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

**Date of Decision: 23.1.2019**

+ O.M.P. (COMM) 13/2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner  
Through: Mr. Shubham Saxena, Advocate.

versus

PROGRESSIVE CONSTRUCTION LTD. .... Respondent  
Through: Mr. Swaroop George with Ms.  
Omana George, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**RAJIV SHAKDHER, J. (ORAL)**

1. This is a petition filed on behalf of National Highways Authority of India (hereafter referred to as “NHAI”) under Section 34 of the Arbitration and Conciliation Act, 1996 (in short “1996 Act”). Mr. Shubham Saxena, who appears on behalf of NHAI seeks to challenge the award only *vis-a-vis* claim nos.1 and 2.

2. Insofar as claim no.1 is concerned, it relates to recovery of Welfare Cess. NHAI before the Arbitral Tribunal under this head sought recovery of Rs.2,54,54,998/-.

3 Likewise, under claim no.2, NHAI sought recovery of Rs.52,82,560/- with respect to payments made to the respondent qua escalation on “materials advance”.

4 As regards claim no.1, there is no dispute that a Division Bench of this Court in the matter of: *National Highways Authority of India vs.*

*Gammon-Atlanta (JV)*, 2013(4) Arb.LR 61 (Delhi) (DB) has ruled in favour of the respondent. Relevant observations are contained in paragraph 6 and 7 of the judgment which are extracted hereafter for the sake of convenience: -

*“6. The next question sought to be urged on behalf of the NHAI was the Claim No.2, i.e. recovery of Rs.3,30,225 plus interest from NHAI on account of payment made to the building and construction workers’ welfare cess. Learned counsel has endeavoured to rely upon the decision of a Division Bench of this court in Delhi Metro Rail Corporation Ltd. vs. Simplex Infrastructure Ltd., 2011 (6) RAJ 208 (Del.) (DB) = 2011(3) Arb. LR 307 (Del.) (DB) to suggest that the Act had in fact come into force on 1<sup>st</sup> March, 1996 and the rules had come into effect sometime in the year 1998. It is, therefore, submitted that this burden had to be borne by the contractor by virtue of Delhi Metro Rail Corporation Ltd. vs. Simplex Infrastructure Ltd. (supra). It was, therefore, urged that this amount could not have been awarded to the respondent. Mr. Amit George, counsel for the claimant/ respondent, who is present on caveat, argues that the arbitral tribunal’s decisions as well as that of the learned Single Judge in the impugned order, cannot be interfered with and cites a subsequent judgment of the Supreme Court reported as Dewan Chand Builders & Contractors vs. Union of India and others, (2012) 1 SCC 101, wherein inter alia it was held as follows: -*

*“18. Although both the statutes were enacted in 1996, the Central Government in exercise of its powers under Section 62 of the BOCW Act notified the Delhi Building and Other Construction Workers’ (Regulation of Employment and Conditions of Service) Rules, 2002 (for short “the Delhi Rules”) vide Notification No.DLC/CLA/BCW/ 01/19 dated 10.01.2002. Accordingly, the Government of NCT of Delhi constituted the Delhi Building and Other Construction Workers Welfare Board vide Notification No.DLC/CLA/BCW/ 02/596 dated 02.09.2002. Thus, the Cess Act and the Cess Rules are operative in the whole of NCT of*

*Delhi w.e.f. January 2002.”*

7. *It is evident from a reading of Simplex Infrastructure Limited that the Division Bench was of the opinion that the burden had to be borne by the contractors to make payment in the funds since the enactments and rules had come into force in 1998. However, in respect of identical facts and work contract, the Supreme Court, by a decision in Dewan Chand Builders & Contractors, held that the enactments came into force when rules in question were notified in Delhi, i.e. in January 2002. In the present case, the bids were made in 2000 and the notification in question was issued in 2008. Consequently, the interpretation based upon Clause 10.8 in the instant case by the arbitral tribunal cannot be faulted. The appellant’s arguments on this score are rejected.”*

5. Counsel for the parties inform me that NHAI has assailed the aforementioned judgment of the Division Bench by carrying the matter in appeal to the Supreme Court. I am informed by Mr. Saxena that the appeal filed in the Supreme Court is pending adjudication.

5.1 As would be obvious from the aforenoted extract that the Division Bench has in fact in respect of claim no.1, after noting, *inter alia*, judgment of another Division Bench in *Delhi Metro Rail Corporation Ltd. vs. Simplex Infrastructure Ltd.*, 2011(6) RAJ 208 (Del.) (DB) come to the conclusion that claim no.1 had to be rejected by relying upon observation made by the Supreme Court in *Dewan Chand Builders & Contractors Vs. Union of India and Others*, (2012) 1 SCC 101.

5.2 A perusal of the impugned Award would show that the rationale given by the Arbitral Tribunal, in short, is that, since the State rules and the Boards had not been constituted prior to the submission of the bid by the respondent no deduction could have been made by NHAI towards Welfare Cess.

5.3 The reasoning of the Arbitral Tribunal is contained in 4.1.3, 4.1.4,

4.1.5 and 4.1.6.

6 In these circumstances, insofar as challenge to claim no.1 is concerned, it cannot be sustained in view of the judgment of the Division Bench in *National Highways Authority of India vs. Gammon-Atlanta (JV)*, 2013(4) Arb.LR 61 (Delhi) (DB).

7 However, since a civil appeal is pending in the Supreme Court qua the said judgment one can only observe that in case the Supreme Court were to reverse the view taken by the Division Bench of this Court the respondent will pay the amount adverted to against claim no.1 with interest.

7.1 There is unanimity between the counsel that there is no dispute with regard to quantification of the claim.

8 Mr. George, who appears on behalf of respondent further states that if such an eventuality were to occur the amount claimed by the NHAI would be repaid with simple interest @ 9% per annum.

9 The aforesaid statement made by Mr. George is taken on record.

10 This brings me to claim no.2. A perusal of the record with respect to this claim shows that the decision of the Arbitral Tribunal is pivoted on the ingredients of 'R' factor as provided in clause 70.3 of Conditions of Particular Application (COPA).

10.1 The relevant part of Clause 70.3 of COPA reads as follows: -

*“70.3: decrease in rates decrease in rates and price of Adjustment labour, materials, fuels and lubricants in accordance Formulae with the following principles and procedures as per formula given below. The amount certified in each payment certificate is adjusted by applying the respective price adjustment factor to the payment amounts due in each currency:*

*(a) Price adjustment shall apply only for work carried out within the stipulated time or extensions granted by the*

*Employer and shall not apply to work carried on beyond the stipulated time; price adjustment for extensions for reasons attributable to the Contractor, shall be paid in accordance with sub-clause 70.6;*

*(b) Price adjustment shall be calculated for the local and foreign components of the payment for work done as- per formulae given below; and;*

*(c) Following expressions and meanings are assigned to the value of the work done during each month:*

*R = Total value of work done during the month. Et (SIC "It") would include the value of materials on which secured advance has Been granted. if any, during the month, less the value of materials in respect of which the secured advance has been recovered, if any, during the month. This will exclude cost of work on items for which rates were fixed under variations clause (51 and 52) for which the escalation will be regulated as mutually agreed at the time of fixation of rate.*

*R<sub>l</sub> = Portion of 'R' as payable in Indian Rupees*

*R<sub>r</sub> = Portion of 'R' as payable in foreign currency (at fixed exchange rates)*

$$R = R_l + R_r$$

*To the extent that full compensation for any rise or fall costs to the contractor is not covered by the provisions of this or other clauses in the contract, the unit rates and prices included in the contract shall be deemed to include amounts to cover the contingency of such other rise or fall in cost.....".*

*(emphasis is mine)*

10.2 As would be evident, price escalation would be dependent on the various ingredients of the formula provided in Clause 70.3. The formula, to my mind, is sacrosanct. Nothing can be added. Nothing can be subtracted.

10.3 The argument advanced on behalf of NHAI is that the R factor which

is used in calculating price escalation/price adjustment *vis-a-vis* should include the value of material brought to site as against value of material on which secured advance has been given, cannot be accepted. A plain reading of the definition of R factor as given in Clause 70.3 would show that in calculating the same what is required to be taken into account is only the value of material on which secured advance has been granted. This is the meaning which has been assigned by the parties to the said clause as well.

10.4 The Arbitral Tribunal with respect to this aspect has made the following observations, with which, one cannot find any fault:

*“4.2.3 AT observes that under price adjustment clause, it is the price being paid to the contractor which is to be adjusted. This is the basic principle behind the provision of price adjustment clause in any contract. If the contractor is being paid Rs. 75/- as secured advance against the value of material worth Rs. 100/-, then only Rs. 75/- is to be included in the value of R for price adjustment. Even the clause itself has clarified as under:*

*$R_l$  = portion of R as payable in Indian Rupees*

*$R_r$  = portion of R as payable in foreign currency*

*$R = R_l + R_r$*

*Whatever may be the value of R, it is the portion of R as payable which is to be accounted for in R while making the price adjustment. So, even if the value of R is Rs. 100/-, the payable amount against secured advance is only Rs. 75/-.*

*The Claimant vide its letter dated 28.03.2016, has confirmed during the course of hearing that the practice being followed by the Engineer was to consider the value of materials at 75% of the materials brought at site. Both parties agreed to a particular interpretation of this clause during the course of execution of the work and in view of the Judgment cited by the Respondent as above, the parties cannot now back out. Thus, AT does not find any merit in this claim and the same deserves to be rejected.”*

*(emphasis is mine)*

11. Given the forgoing, in my view the Arbitral Tribunal has come to a correct conclusion and, thus, the argument advanced on behalf of respondent to the contrary cannot be sustained as it would do violence to the language

of clause 70.3 of COPA.

12. Accordingly, the challenge raised by NHAI *vis-a-vis* claim no.2 will also have to be rejected. It is ordered accordingly.

13. The petition is disposed of, consequently, in the aforesaid terms.

**RAJIV SHAKDHER**  
(JUDGE)

**JANUARY 23, 2019**

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