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

\+ **O.M.P. (COMM) 482/2016**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner

Through: Ms. Gunjan Sinha Jain & Mr Mukesh Kumar, Advocates.

versus

M/S SUNWAY CONSTRUCTION SDN BHD ..... Respondent

Through: Dr. Amit George, Mr. Swaroop George & Ms. Omana George, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

% **20.02.2017**

1. The challenge in this petition by the National Highways Authority of India ('NHAI') is to an impugned Award dated 29th April, 2014 passed by the Arbitral Tribunal ('AT') by a majority of 2:1.

2. The AT adjudicated the disputes between the parties arising out of a contract agreement dated 11th August, 2005 whereunder the work of Rehabilitation and Upgrading of KM 406.00 to KM 449.150 of NH-76 to 4 lane configuration in the State of Rajasthan was awarded by the NHAI to the Respondent.

3. The dispute was as regards the rates of excess quantities against the Bill of Quantities ('BOQ') Item 2.02 which reads as under:

"Providing and construction of embankment with approved materials from borrow areas as per Technical Specification Clause 305 with all leads and lifts."

4. Clauses 52.1 and 52.2 COPA, which are relevant to the present dispute read as under:

"52.1 Instructions for variations

All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as "varied work"), shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the Contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor suitable rates or prices shall be agreed upon between the Engineer and the Contractor In the event of disagreement the Engineer shall fix such rates or prices as are in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance-with Clause 60

Clause 52.2 Power of Engineer to fix Rates

Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the Works or to any part thereof, is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item of the Works is, by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate or price, as is, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall

> determine provisional rates or prices to enable on account payments to be included in certificates issued in accordance with Clause 60.
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> Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub-Clause 52.1 or under this Sub-Clause unless, within 14 days of the date of such instruction and, other than in the case of omitted work, before the commencement of the varied work, notice shall also been given either
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> (a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price, or
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> (b) by the Engineer to the Contractor of his intention to vary a rate or price."

5. As it turned out, the quantity of earthwork exceeded the actual quantity by more than 600%. The Engineer then prepared a Variation Order (VO) No.2. Apart from the fact that there was increase in quantities the lead for transportation of materials went beyond the envisaged lead of 3 kilometres. The Engineer in the variation proposal noted that the lead was 8.5 kilometres. Thus, the Respondent and the Engineer were *ad idem* that the material required for the quantity of embankment was beyond 125% of the BOQ quantity and was transported at an average lead of 8.5 kilometres. A categorical finding was rendered by the majority of the AT that "for quantity beyond 125% of BOQ quantity, the item 2.02 is varied to the extent of extra lead of 5.5 km (8.5 km less 3.00 km) and all the other components of item are just similar."

6. After discussing the proviso to Clause 52.1, i.e. Clause 52.2, the AT accepted the rate fixed by the Engineer at Rs.160 per cubic metre for the quantity of work done in excess of 125% of the BOQ quantity plus costs of

extra lead of 5.5 km. The net result was that NHAI was directed to pay for the enhanced quantity plus the additional lead as per the new rate as determined by the AT.

7. When this petition was heard on 8th December, 2016, it was contended by Ms. Gunjan Sinha Jain, learned counsel for NHAI, that as a result of the statement made by Dr. Amit George, learned counsel for the Respondent in FAO (OS) No. 370/2015 before a Division Bench (DB) of this Court, the Respondent would be precluded from claiming, in the present case, any variation in the rate of BOQ Item No. 2.02. This was resisted by Dr George by pointing out that the statement which was made in FAO (OS) No.370/2015 was confined to the items which formed the subject matter of the Award under challenge in those proceedings. In the circumstances, the Court, by the order dated 8th December 2016, permitted the parties to file their respective submissions along with supporting documents.

8. The Respondent has filed a short written note of contentions. Attention is drawn to the Award dated 30th September 2014, which formed the subject matter of FAO (OS) No.370/2015. Although the said Award also dealt with disputes arising from this very contract between the parties, at internal page 24 of the said Award the AT has extracted the remark made under the Statement of Claim filed before it which reads: “Variation Order – Embankment VO (item 2.02) is not taken into account as the dispute is referred separately and arbitration in progress.” It is further recorded by the AT which pronounced that Award that “there was substance in the contention of the claimant that item No.2.02 was not the part of the VO in

dispute in the instant case and it was dealt with under another arbitration reference and award of which was published on 29.04.2014." The reference in the above sentence is to the Award under challenge in the present case.

9. The AT also noted in the other Award dated 30th September 2014 that from the last column of summary of non-BOQ items (which was annexure R-10 of the additional statement of defence submitted by NHAI before that AT) that it showed that "an amount of Rs.8,30,960.14 against item No.2.02 (Embankment) has been kept on hold."

10. The written note of submissions of the Respondent has also drawn attention to the letter dated 9th September, 2014 written by the Respondent to the AT in that case where in paras 2 & 3 it is stated as under:

> "2. At the outset it is reiterated that the present dispute is not part of the amicable settlement process as the Engineer has already certified the quantities and the same have been accepted by the Claimant. In this connection we hereby submit a copy of the letter issued by the Claimant to the Respondent with list of disputes proposed to be settled by Independent Advisory Committee (ISAC). Annexure 1 enclosed refers. The present dispute therefore does not fall under amicable settlement process.
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> 3. It is further submitted that in the present case the quantities certified and rates determined by the Engineer for the said variation items are acceptable to the Claimant and the Claimant has signed it as token of acceptance. CD-3 of Claimant's submission refers. The Engineer has accordingly recommended Final Payment Certificate amounting to Rs.33,931,497.00. The Engineer, however, has withheld an amount of Rs.22,843,270.52 pending approval of variation orders from the competent authority. Exhibit C-18 on page 65-65 refers. In accordance with the conditions of the contract the Engineer has full powers to determine rates of all variation items and the fact that the payment entitled to the claimant has been withheld pending approval

is contrary to the conditions of the contract."

11. It is pointed out by Dr George that the disputes in Annexure 1 to the above letter included the dispute in the present case pertaining to BOQ Item 2.02 which was proposed to be settled by an amicable settlement process. This further showed that the said dispute was not subject matter of the Award which formed the subject matter of FAO(OS) No. 370/2015.

12. An attempt was made by Ms. Jain, learned counsel appearing for the NHAI, to demonstrate that the aforementioned sum of Rs. 2,28,43,270.52 referred to by the other AT in its Award dated 30th September 2014 included the VO No.2 in respect of which the present Award has been passed. She accordingly submitted that the observation of the other AT in the said Award dated 30th September 2014 that the VO No.2 which pertained to BOQ Item 2.02 stood excluded from that Award was erroneous. According to her, this was the reason why NHAI not only challenged the said Award in this Court in OMP No.166/2015, which was dismissed by the single Judge on 30th March, 2015 but also preferred FAO(OS) No. 370/2015 before the DB, which was disposed of by the order dated 17th July, 2015.

13. The above contention was disputed by Dr. Amit George, learned counsel appearing for the Respondent, who pointed out that what was recorded by the DB in the above order was the statement made by the Respondent specific to those items which formed subject matter of the challenge in that matter. It did not include the VO No.2, which was specific to BOQ Item 2.02.

14. In order to appreciate the above submissions, it is necessary to refer to paras 6 and 7 of the order dated 17th July 2015 of the DB in FAO (OS) No. 370/2015 which read thus:

> "6. The second dispute is with regard to an amount of Rs.2,28,43,270.52. Insofar as this amount is concerned, we note that in the Section 34 petition, which was filed by the appellant, ground 'D' has referred to the same. In the said ground, it was mentioned that the contractor had repeatedly and persistently disputed the final payment certificate issued by the engineer. It was also mentioned that all along the payment received by the contractor on account of variation valued by the engineer was disputed and the provisional payments were also received under protest. It was further stated that the contractor had till date not given its acceptance of the rate analysis and rate proposed by the engineer and on that account Rs 2,28,43,270.52 was kept on hold by the appellant."
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> 7. The learned counsel for the respondent submits that he accepts the rate analysis and the rate proposed by the engineer in respect of the items which form the subject matter of the present Award. It is also accepted by him that in case there is an overlap with regard to the items covered by the present Award and the subject matter of disputes which are pending between the parties, then the statement made here shall be binding in those cases also to the extent of the overlap."

15. Although para 6 above refers to Ground D of the appeal i.e. FAO (OS) No. 370/2015, a perusal of the appeal paperbook in the said case reveals that Ground D in fact makes no reference to the above amount of Rs 2,28,43,270.52. The reference to the said amount is made in Ground F which reads thus:

> "(F) Because the Ld. Single Judge as well as arbitral tribunal failed to appreciate the Engineer has not certified payment of Rs 2,28,43,270.52 for the reason that the Variation proposals pending approval of the competent Authority/Appellant. In this regard it is

> submitted that the Respondent/contractor had not given its consent to the rates proposed by the Engineer and therefore, the said amount could not be processed despite repeated letters issued by the Engineer as well as the Appellant requesting the Respondent/contractor to approve the rates recommended by the Engineer (Annexure R-9(Colly) of RD-3)."

16. It thus appears that in the above Ground F there is no reference to VO No.2 or BOQ Item No. 2.02. None of the documents presented before this Court by NHAI bear out the contention that there is an overlap with regard to the items covered by the Award dated 30th September 2014 and those forming subject matter of the impugned Award dated 29th April 2014 i.e. VO No.2 arising out of BOQ Item No. 2.02. The Court is left in no doubt that the other AT which gave the Award dated 30th September 2014 [which formed the subject matter of FAO (OS) No. 370/2015] was not considering VO No.2 arising from BOQ Item 2.02.

17. In any event this Court cannot in these proceedings pronounce on the correctness of the observation made by the other AT in its Award dated 30th September 2014. For all of the above reasons, it is not possible to accept the submission of Ms. Jain that the statement of Dr George recorded by the DB in its order dated 17th July 2015 in FAO (OS) 710/2015 would bind the Respondent in the present petition as well.

18. It was then urged by Ms. Jain that the interpretation placed by the majority Award on the proviso to Clause 52.2 was incorrect. The Court is of the view that the opinion of the majority Award is a plausible one. The re-worked rate has been applied only for the quantity beyond 125% of BOQ

quantity. Item 2.02 was varied only to the extent of extra lead of 5.5 km. NHAI was directed to pay for the enhanced quantity plus the additional lead as per the new rate as determined by the AT.

19. The Court accordingly finds no reason to interfere with the impugned majority Award dated 29th April, 2014. The petition is dismissed but in the circumstances no orders as to costs.

S. MURALIDHAR, J.

FEBRUARY 20, 2017
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