

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

Judgment Reserved on: July 11, 2018

Judgment pronounced on: July 25, 2018

+ **FAO(OS) 155/2015**

M/S. NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

Through: Mr. Narender Hooda, Senior Advocate with
Ms. Gunjan Sinha Jain and Mr. Mukesh
Kumar, Advs.

versus

M/S. ORIENTAL STRUCTURAL ENGINEERS PVT TLD.

..... Respondent

Through: Mr. Anil Airi, Sr. Adv with Mr. Ravi K.
Chandna, Ms. Bindiya Longawney, Mr.
Sukanya Lal, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

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1. The National Highways Authority of India ("NHAI" hereafter) appeals the rejection of its petition objecting to the award of an arbitral tribunal, under Section 34 of the Arbitration and Conciliation Act, 1996 ("the Act").

2. NHAI entered into a contract dated 29th September, 2005 with the respondent (hereafter "the contractor") who had to construct (for a consideration of ₹ 115,24,02,683/-) of New Four Lane Jhansi Bypass on National Highway 25 in the State of Uttar Pradesh, with the stipulated date

of start as 21st November, 2005 and the stipulated date of completion as 20 May, 2008. The works were completed only on 31st August, 2010. Disputes arose with respect to payments to the contractor who invoked the arbitration clause; the matter was referred to arbitration by a tribunal, under the Act. The award granted was of ₹ 89,66,783/- with interest for wrongful certification of Bills of Quantity for construction of reinforced earth, precast concrete fascia panel, RCC crash barrier etc. for the period till 31st August, 2010 and held the respondent entitled to further sums on similar basis for period subsequent to 31st August, 2010 and till final account in respect of wrong quantification (Claim No. 2). ₹ 30,65,779/- was allowed towards delay till 31st August, 2010 in payments of the admitted amounts (Claim No. 3). The contractor's Claim No.4 in the sum of ₹ 3,21,64,657/- for non-payment of price adjustment upto 31st August, 2010 was allowed and ₹ 60,87,471/- towards interest thereon till 31st August, 2010 and further the contractor was held entitled to payment of correct quantification of price adjustment in subsequent IPCs till final account, together with interest thereon. Claim No. 5 for ₹ 16,09,647/- towards additional cost due to increase in royalty on various minerals for the quantities executed till February 2010 with interest @ 10% compounded monthly from 9th March 2010 till the completion of the work, and simple interest @ 10% per annum including on compound interest as stated, from 1 September 2010 till the date of actual payment, too was awarded. Claim No.6 by the contractor, for ₹2,68,69,295/- on account of price escalation till 31st August, 2010 and ₹ 48,29,367/- towards interest @ 10% per annum thereon compounded monthly and simple interest @ 10% per annum from 1st September, 2010 till the date of actual payment was also awarded.

3. NHAI's plea was that the tribunal wrongly read the contract between the parties to conclude that certain works required to be carried out were not part of the Contract when in fact as per the Contract they were not to be measured separately and were to be deemed to be incidental to the work under the Contract and that the delays in payment of the admitted amounts by NHAI to the contractor being on account of the latter failing to comply with the obligations it was required to comply with before receiving payment. NHAI submitted that thus, it was not liable to pay interest. It was argued that since the contractor did not seek a clarification to the addendum/corrigendum of the pre-bid meeting, thereby impliedly accepting the addendum and having started making representation only after major work were executed, thus precluding it from claiming amounts. The findings with respect to price adjustment at a rate contrary to the contract between the parties and the clarifications, addendum and corrigendum issued by NHAI was argued.

4. The single judge rejected NHAI's argument, and held as follows:

“6. The senior counsel for the petitioner during the hearing fairly informed that the award, insofar as allowing the Claim No.5 of the respondent towards additional cost due to increase in royalty on various minerals, is in accordance with the judgments of the Single Judge and the Division Bench of this Court but the issue is pending consideration before the Supreme Court. The senior counsel also agrees that the challenge to the award is on the grounds either of the Arbitral Tribunal having wrongly interpreted the contract between the parties or having not considered the defence of the petitioner to the claims of the respondent which have

been allowed. With regard to award on Claim No.3 allowing interest on delayed payments, it is argued that the respondent had failed to furnish the clarification sought from it and so the engineer had no option but to assess the payment due on best judgment and payment was made accordingly and thus the petitioner could not be held liable for any interest for delay. It was argued that under the Contract the engineer was entitled to seek such clarifications and the engineer having done so and the respondent having not submitted the clarifications, no delay in payment could be attributed to the petitioner. On enquiry, as to whether the payment ultimately made to the respondent was as demanded by the respondent, it was informed that there was a difference of 5% between what the respondent had demanded and what was paid to the respondent. It was yet further contended that though the respondent in the pre-bid meeting had given a discount of 7.5% on each item and though in accordance therewith the petitioner was entitled to discount of 7.5% on payment even if found due on increased work also but the Arbitral Tribunal while allowing the claim of the respondent for price escalation has not given the said discount of 7.5%. With respect to the award on Claim No.4, it is argued that the Arbitral Tribunal did not consider that the respondent was required to raise the said dispute within 28 days and had raised the same just one month prior to the closure of the award.

14. I have considered the challenge aforesaid to the arbitral award on the anvil of the above latest adjudication also. No ground, of the Arbitral Tribunal in the instant case having not adopted a judicial approach or having acted in violation of the principles of natural

justice has been urged. It is also not the case that the Arbitral Tribunal has not acted bona fide or not dealt with the subject in a fair, reasonable and objective manner or that the decision of the Arbitral Tribunal was actuated by any extraneous consideration. Non application of mind by the Arbitral Tribunal is also not pleaded or argued. No case of perversity or irrationality has also been made out. The entire challenge is on the ground of the findings of the Arbitral Tribunal being factually erroneous and which is not a ground even as per the judgment (supra) of the Supreme Court. Of course, the Supreme Court in para 40 of the judgment has held that if the Arbitral Tribunal, from the facts proved before it fails, to draw an inference which ought to have been drawn or draws the inference which on the face of it is untenable, the arbitral award would be in conflict with public policy of India and the test of "fails to draw inference which ought to have been drawn or draws an inference which is untenable" is very wide but the said test is qualified with the words "resulting in miscarriage of justice". I am unable to read the judgment of the Supreme Court as opening the doors of challenge to an Arbitral Award by a detailed examination of all the facts and material before the Arbitral Tribunal and to determination of whether the inferences drawn and the consequences reached by the Arbitral Tribunal therefrom are correct or not and whether the Court agrees with the same or not. If the same were to be permitted, it would do away with the difference between the Court exercising appellate power and power of judicial review of Arbitral Award under [Section 34](#) of the Act and would be against the several other judgments of the Supreme Court and which, in the judgment (supra) were neither considered

nor differed from. The judgment (supra) of the Supreme Court, cannot be read in isolation, forgetting all other judgments of the Supreme Court and none of which have been overruled.

15. The expression "miscarriage of justice", used by the Supreme Court in the judgment (supra) as qualifying the test laid down in para 40 thereof of the validity of the Arbitral Award, is an expression well recognized in law and generally associated with grossly unfair outcome in a judicial proceeding as when a defendant is convicted despite a lack of evidence on an essential element of a crime (per Black's Law Dictionary, Eight Edition). The Supreme Court in Union of India Vs. Ibrahim Uddin (2012) 8 SCC 148 cited with approval Bibhabati Devi Vs. Ramendra Narayan Roy AIR 1947 PC 19 holding that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word "judicial procedure" at all.

16. Thus, it is not every inference drawn or not drawn by the Arbitral Tribunal from the material before it and which the Court finds to have been wrongly drawn or not drawn, which could be held to be resulting in miscarriage of justice. Such inference / failure to interfere by the Arbitral Tribunal, even if in the opinion of the Court wrong, would permit interference under Section 34 of the Arbitration Act only if it results in a grossly unfair outcome.

17. There is another aspect of the matter. A detailed inquiry into the correctness of the inference drawn / not drawn by the Arbitral Tribunal would require the Court

not only to go through and dissect the arbitral record which is often voluminous in cases as the present but to also give an opportunity to the parties / their counsels to address on the inferences drawn / not drawn by the Arbitral Tribunal and to only thereafter form an opinion. The same would again make a proceeding under Section 34 of the Arbitration Act and hearing thereof akin to an appeal from original decrees of the Court and would be an antithesis to the very concept of judicial review of arbitral award, even if the Court at the end of such a marathon hearing were to conclude that there has been no miscarriage of justice. It is thus for the contracting party challenging the Arbitral Tribunal to, in the memorandum of challenge itself, make out a case of miscarriage of justice within the parameters aforesaid. No such case has been made out in the petition in the present case. Without any such case having been made out in the memorandum of petition, this Court would not embark upon an exercise of requisitioning the arbitral record and giving an opportunity to the parties / their counsels to address on the correctness of the inference drawn / not drawn by the Arbitral Tribunal and on the aspect of whether there has been a miscarriage of justice.”

5. Mr. Hooda, learned senior counsel for NHAI, argued that the impugned judgment cannot be sustained, because it does not discuss the arguments made before the single judge. Counsel argued that the single Judge and the tribunal failed to appreciate that the contractor's claim was not maintainable for non-compliance of mandatory Clause 53.1, 53.2 of GCC and Clause 53.3 of COPA. Under Sub Clause 53.1 of GCC, it was required to give notice of his intention to claim within 28 days after the event giving

rise to the claim had arisen. This condition was not followed. Next, it was highlighted that Clause 70.3 COPA defined “R” is defined as total value of the work done during the month. This included the value of the material on which secured advance has been granted, if any, during the month, less the value of materials in respect of which the secured advance has been recovered, if any, during the month. This excludes the cost of work on items for which rates were fixed under variation Clauses (51 & 52) for which the escalation had to be regulated as mutually agreed at the time of fixation of rate. It was further submitted that Clause 70.3 specifies that to the extent, full compensation for any rise and fall cost to the contractor was not covered by any provisions of the contract, the unit rates and prices included in the contract were deemed to include amounts to cover the contingency of such rise or fall in costs. The reliance placed by the contractor on Clause 14.1 and 14.4 ITB to show that the quoted rates as entered in the BOQ are the true value of each of the BOQ items, which are subject to price adjustment as per the Contract, was therefore misplaced and misleading.

6. Counsel also urged that the following salient points were ignored: (a) the contract price is made up of total of BOQ amounts i.e. the sum of quantities for each work item, multiplied by the relevant unit rates submitted by the Contractor. (b) The contractor gave discount/rebate of 7.75% over and above the quoted bid price for all the contracts awarded to it. (c) As a result of discount, the new contract price was reduced to Rs.115, 24, 02, 683/- as the relevant BOQ rates in the contract were automatically discounted. (d) NHAI issued the letter of acceptance on 27.07.2005 wherein it was specifically stated that the contract price of ₹ 15,24,02,683/- includes the discount of 7.75% (₹ 9,68,14,317/-) on quoted rates of all the items. (e)

Therefore, the discounted BOQ rate only are applicable and has to be taken while calculating escalation as per price adjustment formulae provided in Sub Clause 70.3 of the Contract. (f) Clause 70.3 specifically stipulated that the “Contract price” shall be adjusted to cater for the increase/decrease of the various inputs entered in the various price adjustment formulae, thereby implying the *discounted BOQ rates* on which the Contract Price is calculated.

7. It was submitted that the single judge and the tribunal failed to appreciate that the discount @ 7.75% (₹ 9,68,14,317/-) offered by the contractor was unconditional and applicable on quoted rates of all items. It was also significant that the contractor did not raise any objection to the Letter of Acceptance dated 27.7.2005 implying its consent.

8. The tribunal’s findings, in the impugned award, on the scope of the discount, are as follows:

“6.32 The offer by the contractor was a discount of 7.75% over and above the quoted Bid Price for the above work. While making so the tender amount was worked out to Rs. 115,24,02,683/- duly deducting the discount which worked out to Rs. 9,68,14,317/-. Further, if the discount was to be meant as reduction in the rate requiring the rates to be amended, then there was no need to mention the amount of discount in the letter of acceptance.

Factually, the payment on account of price adjustment is based on different formulae where value of work done is to be known for the relevant period of claim. The value of work was based on the rates quoted in the BOQ. The discount is only a concession, a commission, a discount

offered to be foregone by the Contractor from the amounts due for the work done. The value of work is generally referred to the gross value of the work before effecting deductions there from. The discount offered is only one such deduction and other deductions are security deposits, statutory recoveries to construe that by both the parties keeping the rates quoted intact and all other deductions are based on such rates. Further, the payment on account of price adjustment is based on value of the work done on the rates quoted i.e. market value but not the net value of the work which is only in between the contractor and the Respondent.

6.33 Now, coming to the clause 70.1, Price Adjustment – the amount payable to be contractor and valued at base rates and prices pursuant to Sub-Clause 60.1 thereof shall be adjusted in respect of the rise or fall in the indexed costs of labour, Contractors Equipment, Plant, materials and other inputs to the Works, by the addition or subtraction of the amounts determined by the formulae prescribed in this Clause.

6.34 The words “the base rates” and “prices” as applicable under the contract require examinations for arriving at the correct rates to be applied. The BOQ consists of rates of individual items tendered by the Contractor and then the same becomes the contract. The base rates are the rates quoted by the tenderer. Prices are those basic prices which mean the prices for specified materials indicated in Section VI of Volume-III of the Tender Documents. Regarding base rates, the rates given in the BOQ shall be the base rates applying which the interim payment is calculated and there form the net payment is arrived at after making the deductions.

Therefore it is very clear since both the parties agreed in keeping the quoted rates as base rates and gross value of work is arrived at in all Interim Payments. Therefore the discount offered by the claimant is not applicable to the value of the work to be arrived at under clause 60.1 (c) or (d). Further under clause 60.1 (g) the discount offered cannot be extended to the amount price adjustment as there is no such provision either in the Form of Bid/LOA or in the provisions of the Contract Agreement. Further, the price adjustment is not a rate quoted in the BOQ but based on the rates quoted in the BOQ and therefore, discount @ 7.75% offered is not applicable to such price adjustment.

6.35 Further, the price adjustment is applied in both directions i.e. for increase as well as decrease in the prices. The prescribed formulae applied for arriving at the price adjustment. The ingredient “R_i or R” is the value of work done during the month under consideration for intermediate payment by price adjustment. The Respondent as well as the Contractor are equal beneficiaries in the sense when the rates diminish it is beneficial to the Respondent and in case of increase in prices it is beneficial to the contractor. Therefore it is neither exclusive benefit to the Respondent nor to the Contractor. But it is only a principle of equity. Therefore to our mind the scope of discount as contained in Form of Bid (pages 54 and 55 of the CA) read with provisions of the contract agreement and the letter of acceptance, in all reasonability does not cover the price adjustment and is limited to contract price only.”

9. It is evident from a plain reading that the award is coherent and spells out quite plainly why NHAI's arguments were not appealing, given the terms

of the contract. The tribunal stated that BOQ consisted of individual item rates quoted by the contractor which become part of the contract. The bidder quotes base rates; prices are those basic prices which imply prices for specified materials indicated in Section VI of Volume-III of the Tender Documents. As regards base rates, the rates given in the BOQ were to be the base rates to apply for interim payment calculation and from those net payment was to be arrived at after making the deductions. The parties agreed -in keeping the quoted rates as base rates and gross value of work is arrived at in all interim payments. The tribunal therefore concluded that the discount offered (by the claimant) was inapplicable to the value of the work to be arrived at under clause 60.1 (c) or (d). Further under clause 60.1 (g) the discount offered could not be extended to the amount price adjustment as there is no such provision either in the Form of Bid/LOA or in the provisions of the Contract Agreement. Further, the price adjustment was not a rate quoted in the BOQ but based on the rates quoted in the BOQ and therefore, discount @ 7.75% offered is not applicable to such price adjustment.

10. In this court's opinion, what NHAI argues, is to invite the court, in the guise of saying that the contract conditions were ignored, to substitute its reasons for the reasons given in the award. When the law is clear, that the interpretation of contract is the primary task – or within the exclusive domain of an arbitral tribunal, the court cannot, by a sleight of reasoning, by saying that the reasons are contrary to the contract, upset the award. In *P.R. Shah v B.H.H Securities* 2012 (1) SCC 594 it was held that:

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the

grounds mentioned in Section 34 (2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

Earlier *McDermott International Inc. v Burn Standard Co. Ltd*(2006) 11 SCC 181, held as follows:

"It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that the correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law."

11. In this case, the single judge analyzed the materials in the context of challenge to the award and ruled that it disclosed no patent error of law or manifest unreasonableness. That the single judge was unpersuaded to accept NHAI's interpretation of a plausible, reasonable interpretation, is no ground to intervene in appeal under Section 37, which at best gives an appellate review *of the judgment of the court of first instance* (in this case that of the single judge). Being twice removed, as it were, from the primary decision making process, the concurrent determinations should show up a salient or prominent error or unreasonable approach, which are both lacking in this appeal. Consequently, the appeal has to fail and is dismissed.

S. RAVINDRA BHAT
(JUDGE)

A. K. CHAWLA
(JUDGE)

JULY 25, 2018
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