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

+ **O.M.P. (COMM) 280/2016**

ORIENTAL STRUCTURAL ENGINEERS PVT LTD

-KMC CONSTRUCTIONS JV

..... Petitioner

Through: Mr Anil Airi, Senior Advocate
with Ms Bindiya Logawney, Mr
Ravi K. Chandna, Ms Sukanya
Lal, Ms Sadhna Sharma and Mr
Satyam Bhatia, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF

INDIA

..... Respondent

Through: Mr Mukesh Kumar, Ms Gunjan
Sinha Jain and Ms Somya
Priyadarshnee, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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16.03.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 28.12.2015 (hereafter 'the impugned award'). The petitioner is aggrieved inasmuch as its claims in relation to the construction of embankment with pond ash, has been rejected.

2. The respondent (hereafter 'NHAI') had invited bids for the

work of “Allahabad Bypass Project – Construction of Road from Km 198 to Km 242.708 (Contract Package - ABP 3) in the State of Uttar Pradesh. The petitioner submitted its bid pursuant to the said invitation which was accepted. NHAI issued a Letter of Acceptance (LOA) dated 06.09.2004 in favour of the petitioner for execution of the works at a contract price of ₹505,27,07,215/- (₹454,74,36,494 + US\$110,78,068.88).

3. The disputes between the parties relate to payment for construction of embankment with pond ash. The Bill of Quantities for earthwork (Bill No. 2) includes Item No. 2.02 regarding construction of embankment with approved material as per technical specifications under Clause 305 with all leads and lifts. The description of the said item is set out below:-

“2.02 Construction of embankment with approved material complete as per Technical Specifications Clauses 305 with all leads & lifts.

a) with soil

b) with Pond Ash”

4. Admittedly, BOQ Item No. 2.02(b) is for construction of embankment of a composite section consisting of Pond Ash core and soil cover.

5. It is the petitioner’s case that it is entitled to be paid for entire quantity of earthwork at the rate specified for construction of

embankment with Pond Ash even though part of the embankment also includes use of soil as the construction material.

6. Admittedly, the embankment is not constructed by use of Pond Ash alone and the petitioner is also required to use soil for such construction. The petitioner claims that notwithstanding the same since the work involves use of Pond Ash, the petitioner ought to be paid at the rates provided for construction of embankment with Pond Ash. NHAI disputes the same. According to NHAI, the quantum of work done by use of soil has to be paid at the rate of construction of embankment with soil and the quantum of work done using Pond Ash alone is to be paid at the rate provided under BOQ Item 2.02(b).

7. The Arbitral Tribunal considered the petitioner's claim and the majority was of the view that the petitioner's claim was sustainable. However, the petitioner's claim was rejected in view of the judgment passed by this Court in *National Highway Authority of India v. Hindustan Construction Company: 196 (2013) DLT 498*, wherein the Division Bench of this Court had examined the aforesaid issue in an similar matter and decided the same in favour of NHAI.

8. The relevant extract of the impugned award is set out below:-

- “i) Clause 305.2.2.3.4 of Additional Specification provides for the rate of Pond Ash Embankment under BOQ item no. 2.02 (b) and it mandates that rate shall be same as Clause 305. 9 of MORTH Specification which is for BOQ item no.2.02 (a) and in addition, the rate for Pond Ash

Embankment shall include the compensation for (i) cost of loading of Pond Ash at the source, (ii) cost of transportation of Pond Ash from source to the site of work and (iii) cost of unloading of Pond Ash at the site of work.

- j) Thus, Contract Unit Rate for Pond Ash Embankment under BOQ item no. 2.02 (b) encompasses not only the scope of Rate set out under 305. 9, which covers the excavation in all soils for borrow pits with all lifts and leads (sub-clause (x) of 305.9.1 of MORTH Specification) but also the compensation for Pond Ash (e.g. loading, unloading, transportation, etc.).
- k) We, in view of the analysis stated herein above, is of the view that the BOQ item no. 2.02 (b) is for the construction of the Embankment with Pond Ash in full which covers pond ash core, top and side soil covers including intermediate layers. The Rate for BOQ item no. 2.02 (b) is also for the execution of the complete work of Embankment with Pond Ash. The method adopted by the Engineer to separately measure quantities of soil and pond ash for work of Embankment with Pond Ash is incorrect and not supported by the provisions of the Contract Agreement. On the other hand, the Claimants stand that full width of the Embankment with Pond Ash has to be measured for payments including both materials viz. pond ash and soil are fully supported by the provisions of the Contract Agreement. Accordingly, we are of the firm view that method contemplated for measuring the embankment with soil (BOQ item no. 2. 02 (a) and embankment with pond ash (BOQ item no. 2.02 (b) is one and same, which is by taking composite length of the

interval and determine the volume based on the average end area method.

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- o) The Respondent has brought to our notice that the judgment dated 08.11.2012 of Hon'ble Delhi High Court passed in an identical matter [FAO{OS} No. 48/2012 {NHAI V/s HCC}] wherein the Hon'ble High Court has held this claim on principle which are contrary to the terms of the Agreement. We have been informed by the claimant vide letter dated 3.08.2013 that the said judgement has been impugned before the Hon'ble Supreme Court. Though we have clearly arrived at a finding with regard to the entitlement of the Claimant and the amount which is due and payable by the Respondent. However, because of the judgement dated 08.11.2012 of the Hon'ble Delhi High Court, which is binding on us, it is held that the Claimant would not be entitled for the said amount as quantified by us as above and the Claim therefore stands rejected"

9. Concededly, the decision of the Division Bench of this Court in ***National Highway Authority of India v. Hindustan Construction Company*** (*supra*) is clearly applicable. In that case, the Arbitral Tribunal had accepted the contractor's view which is similar to the contentions advanced by the petitioner. The award rendered by the Arbitral Tribunal was also upheld by the learned Single Judge of this Court. However, NHAI successfully challenged the arbitral award and the decision rendered by the learned Single Judge before the Division Bench. The relevant extract of the decision of the Division Bench is set out below:-

“32. We find from a perusal of the impugned order of the learned Single Judge that there has been no discussion on this crucial issue. This is the reason we have been called upon to pen down a more detailed order appreciating the rival contentions of the parties. In our view, the first fallacy in the majority view of the arbitral tribunal is the manner of extraction of the terms of the contract itself. Para 11.3.11 of the Majority award where BoQ Item 2.02(a) and (b) have been extracted seeks to suggest as if there are two item numbers – one dealing with the construction of soil embankment, while the other dealing with the construction of pond ash embankment. The fact is that the original contract provides only for one BoQ Item for construction of embankment. However, the said construction of embankment can take place in two manners. The first is where only soil is used and the other is where soil and pond ash is used. The technical specification clause is the same, i.e., clause 305. It is not in dispute that the costing is quite different for soil and pond ash, largely on account of the transportation cost. The expression used in clause 2.02 (a) is “with soil” and in clause 2.02(b) is “with pond ash”. This is not as if in the second situation only pond ash is used. Both soil and pond ash is used. If we were to accept the contention as sought to be propounded in the majority view of the arbitral tribunal as also of learned counsel for the respondent, it would mean that “with pond ash” in sub clause (b) is used to mean “with soil and pond ash”. It is nobody’s case that any embankment can be completely constructed and finished with only pond ash. When sub clause (b) uses “with pond ash” it means, and can only mean – that part of the embankment which is made of pond ash alone. The opening words of clause 2.02 of the BOQ which use the expression “.....complete as per Technical specification clause 305 with all leads and lifts” only connote that the payment for this BOQ item would be

due only after completion of the work of making the embankment in a given section or stretch, i.e. upon the finishing of the soil embankment (if it is only of soil) or of soil and pond ash embankment (if it is of both the substances) with all layers of soil and pond ash in place as per the technical specification.

33. It is obvious to us how clause 2.02 – which deals with the sole item of construction of embankment, has dealt with two eventualities, i.e., where only one material is used or two different kinds of materials are used. Insofar as the content/volume of soil is used, it has to be paid at a particular rate, while the quantity of pond ash has to be paid at another rate. It has also been rightly pointed out to us that the ratio of the soil and pond ash can vary and the percentage of pond ash can be high or low as the ratio varies from 9:1 to 3:1 (pond ash : soil). It would hardly be expected that irrespective of the ratio of pond ash used (which is determined by the engineer), one rate for embankment would have to be paid and that too the higher rate, where the price differential is almost 2 ½ times. Adoption of such a mechanism for payment would lead to absurd results.

34. In our view, the terms of the contract can brook of no two views at all and the terms are clear. The learned Single Judge has, in fact, only observed that the view taken by a technical team being one possible view, he would not like to examine the same any further. He has, however, not examined the submission of the appellant as set out above. This, to us, appears to be a clear error in the impugned judgment. On a conjoint reading of BOQ item No.2.02 and clause 305.8 of the technical specification, to us, it is clear that the cross sections have to be taken in respect of the different materials used, i.e. soil and pond ash. Pertinently, it is not the case of the respondents that the two are mixed into a mixture and then used. Soil and pond ash are used separately. Thus, the cross sections are to be taken at

intervals. We cannot permit the respondent to contend that it is not possible to compute the volumes of the two materials in the cross section, when for 30 months both the appellant and the respondent were actually making measurements accordingly. The respondent itself made the IPCs and submitted for payments which were duly paid by the appellant. Such measurements were made on the basis of actual utilization of the two materials. We fail to appreciate how the arbitral tribunal could have come to a conclusion that the mode of measurement of the two items separately was not in accordance with the contract. The majority view, after having noticed the principles of consensus ad idem, seems to have failed to appreciate this vital issue. This is not a mere mistake, but for about 30 months the parties acted in a particular manner and completed 70% of the work. This could hardly be categorized as an “inadvertent error”, which was utilized by the respondent as an escape route to contend that a mistake can always be corrected. It is also not in dispute that clause 60.9 of the CoPA vests the authority only with the engineer who has opined against the respondent. He alone could have changed the IPCs. It was not for the arbitral tribunal to do so.

35. We are unable to accept the stand that merely because some element of pond ash is used, the rates for the entire work would go up by about 2 ½ times even where only soil is primarily used, irrespective of quantum of pond ash. This could never be the intent of the drafters of the contract and the parties also understood the contract in a particular manner till the respondent started having a second thought of realising extra money from the appellant.

36. We are thus of the unequivocal view that the interpretation put forth by the majority view of the arbitral tribunal, which has received the imprimatur of the learned Single Judge, is not a plausible view of the

terms of the contract which are crystal clear and brook of no two views. Such a view, we feel would border on absurdity. We are conscious of the fact that it is an arbitral tribunal manned of three technical people. But then there is also a minority view of one technical person, apart from the fact that the DRB of three technical people also opined otherwise, apart from the engineer concerned.”

10. In view of the above, this Court is unable to accept that the decision of the Arbitral Tribunal in rejecting the petitioner’s claim can be faulted.

11. The petition is, accordingly, dismissed. The parties are left to bear their own costs.

MARCH 16, 2018
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VIBHU BAKHRU, J