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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 148/2017**

Date of Decision : 15th March, 2019

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Ms.Padma Priya and
Mr.Mukesh Kumar, Advs.

versus

UEM-ESSAR

..... Respondent

Through: Mr.Vivek Chib, Mr.Kushal
Gupta and Mr.Asif Ahmed,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Award dated 10.10.2014 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the work of Western Transport Corridor, Tumkur-Haveri NH-4 Project-Package-2, Rehabilitation and Upgrading of Sira – Chitradurga Section (Km. 122.3 to Km 189) in the State of Karnataka – under Contract Agreement No. WTC/TUM-HAVERI/NH-4/CIVIL CONTRACT-PACKAGE-2.

2. The petitioner challenges the Award on claim nos. 1, 2, 4 and 5 as also on the issue of interest awarded by the Arbitral Tribunal.

3. Claim no. 1 of the respondent was towards the loss suffered by it due to wrong practice of division of price adjustment into Indian rupees and USD.

4. Relying upon sub-Clause 60.1 of the Conditions of Particular Application (COPA), the respondent asserts that as far as price adjustment under sub-Clause 70.1 of COPA is concerned, the same had to be paid in the currency relevant to such price adjustment. On the other hand, it was the case of the petitioner that the Contract price was to be divided into Indian Rupee and USD in the ratio of 70.08:29.92. The same was also applicable to the amount payable under the Price Adjustment. The respondent having bid on the basis of the above referred division of the Contract Price, the said division would also be applicable to the price adjustment.

5. The Arbitral Tribunal has agreed with the submission made by the respondent and has held that the price adjustment on the Indian component would only be payable in Indian Rupee and would not be further sub divided into the two currencies. In reaching this conclusion the Arbitral Tribunal has observed as under:-

“(d) A close reading of the above sub-clauses clearly indicates that

- *Price adjustment is to be calculated separately for Non convertible Indian Rupee component and for Foreign Inputs - US Dollar component and is to be paid separately as such.*
- *There is no provision in the contract for further bifurcation of Price Adjustment worked out on Non convertible Indian Rupee component into Indian currency and US Dollar in the proportion of 70.08%*

and 29.92% respectively, as bifurcated by the Engineer in IPC's.

- *The Engineer had erred in not paying the Price Adjustment worked out for Non convertible Indian Rupee component in Indian Rupees only as Price Adjustment is for increase/decrease in cost incurred in respective currency.*

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- (f) *Respondent contended that the Claimant was paid as claimed by him and who continued to claim subsequently also. In this regard, AT perused Sub-clause 60.1 of COPA of Contract, which stipulates that the Claimant is to submit a statement in 3 copies to the Engineer by the 7th day of each month for the work executed up to the end of the previous month in a tabulated form approved by the Engineer and found from records filed with the AT that the Engineer was not at all prepared to consider any change in his stand even when the matter was specifically brought to his notice. AT is bound with the terms and conditions of the contract particularly when a party adversely affected by such a mistake complains and requests to correct the mistake.*
- (g) *AT perused the contention of the Engineer (CD-2, page 226) rejecting the claim of the Contractor and held that the contention of Engineer is not in order as there is specific provision in the contract for payment of price adjustment to be worked out for non- convertible Indian rupee portion and for foreign inputs - US dollar portion in respective currency only vide sub-clause 60.1 (g) as detailed above."*

6. The learned counsel for the petitioner submits that the Arbitral Tribunal has clearly fallen in error in awarding the above claim in favour of the respondent. She submits that not only did the respondent

in its bid itself give the above division based on its own estimate, but also did not raise any such claim till 03.12.2007, that is, till 59th Interim Payment Certificates (IPC).

7. I have considered the submissions made by the counsel for the petitioner, however, find no merit in the same. The Arbitral Tribunal in awarding the above claim in favour of the respondent has placed reliance on sub-Clause 60.1 of COPA. The said Clause of the COPA is reproduced hereinbelow:-

“Sub-Clause 60.1: Monthly Statements

The Contractor shall submit a statement in 3 copies to the Engineer by the 7th day of each month for the work executed up to the end of the previous month in a tabulated form approved by the Engineer showing the amounts to which the Contractor considers himself to be entitled. The statement shall include the following items, as applicable, which shall be taken into account in the sequence listed:

- (a) the estimated value of Temporary and Permanent Works executed up to the end of the month in question at base unit rate and prices and in local currency;*
- (b) the actual value certified for payment for the Temporary and Permanent Works executed up to the end of the previous month, at base unit rates and prices and in local currency;*
- (c) the estimated value at base unit rates and prices of the Temporary and Permanent Works for the month in question, in local currency, obtained by deducting (b) from (a);*

(d) *the equivalent of the amount set forth in (c), expressed in the various currencies in which the Contract Price, is payable and calculated by applying the proportions and the exchange rate set forth in the Appendix to Bid to the amount set forth in (c);*

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(g) *amounts reflecting changes in cost and legislation, pursuant to clause 70 expressed in the relevant amounts of foreign and local currencies;*”

(Emphasis Supplied)

8. A reading of the above would indicate that while the estimate value of the work done up to the end of the month is to be shown in the statement filed by the Contractor in local currency and thereafter is to be bifurcated by applying the proportions and the exchange rates set forth in the Appendix to Bid, for the price adjustment under Clause 70, such amounts are to be expressed in relevant amounts of foreign and local currency. This itself indicates that as far as price adjustment is concerned, the bifurcation as mentioned in Appendix to Bid is not applicable. In fact, the Price Adjustment had to be calculated separately for the Indian Rupee component and for the foreign currency component. Therefore, question of applying the bifurcation again cannot be accepted. In any case, the Arbitral Tribunal having interpreted the terms of the Contract, it would not be open to the Court to interfere with the same unless such interpretation is found to be perverse or unreasonable, which in the present case is not so.

9. As far as the delay of the respondent in raising such a claim is concerned, the Arbitral Tribunal has rightly held that if such claim is made out on the basis of the terms and conditions of the Contract, such claim cannot be denied to a party merely because it may have acted due to some mistake. A Contract cannot be interpreted on the basis of subsequent conduct of the party especially where the terms of the Contract are clear and unambiguous.

10. I may also note that the respondent during the relevant period had also been claiming price adjustment on the foreign currency component of the work, which had been denied by the petitioner. The respondent had in its correspondence, therefore, been requesting the petitioner to even consider the foreign component of price adjustment by applying the Indian Currency Indices. Though this request was rejected by the petitioner, the fact that the respondent was making representations on issue of Price Adjustment would mitigate against the claim of estoppel on basis of the IPC(s), for had the representation of the respondent been accepted by the petitioner, the bifurcation in terms of Appendix to the Bid would certainly have become applicable.

11. The next challenge of the petitioner is to the claim no. 2 awarded by the Arbitral Tribunal. Claim no. 2 is for payment of Price Adjustment on foreign component.

12. It is the case of the petitioner that in Item No. 21 to the Appendix to Bid, the Bidder was to indicate all indices at the time of the bid, including the origin of input, currency of indices and the published source of indices. The respondent had in its bid left these

inputs blank and on the basis thereof the bid of the respondent had been accepted. It was only on 15.01.2007, that is, almost five years after the award of Contract that the respondent for the first time provided indices that could be used for the purposes of granting price adjustment on the foreign component. The learned counsel for the petitioner submits that the Arbitral Tribunal has therefore erred in awarding the above claim in favour of the respondent.

13. On the other hand, the learned counsel for the respondent submits that the price indices were to be in any way approved by the Engineer. The Engineer refused to approve the same only on the ground that as the foreign component was stated to be payable in USD, the price indices from Malaysia could not be made applicable. This was found to be an incorrect conclusion by the Arbitral Tribunal and thereafter, the Arbitral Tribunal has not only given reasons for adopting the price indices from Malaysia but has also awarded this claim based on the amount verified by the petitioner itself applying such indices.

14. I have considered the submissions made by the learned counsel for the parties. Item No. 21 to the Appendix to the Bid reads as under:-

“APPENDIX TO BID

(Bidders shall fill in appropriate blank spaces)

21	Sources of Indices	70.4	All indices shall be as stated in Sub-Clause 70.3, Section III Volume I,
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			<i>except for foreign inputs which shall be as under:</i>
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<i>Index for (Factor)</i>	<i>Origin of Input (Country)</i>	<i>Currency of Index</i>	<i>Published source of Index</i>	<i>Base Value on 2001</i>
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The above sources of indices shall be supplied by the bidder and are subject to negotiation before formalizing the Contract.”

15. Sub-Clause 70.3(E) gives the adjustment formula for variation of price in foreign inputs, if any:-

*“Sub-Clause 70.3: **Adjustment Formulae***

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E) Variation of Price – Foreign Inputs, if any

The Contract price will be subjected to adjustment on account of general variation in prices due to all foreign inputs, if any, to be provided for by the Contractor in accordance with the details furnished by him in Appendix to Bid in accordance with the formula given below:

$$V_5 = \frac{0.85RF_x (F - F_o)}{F_o}$$

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F_o = Base Index as applicable to foreign inputs like cost of technical personnel, constructional plant, etc, on construction projects in the Contractor’s country, or failing which an appropriate proxy index reflecting the cost at periodic intervals, of providing an appropriate mix of

expatriate personnel, imported constructional plant etc., as the case may be, at the time specified in para F) hereinafter. The relevant index to be applied for this purpose shall be indicated by the Bidder in the Appendix to Bid.

(Emphasis Supplied)

16. The formula also states as under:-

“RF = The value of work done in Indian Rupee currency during the period under consideration which is worked out as percentage of the total value of work done during the period under consideration and payable in convertible Indian Rupee currency at base rates and prices as applicable under the contract, the percentage being as given in Appendix to Bid.

All official/proxy indices to be used in the prescribed Price Adjustment Formula in this connection shall be subject to approval by the Engineer. Indices shall be appropriate for their purpose and shall relate to the Contractor’s proposed source of supply of inputs on the basis of which his Contract Price and expected foreign currency requirements shall have been computed. As the proposed basis for price adjustment the Contractor shall have submitted along with his Bid, official publication showing the values of the proposed indices as available during the 12 months preceding the closing date for submission of Bids. The indices shall be well established and nationality recognised in the country of manufacture or origin. Preferably only government indices shall be used. The Bidder shall furnish authenticated copies of the relevant published Indices as and when so requested by the Employer/Engineer.

(Emphasis Supplied)

Sub-Clause 70.4: Sources of Indices

The sources of those indices not stated in Sub-Clause 70.3 shall be as listed in the Appendix to Bid, as approved by the Engineer.”

17. Admittedly the respondent never gave the base indices as applicable to foreign inputs as required in the above reproduced Appendix to the Bid. As noted in the bid document itself, such price indices were not only subject to the approval of the Engineer, but also were subject to further negotiation between the parties. This was an important aspect to be considered by the Arbitral Tribunal.

18. What was further to be considered by the Arbitral Tribunal was that in its repeated correspondence the respondent had shown its awareness to the fact that the Price Adjustment on Foreign Inputs cannot be worked out as it had failed to give these base indices. This is evident from the letters dated 13.10.2003, 16.09.2004, 03.11.2004, 15.12.2004, 07.01.2005 etc., addressed by the respondent itself to the Engineer wherein the respondent had requested the Engineer to devise some other formula for making payment of price adjustment on the foreign component. The respondent even went to the extent of suggesting that entire 100% of the work be considered as Indian component and therefore be paid for by applying the price adjustment formula which is applicable to the Indian Component of the work. These suggestions/representations were however, rejected by the Engineer by its communication dated 25.04.2006, clearly stating that as the respondent had failed to insert any data of base indices, the formula to be utilized for calculating price adjustment cannot be worked out.

19. These were important correspondence to be considered by the Arbitral Tribunal, which in my opinion, the Arbitral Tribunal has failed to consider in the present case.

20. It is to be noted that the bid was filed by the respondent and therefore, if there was any mistake or omission in the same, the respondent alone has to be blamed.

21. It is contended that the petitioner did not point out the said deficiency to the respondent at the time of acceptance of the bid. In my opinion, however, the burden arising out of such omission cannot be passed on to the petitioner. In my opinion, therefore, the Award, insofar as it grants claim no. 2 in favour of the respondent, cannot be sustained.

22. The next challenge of the petitioner is to the award of claim no. 4 in favour of the respondent. Claim no. 4 of the respondent was for interest on delayed reimbursement of increased royalty and balance reimbursement of increased royalty.

23. As far as the balance reimbursement of increase in royalty is concerned, the Arbitral Tribunal has rejected such claim and there is no challenge by either party to such finding.

24. The petitioner challenges the award of interest on the delayed reimbursement of increase in royalty by submitting that the reimbursement of increased royalty was awarded in favour of the respondent by way of a separate Arbitral Award. In the said Award there was no direction to pay interest on the amount so awarded

therefore, the Arbitral Tribunal could not have awarded interest on the said amount in the present Award.

25. I have considered the submission made by the learned counsel for the petitioner, however, find no merit in the same. It is not disputed that in the earlier arbitration proceedings the claim of the respondent for interest on the delayed payment had been refused to be considered by the Arbitral Tribunal on the ground that the respondent had not raised the same before the Dispute Adjudication Board (DAB) before initiation of arbitration proceeding. This finding was given on an application filed under Section 16 of the Act by the petitioner. The respondent, therefore, raised such disputes before the DAB and DAB having failed to act within stipulated period, respondent raised such claim before the Arbitral Tribunal. The Arbitral Tribunal, therefore, held that there was no prior adjudication on this claim only for the reason that the earlier Arbitral Tribunal had felt that it was beyond their jurisdiction. The Arbitral Tribunal thereafter, on merit, has considered this claim and has awarded the same in favour of the respondent. I do not find the Award to be suffering from any infirmity on this account.

26. The petitioner further challenges the Award on claim no. 5, which was for loss incurred by the respondent due to non-payment of certified amount by the Engineer against VP 10 - BC with CRMS.

27. The learned counsel for the petitioner submits that the above amount could not have been awarded in favour of the respondent. However, I find that the Arbitral Tribunal in awarding such claim in

favour of the respondent has relied upon the determination issued by the Engineer, and applying sub-Clause 52.2 of the COPA, awarded such claim in favour of the respondent. I, therefore, find no merit in the challenge raised by the petitioner on award of this claim.

28. The last challenge of the petitioner is to the effect that while awarding interest on various claims in favour of the respondent, the Arbitral Tribunal has directed that such interest shall be payable 30 days from the date on which the payment was claimed by the respondent in its IPC “Statement at Completion”.

29. Relying upon sub-Clause 60.8 of COPA, the learned counsel for the petitioner submits that while the IPCs are to be paid within 30 days after the Contractor’s Monthly Statement has been submitted to the Engineer for certification, the payment against the final certificate had to be made within 84 days after the agreed final statement and discharge have been submitted to the Engineer for certification. She submits that therefore, interest was payable only on expiry of 84 days from the submission of the “Statement at Completion” by the respondent.

30. Sub-Clause 60.8 of COPA is reproduced hereinbelow:-

“Sub-Clause 60.8: Time of Payment and Interest

The amount due to the Contractor under any Interim Payment Certificate issued by the Engineer pursuant to this Clause, or to any other term of the Contract, shall, subject to Clause 47, be paid by the Employer to the Contractor within 30 days after the Contractor’s monthly statement has been submitted to the Engineer for certification or, in the case for

Final Certificate pursuant to Sub Clause 60.13, within 84 days after the agreed Final Statement and written discharge have been submitted to the Engineer for certification. In the event of the failure of the Employer to make payment within the times stated, the Employer shall pay to the Contractor interest compounded monthly at the rates stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid, in the currencies in which the payments are due.”

31. A reading of sub-Clause 60.8 would show that the period of 84 days begins upon submission of agreed ‘final statement’ and ‘written discharge’ in terms of sub-Clause 60.11 and 60.12 of the COPA. These are separate from the ‘Statement at Completion’ contemplated as per sub-Clause 60.10. The Agreement thus stipulates different stages for the submission of Statement at Completion, final statement and the written discharge. In view of the above, I find no force in the above submission of the learned counsel for the petitioner.

32. The petition is partly allowed in the above terms, with no order as to cost.

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NAVIN CHAWLA, J

MARCH 15, 2019/rv