adjustment, claimed by the respondent and allowed by

the learned Tribunal, was available to permanent works referred to in the Bill of Quantities (hereinafter referred to as “BOQ”), in the contract entered into between the appellant and the respondent, or was applicable only to variations.

3. The learned Single Judge has noticed the fact that the said issue was not *res integra*, having been decided in an earlier dispute between the appellant and M/s KMC-RK-SD (JV), with respect to the same work forming the subject matter of the present appeal, as, prior to awarding the said work to the respondent, the appellant had awarded it to M/s KMC-RK-SD (JV). The learned Single Judge has observed that the dispute regarding availability of price adjustment on permanent works referred to in the BOQ, had arisen between the appellant and M/s KMC-RK-SD (JV), which had been decided by the learned Arbitral Tribunal, constituted in that case, in favour of M/s KMC-RK-SD (JV), holding the claim for price adjustment, on permanent works under the BOQ items, to be sustainable in law.

4. The said award was challenged, by the appellant, before this Court, vide OMP No.1043/2013, which was dismissed by the learned Single Judge vide order dated 22nd October, 2013. Appeals filed, thereagainst, were successively dismissed, by the Division Bench of this Court (vide judgment dated 1st April, 2014 in FAO(OS) 139/2014) and by the Supreme Court (vide order dated 17th November, 2015 in SLP (C) 20155/2014).

5. The issue having thus been concluded up to the Supreme Court, the learned Single Judge dismissed OMP 350/2015, filed by the appellant, as already noticed hereinabove.

6. In view of the fact that the issue appears to stand concluded, we had queried of Mr. Abhijat, learned Counsel for the appellant, as to the error which, in his perception, exists in the impugned order of the learned Single Judge. The response of Mr. Abhijat reveals that his grievance is essentially against the earlier judgment, dated 22nd December, 2013 of this Court in OMP 1043/2013 (*NHAI v M/s KMC-RK-SD (JV)*), and dated 01st April, 2014 in FAO (OS) 134/2014 (*NHAI v M/s KMC-RK-SD (JV)*). The response of Mr. Abhijat was, essentially, that the learned Single Judge, while deciding OMP 1043/2013 (*NHAI v. M/s KMC-RK-SD (JV)*), vide order dated 22nd October, 2013, had erroneously relied on an earlier judgment dated 08th March, 2010 in OMP 362/2008 (*NHAI v M/s Unitech-NCC JV*), which related to a dispute between the appellant and M/s Unitech-NCC JV (hereinafter referred to as “Unitech”) - which, in the submission of Mr Abhijat - was distinguishable on facts and in law.

7. Be it noted, here, that the judgement, dated 08th March 2010, in *NHAI v Unitech*, was, in fact, carried in appeal, by the appellant, vide FAO (OS) 338/2010 (*NHAI v Unitech*), which was dismissed vide order dated 30th August 2010. The appellant carried the matter upward, to the Supreme Court, vide SLP (C) 201/2011, which was tagged along with a number of similar SLPs [including SLP (C) 20155/2014 (*NHAI v. M/s KMC-RK-SD (JV)*) *supra*]. All the said

SLPs were dismissed by a common order, dated 17th November 2015, with a caveat, however, that "the question of law raised" was "kept open to be agitated in an appropriate case". Mr Abhijat, understandably, places considerable reliance on this caveat, to contend that the issue still looms large, inviting consideration on merits and that, therefore, we have, as it were, a *tabula rasa* before us.

8. Mr. Abhijat would, in other words, seek to assert that, as OMP 1043/2013 (*NHAI v. M/s KMC-RK-SD (JV)*), had been dismissed by erroneously placing reliance on the earlier judgment dated 08th March, 2010 in OMP 362/2008 (*NHAI v. Unitech*) and the question of law was ultimately left open by the Supreme Court, it was open to this Court to re-examine the entire issue and assess whether, in fact, price adjustment would be claimed by the respondent on items of work referred to in the BOQ, or only on variations.

9. (For ease of allusion, the decisions in *NHAI v. Unitech* and *NHAI v. M/s KMC-RK-SD (JV)* are referred to, hereinafter, as "*Unitech*" and "*KMC*", respectively.)

10. It would only be fair, to Mr Abhijat and the stand so assiduously canvassed by him before us, to scan the pronouncements of the learned Single Judge and the Division Bench in *Unitech* and *KMC*, and the order of the Supreme Court dismissing the SLPs preferred thereagainst, to assess their true import and consequence.

(i) **The Unitech case:**

(a) The judgement, dated 8th March 2010, of the learned Single Judge, commences with the cautionary note that *"if this petition is accepted, the effect would be that a perfectly valid, equitable and just interpretation of the contractual clause which entitles price vaciation and escalation in the contract spread over for completion in 32 months, is sought to be set at naught by the petitioner."*

(b) The grievance, of the appellant (who was the petitioner in the said case as well), with the arbitral award under challenge in that case, was to the decision, therein, *"to amend the obvious error arising in the contract and a typographical mistake in the same, whereby price variation and escalation was seemingly to be given only on deviation in the work, but not on the original quantity of contracted work as per the BOQ items."* The dispute in *Unitech (supra)* was, therefore, substantially the same as that arising in the present case.

(c) The learned Arbitral Tribunal, in *Unitech (supra)*, held thus:

"The price adjustment clause is applicable to all items of work. The reason is that in long term contracts the increase in the price and cost of inputs into the BOQ items during the period of execution is so uncertain and the Contractors are not excepted to bear such uncertain extra burden."
(Emphasis supplied)

This rationale, of the learned Arbitral Tribunal, was held, by the learned Single Judge, to be "unexceptionable".

(d) The learned Single Judge proceeds to observe that the dispute arose because of Clause 70.3 in the contract, which read thus:

“70.3 Adjustment Formulae (page 261 of the Contract):

The adjustment to the Interim Payment Certificates in respect of changes in cost and legislation shall be determined from the following formula:

$$P_n = A + b \frac{L_m}{L_o} + C \frac{M_n}{M_o} + d \frac{F_n}{F_o} + e \frac{B_n}{B_o}$$

Where,

“pn” is a price adjustment factor to be applied to the amount for the payment of the work carried out in the subject month, determined in accordance with Sub-clause 60.1 (d), where such variations and day work are not otherwise subject to adjustment”.

It was the contention, of the appellant in that case, that, by virtue of the underlined portion of clause 17.3 supra, escalation could be granted only on items of variation, and not on the original items/quantity of work agreed upon. In other words, the appellant contended that escalation and price variation were permissible only qua the derivation/extra work done. *The same clause has*

been pressed into service, by the appellant, in the present case as well.

(e) Para 5 of the judgment of the learned Single Judge in ***Unitech (supra)*** notes that the appellant relied upon clauses 60.1 and 70.3 to contend that price variation and escalation could not be granted, and that contract had to be interpreted as a *lump sum* contract in the original contracted value only. *Paras 24 to 29 of the award, in the present case, reveals that the appellant chose, before the ld. Arbitral Tribunal, to rely on the very same clauses 60.1 and 70.3 of the contract.*

(f) Para 7 of the judgment of the learned Single Judge in ***Unitech (supra)*** proceeds to record the finding, of the learned Arbitral Tribunal, to the effect that there was an error in clause 70.3 of the contract, and that escalation could not be limited to variation items preferred to in clause 60.1 (d). *In the present case, too, paras 61, 64 and 65 of the award of the learned Arbitral Tribunal hold that clause 70.3 could not be interpreted in such a manner as would limit the contractor's right, to the escalation, to variations alone.*

(g) *It is important to note, in this context, the fact that, in arriving at the said conclusion, the learned Arbitral*

*Tribunal significantly relied, in paras 61 and 62 of its award, on the earlier decisions of this Court in **KMC (supra)** and **Unitech (supra)**. The said para merits reproduction, in extenso, thus:*

*“61. The reading of Sub-Clause-70.3 and the definition of Pn, as dealt with earlier, also has an inbuilt lacuna that “determined in accordance with Sub-Clause-60.1(d), where such variations and day work are not otherwise subject to adjustment” is patently wrong and inapplicable because day work is included in Sub-Clause-60.1 (e). **In the case of National Highways Authority of India Vs. M/s. KMC-RK-SD (JV) OMMP No.1043/2013 decided by the Hon’ble High Court of Delhi in an identical contract** has upheld the contention of the Claimant, that it is necessary to interpret the Clause -70.3. In para 7 of the judgment, the court held “It is pertinent to note that this is only one of the many other reasons cited by the arbitral tribunal, as why, it chose the interpretive route as against literal application of Clause-70.3 of COPA”. Therefore we consider it as appropriate to interpret the Clause-70.3 in such a manner as to harmonize the Contract and remove the ambiguity.*

*62. **In National Highway Authority of India Vs. Unitech-NCC JV OMP No.362/2008 decided on 8th March 2010 by a single judge of the Delhi High Court, the issue was absolutely identical as regards the clauses of the Contract in the present case before us and in appeal***

by the NHAI against an award in favour of the Respondents therein, the High Court upheld that the Sub-Clause-70.3 of the Contract is just and appropriate to have been interpreted by the Arbitral Tribunal as entitling the Contractor for price adjustment on the BOQ Items and finally dismissed the appeal of the NHAI.

It would be of use to reproduce the observations of the single judge under Para-9 of the judgment “Can it be contended, that in a Contract which is valued approximately of Rs.146 Cr and performance of which is over 32 months there ought not to be price variation/escalation clause? If the Contract is so interpreted to deny the price, variation/escalation, then, in fact the same would mean that the Contractor would, in fact, pay out of his pocket because there would be little or no profit margin once there is an increase in the inputs of Contract such as labour, material, fuel & Bitumen. Possibly the Contractor may even end up paying out of his pocket. In my opinion, the interpretation which is sought to be placed upon Clause-70.3 as per the original form thereof containing a typing mistake therein would lead to absurdities and which interpretation therefore has been rightly eschewed by the Arbitration Tribunal”.

(h) Having thus analysed the factual, and legal panorama which stood unfolded before him, the learned Single Judge proceeded to declare the award, of the

learned Arbitral Tribunal, to be impervious to interference, in the following terms:

“For an award to be against the contractual provisions, the Award has to be violative of an obviously meaning clause of the Contract but which has been perversely preached by an absurd interpretation by the Arbitrators. If there are various clauses, and a harmonious construction of the clauses read with the intendment of the Contract, is done by the Engineer and so adopted by the Arbitrators, then, it cannot be said that the Award in any manner violates the contractual provisions. Also, further I do not find any perversity whatsoever in the Award. In fact, if there is perversity, it is in the arguments as raised by the petitioner (NHAI) because what is sought to be argued is not only perverse but would also lead to absurd conclusions”.

(i) It was in these circumstances that the learned Single Judge, in **Unitech (supra)**, concurred with the decision of the learned Arbitral Tribunal, in that case.

(j) FAO (OS) 338/2010, preferred by the appellant against the judgment of the learned Single Judge in **Unitech (supra)** was dismissed, by the Division Bench of this court, in the following terms:

“Having articulated this appreciation of law, it would be illogical for us to enter into a detailed dialectic upholding the views of the Arbitral Tribunal with regard to the

*interpretation of the contract vis-à-vis the claim for escalation on the BoQ contained in the contract. We uphold the detailed reasoning of the learned Single Judge in the impugned Order which, in turn, had appreciated the conclusion of the Arbitral Tribunal. No perversity has been detected by the learned Single Judge as also by us. **We affirm that the contract envisages payment of escalation on BoQ spelt out in the contract as well as on deviations on BOQ and extra work subsequently placed by the Appellants on the Respondents.** For these reasons, the Appeal is devoid of merit and is dismissed along with pending application with additional costs of Rs.30,000/- ”*

(Emphasis supplied)

(k) We would be failing in our duty if we omitted to note the fact that, in *Unitech (supra)*, the Engineer in charge of the work had supported the claim of the contractor, opining that price escalation was available on all items including BOQ items whereas in the present case, the Engineer has rejected the claim of the respondent. Mr. Abhijat, predictably, drew our attention to this distinction. We are, however, not convinced that the applicability of the judgment in *Unitech (supra)* can depend on whether the Engineer supported the case of the contractor, or not, as the right of the contractor, to payment, necessarily requires to be determined on the basis of the terms of the contract, and cannot be made

dependent solely on the opinion of the Engineer. The distinction, therefore, though superficially apparent, is effectively reduced to a distinction without a difference.

(ii) **The KMC Case:**

(a) Before venturing to discuss the orders passed by the learned Single Judge and the Division Bench of this Court in *KMC (supra)*, notice deserves to be taken, at the outset, of a candid admission, in sub-para (b) of para 4 of the present appeal filed by the appellant, to the effect that *KMC (supra)* dealt with the same contract which is subject matter of the present proceedings. The said sub-para (b) of para 4 of the present appeal reads as under:-

“On 11.06.2013, an arbitral award was passed in arbitration proceedings between NHAI and KMC-RK-SD (JV) in respect of claims by the contractor for price adjustment on Permanent Works in the Bill of Quantity. The aforesaid arbitration proceedings related to the same contract package, for which the respondents bid for after the termination of the contract of the previous contractor (KMC-RK-SD (JV)). In the said arbitration proceedings between NHAI and KMC-RK-SD (JV) the stand of NHAI was that that price adjustment was not applicable to Permanent Works. This stand was rejected by the arbitral tribunal. It is pertinent to mention that in this case and the leading case in the matter viz. NHAI Vs. UNITECH-NCC, one of the main contentions of the parties was that the NHAI circular no.49/2006 clarifying the price

adjustment policy on permanent work was an attempt by NHAI to alter the contract unilaterally and without any basis in law. It is also pertinent to mention at this juncture that the case between the parties in this appeal, this issue does not arise at all, as the NHAI policy circular was well known at the time of execution of contract between NHAI and the Respondents herein.” (Emphasis supplied)

(b) The dispute, in **KMC (supra)**, stands encapsulated in para 2 of the judgment dated 22nd October, 2013 of the learned Single Judge in that case, thus:

*“The dispute in the present petition is admittedly related to one singular issue. **The issue being: whether the respondent is entitled to payment towards price adjustment on all items of work referred to in the Bill of Quantities (in short BOQ).** In other words, was the respondent rightly awarded price adjustment in respect of value of permanent works by the arbitral tribunal. It is the respondent’s stand that the price adjustment in terms of clause 70.3 of the Conditions of Particular Application (in short COPA) would apply only to “variations” and “day works”. (Emphasis supplied)*

(c) The finding of the learned Arbitral Tribunal, in **KMC (supra)**, stands recorded, thus, in para 2.1 of the judgement:

*"The arbitral tribunal, after a detailed analysis of the material placed on record and perusal of the terms and conditions of the contract obtaining between the parties, came to the conclusion that **when clause 70.3 of the COPA is read along with clauses of the tender and bid data documents, and other relevant clauses of the COPA, the price adjustment is applicable to the entire work comprising of all BOQ items, including variations and day work except where such variations and day work are otherwise not subject to price assessment.**" (Emphasis supplied)*

(d) At the pre-bid meeting, in *KMC (supra)*, the contractor raised a query as to whether price escalation would be applicable to all BOQ items. The appellant responded, to the query, in the following terms:

"The Price Adjustment provision as stipulated under clause 70 of the Contract (COPA) shall remain unchanged. No change in Contract clause is acceptable ..."

In the present case, too, the respondent queried, at the pre-bid meeting, regarding the availability of price variation on all items, to which the reply, of the appellant, was "*as per contract*". Clearly, the clarification, by the appellant, on the issue in controversy, in the pre-bid meeting, in the present case, was as laconic as in the case of *KMC (supra)*. On the face of it, we find the reliance, of the appellant, on this

"clarification", purportedly provided by it, to the respondent, at the pre-bid meeting, inexplicable.

(e) As in the present case, in *KMC (supra)*, too, the claim for price escalation on all items, including BOQ works, was submitted, by the contractor, only with the 6th Interim Payment Certificate (IPC). This aspect also assumes significance, as one of the submissions advanced by the appellant, to defeat the claim of the respondent, in the present case, is the delay, on the part of the latter, in claiming price variation.

(f) The Engineer, in this case, rejected the claim of the contractor. Here, too, the situation obtaining in *KMC (supra)* parallelises that obtaining in the present case.

(h) The learned Arbitral Tribunal held the contractor, i.e. KMC, entitled to price variation on all items, including BOQ items of work, following the judgement, of the learned Single Judge of this Court, in *Unitech (supra)*.

(i) The judgement of the learned Single Judge, after noting the above facts, proceeds, in paras 6 and 7 thereof, to record as under:

"I am of the view that principally the matter in issue before the arbitral tribunal was one which related to the interpretation of the provisions of the contract having regard to the background circumstances, the tender documents and the provisions of the contract. This exercise, in the instant case, had to be carried out by the arbitral tribunal given the ambiguity in the terms and conditions of the contract obtaining between the parties, in particular clause 70.3 of the COPA. The arbitral tribunal inter alia took into account clause 14.4 of the ITB and clause 14.4 of the bidding data and held that the price adjustment was available with regard to all items of the BOQ and not restricted to variations and day work. With the help of other provisions of the COPA, it concluded that price adjustment under clause 70.3 of the COPA was not restricted to variations and day work, but took into account all items of the BOQ. The reasoning given by the arbitral tribunal is contained in paragraphs 6.3 to 6.19 of the impugned award. To avoid prolixity, I propose to extract only the conclusion of the arbitral tribunal which reads as follows:

*'...6.19 We, the Arbitrators unanimously hold on a conjoint reading of ITB Clause 14.4 read with corresponding provision in Bid Data and 31.4 of ITB, Sub-clauses 70.1, 70.2, 70.5, 70.7, 60.1 and 60.2 of COPA, and other relevant provisions in Conditions of Contract that **all these clauses/provisions are***

consistent and provide that price adjustment is payable on the entire work comprising of all BOQ items including Variations and Day Work except where such Variations and Day work are otherwise not subject to adjustment. All these Sub-Clauses corroborate one another and are in complete harmony except for Sub-Clause 70.3 for its restrictive provision which has ambiguity and errors as explained in foregoing paras. A mere inconsistent entry in sub-clause 70.3 cannot override and ignore other qualifying clauses in the contract. On the other hand, this appears to be against the genuine intention of the Employer of allowing price adjustment on permanent works (BOQ) in all contracts as a policy ...' "

(Emphasis supplied)

(j) Having recorded as above, the learned Single Judge, in *KMC (supra)*, proceeded to hold, in para 7 of his judgement, thus:

"7. There was decidedly an ambiguity in clause 70.3 of the COPA, in particular, that which related to the application of the price adjustment factor qua the amount crystallized for the payment of work carried out in the subject month which, in terms of the said clause had to be determined, if read literally, in accordance with, sub-clause 60.1 (d). However, as correctly reasoned by the arbitral tribunal, "day work" was required to be valued separately under

clause 60.1 (e) of COPA and not under sub-clause 60.1 (d). In these circumstances, in my view, there arose definitely a case for interpretation. It is pertinent to note that this is only one of the many other reasons cited by the arbitral tribunal, as why, it chose the interpretative route as against literal application of the provisions of clause 70.3 of the COPA."
(Emphasis supplied)

(k) The learned Single Judge proceeded, thereafter, to hold that interpretation of the contractual provisions fell within the province of the learned Arbitral Tribunal, and that any error, even if existing, was not amenable to correction, by the court, unless it was apparent on the face of the record. This legal position is trite, and warrants no elucidation.

(l) Significantly, thereafter, paras 9 to 11 of the judgement of the learned Single Judge, in **KMC (supra)**, proceed to record thus:

*"9. Apart from the above, in respect of the provisions of the very same contract, a Single Judge of this court in the case of **National Highways Authority of India vs. Unitech-NCC Joint Venture** has repelled this very contention advanced by the petitioner. Pertinently, the matter was carried in appeal to the Division Bench. The Division Bench vide judgment dated 30.08.2010 passed in FAO (OS) No.*

338/2010 has sustained the view taken by the learned Single Judge.

10. The submission of Mr Kapur that the present case on facts was distinguishable from facts which arose in the case referred to above, is according to me untenable, for the following reasons:

(i) First, the respondent had been awarded contract to execute the balance works in respect of a rescinded contract qua which this court has already rendered its ruling.

(ii) Second, the response to the query raised by the respondent, simply conveyed that the terms and conditions of the contract qua price adjustment would remain unchanged. Since an ambiguity prevailed, according to the respondent, in terms of clause 5.2.1 of the contract, it was entitled to seek a clarification which it did by taking recourse to the route provided under the contract.

11. The other contention of Mr Kapur that the respondent did not raise an issue with regard to price adjustment till it filed the sixth (6th) IPC, is also misconceived, in my opinion, for the reason that the respondent was entitled, under the terms of the contract, to raise the issue with the engineer, which it did, and thereafter, if necessary, escalate the issue with the DRB and, if not satisfied, by invoking the

arbitration agreement obtaining between the parties. As a matter of fact, as noted by the arbitral tribunal as well, the respondent was entitled to, as a matter of fact, wait till the conclusion of the contract to raise the issue of price adjustment vis-a-vis all items of the BOQ."

(Emphasis supplied)

(m) The Division Bench of this Court, when approached by the appellant by way of FAO (OS) 139/2014, disposed of the appeal by the following brief order:

"This appeal is directed against the decision of a learned single judge delivered on 22.10.2013 in OMP 1043/2013. The appellant had filed the said OMP under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award passed by a three Member Arbitral Tribunal on 11.06.2013. The learned single Judge while rejecting the petition had noted in paragraph 9 that the very contentions which were raised by the learned counsel for the appellant before him had been considered in earlier cases including the case of National Highways Authority of India vs Unitech-NCC Joint Venture and those contentions had been rejected by the learned Single Judge. The matter went in appeal to the Division Bench which by a decision dated 30.08.2010 in FAO (OS) No. 338/2010 reported in 178 (2011) DLT 496 (DB) upheld the view taken by the learned Single Judge. There are several other decisions of

this court also interpreting clause 70.3 of Conditions of Particular Application (COPA). All those decisions have interpreted the said clause in a manner contrary to what is being urged by the learned counsel for the appellant. Following those said decisions and in particular the decision in the case of Unitech-NCC Joint Venture (supra), the present appeal is also dismissed."

(Emphasis supplied)

(iii) **The order of the Supreme Court:**

Special Leave Petitions filed against the orders of the Division Bench of this Court in *Unitech (supra)* and *KMC (supra)*, were clubbed with several other SLPs apparently involving similar issues, and disposed of, by the Supreme Court, *vide* a common order, dated 17th November 2015, which read as under:

"Dismissed.

The amount that is deposited by the petitioner before the Registry of this Court shall be returned to the petitioner along with accrued interest, if any, for being disbursed to the respondents-herein at the earliest.

The balance amount, if any, shall be paid by the petitioner within three months' time from today.

However, the question of law is kept open to be agitated in an appropriate case.

The cost imposed by the High Court is also deleted.

Pending application(s), if any, is/are also disposed of.”

(Emphasis supplied)

11. The judgements in **KMC (supra)** and **Unitech (supra)**, when read conjunctively, and vis-a-vis the present case, make it apparent that it was the same work which the appellant had, successively, contracted to Unitech, KMC and, later, the present respondent. We may regard this as indisputable, as, on facts at least, the decisions in **KMC (supra)** and **Unitech (supra)** have clearly attained finality - irrespective of the import of the “caveat” entered, by the Supreme Court, in its order dated 17th November 2015, regarding the “question of law”, on which Mr Abhijat understandably pegs his case.

12. In view of this factual position, if we were to accept the stand of the appellant, or even accord it serious consideration on merits, we would be going against the grain of the decisions in **KMC (supra)** and **Unitech (supra)**, which deal with the self-same contract, and the self-same dispute, with which we are concerned, albeit with earlier contractors. Such an approach would render any decision, by us, inconsistent with the decisions in **KMC (supra)** and **Unitech (supra)**. What Mr Abhijat would have us hold, therefore, would be that, in respect of a single contract, successively awarded to three contractors, we should hold the third contractor to be entitled to price adjustment,

or escalation, only on items not mentioned in the BOQ, i.e., on variations, even when it has been held, by co-equal benches, that the two earlier contractors were entitled to price adjustment on all works, including BOQ items, and not merely on variations. We are, therefore, being exhorted to adopt a view clearly inconsistent with the views taken by earlier Division Benches, of this Court, in **KMC (supra)** and **Unitech (supra)**.

13. Is this advisable?

14. One of the cardinal principles governing judicial thought, and decision making, is consistency. Often, it has been held that the greatest virtue of the ideal adjudicator is not correctness, but consistency. In a little known decision, K.S. Radhakrishnan, J. (as His Lordship then was), while sitting singly in the Kerala High Court, expressed this thought unequivocally, albeit a trifle radically, in the following words, in **Joy v Regional Transport Authority, 1999 (105) ELT 275 (Ker)**:

“Judicial discipline demands consistency in rendering judgments. A Judicial Officer may hold different views on various aspects. A Judicial Officer may err and pass contradictory orders inadvertently. But once it is brought to the knowledge of the Judicial Officer, he is duty bound to keep track of consistency. Inconsistent orders passed by a judicial officer almost in the same fact situation, and that too on the same day, would give rise to complaint of discriminatory treatment, which will undermine the people's faith in judicial system and the rule of law. It will cause resentment and anguish

and make an imprint in the mind of the litigant that he has been discriminated. A Judicial Officer may err and pass illegal orders, but he shall not err in consistency. He should be consistent even in illegality.”

(Emphasis supplied)

Needless to say, it would be folly to read the last sentence, in the above extract, in isolation; however, the principle which Radhakrishnan, J., has so emphatically - and, in fact, empathetically - reiterated, is laudable, and is the essence behind the hallowed doctrine of *stare decisis* (*stare decisis et non quieta moevre*; meaning, meaning “to stand by and adhere to decisions and not disturb what is settled”).

15. Referring to the well-known precedent in ***Sub-Inspector Rooplal v Lt. Governor, (2001) 1 SCC 644***, the Supreme Court underscored the need for consistency in judicial pronouncements, in ***Govt. of A.P. v A.P. Jaiswal, (2001) 1 SCC 748***, in the following words:

“Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect to the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the courts have evolved the rule of precedents, principle of stare decisis etc. These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice, which we see in plenty in this case. This Court in the case of Sub-Inspector Rooplal v. Lt. Governor, (2000) 1 SCC held thus: (SCC p. 654, para 12)

‘At the outset, we must express our serious dissatisfaction in regard to the manner in which a

Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law from the foundation of administration of justice under our system. This is a fundamental principle which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate court is bound by the enunciation of law made by the superior courts. A Coordinate Bench of a court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement. ’ ’

(Emphasis supplied)

16. On the larger *stare decisis* principle, the Supreme Court had this to say, in *Manganese Ore (India) Ltd v Regional Assistant Commissioner of Sales Tax, (1976) 4 SCC 124*:

*“The High Court relied on a number of authorities, but in view of the decision of this Court in **Md Serajuddin case, (1975) 2 SCC 47**, it is not necessary for us to consider those authorities at all, because the matter has now been concluded by a decision of this Court. In fact this position was conceded by Mr Natu appearing for the appellant but **he tried to persuade us to refer the case to a larger Bench for reconsidering Md. Serajuddin case, (1975) 2 SCC 47**. We are, however, unable to agree with the prayer made by the learned counsel for the appellant because this Court has given its decision recently and the doctrine of stare decisis is a very valuable principle of precedent which cannot be departed from unless there are extraordinary or special reasons to do so”.*

(Emphasis supplied)

17. We, too, have, with us, the advantage of recent pronouncements, of this Court, on identical disputes, regarding the very contract with which we are concerned, albeit vis-a-vis predecessor-contractors-in-interest. The said decisions are recent in point of time. They, therefore, constitute “very valuable precedent”, and we are unable to glean any “extraordinary or special reasons” which should persuade us to depart therefrom.

18. Any such departure, moreover, would also result in the citizen-contractor becoming totally unsure of the legal position. It would result in the litigant harbouring the perfectly legitimate apprehension that, were he to approach this Court with a similar dispute, the

outcome would be totally unpredictable. This is destructive of the very fabric of law, and has to be avoided at all costs.

19. Not much, in our view, deserves to be made of the reliance, of Mr Abhijat, on the caveat, in the order dated 17th November 2015, of the Supreme Court, in the SLPs emanating from *KMC (supra)* and *Unitech (supra)*. The Supreme Court, in unambiguous terms, not only dismissed all the SLPs before it; it also directed payment, to the contractors, of the amounts deposited by the appellant in court. Clearly, therefore, in the facts obtaining before it - which, as repeatedly emphasised hereinbefore, were identical to the facts obtaining in the present case - the Supreme Court felt the decision of this Court to be unexceptionable. We are in the realm of similar facts, and, therefore, have to adhere to the same view.

20. Respectfully following the decisions of this Court in *Unitech (supra)* and *KMC (supra)*, we, therefore, dismiss this appeal.

21. No costs.

नित्यमेव जयते

C.HARI SHANKAR, J.

ACTING CHIEF JUSTICE

September 01, 2017
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