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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 359/2020**
NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Saurabh Banerjee and Mr. Bikram Singh, Advs.

versus

M/S G.R. INFRAPROJECTS LTD.

..... Respondent

Through: Mr. Sandeep Sethi, Sr. Adv with Mr. Manmeet Singh, Mr. A. Sharma and Ms. Nishtha Chaturvedi, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

% **14.02.2020**

I.A. 2137/2020 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

O.M.P. (COMM) 359/2020 & I.A. 2136/2020 (for stay)

1. The present petition has been filed by the National Highways Authority of India ('NHAI' for short) under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award dated October 20, 2019 ('impugned award', for short) passed by the Arbitral Tribunal wherein the Arbitral Tribunal has allowed the claims Nos.1 to 4 and 7 of the respondent herein.

2. It may be stated here that the claim of the respondent was primarily seeking declaration of Change of Scope for the execution of the slope

stability measures, erosion control and landslide correction measures. The issue that arose before the Arbitral Tribunal was whether measures like slope stability, erosion control and landslide correction etc. other than breast walls and retaining walls are part of the scope and / or incidental during the construction period for the development of the project. On a finding in favour of the respondent that they are not part of the EPC Agreement, the Arbitral Tribunal has allowed certain claims as noted above.

3. Some of the relevant facts are that the NHAI, which is constituted by an Act of Parliament, was responsible for development, maintenance and management of National Highways entrusted to it and for matters connected or incidental thereto and was operationalized in February 1995. On October 20, 2014 the petitioner invited Request for Proposal ('RFP' for short) for shortlisting bidders for EPC Agreement of the aforementioned Section of NH-22 (now NH-5) and shortlisted certain bidders, including the respondent herein. On February 23, 2015 the respondent herein submitted its bid, which was subsequently accepted by the petitioner and was issued a Letter of Acceptance by petitioner. The petitioner and the respondent herein entered into an EPC Agreement on August 24, 2015 ('EPC Agreement' for short) for a contract price of INR 7,48,77,00,000/- in respect of the project, namely "*Four Laning of Parwanoo-Splan Section NH-22 (Now NH-5) from km. 67.000 to km. 106.139 on EPC mode under NHDP Phase-III in the State of Himachal Pradesh*" ('Project Highway', for short). The scope of the project to be undertaken by the respondent was provided in Article 2 of the EPC Agreement. As per the EPC Agreement, the respondent is required to construct the Project Highway on the site set forth in Schedule A and as specified in Schedule B with the provision of the project facilities specified

in Schedule C, and in conformity with the specifications and standards set forth in Schedule D.

4. It is the case of the petitioner that the Authority Engineer warned about landslides which may occur during the execution of the work and advised to exercise all necessary care and provide/ install safety and informatory boards at both ends of the effected section. It is their case that design done by the respondent did not take into account the surrounding ground condition while submitting various designs and drawings i.e. the design of highway shall be safe and durable which is the fundamental requirement of Schedule D specifications and Standards (IRC:SP:84-2009 / 2014) and (IRC:SP:48-1998).

5. It is the case of the petitioner that the Authority Engineer sent several letters informing the respondent to take all necessary measures against the stability of hill side and valley side slopes backed by design and further warned that it has been noticed that lack of systematic approach is leading to a situation which may lead to safety hazard but the respondent did not give any serious thought to the same. Despite being aware of their own responsibility as per the IRC:SP:84-2009, respondent submitted proposals for undertaking urgent measures at two locations and asked for approval of Change of Scope for undertaking such work from the petitioner.

6. On July 01, 2016 Authority Engineer rightly rejected the respondent's request for Change of Scope for the emergency work undertaken at certain places. The Authority Engineer also vide letters dated July 07, 2016 and July 08, 2016 further rejected the request for Change of Scope for undertaking emergency measure between 105.930 Km. and 106.000 Km. stating that such measure were noticed with incomplete details and also were not

supported by any investigation based on design and that the same is within the scope of work under the EPC Agreement and further reminded the respondent to provide the design based on data obtained from investigation and working methodology.

7. Even thereafter, the respondent sent similar proposal to the petitioner for its acceptance. The said proposal was rejected. Accordingly, the respondent invoked the arbitration clause for dispute resolution between the parties and appointed its nominee Arbitrator on December 06, 2017. On February 05, 2018 the petitioner appointed its nominee Arbitrator, the two Arbitrators appointed a Presiding Arbitrator.

8. The claims of the respondent before the Arbitral Tribunal are primarily as under:

CLAIM No.1: Claim for declaration of Change of Scope for the execution of the slope stability, erosion control and landslide correction measures [i.e. Slope Protection Measures other than Breast Walls and Retaining Walls] set out in the Change of Scope Proposal.; and

CLAIM N0.2: Claim for amounts 'illegally' deducted in violation of the EPC Agreement for the Petitioner not having undertaken slope stability, erosion control and landslide correction measures.; and

CLAIM N0.3: Claim for interest on amount of Rs. 3,00,88,000/- initially deducted 'illegally' in violation of EPCA for Claimant not having undertaken slope stability, erosion control and landslide correction measures from due date for such payment.; and

CLAIM N0.4: *Claim for emergency measures already undertaken by Claimant at km 102 and 105.930 of Project Highway, being not covered under Article 2 of EPCA alongwith interest thereon.; and*

CLAIM N0.5: *Claim for declaration of Change of Scope in respect of extension [586m] in length of Project Highway.;and*

CLAIM N0.6: *Claim for legal expenses and associated costs.; and*

CLAIM N0.7: *Claim for pendent lite and future interest.*

9. The case of the respondent before the Arbitral Tribunal was that as per the provisions of Article 2 of the EPC Agreement the respondent is required to undertake *inter alia* only the slope protection measures set out in paragraph 14 of the Schedule B and paragraph I (h) of Schedule C of the EPC Agreement, i.e. breast walls and retaining walls. Any other slope protection measures or slope stability, erosion control and landslide correction measures are not covered within the scope of the project under Article 2 of the EPC Agreement. Accordingly, if the petitioner requires that such measures be undertaken by the respondent, the respondent would be entitled to a Change of Scope under Article 13 of the EPC Agreement. The rejection of the Change of Scope proposal by the petitioner is patently wrong and based on an erroneous interpretation of the EPC Agreement.

10. It is the case of the petitioner before the Arbitral Tribunal that the duties of the respondent include the performance and fulfilment of all other obligations of the respondent in accordance with the provisions of the EPC Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the respondent under EPC Agreement and

the maintenance of the Project Highway in accordance and in conformity with the Schedule E of the EPC Agreement. Thus, evidently the development, maintenance and management of the Project Highway under the instant EPC Agreement was in a permanent and not temporary nature and Schedule/s A, B, C and D are inter-connected and equally dependent upon each other. The framework of Model EPC Agreement development by Ministry of Road Transport and Highways ('MoRTH', for short) is based on various principles and it specifically adopts an approach that relies on assigning the responsibility for investigations, design and construction to the respondent for a lump sum price determined through competitive bidding. The objective is to ensure implementation of the Project to specified standards with a fair degree of certainty relating to costs and time while transferring the construction risks to a private sector contractor. The EPC Agreement defines the scope of the Project Highway with precision and predictability to enable the respondent herein to determine its costs and obligations with a ceiling of 10% of the Contract Price to cater for any changes in the Scope of Project to be borne by the respondent. Project risks such as soil conditions and weather or commercial and technical risks relating to design, construction and maintenance have also been assigned to the respondent herein. The landslide occurred as the design opted/ followed by the respondent herein did not take into account the surrounding ground conditions, which resulted in failure of hill slopes while cutting. The respondent herein executed the excavation work without taking any safety measures to ensure that there are no slope failures while hill cutting. By virtue of the instant claim/s the respondent herein is merely trying to cover

its wrong-doings by claiming that the alleged rectifications somehow change the Scope of Work as per the EPC Agreement and blame the petitioner.

11. The respondent herein is solely responsible for the design of the Project Highway. The respondent herein has failed to establish that while doing the design what were the factor/s for the adequacy of the slope protection done at site and further that it informed the petitioner about the need for any slope protection measures. Further, while the hill cutting was done, the respondent had not stated what protection measures were taken by it. Further, the methodology of hill cutting was never submitted for review to the petitioner. There was no safety audit conducted by the respondent herein during design phase of the 'Project'. The same shows that the respondent herein did not carry out survey and investigation with respect cutting section as per IRC SP: 84-2009, Manual of Specification and Standards for Four-Laning of Highways ('Manual' for short).

It is stipulated in

- CL. 4.1.1 of IRC SP-84-2009 the design and construction of the road in embankment and in cutting shall be carried out in accordance with Section 300 of MoRTH Specification
- CL. 4.4.1 of IRC SP-84-2009, the Concessionaire shall carry out necessary soil surveys, and field and laboratory investigation for selecting appropriate borrow pits, identifying and treating problematic ground locations, if any, and for finalizing structural features and design of the embankment and cut sections and establishing ground properties and a report on the soil investigation shall be furnished along with the design and as stipulated in 4.4.3 of IRC SP-84-2009 soil investigation for cut section shall be carried out in accordance

with the requirements specified in IRC SP: 19 and information regarding depth of water table, seepage flow, presence of any weak, unstable or problematic strata and as stipulated in 4.4.4 of SP: 84-2009 type of cutting involved and proposed cut slopes shall be provided in accordance with the nature of the soil encountered. Where required, benching, including use of Slope Stability measures like pitching, breast walls etc. shall be provided to make slopes stable and safe.

12. Furthermore, as per Sub-Cl. are 301.1 of MoRTH Specification, the excavation shall be carried out as per lines, grades and cross sections shown in drawings. Project being an EPC Agreement, it is the responsibility of contractor to submit required drawing before start of work. The respondent herein had submitted Plan and Profile but failed to submit Cross Sections as per Annex-I, Schedule I and has failed to produce and/ or show the same on record. Therefore, it is clear that respondent herein had not designed Cross Section but opted to start work without submission of design and further as per Sub-Clause 301.3.9 of MoRTH Specification, it was the bounden duty of the respondent herein to have taken adequate precaution to ensure that during construction, the slopes are not rendered unstable or give rise to recurrent slides after construction. In the instant case, the respondent herein neither took any precautions during construction nor submitted any design cross sections before start of work. The same is apparent from the fact that the respondent herein has failed to produce anything related thereto and furthermore as per Sub-Clause 301.5 of Preservation of Property of MoRTH Specification it is stated that the respondent herein shall take reasonable precautions for preservation of any or all existing roadside trees, drains or

any other structures under or above ground, which may be affected by construction operations get all safety measures approved from the Engineer. It is specifically stated therein that if any, of the said objects get damaged by reason of the negligence of the respondent herein, it shall be replaced, restored to the original condition at his cost. In the instant case, the respondent herein, despite being well aware of the limited RoW and height of excavation, started work without submission of any precaution measures as no such measures were taken during excavation, therefore consequence due to excavation on hill side is Contractor's responsibility. It was after the road was constructed, the exposed surface of excavated hill started failing during rains as there was no slope protection done by the respondent herein. This resulted in serious threat to the safety of workers and also endangered the lives of road users. It is mainly due to the deficient design and poor execution of works that has resulted in failure of excavated hill slopes which were left exposed without any slope protection measures.

13. As per Article 10.1.5 of the EPC Agreement, the respondent shall appoint a 'Safety Consultant' to carry out the safety audit of the design stage of the Project Highway in accordance with the Applicable Laws and 'Good Industry Practice'. As per Article 10.1.6 of the EPC Agreement, the said safety audit shall be carried out by the 'Safety Consultant' in respect of all such design details having a bearing on safety of users as well as pedestrians and animals involved in or associated with accidents and if any 'Works' required by the 'Safety Consultant' shall fall beyond the scope of Schedule B, Schedule C or Schedule D, the respondent shall make a report thereon and seek instructions of the petitioner for Change of Scope. As per Article 10.2.1, the Design and Drawings shall be developed in conformity with the

Specifications and Standards set forth in Schedule D and in case of any relaxation required by the respondent in a section, the alternative design criteria for the said section shall be provided for review of petitioner's Engineer. As per Article 10.2.2, the respondent shall also appoint a 'Proof Consultant' in the manner prescribed therein. As per Article 10.2.3, the said 'Proof Consultant' shall evolve a systems approach with the Design Director to minimize the time required for final designs and construction drawings and proof check the detailed calculations, drawings and designs, approved by the Design Director. As stipulated in Article 13.1.1 of the EPC Agreement, the petitioner may require the respondent to make modifications/ alterations to the 'Works' before issuance of a 'Completion Certificate' either by instructing or by requesting the respondent to submit a proposal for 'Change of Scope' involving addition cost or reduction in cost and similarly as stipulated in Article 13.1.3 of the EPC Agreement upon determining at any time that a 'Change of Scope' will, if adopted (i) accelerate completion, (ii) reduce the cost of the petitioner of executing, maintaining or operating the Project Highway, (iii) improve the efficiency or value to the petitioner of the completed Project Highway or (iv) otherwise be of benefit to the petitioner, it shall prepare a proposal with relevant details and submit it along with relevant details to petitioner for its approval or rejection and if rejected by the petitioner, the respondent herein shall not undertake any such 'Change of Scope' without express consent of the petitioner, save and except for meeting any emergency and furthermore as stipulated in Article 13.4 all and any such work/s are subject to restrictions on Change of Scope as it is specifically stipulated in Article 13.4.1 that no 'Change of Scope' shall be executed unless the petitioner has issued the

‘Change of Scope’ order save and except any ‘works’ necessary for meeting emergency and as stipulated in Article 13.4.3 no change made necessary because of any default of the respondent herein in the performance of its obligations under the EPC Agreement shall be deemed to be ‘Change of Scope’ and shall not result in adjustment of the ‘Contract Price’.

14. Furthermore, as stipulated in Article 13.1.2 of the EPC Agreement the ‘Change of Scope’ shall mean [a] change in specifications of any item of ‘Works’; [b] omission of any work; and / or [c] any additional work, plant, materials or services which are not included in the Scope of the Project, including as those mentioned therein.

15. In view of the above provisions contained in the EPC Agreement, the claim/s of the respondent are not covered under Article 13 therein and as such do not fall within the ‘Change of Scope’ as contained therein. Admittedly in its claim/s the respondent has not attributed any loss or damages arising to it because of the default or neglect of the petitioner as stipulated in Article 13.1.4 of the EPC Agreement. The respondent has failed to show any report given by the ‘Safety Consultant’ in adherence to Clause 10.1.6 and furthermore as apparently evident from Schedule B of the EPC Agreement the same is pertaining to ‘Project Facilities’ and is not with respect to the overall/general working of the Project Highway. Construction of breast walls and retaining walls are ancillary parts of the ‘Scope of Work’ to be performed by the respondent in parts of the Project Highway and not throughout the same and the main works consist of lying, developing, constructing, maintenance of the Project Highway. The instant EPC Agreement is a standalone agreement, which is as per the specific landscape, topography, whether conditions, necessities and other requirements of the

area and no other alternate EPC Agreement and / or Contract Agreement can be, in fact ought to be compared with the same. In view of the foregoing provisions, especially those stipulated in Clause/s 5.1[e], 10.1.6, 10.3.1, 11.4, 14.1.2[a], [b], [c] and 19.1.5 of the EPC Agreement, there was / is no ‘Change of Scope’ and the alleged ‘Works’ are part and parcel of the EPC Agreement pertaining to the whole of the Project Highway and the breast wall/s and / or retaining wall/s are forming only a part of the said Project Highway and are only to provide support and strengthen the identified areas, as, where and when required and are thus within the ‘Scope of Work’ of the respondent, more so as there have been neither any kind of change in specifications nor any additional work or services to be performed by the respondent which are not included in its ‘Scope of Works’. The instant EPC Agreement is not pertaining to construction of the breast walls and / or retaining walls only. The respondent has further failed to show and / or establish that it has constructed the breast walls as per approved drawings of the typical cross section granted by the petitioner. The claims have been wrongly allowed. The Project Highway has to be stable and sustainable at all parts, even with and / or without breast walls and restraining walls.

16. The Arbitral Tribunal in its finding has stated as under:

“14.1 Claim 1: [Regarding Breast Walls and Retaining Walls]

14.1.1 In this Claim, the Respondent herein has prayed/sought

“a. Declaration that other than breast walls and retaining walls, undertaking any slope protection measures or any slope stability measures, erosion control and landslide correction measures including those set forth in the Change of Scope Proposal is not covered within the Scope of the Project under Article 2 of the EPC

Agreement;

b. Declaration that the slope stability, erosion control and landslide correction measures set forth in the Change of Scope Proposal if required to be undertaken by the respondent herein are to be undertaken as a Change of Scope under Article 13 of the EPC Agreement;”

14.1.2 The AT considers this dispute as consisting of the following issues

(a) Regarding Scope :

Whether Slope Protection Measures (Slope Stability, Erosion Control, Land Slide Correction Measures, etc (other than Breast Walls and Retaining Walls) are part of the Scope, and/or ‘incidental’^{EPCA1.2.1f} during the construction period, for the ‘development’^{EPCA1.2.1g} of the ‘Project’^{Art.28}

(b) Regarding Schedules :

Whether Schedule B & Schedule C are subject to Schedule D (which is the contention of the Respondent), or Schedule D is subject to Schedule B & Schedule C (which is the contention of the respondent herein)

(c) Regarding ‘detailed investigations’ during ‘Site Visit’

Whether Slope Protection Works (other than Breast Walls and Retaining Walls) should/could have been identified (with the required detailed survey investigations) during ‘Site Visit’ before bidding (and appropriately provided for in the Bid by the respondent herein and proposed to the AE for Review) - even as Good Industry Practice^{EPCA 3.1.3, 28.1}

14.1.3 *The following inter alia flow from the Schedule D (as it cites them) and have their effect on the EPCA accordingly.*

- *the Manual (defined in EPCA^{Art 28}) – “IRC SP:84-2009/2014 “Manual of Specifications and Standards for Four Laning of Highways through Public Private Partnership” [paragraph 1 of Annex-1 of Schedule D cites 2 laning Manual IRC SP:73-2007 also]*
- *the Hill Road Manual IRC SP:48-1998 (cited in Cl. 13.1.2 of IRC:84)*
- *MORTH Specifications for Road & Bridge Works (defined in EPCA^{cl28})*
- *Good Industry Practice (defined in EPCA^{EPCA 28.1})*

14.1.4 *The AT after considering the stipulations of the EPCA [as well as these Manuals, Specifications, etc of the Schedule D] and the facts before this AT (pertaining to this dispute), and the contentions of the respondent herein and the petitioner herein, brings out the following:*
(a) Regarding Scope :

1. *The Specifications in the Manuals / MORTH Specifications etc. are generic and broad-based in nature as they are intended to cater to all kinds of road projects. They contain specifications for various work items, some of which may not be required in a given road project. For instance, the Manual / MORTH specifications provides specifications for ‘Well Foundation’ but well foundation is not included in present project.*
2. *The Hill Road Manual inter alia, has separate Chapters (as indicated below), all of which may not be applicable to all hill roads. For example, in the instant case, the Chapter 12 of the Hill Roads Manual is not applicable.*

- *Chapter 9 titled “Structures and Protective Works” covering 9.2 “Retaining Wall”; 9.3 Breast Wall”; 9.4 “Parapets, Railing, and Edge Stones”; 9.5 “Toe & Check Walls”; 9.6 “River Training Structures”; 9.7 Reinforced Soil Retaining Walls’; and 9.8 “Other Structures” indicating “...special structures...” discussed in “subsequent chapters” viz.,*
- *Chapter 11 titled “SLOPE STABILITY, EROSION CONTROL AND LANDSLIDE CORRECTION” (covering inter alia, 11.4 “Landslide Investigations”- with the required Field Investigations, 11.5 “Stability Analysis”, 11.6 “Corrective Measures and Design Considerations”, 11.7 “Control of Erosion of Hill Slopes”, and 11.8 “Rock Slope Protection”) and*
- *Chapter 12 titled “Snow Clearance and Avalanche Treatment”*
Chapter 11 though relevant in this hill road, is different from the conventional Protective Works of Breast Walls and Retaining Walls of Chapter 9, as they are “... special structures...” (“in areas subject to land-slides, rock slides snow-fall, etc”) discussed in “subsequent chapters” indicated in Chapter 9.

3. IRC SP:84-2009 (Manual) indicates

- *in the starting para 1.1 itself that “.....The scope of the work shall be as defined in the Concession Agreement. The Manual shall be read harmoniously with the intent of the Concession Agreement” which overrides its paras 1.2, 1.4 and 1.5.*
- *in para 1.11 of the Manual, that the respondent “while finalising the feasibility/project Report and the scope of the project” should have*

addressed the paras 1 to 13 of the Manual “with a view to make appropriate provisions in the Schedules of the Concession Agreement” with regard to the items of work to be taken up as part of the Scope of the project.

Paras 12 (Special Requirements for Hill Roads) and 14 (Retaining Wall and Breast Wall) of Annex I to Schedule B, and IRC SP:84-2009 para 13.1.3 are also to be noted in this regard.

4. MORTH Specifications also at the beginning of each and every relevant para, highlight Scope of the Project.

5. Petitioner herein in its Defence Statement and oral submissions has argued that scope of work is not limited to Schedule B and C and covers every work required to be carried out for safe and reliable highway which includes complying with special requirements of hill roads as per Manual and therefore, the respondent herein is under obligation to carry out slope protection and slope stability measures, erosion control and landslide correction measures, etc. In view of this, no payment of works included in change of scope proposal under claim No.1 is admissible.

6. Such averment of the Respondent is not tenable for the following reasons:

a. The Respondent has admitted in its Defence Statement (para 6.14) that

“Schedule B sets out very detailed and exact requirements as well as drawings and TCSs for the project highway and similarly Schedule C details of the project facilities which are to be provided by the respondent herein. Thus and as evident, the scope of the project is

limited to Schedule B and Schedule C, which are to be undertaken in conformity and have to be in accordance with the Specifications and Standards provided in Schedule D.” AT has noted that slope protection measures, erosion control and landslide correction measures, etc are not explicitly mentioned in Schedule B or Schedule C and therefore cannot be treated to be part of the Scope of the instant Project.

b. The AT has considered provision of para 12 of Schedule B which states that Special Requirements for hill roads as per Manual shall be complied with Section 13 of the Manual deals with the Special Requirements of Hill Roads. Clause 13.7 relates to Cut Slopes and reads as follows:

“13.7 cut Slopes – Cut slopes shall be rendered stable in the construction stage itself, by cutting at the correct angle and benching etc. including slope stabilizing structures like drains, breast walls, pitching, etc.”

Of the slope stabilising structures, only drains and breast walls find mention in Schedule B and C; no other works such as erosion control and landslide correction measures, etc appear in these Schedules. Thus, the factual position is that while slope stability measures other than drains and breast walls may be required as per Manual, they are not provided for in the Project Scope. It is not the case of the respondent herein that these measures are not needed; in fact they have submitted that these are necessary, but as they are not included in the Scope of the Project, these works can be taken up only under Change ad Scope.

7. To arrive at a final conclusion as to what is included or excluded from scope of work set out under Schedule B and C, it is necessary to refer to contract provisions as a whole and also look into the intention of the Respondent Authority at the time of inviting RFP with regard to inclusion of works in the scope of the Project. A reading of the Project's RFP, which as per EPCA Cl. 27.8 is deemed part of the Agreement, shows that an 'Executive Summary' of the Feasibility Study Report (FSR) was made available to the Bidders as part of the RFP. This Executive Summary under para 1.11 (Improvement Proposal) only provides for construction of retaining walls and breast walls as slope protection measures. It provides for construction of 31.755 km retaining wall (para 1.11.11) and 40.604 km breast wall (para 1.11.12). Same length of retaining walls and breast walls is provided under Schedule B of the EPCA. No slope protection measures other than retaining walls and breast walls are provided in the Executive Summary.

8. During the 'Discovery' process (Application for Discovery and Production of Documents), a copy of the FSR was made available (containing particulars of the cost estimate) by the petitioner herein during the AT's proceedings on January 14, 2019. The FSR makes it clear that only Breast Walls and Retaining Walls were contemplated therein and cost estimated accordingly; no other/special structures were envisaged therein.

9. The Schedule H "Contract Price Weightages" of the EPCA provides 26.57% for Protection Works which tallies with the cost estimate of the petitioner herein at FSR of 183.46 crore (page-65 of

copy submitted on January 14, 2019) against the Total Civil Cost at FSR of Rs 690.56 cr (at page-1 of the above). The cost estimate of 183.46 crore only includes construction of 31.764 km length of retaining wall and 40.604 Km length of breast wall (page 7.5) in addition to drains.

10. Also, Schedule E for Maintenance Requirements (inter alia) indicates attending damages to Breast Walls and Retaining Walls only.

11. Para 1.6.11 (Geology) of Executive Summary of FSR states that “The rocks along the project road generally consist of shale, lime stone, sand stone, dolomite, quartzite, slates, granite, etc. The hill slopes practically stabilized over the time. There is no major slide zone/sinking zone along the road.” This paragraph gives an impression to bidders that since slopes comprising rocks of different nature are stabilized and there is no major slide zone, special protection measures other than those provided under Schedule Bare not required.

12. The AT has noted that slope protection measures, erosion control and landslide correction measures, etc are high cost items. If it was the intention of the petitioner herein to include such special protection measures in the scope of work, those should have been categorically specified under Schedule B, the way provision of retaining breast wall has been specified. This would have ensured that the bidders included their cost in their bid amount. Not having done that the petitioner herein cannot claim these protection works to

be part of Project Scope on the ground that these are specified in Manual/ Hill Road Manual.

13. The AT does not agree with the averment made by petitioner herein that since the project is to be carried out conforming to Good Industry Practices, the works claimed under change of scope are covered under Good Industry Practices even if not so specifically provided under Schedule B. Carrying out works as per Good Industry Practices is only applicable when no specification of such work is available under the Standard Specifications/Manual. In the present case, specifications for protection works are available in the Manual/ MORTH Specifications, and therefore the question of taking them up under Good Industry Practice clause does not arise.

14. AT has also observed that the petitioner herein did not raise any issue regarding absence of slope protection measures at the time of approving TCSs of retaining wall and breast wall and no amount for incomplete protection works was withheld from first 2 SPS paid to respondent herein. The dispute has only arisen with the SPS 3 in the month of July 2016 after the first slope failure in April 2016.

15. Even EPCA Cl. 6.1.1 (Disclaimer) excludes Cl. 4.1.2 (which places the responsibility for correctness of the Scope of the Project on the petitioner herein), and Cl. 5.2 (representations and warranties of the Authority). The Cl. 6.1.3 refers to matters set forth in Cl. 6.1.1 which excludes Cl 4.1.2. Cl. 6.1.6 relates to all risks relating to the Project, and does not specifically override Cl. 4.1.2 which relates to the Correctness of the Scope of the Project.

16. *The Completion Certificate “.....safely and reliably placed in service of the Users...” is for the AE to give as part of the Completion Certificate (Schedule L of the EPCA). Any thing required for it - if it is not part of the Scope -will have to be ensured as Change of Scope by the AE. It is immaterial whether project was carried out as per original scope of work or includes some works carried out under change of scope.*

17. *Slope Protection Works (other than Breast Walls and Retaining Walls) cannot be considered incidental to the Work as*

- *these ‘other protection works’ are high cost items costing about ₹ 139 crore against the Agreement cost of ₹ 748.77 Crores, i.e., about 18.6%*
- *‘other structures’ of the Hill Road Manual (viz., “Slope Stability, Erosion Control and Landslide Correction” and “Snow Clearance and Avalanche Treatment”) can not be considered as incidental to the structures (viz., Breast Walls and Retaining Walls) specifically mentioned in the Scope of the Work.*

18. *In this connection AT notes that a similar hill road project of NHAI - for which RFP was issued in July 2014, as compared to the RFP of this Project issued in Oct, 2014) and entered into on October 13, 2015 (Ref. Answer to Q24 during the cross examination of the Contractor’s Witness) - viz., Ramban-Banihal project in J&K, separately lists the special protection measures in detail as part of the Scope.*

(b) Regarding Schedules

- *The AT after due consideration has arrived at the conclusion that the Scope of the Project is fully described in Schedules B and C and therefore Schedule D is subject to Schedules B and C in respect of the Scope of Work .*
- *The comma before Schedule D in the definition of Scope in Clause 2.1 (a), also leads to the interpretation that Schedule D is subject to Schedules B & C, i.e., Project Works indicated in Schedules B & C are to be carried out following the Specifications indicated in Schedule D.*

(c) *Regarding detailed investigations during ‘site visit’*

Even if the ROW / permissions were available for detailed investigations on the hill slopes (as being insisted by the petitioner herein from SPS 3), this could not be done by any Bidder during ‘Site Visit’, within the short time made available for bidding (45 days only initially-though extended subsequently).

‘Detailed investigations’ of this nature by each Bidder during ‘site visit’ before bidding

- *is not feasible,*
- *will definitely be waste of energy/resources/damages to the environment, and*
- *is also not Good Industry Practice / Trade Usage (Refer Cl. 28.3 of The Arbitration & Conciliation Act, 1996)*

even if adequate ROW and required permissions were available then.

Accordingly, the claim as stated in para 14.1.1 is upheld.”

17. Mr. Saurabh Banerjee, learned counsel for the petitioner has reiterated the submissions as advanced before the Arbitral Tribunal. He has taken me through the various provisions of the Manual to contend that the Scope of Work includes the work regarding slope stability, erosion control, landslide correction measures. In other words, he states that the petitioner has rightly rejected the request of the respondent for change of scope by executing the supplementary agreement. He states that the conclusion arrived at by the Arbitral Tribunal is contrary to the provisions of the contract and need to be set aside.

18. On the other hand, Mr. Sandeep Sethi, learned Senior Counsel appearing for the respondent, would submit that before bids were invited, a RFP was issued for shortlisting bidders for EPC Agreement. In the said document the work regarding slope stability, erosion control, or land slide correction measures were not mentioned. In fact, the RFP was preceded by preparing the cost estimate of the project. The costing for the purpose of carrying out the slope stability, erosion control, and land slide correction measure was not provided, which would cost Rs.130 Crores over and above the project value.

19. He states that the plea of the learned counsel for the petitioner by placing reliance on the Manual, is totally misplaced. The Manual relates to many types of work relating to road construction whereas the contract was specific to constructions of breast walls and retaining walls. It is only those specifications which relate to the breast walls and retaining walls which would be of relevance in this case and not specifications related to slope stability, erosion control, and land slide correction measures, as they were

not part of the work.

20. In fact, the NHAI had appointed an independent Engineer who did not issue any instruction with regard to slope stability, erosion control, and land slide correction measures. The petitioner had approved and paid two bills without any demer. It is only in the third bill that the petitioner started deducting the cost of the slope stability, erosion control, and land slide correction measures.

21. That apart, it is his submission that protection measures like slope stability, erosion control and land slide correction measures generally become relevant in areas, which are prone to land slide etc. It is his submission that in the case in hand it has come on record that this area is not so prone to land slide etc. and hence, the correction measures like slope stability, erosion control and land slide correction measures could not be required.

22. He has drawn my attention to page 187 onwards of the impugned award in support of his contention. He states that the Arbitral Tribunal consisted of three retired Officers of Government of India including a retired Director General, Road Development / Special Secretary, Ministry of MoRTH, Additional Director General, CPWD and the Secretary, MoRTH, who being experts in the field of Road Development, have on an interpretation of the provisions of the EPC Agreement has come to a conclusion in the impugned award in favour of the respondent herein and further noting the scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 more particularly with regard to the interpretation of contract being limited, this Court would not come to a different conclusion and set aside the impugned award.

23. Having considered the respective submissions of the learned counsel for the parties, I have already reproduced the relevant conclusion of the Arbitral Tribunal with regard to claim No.1. A reading of the same would depict the following position.

(i) The Specifications in the Manuals / MoRTH Specifications etc. are generic and broad-based in nature as they are intended to cater to all kinds of road projects. They contain specifications for various work items, some of which may not be required in a given road project. For instance, the Manual / MoRTH specifications provides specifications for ‘Well Foundation’ but well foundation is not included in present project.

(ii) The Hill Road Manual (IRC:SP:48-1998) [‘Hill Road Manual’, for short) inter alia, has separate Chapters, all of which may not be applicable to all hill roads. For example, in the instant case, the Chapter 12 of the Hill Road Manual is not applicable.

(iii) The scope of the work shall be as defined in the Concession Agreement. The Manual shall be read harmoniously with the intent of the Concession Agreement.

(iv) That the petitioner “while finalising the feasibility/project Report and the scope of the project” should have addressed the paras 1 to 13 of the Manual “with a view to make appropriate provisions in the Schedules of the Concession Agreement” with regard to the items of work to be taken up as part of the Scope of the project.

(v) The respondent has admitted in its Defence Statement that Schedule B sets out very detailed and exact requirements as well as drawings and TCSs for the project highway and similarly Schedule C details of the project facilities which are to be provided by the respondent herein. Thus and as

evident, the scope of the project is limited to Schedule B and Schedule C, which are to be undertaken in conformity and have to be in accordance with the Specifications and Standards provided in Schedule D. Arbitral Tribunal has noted that slope protection measures, erosion control and landslide correction measures, etc are not explicitly mentioned in Schedule B or Schedule C and therefore cannot be treated to be part of the Scope of the instant Project.

(vi) The Arbitral Tribunal has considered provision of para 12 of Schedule B which states that Special Requirements for hill roads as per Hill Road Manual shall be complied with. Section 13 of the Hill Road Manual deals with the Special Requirements of Hill Roads.

(vii) Of the slope stabilising structures, only drains and breast walls find mention in Schedule B and C; no other works such as erosion control and landslide correction measures, etc appear in these Schedules. Thus, the factual position is that while slope stability measures other than drains and breast walls may be required as per Manual, they are not provided for in the Project Scope. It is not the case of the respondent herein that these measures are not needed; in fact they have submitted that these are necessary, but as they are not included in the Scope of the Project, these works can be taken up only under Change of Scope.

(viii) To arrive at a final conclusion as to what is included or excluded from scope of work set out under Schedule B and C, it is necessary to refer to contract provisions as a whole and also look into the intention of the NHAI at the time of inviting RFP with regard to inclusion of works in the scope of the Project. A reading of the Project's RFP, which as per EPCA Cl. 27.8 is deemed part of the Agreement, shows that an 'Executive Summary' of the

Feasibility Study Report (FSR) was made available to the Bidders as part of the RFP. This Executive Summary under para 1.11 (Improvement Proposal) only provides for construction of retaining walls and breast walls as slope protection measures. It provides for construction of 31.755 km retaining wall (para 1.11.11) and 40.604 km breast wall (para 1.11.12). Same length of retaining walls and breast walls is provided under Schedule B of the EPC Agreement. No slope protection measures other than retaining walls and breast walls are provided in the Executive Summary.

(ix) A copy of the FSR was made available by the petitioner herein during the AT's proceedings on January 14, 2019. The FSR makes it clear that only Breast Walls and Retaining Walls were contemplated therein and cost estimated accordingly; no other/special structures were envisaged therein.

(x) The Schedule H "Contract Price Weightages" of the EPCA provides 26.57% for Protection Works which tallies with the cost estimate of the petitioner herein at FSR of 183.46 crore (page-65 of copy submitted on January 14, 2019) against the Total Civil Cost at FSR of Rs 690.56 cr (at page-1 of the above). The cost estimate of 183.46 crore only includes construction of 31.764 km length of retaining wall and 40.604 Km length of breast wall (page 7.5) in addition to drains.

(xi) Schedule E for Maintenance Requirements (inter alia) indicates attending damages to Breast Walls and Retaining Walls only.

(xii) Para 1.6.11 (Geology) of Executive Summary of FSR states that "The rocks along the project road generally consist of shale, lime stone, sand stone, dolomite, quartzite, slates, granite, etc. The hill slopes practically stabilized over the time. There is no major slide zone/sinking zone along the road." This paragraph gives an impression to bidders that since slopes

comprising rocks of different nature are stabilized and there is no major slide zone, special protection measures other than those provided under Schedule Bare not required.

(xiii) That slope protection measures, erosion control and landslide correction measures, etc are high cost items. If it was the intention of the petitioner herein to include such special protection measures in the scope of work, those should have been categorically specified under Schedule B, the way provision of retaining breast wall has been specified. This would have ensured that the bidders included their cost in their bid amount. Not having done that the petitioner herein cannot claim these protection works to be part of Project Scope on the ground that these are specified in Manual/ Hill Road Manual.

(xiv) Arbitral Tribunal notes that a similar hill road project of NHAI - for which RFP was issued in July 2014, as compared to the RFP of this Project issued in Oct, 2014) and entered into on October 13, 2015 (Ref. Answer to Q24 during the cross examination of the Contractor's Witness) - viz., Ramban-Banihal project in J&K, separately lists the special protection measures in detail as part of the Scope.

24. This Court in ***TRG Industries Pvt. Ltd. Vs. N.H.P.C. Ltd., 218 (2015) DLT 611***, held that a plausible interpretation given by the Arbitral Tribunal should not be interfered even if a different interpretation is plausible. The relevant paragraph is reproduced as under:-

“24. Also in the case of Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd., 2007 (8) SCC 466 wherein it was held that the interpretation given by the Arbitral Tribunal to the contract is a plausible interpretation, the Court should not interfere even if a different interpretation is plausible. It is the consistent view

of the Supreme Court that award is a well reasoned based on substantive law and within the four corners of the terms of the contract, there is no patent illegality on the face of it. The award cannot be set aside only because a party feels that the award is unfair or unreasonable unless the unfairness and the unreasonableness shocked the conscience of the Court (ref. J.G. Engineers Pvt. Ltd. v. Union of India and Another, 2011 (5) SCC 758.)”

25. It is also held by this Court in the case of ***Devika Builders Pvt. Ltd. an Ors. v. National Cooperative Consumers and Ors. 2015 (3) ARBLR 448 (Delhi)***, that court will not interfere with finding of fact and plausible reasoning rendered by the Arbitral Tribunal.

26. In view of the conclusion arrived at by the Arbitral Tribunal and noting the fact that the scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 is limited, as held by this Court in the judgments referred above, suffice it would be to state that the conclusion arrived at by the Arbitral Tribunal has a plausible reasoning and not a perverse reasoning. Hence, this Court refuses to entertain the present petition and dismiss the same. No costs.

I.A.2136/2020 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

FEBRUARY 14, 2020/aky