IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 02.07.2018

+ **O.M.P. (COMM) 19/2018 & IA Nos. 739/2018 & 6462/2018**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ...Petitioner

Versus

M/S HINDUSTAN CONSTRUCTION CO. LTD. ...Respondent

Advocates who appeared in this case:
For the Petitioner :Dr Maurya Vijay Chandra.
For the Respondent :Mr Dayan Krishnan, Senior Advocate with Ms MalvikaLal & Ms AakashiLodha.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 03.09.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal comprising of three arbitrators, namely, Sh S.S. Agarwal (Presiding Arbitrator), Sh M.K. Aggarwal and Sh J.S. Katoch (hereafter 'the Arbitral Tribunal').

2. The impugned award was rendered in the context of disputes that had arisen between the parties in relation to the 'Contract Agreement' dated 21.10.2005 (hereafter 'the Agreement') for execution of the works relating to Lucknow-Muzzaffarpur National

Highway Project NH-4.

3. By the impugned award, the Arbitral Tribunal rejected NHAI's claim and awarded a sum of ₹1,25,05,186/- alongwith future interest at the rate of 12% per annum in favour of the respondent (hereafter 'HCL'). NHAI has contested the award made against the counter claim preferred by HCL.

4. The controversy involved in the present petition relates to whether the Arbitral Tribunal had erred in rejecting the claim of interest on deferment of recovery of Mobilization and Equipment Advance as per Clause 60 of Conditions of Particular Application (COPA) preferred by NHAI.

5. NHAI is a statutory body constituted under Section 3 of the National Highways Authority of India Act, 1988 and is, *inter alia*, engaged in Development, Maintenance and Management of National Highways. HCL (the Contractor) is a company incorporated under the Companies Act, 1956.

6. On 21.10.2005, NHAI and HCL entered into the Agreement for execution of the work of four laning of Lucknow-Muzzaffarpur National Highway-4 (NH-4) from km 135.000 to km 164.000 of Ayodhya to Gorakhpur Section of NH-28 in the State of Uttar Pradesh (hereafter 'the Project').

7. The Agreement was a unit rate contract. The bidding documents contained a detailed document 'Bill of Quantities' (hereafter 'BOQ')

containing the items of work with the estimated quantities of each item to be executed by HCL. The parties adopted the terms and conditions of the contract as contained in the General Conditions of Contract (GCC) and Special Conditions of Contract (SCC). These terms are based on standard format FIDIC Contract 4th Edition in 1987 with certain Conditions of Particular Application (COPA) amending the FIDIC and GCC.

8. On 22.03.2007, HCL requested the Engineer to defer the recovery of mobilization and machinery advance from interim payment certificates till the Project progress reaches 20%.

Claims

9. NHAI filed its Statement of Claims before the Arbitral Tribunal claiming (i) ₹3,19,14,314/- on account of loss of interest in respect of deferment of recovery of mobilization and equipment advance for three months, which continued for over thirty months (Claim No.1); (ii) *pendente lite* interest at the rate of SBI-PLR + 2% on the abovementioned amount (Claim No.2); (iii) future interest at the rate of 18% per annum (Claim No.3); and (iv) cost of arbitration (Claim No.4).

10. HCL filed its Statement of Defence contesting the claims made by NHAI. HCL, *inter alia*, also filed a counter claim for an amount of ₹1,25,05,186/- towards the amount withheld by NHAI for loss of interest.

11. The principal controversy involved in the present petition relates to the decision of the Arbitral Tribunal rejecting the claim of NHAI for recovery of interest of ₹3,19,14,314/- and further interest on that amount. NHAI also assails the impugned award inasmuch as the HCL's counter claim has been accepted.

12. In terms of the Agreement, HCL was provided mobilization advance of a sum of ₹12.76 crores on 24.01.2006 and equipment advance of an amount of ₹12.76 crores on 13.09.2006. Thus, in aggregate, NHAI provided an advance of ₹25.52 crores to HCL. The said advance was an interest free advance and was to be recovered from interim payments. In terms of Clause 60.7 (C) of COPA (Conditions of Particular Application), the recovery of advance was agreed to commence from interim payment certificates (IPC) after the cumulative value of IPCs reach 20% of the contract price or 12 months after the disbursal of the first installment whichever is earlier. The recovery was to be made at the rate of 30% of the amount of each interim payment (IPC).

13. Admittedly, the works did not progress as scheduled, and HCL claimed that the delay in execution of the works was attributable to NHAI as it had failed to handover the site within the stipulated period and further the site as handed over was not free from encumbrances. In addition, HCL claimed that there were other delays, which were beyond the control of HCL.

14. Resultantly, 20% of the contract was not completed within the

period of 12 months; that is, the period after which recoveries of the mobilization advance provided by NHAI were to commence.

15. It is in the above context that HCL requested for deferment of the recovery of mobilization advance. HCL claimed that it had proceeded on the basis that cash flow to the extent of 20% of the contract price would be available with it.

16. In the aforesaid background, HCL requested for deferment of the recovery of mobilization advance and further agreed to pay interest at the rate equivalent to SBI PLR + 2%.

17. By a letter dated 22.03.2007, HCL requested that the recovery of mobilization and machinery advance be deferred till cumulative IPCs reach 20% of the contract value. The parties had held discussions and on 19.04.2007, HCL sent a letter, *inter alia*, stating as under:-

> "In pursuance of the further discussions on the above subject, we do hereby undertake that the interest @ SBI PLR + 2%, on the recoverable amounts of advance (30% of the gross IPC value), which will actually be deferred from various interim payment certificate, beyond the actual date of recovery for a further period of 3 months or till the progress reaches 20%, whichever is earlier would be borne by us."

18. NHAI accepted the aforesaid request and sent a letter dated 17.05.2007 accepting the HCL's request for deferment of the recovery of the mobilization advance for a period of three months from the date of the said letter. The contents of the said letter dated 17.05.2007 read as under:-

"Sir,

With reference in the above mentioned subject it is to inform that NHAI has agreed for the following :-

i. Deferment of recovery of mobilization and equipment advances from monthly IPCs with interest rate at SBI PLR + 2% on deferred amount for the period of next three months from the date of issue of this letter.

This issues with the approval of competent authority."

19. NHAI deferred the recovery of mobilization advance for three months. However, NHAI recovered the interest at SBI PLR+2% from IPC No. 8, 9 & 10. A tabular statement indicating the interest recovered is set out below:-

IPC No.	Gross IPC Amount (Rs)	30% of Gross IPC Amount (Rs)	Amount of Interest @ SBI - PLR + 2% (i.e. 12.75%+2%) Rs	Recovery of Interest in IPC No.
	a	b=ax30%	c=bx(12.75+2)%/12	d=c
8	7,71,90,097	2,31,57,029	2,84,638	IPC No. 8
9	7,47,65,702	2,24,29,711	5,60,337	IPC No. 9
10	5,62,85,718	1,68,85,715	13,28,228	IPC No. 10
	Total :	6,24,72,455	21,73,203	

20. Admittedly, the recovery of the advances was made regularly from IPC No. 11 onwards and the recovery was complete by the time IPC No. 29 was issued in March, 2010.

21. Each of the IPCs was certified by the Engineer as required in terms of sub-clause 60.2 of COPA.

22. After the entire amount of advance (mobilization as well as equipment advance) was recovered by NHAI, further interest on the deferred installments of ₹6,24,72,455/- was sought to be recovered from IPC No. 29.

23. Although HCL had paid three months interest; but, because the deferred advances were not recovered immediately thereafter, NHAI claimed that it was entitled to recover further interest for the period of 29 months. This was informed by the Engineer to HCL on 24.10.2011. NHAI states that on 30.01.2016, it informed HCL as to the balance amount payable/recoverable from HCL and this included interest on deferment of mobilization and equipment advance.

24. HCL did not accept the same and issued a notice of dispute dated 20.05.2014 in terms of Clause 67 of COPA.

25. Although, the copy of the said notice has not been produced by NHAI, a copy of the letter dated 23.05.2016 produced by NHAI indicates that HCL had raised the dispute in the following words:

> "the proposed recovery is opposed to the terms of the agreement between the parties for deferment and subsequent action of Engineer/ Employer in recovering the legitimate payments from the IPC etc. While the Contract ensures payment of interest free advances and the deferment of recovery of advances was required due to the Employer delays prohibiting execution of the work as per Contractors plan etc., the Employer is unjustly

> enriching their position by directing recovering additional amounts beyond that is genuinely due to them and recovered from the IPC. They consider that very action is not in accordance with the terms of the Contract and Law applicable to it. Further, under the circumstances explained hereinabove, the contractor is left with no other alternative but to seek the Employer's intervention in this matter to settle the same amicably. In view of the above facts explained & clear provisions of the contract, they requested to refrain from recover any payments in this regard."

26. Since the said matter could not be resolved, the disputes were referred to arbitration. Although, NHAI suggested the disputes be referred to a sole arbitrator, the same was not acceptable and the Arbitral Tribunal of three members was constituted.

27. The Arbitral Tribunal considered the rival contentions. Before the Arbitral Tribunal, it was contended on behalf of HCL that the mobilization and equipment advance was interest free advance and since the delay in execution of the works was attributable to NHAI, HCL had requested that the recovery of the advance be deferred. It had also agreed to pay interest for a period of three months, which was, concededly, recovered. It was stated that the parties always understood that the deferment of recovery of mobilization advance would mean that no advance would be recovered for a period of three months. This was also the understanding of the Engineer who had duly certified the IPCs. The Arbitral Tribunal considered the same and held that the communications issued by NHAI clearly indicated that it had agreed for deferment of recovery of mobilization advance and

equipment advances from monthly IPCs with interest at the rate of SBI PLR+2% on deferred amount for a period of next three months from the date of issue.

28. The Arbitral Tribunal observed that the words used in the communication dated 17.05.2007 gave sufficient scope for one to think that interest would be levied only for a period of three months. Concededly, NHAI had not communicated any intention to charge interest till the amount was finally recovered. The Arbitral Tribunal also noted that the conduct of the parties also indicated that the interest was to be levied only for a period of three months and, accordingly, the Arbitral Tribunal rejected the claim made by NHAI.

29. Dr Maurya Vijay Chandra, learned counsel appearing for NHAI contended that the fact that the Engineer had certified the 11th IPC without recovering the advances that were recoverable under IPC 8, 9 & 10 did not absolve HCL of the liability to pay interest. He earnestly contended that in terms of Clause 60.1 of COPA, the primary duty to submit a statement for interim payments rested with HCL and it was HCL's obligations to indicate the current amount of recovery. Since, HCL had failed to do so, the IPCs certified by the Engineer could not be held against NHAI.

30. This Court is not persuaded to accept the aforesaid contention. First of all, the background in which the request for deferment of mobilization advance had been agreed by the parties cannot be ignored. It is also relevant to note that the advances provided were

interest free and NHAI was not otherwise entitled to recover any interest on the advance provided to HCL. In this background, the letter dated 17.05.2007 issued by NHAI for deferring the recovery of advances on an interest for a period of three months must be construed strictly. Undisputedly, the said communications had been construed in a manner so as to provide for interest only for a period of three months and to defer the recovery schedule for the said period. Therefore, the recovery of advances was made as per schedule; that is, from 11thIPC onwards.

31. It is relevant to state that this Court is not called upon to re-appreciate and re-examine the disputes between the parties in these proceedings. The view taken by the Arbitral Tribunal is undisputedly a plausible view and cannot be stated to fall foul of Section 34(2)(b)(ii) of the Act. In this view, no interference is called for with the decision of the Arbitral Tribunal to reject the claim raised by NHAI.

Counter claims

32. The next question to be addressed is whether the Arbitral Tribunal had erred in awarding the counter claim made by HCL. HCL had claimed that the Engineer had certified a payment of ₹1,69,80,319/- and €71,216/- and had issued a final payment certificate dated 04.04.2012 recommending the release of the aforesaid amounts. The said amount did not account for the interest on deferred mobilization advanced claimed by NHAI. It was stated that, subsequently, the Engineer had modified the final statement and had

recommended an amount of ₹80,83,957/-. HCL further claimed that in addition to the aforesaid amount, NHAI intimated that a sum of ₹60,96,048/- was to be paid to HCL as the balance amount under IPC 43. Thus, in all, HCL claimed that a total amount of ₹1,25,05,186/- is due and payable by NHAI.

33. The aforesaid counterclaim was contested by NHAI on the ground of maintainability as well as on merits. NHAI claimed that the HCL's counter claim was not maintainable, as the scope of the dispute referred to the Arbitral Tribunal was also barred by limitation. NHAI's response to the counter claim is sketchy and bald denial. However, it is not disputed that before the Arbitral Tribunal, NHAI had contended that the amount claimed by HCL was not payable.

34. It is HCL's case that the amount of ₹1,25,05,186/- was due and payable but had been withheld by NHAI on account of NHAI's claim for interest on deferment of recovery of advances made in terms of sub-clause 60.7 of COPA. Thus, if NHAI failed in its claim for interest on deferment of recovery of advance, HCL would as a logical consequence succeed in its counter claim.

35. The aforesaid contention is contested by NHAI. NHAI has also referred to a letter dated 23.05.2016 issued by NHAI, which indicates that a sum of ₹1,41,80,005/- was payable to HCL and that includes a sum of ₹60,96,048/- withheld from IPC 43. Against the aforesaid sum, NHAI had sought to adjust ₹2,22,533/- on account of WPCT; ₹3,01,828/- on account of recovery of share of DRB payment;

₹10,00,000/- on account of rectification as per recommendations of the Engineer; ₹1,21,994/- on account of recovery of interest for indices not correctly used; ₹28,464/- as excess paid in IPC 8; and ₹62,40,000/- paid on account of provisional escalation paid earlier. Thus, in terms of the said letter dated 23.05.2016, a sum of ₹62,65,186/- was payable after adjusting the aforesaid sums aggregating a sum of ₹79,14,819/- against the aforesaid amount and NHAI had sought to adjust the interest on deferment of mobilization and equipment advance amounting to ₹2,36,20,000/- and, thus, had computed ₹1,73,54,814/- was recoverable from HCL.

36. It is apparent from the above that a sum of ₹1,25,05,186/- was not withheld on account of NHAI's claim for interest on deferment of recovery of the advances. It appears that only a sum of ₹62,65,186/- was payable to HCL which was adjusted from the claim raised by NHAI.

37. It is also apparent from the communications as well as letter appointing the arbitrators that the disputes referred to the Arbitral Tribunal were only with regard to the dispute relating to "interest on deferment of recovery of mobilization and equipment advanced."

38. In the circumstances, the Arbitral Tribunal was required to adjudicate whether (i) the counter claim fell within the scope of reference; (ii) if so, whether it was barred by limitation; (iii) and if not, whether it was sustainable on merits. However, it is seen that although the Arbitral Tribunal has adjudicated the issue as to whether

the counter claim was barred by limitation, it has not addressed any of the other issues. The Arbitral Tribunal has simply allowed the counter claim in the following words:-

> "10.1.1 It is noted from the final statement prepared by the Claimant himself that a sum of Rs.1,25,95,186/- has been shown as payable to the Respondent. However, the Claimant has opposed the claim, not only on the merit but also on the plea of limitation. The Claimant has mentioned that the Counter Claim of the Respondent is even otherwise not admissible as the claim has been made after the period of limitation. The AT holds that Final Payment Certificate was being prepared by the Respondent even on 23.05.2016, which shows that the accounts between the Claimant and the Respondent were still being made as on 23.05.2016, as such the Counter Claim preferred by the Respondent cannot be considered as barred by limitation. As such AT considers it as fair and reasonable to award a sum of Rs.1,25,05,186/- in favour of the Respondent towards its counter claim."

39. As apparent from the above, there are no reasons provided by the Arbitral Tribunal for allowing the counter claim. This is plainly contrary to Section 31(3) of the Act, which mandates that the Arbitral Tribunal shall state the reasons upon which the arbitral award is passed unless the parties have agreed otherwise or the arbitral award is a consent award.

40. It cannot be disputed that it is a fundamental policy of Indian law that all decisions must be informed by reason and such reasons, however brief, must be discernable from the order embodying such decisions.

41. In view of the above, this Court is unable to sustain the award of counter claim in favour of HCL as the same is not only contrary to Section 31(3) of the Act but also falls foul of Section 34(2)(d)(ii) of the Act as being contrary to fundamental policy of Indian law.

42. In view of the above, the impugned award to the extent of counter claim awarded in favour of HCL, is set aside.

43. The petition and the pending applications are disposed of. Parties are left to bear their own costs.

VIBHU BAKHRU, J

JULY 02, 2018
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