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

Pronounced on: 23rd March, 2018

+ FAO(OS) 192/2017

NATIONAL HIGHWAYS AUTHORITY
OF INDIA.

.... Appellant

Through : Ms. Gunjan Sinha Jain and Mr.
 Mukesh Kumar, Advs.

versus

HINDUSTAN CONSTRUCTION CO. LTD..... Respondent

Through : Mr. Dayan Krishnan, Sr. Adv.
 with Mr. Rishi Agrawala, Ms.
 Malavika Lal, Ms.
 Aakashilodha and Mr. Sanjeevi
 Seshadri, Advs.

+ FAO(OS) 195/2017

NATIONAL HIGHWAYS AUTHORITY
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.... Appellant

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CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

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C. HARI SHANKAR, J.

1. The National Highways Authority of India (NHAI) has, in FAO(OS) 192/2017 and FAO(OS) 195/2017, filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), challenged a common judgement, dated 20th April 2017, passed by the learned Single Judge of this Court in OMP 1556/2014 and OMP 1165/2014 respectively, under Section 34 of the 1996 Act. The said OMPs assailed Arbitral Awards, dated 22nd July 2014 and 28th May 2014 respectively, passed by two different three member Arbitral Tribunals, in disputes that had arisen between the appellant and the respondent. The impugned judgement, dated 20th April 2017 also adjudicated OMP(COMM) 156/2016 between the present appellant and the respondent, which arose out of a third Award, dated 13th June 2015. The said decision, too, has been challenged, by the appellant, *vide* FAO (OS) (COMM) 154/2017. Though these three FAOs had initially been listed together, FAO (OS) (COMM) 154/2017 was, subsequently de-tagged, and now stands adjourned to 20th April 2018.

2. As such, this judgement disposes of FAO(OS) 192/2017 and FAO(OS) 195/2017.

3. Having heard Ms. Gunjan Sinha Jain, for the appellant and Mr. Dayan Krishnan, for the respondent at length, we may, at the outset, identify the peripheries of our jurisdiction under Section 27 of the Act, as well as the jurisdiction of the learned Single Judge under Section 34 of the Act, as set out in the following passages from an earlier decision of this Bench in ***M.T.N.L. v. Finolex Cables Ltd, MANU/DEFENDANT/2818/2017***:

*“40. The extent of jurisdiction of the court while dealing with the challenge to an arbitral award, by now, stands authoritatively examined by a plethora of pronouncements of the Supreme Court, which travel from the judgment reported at 1994 Supp (1) SCC 644, **Renusagar Power Co. Ltd. v. General Electric Co.** to (2015) 3 SCC 49, **Associated Builders v. DDA**. On an analysis of all the said decisions, this court has, in a recent judgment reported at MANU/DE/2699/2017, **NHAI v. Hindustan Construction Co. Ltd.**, delineated the following propositions :*

*‘36. **Associated Builders v. DDA, (2015) 3 SCC 49**, may justifiably be christened as the high watermark in the law relating to Section 34 of the Act, and any attempt to paraphrase the decision is fraught with the risk of mutilation. The decision is, almost entirely, definitively authoritative, and brooks no ambiguity or anomaly. Nonetheless, in view of the proliferation of litigation, challenging arbitral awards, in recent times, we have, in a recent decision, dated 10th August 2017, in **Shiam Cooperative Group v Kamal Construction Co. Ltd.**, extracted, in extenso, the relevant paragraphs from the said decision, and respectfully culled, therefrom, the following clear principles:*

(i) The four reasons motivating the legislation of the Act, in 1996, were

- (a) to provide for a fair and efficient arbitral procedure,*
- (b) to provide for the passing of reasoned awards,*
- (c) to ensure that the arbitrator does not transgress his jurisdiction, and*
- (d) to minimize supervision, by courts, in the arbitral process.*

(ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.

(iii) An award would be regarded as conflicting with the public policy of India if

- (a) it is contrary to the fundamental policy of Indian law, or*
- (b) it is contrary to the interests of India,*
- (c) it is contrary to justice or morality,*
- (d) it is patently illegal, or*
- (e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.*

(iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

- (a) it disregards orders passed by superior courts, or the binding effect thereof, or*
- (b) it is patently violative of statutory provisions, or*
- (c) it is not in public interest, or*
- (d) the arbitrator has not adopted a "judicial approach", i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or*

whimsically, or

(e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or

(f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or

(g) the principles of natural justice have been violated.

(v) The "patent illegality" had to go to the root of the matter. Trivial illegality was inconsequential.

(vi) Additionally, an award could be set aside if

(a) either party was under some incapacity, or

(b) the arbitration agreement is invalid under the law, or

(c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

(d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or

(e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or

(g) the award contravenes the Act, or

(h) the award is contrary to the contract between the parties.

(vii) "Perversity", as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which

(a) the findings, in the award, are based on no evidence, or

(b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or

(c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.

(viii) At the same time,

(a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as "perverse",

(b) if the view adopted by the arbitrator is a possible view, it has to pass muster,

(c) neither quantity, nor quality, of evidence is open to re- assessment in judicial review over the award.

(ix) "Morality" would imply enforceability, of the agreement, given the prevailing mores of the day. "Immorality", however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.

(x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.

(xi) The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts."

41. It is apparent, therefore, that, while interference by court, with arbitral awards, is limited and circumscribed, an award which is patently illegal, on account of it being injudicious, contrary to the law settled by the Supreme Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the ld. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the Act. In a pronouncement reported at MANU/DE/0459/2015, MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse."

4. Proceeding, now, to the lis before us, we find that the issues in these two appeals overlap to a substantial extent; as such, to avoid prolixity, we propose to deal with FAO (OS) 192/2017, as the "lead case".

5. FAO (OS) 192/2017, as already stated, hereinabove has its genesis in OMP 1556/2014 which, in turn, challenged the Award, dated 22nd July 2014, passed by a three-Member Arbitral Tribunal (hereinafter referred to as "the Arbitral Tribunal").

6. Four claims, raised by the respondent herein, were decided, by the Tribunal, *vide* the aforementioned Award dated 22nd July 2014. We propose to deal with the findings of the Tribunal, the decision of

the learned Single Judge, and our findings in the present appeal, on the said claims of the respondent, serially.

7. The disputes between the appellant and the respondent arose out of a contract, dated 21st October 2005, whereby and whereunder the appellant awarded, to the respondent, the work of “4-laning from km 92.00 to km 135 of Lucknow to Ayodhya of NH-28 in UP-Contract Pkg. LMNHP EW-II (WP-3)”. A few relevant Clauses, of the aforementioned contract, dated 21st October 2005, may be reproduced thus:

Clause 51 of General Conditions of Contract (hereinafter referred to as “the GCC”):

“Clause 51.1- Variation

The Engineer shall make any variation of the form, quality or quantity of the Works or any part thereof that may, in his opinion, be necessary and for that purpose, or if for any other reason, it shall, in his opinion, be appropriate, he shall have the authority to instruct the Contractor to do and the Contractor shall do any of the following:

- a) increase or decrease the quantity of any work included in the Contract,*
- b) omit any such work (but not if the omitted work is to be carried out by the Employer or by another contractor),*
- c) change the character or quality or kind of any such work,*
- d) change the levels, lines, position and dimensions of any part of the Works,*
- e) execute additional work of any kind necessary for the completion of the Works,*
- f) change any specified sequence or timing of construction of any part of the Works.*

No such variation shall in any way vitiate or invalidate the Contract, but the effect, if any, of all such variations shall be valued in accordance with Clause 52.

Provided that where the issue of an instruction to vary the Works is necessitated by some default of or breach of contract by the Contractor or for which he is responsible, any additional cost attributable to such default shall be borne by the Contractor.

51.2 Instructions for Variations

The Contractor shall not make any such variation without an instruction of the Engineer. Provided that no instruction shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an instruction given under this Clause, but is the result of the quantities exceeding or being less than those stated in the Bill of Quantities.”

Clause 52 of GCC

“Clause 52.1-Valuation of 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, falling 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 of Engineer 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 Contained in the Contract for any item of the Works is, by reason of such varied work, rendered inappropriate of 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.

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 commencement of the varied work, notice shall have been given either:

- a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price, or*
- b) by the Engineer to the Contractor of his intention to vary a rate or price.*

Clause 52.3- Variations Exceeding 15 per cent

If, on the issue of Taking-Over Certificate for the whole of the Works, it is found that as a result of:

(a) all varied work valued under Sub-Clauses 52.1 and 52.2, and

(b) all adjustments upon measurement of the estimated quantities set out in the Bill of Quantities, excluding Provisional Sums, dayworks and adjustments of price made under Clause 70,

but not from any other cause, there have been additions to or deductions from the Contract Price which taken together are in excess of 15 per cent of the “Effective Contract Price” (which for the purposes of this Sub-Clause shall mean the Contract Price, excluding Provisional Sums and allowance for dayworks, if any) then and in such even (subject to any action already taken under any other Sub-Clause of this Clause), after due consultation by the Engineer with the Employer and the Contractor, there shall be added to or deducted from the Contract Price such further sum as may be agreed between the Contractor and the Engineer or, failing agreement, determined by the Engineer having regard to the Contractor’s Site and general overhead costs of the Contract. The Engineer shall notify the Contractor of any determination made under this Sub-Clause, with a copy to the Employer. Such sum shall be based only on the amount by which such additions or deductions shall be in excess of 15 per cent of the Effective Contract Price.

Clause 52.4- Daywork

The Engineer may, if in his opinion, it is necessary or desirable, issue an instruction that any varied work shall be executed on a daywork basis. The Contractor shall then be paid for such varied work under the terms set out in the daywork schedule included in the Contract and at the rates and prices affixed thereto by him in the Tender.

The Contractor shall furnish to the Engineer such receipts or other vouchers as may be necessary to prove the amounts paid and, before ordering materials, shall submit to the Engineer

quotations for the same for his approval.

In respect of such of the Works executed on a daywork basis, the Contractor shall, during the continuance of such work, deliver each day to the Engineer an exact list in duplicate of the names, occupation and time of all workmen employed on such work and a statement, also in duplicate, showing the description and quantity of all materials and Contractor's Equipment used thereon or therefor other than Contractor's Equipment which is included in the percentage addition in accordance with such daywork schedule. One copy of each list and statement will, if correct, or when agreed, be signed by the Engineer and returned to the Contractor.

At the end of each month the Contractor shall deliver to the Engineer a priced statement of the labour, materials and Contractor's Equipment, except as aforesaid, used and the Contractor shall not be entitled to pay payment unless such lists and statements have been fully and punctually rendered. Provided always that if the Engineer considers that for any reason the sending of such lists or statements by the Contractor, in accordance with the foregoing provision, was impracticable he shall nevertheless be entitled to authorise payment for such work, either as daywork, on being satisfied as to the time employed and the labour, materials and Contractor's Equipment used on such work, or at such value therefor as shall, in his opinion, be fair and reasonable."

Item 2.02 of Bill of Quantities (hereinafter referred to as "the BOQ")

"Construction of embankment with approved borrow soil with all leads and lifts all complete as per drawing and Technical Specifications Clause 305"

Item 2.03 of BOQ

"Construction of embankment with suitable material obtained

from roadway, cutting and excavation from drain and foundation of other structures with all leads and lifts all complete as per drawing and Technical Specifications Clause 305.”

Item 2.08 of Bill of Quantities (BOQ)

“Construction of embankment with fly-ash obtained from coal or lignite burning thermal power station as waste material, spread and compacted in layers as per drawing and Additional Technical Specification Clause A-8.”

Clause 2.1 of Conditions of Particular Application (hereinafter referred to as “the COPA”)

“Sub-Clause 2.1- Engineer’s Duties and Authorities:

With reference to Sub-Clause 2.1(b), the following provision shall also apply:

The Engineer shall obtain the specific approval of the Employer before a taking any of the following action specified in Part-I: in all other cases engineer shall decide the issues on merits as per terms and conditions of the contract and keep the employer posted by endorsing copies of his communications to the Contractor.

- a. consenting to the subletting of the part of the Works under clause 4;*
- b. Certifying additional cost determined under Clause 12’.*
- c. determining an extension of time under Clause 44;*
- d. issuing a variation under Clause 51 except;*
 - i. in an emergency situation, as reasonably determined by the Engineer; or*
 - ii. If such variation would increase the contract price by less than the amount stated in the appendix to Bid; or*
- e. fixing rates or prices under Clause 52*

Notwithstanding the obligation, as set out above, to obtain approval, if, in the opinion of the Engineer, an emergency occurs affecting the safety of life or of the Works or of adjoining property, he may, without relieving the Contractor of any of his duties and responsibilities under the Contract, instruct the Contractor to execute all such work or to do all such things as may, in the opinion of the Engineer, be necessary to abate or reduce the risk. The Contractor shall forthwith comply, despite the absence of approval of the Employer, with any such instruction of the Engineer. The Engineer shall determine an addition to the Contract Price, in respect of such instruction in accordance with Clause 52 and shall notify the Contractor accordingly with a Copy of the Employer.”

“Sub-Clause 70.8- Subsequent Legislation:

If, after the date 28 days prior to the latest date for submission of tenders for the Contract there occur in the country in which the Works are being or are to be executed changes to any National or State Statute, Ordinance, Decree or other Law or any regulation or by-law of any local or other duly constituted authority, or the introduction of any such State Statute, Ordinance, Decree Law, regulation or by-law which causes additional or reduced cost of the Contractor, other than under the preceding sub-Clauses of this Clause, in the execution of the Contract, such additional or reduce cost shall, after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be added to or deducted from the Contract Price and the Engineer shall notify the Contractor accordingly, with a copy to the Employer. Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of sub-Clauses 70.1 to 70.7.”

8. There is no dispute about the fact that the work, under the

contract, was completed on 21st February 2011 and that the defect liability period was also over, before the disputes surfaced. We now propose to deal with the disputes, one by one.

9. Re. Claim No.1 – “Non-Approval of appropriate rates for the varied works of construction of embankment of Faizabad bypass with earth obtained from Contractor’s own borrow pit”

9.1 This claim related to construction of the embankment of the Faizabad by-pass. The BOQ contemplated construction of the said embankment using fly-ash. Contending that the quantity of fly-ash stipulated in the contract was insufficient to construct the embankment, the respondent addressed a communication, dated 11th February 2006, to the Engineer-in-charge of the contract, requesting for revision of the rates mentioned in Item No. 2.08 of the BOQ (*supra*).

9.2 The Engineer, in his response dated 28th December 2006, stated that the fly-ash to be used in the construction of the embankment would be restricted to the BOQ quantity. In a subsequent communication dated 6th February 2007, the Engineer stated that the action of restricting the quantity of embankment construction with fly-ash upto 1,10,000 cu.m. (which was the quantity stipulated in the contract) had been taken in the interests of the appellant, in order to avoid huge additional financial cost.

9.3 In-principle approval for restricting the quantity of fly-ash to be used to construct the embankment to 1,10,000 cu.m. was granted, by the appellant, *vide* letter dated 30th April 2007; however, the said letter went on to direct that the remainder of the embankment would be constructed using earth obtained from the respondent's own borrow area. While the respondent proceeded to construct the embankment using earth from its borrow area, as directed by the appellant, it also submitted a claim, in respect of the said work, at a new rate, with a new unit cost analysis, *vide* letter dated 17th November 2007. The new rate derived by the respondent was Rs. 170.54 per cu.m., based on actual inputs required for execution of the said construction using borrow earth, which involved, *inter alia*, transportation of the earth from its borrow area to the site of the Faizabad embankment by-pass.

9.4 The said claim, of the respondent, was rejected by the Engineer's representative, *vide* letter dated 15th January 2008, which stated that revision of rate for BOQ Item 2.02 could not be entertained, as BOQ Item 2.02 did not comply with the requirements of Clause 52.2 of the GCC, the total cost of the said item, as per the said item, being less than 2% of the contract price, though, admittedly, quantity increase exceeded 25%.

9.5 The matter was referred to the Dispute Resolution Board (DRB) of the appellant, which opined that, till the quantities exceeded the limits specified in Clause 52.2 of the GCC/COPA, the demand, of the respondent, for re-fixation of rates could not be acceded to.

9.6 In view of the dispute that had arisen, the claim was referred to Arbitration.

9.7 The respondent contended, before the Tribunal, thus:

- (i) The bidding data contemplated construction of the embankment at the Faizabad by-pass using fly-ash.
- (ii) The action of the appellant, in directing the respondent to execute the increased quantities for construction of the embankment using borrow earth instead of fly-ash, constituted a change in the scope of work as contemplated by Sub Clause (b) and (c) of Clause 51.1 and not Sub Clause (a).
- (iii) These instructions effectively changed, entirely, the scope of the work. Inasmuch as the contract did not contain any item on the basis of which a rate could be determined, for execution of the embankment using borrow earth, a rate therefor had to be fixed between the parties.
- (iv) Clause 52.2 applied to work items for which rates were available in the contract, as stipulated in the BOQ. Where such rates were available, if the quantities of the items increased or decreased, Clause 52.2 could be applied. The 2% and 25% stipulations contained in the said Clause, therefore, did not cover a case such as the present, where the manner of execution of the contract was totally foreign to that contemplated in the BOQ.
- (v) The work thus directed to be executed by the appellant to

the respondent, therefore, constituted a “new” item of work and was not just a “variation”.

(vi) Insofar as BOQ Item 2.02 was concerned, the said Item dealt with undertaking of embankment of sections of the road other than Faizabad bypass, of low height. Such construction was possible using earth from various identified borrow pits adjacent to the project corridor, on an economical leads. These rates could not, therefore, be imported to assess payments to be made towards the construction of the embankment at the Faizabad bypass using earth from the respondent’s borrow area.

(vii) Usage of earth from the respondent’s borrow area, as directed by the appellant, involved huge additional expenses, which are detailed in para 5.1.10 of the Award. It was for this reason that a new rate had to be fixed for making payments against such additional work.

9.8 As against this, the appellant contended, before the Tribunal, thus:

(i) Clause 1.1 of the Bidding Data did not specifically indicate that the embankment construction of the Faizabad bypass had to be constructed with fly-ash only.

(ii) Section 2 of the Preamble to the BOQ provided that the quantities stipulated in the BOQ were not fixed but subject to variation as per actual quantities of work ordered.

(iii) BOQ Items 2.02, 2.03 and 2.08 did not specify the stretches of the embankment which were to be constructed

using fly-ash and borrow earth respectively. Rather, a reading of these Items made it clear that it was the prerogative of the appellant to direct the respondent, at the time of execution of the project, to use fly-ash, borrow earth, or any other suitable material.

(iv) Had the respondent any doubt regarding usage of fly-ash in construction of the embankment, it ought to have clarified it in the pre-bid meeting. This was not done.

(v) Clause 51.1 of the GCC empowered/authorized the Engineer to order any such variation as was felt necessary during execution of the contract, subject to obtaining specific approval of the appellant, in accordance with Clause 2.1 (b)(d) of the COPA.

(vi) Irrespective of the sub-clause of Clause 51.1 of the GCC whereunder variations were issued, BOQ Item 2.02 applied for increase in the quantity of embankment construction using borrow soil. As such, the rate provided in BOQ Item 2.02 provided a reasonable basis to make payment to the respondent for the work of construction of the embankment at the Faizabad bypass using earth from its borrow area. No justification, therefore, existed, for the respondent to seek any change in the rate stipulated in BOQ Item 2.02.

(vii) No occasion for fixing any new rate, under Clause 52.2 of the GCC, arose. The request, of the respondent, for fixation of a new rate, was contrary to the terms of the contract, for the reason that Clause 52.2 clearly provided for fixation of new rate

where the quantity of the material exceeded 25% and amount exceeded 2% of the contract price. These conditions were required to be cumulatively fulfilled. It was not so in the present case.

9.9 Adjudicating on the issue, the Arbitral Tribunal found that there was a clear distinction between construction of the embankment of the project road of low height (up to 2.5m) by earth, and of the embankment of the Faizabad bypass (which was normally more than 3m in height) with fly-ash. It was also observed that the Government notifications dated 5th November 2002 and 4th December 2003 unambiguously provided for the use of fly-ash in the Faizabad bypass road, as it was within 100 km of thermal plants. These notifications had been included in the IRC specifications, which provided that any deviation therefrom could be agreed to only for technical reasons, if approved by the Chief Engineer (Design) or Engineer-in-Chief of the concerned agency or organisation. Given these facts, the Arbitral Tribunal opined that it was clear that the Faizabad bypass embankment had to be constructed using fly-ash for which rates were required to be quoted by the bidders under BOQ Item 2.08; on the other hand, shallow reaches of the main road were to be constructed using earth only. In view of the stipulation that no change, regarding usage of fly-ash, could be effected by the Engineer/employer except on a technical ground by approval of the competent authority, it was not possible for any bidder to anticipate construction of the embankment using anything other than fly-ash. Taking stock of the

communications amongst the respondent, the Engineer and the appellant, regarding inadequacy of the quantity of fly-ash stipulated in BOQ Item 2.08 for construction of the embankment at the Faizabad bypass and how permission to use additional fly-ash was not granted only in the economic interests of the appellant, the Tribunal held that the appellant could not be expected to vary the BOQ items to derive financial benefits, to the prejudice of the interests of the respondent, by decreasing high cost items and increasing low cost items, without technical or compelling practical considerations. It was noted that Clause 51.1 of the GCC only empowered the Engineer to make variations, and not to change the very item with which the embankment was to be constructed. This change, in contravention of the contractual stipulations, it was noted, had been effected only to benefit the appellant financially. It was held that, after bidding and finalisation of the contract agreement, the basic structure of the bid could not be altered, and that it was not permissible for an employer, “to call for bid involving earth embankment and concrete dam structure, and during execution replace one with the other without any consequence”.

9.10 As a consequence of the above appraisal, the Arbitral Tribunal held that the order limiting the quantity of fly-ash for construction of the embankment, and directing the remainder of the embankment to be constructed using earth, resulted in alteration of the Technical Specification of the work of fly-ash embankment, it could not be regarded a mere variation in quantity, but amounted to change in a

scope of the work relating to the Faizabad bypass, entitling the respondent to a new rate for the substituted work. It therefore amounted to an entirely new item of work, under Section 51.1 Clause (c) of GCC. It was also noted that, while accepting the substituted work, the respondent had informed the appellant that the use of earth from borrow its area, as directed, would require huge additional quantities of earth, extra lead and additional resources, which would entitle it to fixation of a new rate. Such fixation, it was observed, was not prohibited by contract.

9.11 The applicability of Clause 52.2 of the GCC was ruled out, as the case was not one of variation, but ordering of a change of the scope of the work relating to the Faizabad bypass, involving an absolutely different methodology of work. Clause 52.2, it was held, applied to variations within a single item and not where one item of work was substituted by another (for which, we may observe, no rate was specified in the contract). The appellant was also found to be solely responsible for the gross underestimation of the quantities of material required for execution of Items 2.02 and 2.08 of the BOQ.

9.12 Having thus rendered its findings relating to the admissibility of a new rate for the work of construction of the remainder of the Faizabad bypass using earth from the respondent's borrow area, instead of fly-ash, the Arbitral Tribunal itself worked out the rate at which payment could be made to the respondent thereagainst, and, on that basis, awarded an amount of Rs. 4,48,94,388/- against the said

claim.

9.13 The learned Single Judge, in the impugned judgement, endorsed the findings of the Arbitral Tribunal, to the effect that in order to save additional cost to itself, the appellant had altered the scope of the work, and directed the respondent to construct part of the Faizabad bypass embankment using earth from its borrow area instead of fly-ash. The original work, as stipulated in the contract, clearly envisaged construction of the embankment using only fly-ash. Obviously, therefore, the direction to use borrow earth could not be regarded as a variation, but resulted in an entirely new item of work, deserving payment at a new rate. The invocation, by the appellant, of Clause 52.2 of the GCC, to argue that no change in rate was admissible unless the item accounted for more than 2% of the contract price whereas, in the present case, the contract price had increased by less than 2%, was found to be without substance, for the simple reason that Clause 52.2 applied only in the case of change in the quantity, and not to a case where the scope of work was itself altered. The view of the Arbitral Tribunal was, therefore, found to be plausible, and not, deserving of interference, applying the law laid down in *NHAI v. ITD Cementation India Limited (2015) 14 SCC 21*.

9.14 Having perused the Award and the judgement of the learned Single Judge, we express our entire concurrence with the decision, of the learned Single Judge, not to interfere with the findings of the Arbitral Tribunal. On the face of it, it is clear that the contractual

clauses contemplated construction of the Faizabad bypass embankment using fly-ash, and that the quantity of fly-ash stipulated in BOQ Item 2.08 was insufficient for construction of the embankment. The respondent appropriately requested for sanctioning of additional quantity of fly-ash to construct the embankment but, in order to minimise its own cost, the appellant directed the respondent to use earth from its own borrow area, instead of fly-ash, to construct the remainder of the embankment. There can be no manner of doubt that such alteration was not contemplated by the contract and had, in fact been directed in contravention of the existing Governmental instructions on the subject. While accepting the said request made by the appellant, the respondent made it unambiguously clear that it would be entitled to a new rate to carry out the said work, as it involved huge additional costs on its part, inter alia for procuring the said borrow earth and transporting to the site of the embankment. The attempt, of the appellant, to apply the rates contained in BOQ Item 2.02, to make payment against the work thus done, was obviously totally misguided, as BOQ Item 2.02 dealt with construction of roads of low height and not of the Faizabad embankment. There was, as the Tribunal correctly noted, a clear distinction between the two items of work. Equally ill conceived was the reliance, by the appellant, on Clause 52.2 of the GCC, which covered only changes in quantities of the material used in carrying out a particular item of work and not where the scope of the work itself was fundamentally altered by substituting one material by another.

9.15 Our jurisdiction, under Section 37 of the 1996 Act, is even more circumscribed than the jurisdiction of the learned Single Judge under Section 34 thereof. In view of the principles governing such jurisdiction, as set out in our earlier judgement in *M.T.N.L. v. Finolex Cables Ltd (supra)*, as also in *NHAI v. ITD Cementation India Limited (supra)*, on which the learned Single Judge has rightly relied, we see no reason to adopt a view different from that adopted by the learned Single Judge.

10. Re. Claim No.2 – “Construction of embankment with fly-ash as per Additional Technical Specification A-8 (Item No. 2.08 of BOQ)”

10.1 The contract between the appellant and the respondent provided for construction of two types of embankment, with soil and with fly-ash. Construction of the embankment with soil was to be as per Clause 305 of the MORT&H specifications, whereas construction of the embankment with fly-ash was to be as per Additional Technical Specification A-8, and the two types of construction were covered by BOQ Items 2.02 and 2.08 respectively.

10.2 The dispute in this case arose because the respondent claimed payment, for the work of fly-ash embankment, as a composite item under BOQ Item No. 2.08, whereas the Engineer, (whose decision was accepted by the appellant) certified and paid for part of the embankment, which comprised earth cover/intermediate soil layers under BOQ Item 2.02 and for the remaining part, having fly-ash in

core, under BOQ Item 2.08. This distinction was sought to be explained, by the Engineer (and the appellant) on the ground that the contract contemplated separate rates in the BOQ Items for work done using earth and fly-ash. The matter was referred to the DRB, which accepted the claim of the respondent, stating that it was entitled to payment for the embankment construction with fly-ash as a composite section at the rates mentioned in BOQ Items 2.08. The decision of the DRB being unacceptable to the appellant, the dispute was referred to arbitration.

10.3 For reasons which would become apparent immediately hereinafter, it is not necessary, or expedient, for us to dwell further on the disputes relating to this claim as ventilated by the respondent. Suffice it to state that the Arbitral Tribunal, after a detailed and exhaustive analysis, concurred with the view of the DRB and awarded, to the respondent, Rs. 2,09,10,463 and € 41,748, against Claim No.2.

10.4 As regards Claim No. 2 and the Award of the Arbitral Tribunal thereon, the learned Single Judge, in the impugned judgement, observes as under:

“35. Claim No.2 was for payment for construction of embankment with fly-ash 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.”

10.5 Having perused the impugned judgement of the learned Single

Judge carefully, we are unable to subscribe to the finding contained in para 35 thereof, extracted *supra*, that the issue in controversy in Claim No.2 stands covered by the earlier findings returned in respect of OMP (Comm) 156/2016, therein. In OMP (Comm) 156/2016, there were four claims, of which Claims Nos. 1, 2 and 3 correspond to Claim Nos. 1,3 and 4 in the present case. Claim No. 4 OMP (Comm)156/2016 was for fixation of appropriate rate for additional work of construction of a viaduct, which does not correspond to any of the claims with which we are concerned. There was, therefore, no claim involved, in OMP (Comm) 156/2016, corresponding to Claim No.2 in the present appeal. The finding, of the learned Single Judge, that Claim No. 2 in OMP 1556/2014 stood covered by his earlier findings, returned in OMP (Comm) 156/2016 is, therefore, not correct. Having said that, we are of the view that it would not be proper for us, in exercise of our jurisdiction of Section 37 of 1996 Act, to pronounce on the correctness of the Arbitral Award on this claim without examination thereof, at the first instance, by the learned Single Judge, under Section 34 thereof, in view of the scheme of the 1996 Act.

10.6 Accordingly, we are constrained to set aside the finding of the learned Single Judge Claim No.2 of the respondent and remand the matter to the learned Single Judge for reconsideration thereof.

11. Re. Claim No.3 – Reimbursement of additional cost incurred by the contractor on account of implementation of the provisions of Cess Act by levying cess @ 1% of the project cost in the state of Uttar Pradesh with effect from

04.02.200 – Subsequent Legislation

11.1 Clause 70.8 of the COPA stipulated that if, after the expiry of 28 days prior to the last date for submission of tenders, there occurred any changes to any national or State statute, or other law, which resulted in additional or reduced cost to the contractor in the execution of the contract, such additional or reduced cost would be added to, or deducted from, the contract price, and the Engineer would notify the contractor accordingly. It is not necessary for us to delve deep into this claim or the specifics thereof as the issue was elementary. The two statutes levying cess i.e. the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and the Cess Act, 1996, provided for payment of cess by all establishments who carried on building and other construction work, or employed ten or more than workers. Cess was payable at a rate not exceeding 2% of the cost on construction, to be notified by the Government. These Acts, had, therefore, been enacted prior to the 28-day period stipulated in Clause 70.8 of the COPA (*supra*).

11.2 The Cess Act required levy and collection of cess by a Welfare Board. The notification constituting the said Board, was issued only on dated 20th November 2009. In the absence of the Welfare Board, collection of cess, under either of the aforementioned two Acts, was impossible. It was also a conceded factual position that, at the time of submission of bid, no cess was levied in the State of UP, and that the applications received in response to the notice inviting bids were

required to consider only duties, taxes and other levies payable 28 days prior to the last date of submission of bids. In view of these facts, the Arbitral Tribunal held that the Cess Act and the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, having become operative, qua payment of cess thereunder, only after the cut off date, i.e 17th June 2005, the levy of cess was eligible to be treated as “subsequent legislation” and consequently, that the recovery of cess by the appellant from the respondent’s bills was contrary to the terms of the contract.

11.3 The learned Single Judge found that this aspect of the matter stood covered by the judgment of the Supreme Court in *NHAI v. ITD Cementation India Limited (supra)*. It is also noted, in para 16 of the impugned judgment, that this part of the impugned award was “very fairly” not pressed by the learned senior counsel appearing for the appellant, Mr. Adarsh B. Dial.

11.4 Ms. Gunjan Sinha Jain, appearing for the appellant, has no quarrel, with the finding of the learned Single Judge that the merits of her client’s case, qua this claim, are covered against it; she, however, takes exception to the observation, in the impugned judgement, that the decision which covers her client is *NHAI Vs. ITD Cementation India Limited Ltd (supra)*. She submits that, in fact, the judgement which covers her client, as regards this claim, is not *NHAI v. ITD Cementation India Limited (supra)* but the judgment of a predecessor

Division Bench of this Court in *NHAI v. Gammon-Atlanta, 2013 (4) Arb LR 61 (Del)*. Apparently, the reason for Ms. Jain wanting this aspect clarified by us is that the decision in *NHAI v. Gammon-Atlanta (supra)* is presently under challenge before the Supreme Court, whereas *NHAI v. ITD Cementation India Limited (supra)* is a judgement of the Supreme Court itself.

11.5 Having examined the decisions of *NHAI v. ITD Cementation India Limited (supra)* and *NHAI v. Gammon-Atlanta (supra)*, we find substance in the submission of Ms. Gunjan Sinha Jain, to the extent that, on facts, the dispute indeed appears to be covered against her client, on merits, by the Division Bench judgement of this Court in *NHAI v. Gammon-Atlanta (supra)*. A reading of *NHAI v. ITD Cementation India Limited (supra)* reveals that the controversy before the Supreme Court therein did not deal with an issue where the statute had been enacted prior to the cut off date, and became capable of implementation and enforcement thereafter. The Supreme Court, in that case, was concerned with the question of whether additional cost, owing to change of seigniorage fee had, or had not, been taken into account in the indexing of inputs while providing for price adjustments in the contract. The contention of NHAI, in that case, was that the said levy having already been factored into the indexing price formula, no further payment to the contractor was justified. As against this, we find that the decision of this Court in *NHAI v. Gammon-Atlanta (supra)* directly dealt with a controversy parallelizing that involved in the present case.

11.6 As regards the specific grievance urged by Ms. Jain at the Bar, we note that the learned Single Judge has not specifically stated that, on facts, the present claim is covered by the decision in *NHAI v. ITD Cementation India Limited (supra)*. It appears that the impugned judgement has upheld the award of the Arbitral Tribunal on merits, and the reference, to *NHAI v. ITD Cementation India Limited (supra)* was probably intended to underscore the position that no case for interference existed, given the limited playing field that Section 34 of the 1996 Act provides, with which proposition there can possibly be no cavil.

11.7 Be that as it may, we agree with Ms. Gunjan Sinha Jain, learned counsel for the appellant that, on facts as well as in law, the issue in controversy in Claim No. 3 stands covered by the judgement of the Division Bench of this Court in *NHAI v. Gammon-Atlanta (supra)*. At the same time, we hasten to add that even *de hors* the said judgment, applying the principles regarding the scope of interference, by this Court with arbitral awards, under Sections 34 and 37 of the 1996 Act, as laid down in *inter alia*, *NHAI v. ITD Cementation India Limited (supra)*, we find no reason to differ with the findings of the Arbitral Tribunal, regarding this claim of the respondent.

12. Re. Claim No.4 – “Withholding of part of payment due towards price adjustment on foreign currency portion, from interim payment certificates.”

12.1 Payment for the work executed under the contract, had to be made in two currencies, 90% in Indian Rupees and 10% in Euros (€). Such payment was subject to adjustment in accordance with the formula stated in the contract. It was also provided in the contract that 15% of the payment in Euros was not adjustable. Accordingly, the respondent submitted the breakup of 85% of the foreign currency portion, 30% towards expatriate staff and labour and 55% towards plant, machinery and spares. While submitting monthly statements during execution of the work, the respondent effected price adjustment, according to the formula of the contract, of 85% of the Euro portion. The representative of the appellant's Engineer, however, certified price adjustment only on approximately 72% of the Euro component, by deducting 15% from the 85% claimed by the respondent.

12.2 The formula for adjustment, as contained in the contract reads thus:

$$VF_c = 0.85 \times R_1 \times (Fe_1 - Fe_o) / Fe_o$$

Where,

VF_c = increase or decrease in cost of work payable due to changes in cost of foreign input.

R₁ = Portion of 'R' as payable in foreign currency (at fixed exchange rates)

Fe_o = the index applicable for the foreign input (plant, material, engineer's salary etc. As the case may be) on the day 28 days prior to the date of submission of bids as published in the country of origin.

Fe₁ = corresponding index on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related (average index in case

indices are published at lesser intervals.)”

12.3 The contention of the respondent was that the factor of 0.85 contained in the aforementioned formula itself provided for the adjustment of 15%, from the foreign currency portion, as stipulated in the contract. As against this, the appellant contended that the said factor of 0.85 was not connected in any way with the 15% non-adjustable Euro portion indicated in the contract. The claim of the respondent was rejected by the DRB and the matter was thereupon, referred to the arbitration.

12.4 The Arbitral Tribunal accepted the submission of the respondent, that the factor of 0.85, in the above-mentioned formula, accounted for the 15% non adjustable portion of the Euro component of the payment. The findings of the Arbitral Tribunal, in this regard read thus:

“Contract also requires the bidders to provide break up of total foreign currency component. Here, the contract specifically indicates 15% as non-adjustable, which, in other words means 85% is adjustable, which is nothing but the factor 0.85 in the formula. This view is further supported by the note, which is provided under the format, (Refer to para (vii) of Adjustment to foreign currency of CoPA 70.3. The Non-adjustable part is 15%). The para (viii) of Clause. 70.3 of CoPA provides formula which is reproduced below: $VFc = 0.85 \times Rf \times (Fei - Feo)/Feo$. Thus when the note (15% non-adjustable is read with the formula under clause 70.3 viii of CoPA, it is clear that 85% of Euro component is adjustable. There cannot be further 85% adjustment and such adjustment would result in 72.2% (0.85 x 0.85) adjustment which is unfounded under the contract.

The Claimant has given break down of the 85% adjustable portion of Euro into Expatriate Staff and Labour @ 30% and Plant, Machinery and Spares @ 55% respectively, which is agreed to by the Respondent.

Therefore, AT is of the view that payments for the price adjustment are to be made to Claimant duly considering the above components in such a manner that 85% of the foreign currency component is adjusted and not 72% adjustment is incorrect and not in accordance with the terms of contract.”

12.5 The learned Single Judge has opined, in the impugned judgment, that the view of the Arbitral Tribunal is an entirely plausible view and that, in fact, in the contract between the parties, the same view had been adopted by the Engineer, in respect of earlier bills. It is observed, in the impugned judgment, that the appellant was unable to show any basis on which the finding of the learned Arbitral Tribunal, on this issue, could be characterized as perverse or shocking to the judicial conscience.

12.6 We entirely agree with the said finding, and find no reason to interfere with the decision of the Arbitral Tribunal on this claim of the respondent, in exercise of our limited jurisdiction under Section 37 of 1996 Act. The reference to the “0.85” factor, in the formula provided in the contract, does appear to be on account of the stipulation, therein, that 15% of the foreign currency component would be non-adjustable. No other reason, for incorporation of the said factor, in the formula, is forthcoming from the record, neither could any such reason be elucidated, at the Bar, by learned counsel for the appellant. We are

unable, therefore to discern any infirmity in the reasoning of the Arbitral Tribunal in this regard, or in the impugned decision of the learned Single Judge to uphold the same.

13. The above findings dispose of the issues involved in FAO 192/2017, which arises out of OMP 1556/2014.

14. In so far as FAO 195/2017 is concerned, OMP 1165/2014, out of which, the said appeal emanates, involved only three claims, which were identical to Claim Nos. 1,3 and 4 in the present case i.e. for fixation of appropriate rates for the new work of construction of the embankment at Faizabad by-pass with earth in place of fly-ash, reimbursement of additional cost on account of implementation of the provisions related to cess, and short-payment on account of application, by the appellant, of 15% non adjustable portion of foreign currency component, in the payment to be made to the respondent, twice over. Our findings, hereinabove, on the corresponding claims in FAO(OS) 192/2017, ie. Claims 1, 3 and 4, apply, *mutatis mutandis*, to the claims involved in FAO 195/2017, and we entirely endorse the judgement of the learned Single Judge in that regard.

15. In the result, we uphold the findings returned by the learned Single Judge in the impugned judgement, insofar as OMP1556/2014 and OMP1165/2014 are concerned, except for the finding as regards Claim No. 2 in OMP 1556/2014, which would require re-examination.

16. The appellant is also aggrieved by the decision, of the learned Single Judge, to impose costs on it, amounting in the aggregate, to Rs. 40,000/- (in OMP 1556/2014 and OMP 1165/2014). We, too, feel that the learned Single Judge has erred – on the side of leniency. We have had repeated occasion to express our discomfort at the multitude of petitions, under Section 34, and appeals, thereafter, under Section 37, being filed under the 1996 Act, which render “yeoman disservice” to the object and purpose of enactment of the Act itself. We do not intend to reiterate the same. Suffice it to state that we find no justification to interfere with the costs imposed by the learned Single Judge, which stand upheld. We would, indeed, have been inclined to impose further costs in both these appeals, but for the fact that we are allowing FAO (OS) 192/2017 in part (to the extent of the finding, in the impugned judgement, *qua* Claim No. 2 therein). We do, however, burden the appellant with additional costs of Rs. 50,000/- in FAO (OS) 195/2017.

17. Resultantly,

- (i) FAO(OS) 192/2017 is partly allowed, to the extent that, while all other findings of the learned Single Judge in OMP 1556/2014, are upheld, the finding regarding Claim no. 2 is set aside and OMP 1556/2014, only *qua* the said Claim, remanded to the learned Single Judge for consideration afresh,
- (ii) FAO (OS) 195/2017 is dismissed,
- (iii) the costs of Rs 20,000/- each, as imposed by the learned Single Judge, in OMP 1556/2014 and OMP 1165/2014, are

upheld, and

(iv) the appellant is burdened with further costs of Rs. 50,000/- in FAO (OS) 195/2017.

18. These appeals are disposed of in the above terms.

**C. HARI SHANKAR
(JUDGE)**

ACTING CHIEF JUSTICE

MARCH 23, 2018

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