



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

Date of decision: 02nd SEPTEMBER, 2022

IN THE MATTER OF:

+ **FAO(OS) (COMM) 42/2022 & CM APPLs. 8794-95/2022**

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Appellant

Through: Mr. Gopal Singh, Advocate

versus

M/S JMC CONSTRUCTIONS PVT. LTD. Respondent

Through: Mr. Kaushik Laik, Mr. Angad Mehta
and Mr. Ashay Kaushik, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

J U D G M E N T

SUBRAMONIUM PRASAD, J

1. The Appellant/National Highways Authority of India ('NHAI') seeks to challenge the Judgment dated 09.11.2021, passed by the Ld. Single Judge in O.M.P. (COMM.) 323/2021, wherein the Ld. Single Judge dismissed the petition filed by the Appellant under Section 34 of the Arbitration and Conciliation Act, 1996 whereunder an Award dated 20.01.2021 passed by the Arbitral Tribunal comprising of three members was challenged.
2. The facts, in brief, leading to the instant appeal are as under:
 - a) The Appellant herein issued a Notice Inviting Tender (NIT) for the works regarding "Short Term Improvement & Routine Maintenance of Gundugolanu-Vijaywada Section NH-5, from Kms. 1022.494 to Kms. 1100.694 in the State of Andhra Pradesh".



- b) Pursuant to the said NIT, the Respondent herein submitted its bid for executing the Project works on 10.11.2009. The bid was accepted by Appellant/NHAI herein for implementation of the Project for an amount of Rs.41,29,30,224/-, and the contract was awarded to the Respondent by a Letter of Acceptance dated 25.02.2010.
- c) Thereafter, an Agreement dated 20.04.2010 was entered into between the Appellant and the Respondent for execution of the said project. In terms of the Agreement, the Respondent was required to complete the project within a period of (18) eighteen months from the date of commencement of work and it was also agreed that the defect liability period would extend for a period of six months after the completion of the works.
- d) In terms of the Agreement, the schedule period for completion of the work was 31.10.2011. However, since the work could not be completed by the aforesaid date, the Respondent requested the Appellant for extension of time to complete the works. The Appellant extended the schedule period for completion of the works till 30.06.2012.
- e) The requisite completion certificate stipulated under Clause 49 of Section V of the General Conditions of the Contract (GCC) was issued to the Respondent certifying that the works have been completed on 30.06.2012.
- f) After the completion of works on 30.06.2012, the defect liability period for a period of six months commenced from the said date.
- g) After the defect liability period came to an end, the Defect Liability Certificate in accordance with Clause 1.1 read with Clause 33 of the



General Conditions of the Contract (GCC) was issued, after the Respondent had rectified the notified defects during the extended defect liability period.

- h) It is stated that *vide* letter dated 28.12.2011, the Respondent had asked for payment of balance amount of money which included amounts towards increase in quantity of bitumen used on account of additional weight of bitumen in the design mix.
- i) Dispute arose between the parties and the Arbitration Clause in the Agreement was invoked as embodied in Clause 25.3 of Section-V, Part-II of the Special Conditions of the Contract (SCC).
- j) The claims made by the Respondent in its Statement of Claims dated 24.05.2017 are tabulated as under:

Claim no.1	Variance in actual percentage of bitumen used in the BC work for the entire stretch from Gundugolanu to Vijayawada.	₹1,74,00,974/-
Claim no.2	Reimbursement of Liquidated Damages recovered by the Respondent	₹47,14,000/-
Claim no.3: Interest on delayed payments	(a) Delay in release of withheld amounts	₹27,09,077/-
	(b) Delay in release of retention money	₹6,08,609/-
	(c) Delay in release of price escalation on labour component	₹39,18,189/-
Claim no.4: Claim for interest	Interest at 18% on Claim No.1	₹1,16,44,827/-
	Interest at 18% on Claim No.2	₹47,48,407/-
Total Claim Amount		₹4,57,74,083/-

- k) The Tribunal, thereafter, passed the Impugned Award dated



20.01.2021, partly allowing the claims made by the Respondent. The tabular statement summarising the award as set out in the Impugned Award is reproduced as below:

Claim No	Details	Claim Amount	Amount allowed by the AT
Claim No.1	The variance in actual percentage of Bitumen used in the BC work (BOQ item 3.07) for entire stretch From Gundugolanu to Vijayawada.	₹2,90,45,801/-	₹1,74,00,973/-
	Interest on the delay in releasing payment of Bitumen variance 50%		₹21,91,652/-
	Interest on the delay in releasing payment of Bitumen variance on the total amount due		₹1,14,63,064/-
Claim No.2	Reimbursement of Liquidated damages	₹94,92,407/-	Nil
Claim No.3A	Interest on the delay in releasing withheld amounts	₹27,09,077/-	₹10,08,264/-
Claim No.3B	Interest on the delay in releasing the retention amounts	₹6,08,609/-	₹3,32,885/-
Claim No.3C	Interest on the delay in payment of price escalation payment on Labour Component	₹39,18,189/-	Nil
Total Amount		₹457,74,083/-	₹323,96,838/-

3. Aggrieved by the Impugned Award dated 20.01.2021, passed by the



Arbitral Tribunal, a petition bearing O.M.P. (COMM.) 323/2021 under Section 34 of the Arbitration and Conciliation Act, 1996 was filed by the Appellant herein, and the Ld. Single Judge *vide* Judgment dated 09.11.2021 dismissed the said petition.

4. The Appellant herein has filed the instant appeal before this Court challenging the Judgment dated 09.11.2021, passed by the Ld. Single Judge in O.M.P. (COMM.) 323/2021.

5. This Court *vide* Order dated 17.02.2022 restricted the notice to Claim No.1, and granted stay on the execution of the Impugned Award in relation to Claim No.1.

6. Heard learned counsels appearing for the Parties and perused the material on record.

7. Learned counsel appearing for the Appellant draws attention of this Court towards a letter dated 27.04.2013 issued by the Respondent herein and contend that the Respondent has categorically stated in the said letter that it would not claim over and above the 5% of increase in quantity of Bitumen used in the design mix in the work carried out by them during the tenure of the abovementioned work contract and, therefore, the Tribunal could not have awarded any amount under the Claim No.1. He further submits that there is nothing on record to show that the said letter dated 27.04.2013 was given under any duress, and the Tribunal ought not to have awarded the said amount. He submits that the Tribunal has not adverted to this aspect of the claim at all and without there being any evidence of the said letter having been given under duress, the Tribunal has brushed aside the said letter by stating that it was given by the Respondent herein under duress.

8. *Per contra*, learned counsel appearing for the Respondent draws



attention of this Court towards the relevant Paragraphs of the Statement of Claims and more particularly towards the Paragraph No.15.11 which reads as under:

“15.11 The Claimant requested the Respondent regarding recovery of Bitumen variance. The Respondent quoted Claimant undertaking and denied the payment. It is submitted that the Claimant executed the works in compliance of job mix formula issued by the Engineer. It is pertinent to mention that as per the Agreement the Respondent shall pay the additional cost to be incurred on the excess quantity of bitumen. It is reiterated that the Claimant executed the work in compliance of the aforementioned job mix formula. However, after completion of the work, the Respondent insisted upon the Claimant to issue an undertaking letter that it will not claim differential amount on the bitumen cost and the Respondent offer to pay the bill amount, withheld amount and LD amount but unfortunately after issuing the letter, the Respondent denied the aforementioned payment and also denying the difference cost of the bitumen. The said fact is also evident from the fact that the Claimant did not issue the aforementioned undertaking either prior to commencement of the work in question or during the course of the execution of the work. The said letter issued after completion of the Agreement works.” (emphasis supplied)

9. Learned counsel appearing for the Respondent submits that there was a specific case of the Respondent (Claimant) that the said letter giving up the claim for the difference of the cost of bitumen was given only under duress, and the balance amount has not been released by the Appellant/NHAI. He submits that there was no specific denial on the issue of duress by the Respondent.

10. This Court has perused the Impugned Award dated 20.01.2021, passed by the Arbitral Tribunal, documents referred to by the Parties and the



Judgment dated 09.11.2021, passed by the Ld. Single Judge in O.M.P. (COMM.) 323/2021.

11. As far as the Claim No.1 is concerned, which is the principal controversy, the Respondent is raising this claim under Clause 509.9 of the Technical Specification which reads as under:

“509.9 Rate

The contract unit rate shall be as specified in Clause 507.9, except that the rate shall include the provision of bitumen at 5.0 per cent, by weight of total mixture. The variance in actual percentage of bitumen used will be assessed and the payment adjusted up or down, accordingly.”

12. A perusal of the abovementioned Clause 509.9 shows that the variation in actual percentage of bitumen used is required to be assessed and the payment has to be adjusted accordingly. Thus, under the terms, if a higher percentage of bitumen over and above 5% was used then the contractor was entitled to additional amount. It has been noted by the Tribunal that the Respondent had secured a Report dated 24.11.2010 from IIT Chennai and the said report specified that the bitumen content as 5.5% of the mix by weight. The Arbitral Tribunal found that said report of the IIT Chennai was approved by the Engineer of the Appellant. The Engineer had also independently approached another organisation, namely, *Siddharth Academy* which had also confirmed that the bitumen content in the mix used by the Respondent for executing the works was higher than 5%. The Engineer of the Appellant had also assessed the additional amount payable on account of increased in the bitumen content at Rs.1,74,00,974/- and had recommended that the said amount be released to the Respondent.

13. The Tribunal had accepted the contention of the Respondent herein



that the claim was given up on the ground of duress by the said letter dated 27.04.2013 wherein the Respondent had stated that it would not claim over and above 5% of Bitumen variation for the bitumen work carried out by them during the tenure of the abovementioned work contract. At this juncture, it is pertinent to extract reasons given by the Tribunal on this issue which read as under:

“L. The Claimant completed the BC work in Feb. 2012 and the Engineer recommended for payment for the work after getting satisfied of the work and the quantity of bitumen used in the work, in May 2012. The Respondent paid 50% in July 2012. The entire work was completed on 30.06.2012 and the Engineer issued completion certificate on 08.10.2012 and the certificate of completion of DLP was also issued on 23.03.2013.

M. The Respondent's letter dated 29.05.2015 (Page 260 of RD-03) reveals that the Respondent made several requests to the Claimant to withdraw the Claim. The Claimant finally with their letter dated 27.04.2013 informed that they will not claim over and above 5% of bitumen variation for the bituminous work carried by them. This makes AT, to believe the argument of the Claimant that in view of huge amounts pending with the Respondent, this letter was provided.

N. There is no dispute between the parties on the quantity of bitumen used in the BC work. The amount was arrived by the Engineer based on the actual quantity bitumen used which was got verified by an independent agency and recommended payment. The amount recommended for payment for the excess bitumen used in BC item of work was Rs.1,74,00,973/-. The Employer released payment of 50% recommended amount i.e. Rs.58, 75,000/- for want of confirmation of tests with third party (Exhibit R-86, Page 222). The Respondent even after getting confirmation of tests by third party did not release the balance 50% withheld. Even the 50% of the amount paid was



recovered subsequently.

O. In view of the above findings, AT is of the view to allow the Claim of Rs.174,00,973/- towards extra quantity of bitumen consumed in the accepted BC work.”

14. The Tribunal, therefore, came to the conclusion that the Respondent was entitled to claim the cost of bitumen over and above 5% of Bitumen variation for the bitumen work carried out by them.

15. The Ld. Single Judge after analysing the Impugned Award dated 20.01.2021, passed by the Arbitral Tribunal, held as under:

“46. The contention that the Arbitral Tribunal has misdirected itself and has found in favour of JMC only on an assumption that JMC had sent a letter dated 27.04.2013 under coercion, is unmerited. A plain reading of the impugned award indicates that the Arbitral Tribunal had found that JMC had used a higher percentage of bitumen in the design mix formula. The same was in accordance with the design mix as recommended by IIT Chennai and as approved by the Engineer. JMC had no opportunity to further optimise the bitumen content in the Bitumen Concrete Mix design and was required to execute the works in accordance with the job mix provided by IIT Chennai and as approved by the Engineer.

47. In view of the Arbitral Tribunal’s finding that JMC had no further scope or opportunity to explore optimising the bitumen content in the Bitumen Concrete Mix design, the fundamental premise being that JMC had issued a letter dated 27.04.2013 agreeing not to charge bitumen variance against its obligation to optimise the bitumen content, as claimed by NHAI, is untenable. It is also not disputed that on 27.04.2013, there were substantial sums payable by NHAI to JMC. Thus, the Arbitral Tribunal’s decision to accept JMC’s contention that the said letter was written on the premise that the sums withheld by NHAI would be released, cannot be faulted.”



16. The jurisdiction of the High Court while considering the appeal under Section 37 of the Arbitration and Conciliation Act, 1996 has been crystallized by the Apex Court in MMTC Limited vs. Vedanta Limited, (2019) 4 SCC 163. The relevant portion of the said judgment reads as under:

“14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings.”

17. The Apex Court vide Order dated 16.01.2018 passed in Civil Appeal No.419/2018 titled as K. Sugumar & Anr. vs. Hindustan Petroleum Corporation Ltd & Anr. has observed as under:

“5. The jurisdiction of the High Court in appeal under Section 37 of the Act would naturally be limited to what has been conferred under Section 34 of the Act insofar as an appeal against an order setting aside or refusing to set aside the award is concerned.

6. A reading of the materials placed on record, including the award and the order passed under Section 34 of the Act, would disclose that the view taken by the arbitrator is on a consideration of the evidence and materials placed before him and the conclusion that the respondents are liable to compensate the appellants is a possible and reasonable conclusion. This is precisely what has been held by the Court



while exercising jurisdiction under Section 34 of the Act. If that is so, we do not see how in an appeal under Section 37 of the Act, the High Court could have reappreciated the evidence to come to a contrary finding. The High Court was not sitting in appeal over the award of the arbitrator but it is the order passed under Section 34 of the Act, which was the subject matter of challenge before the High Court. The High Court seems to have missed the subtle difference between the two jurisdictions and thereby committed an error which would require to be corrected in this appeal.”

18. It is well settled that the scope of scrutiny under Section 34 of the Arbitration and Conciliation Act, 1996 is limited only to the grounds given under Section 34 of the Act and the extent of scrutiny is further narrowed under Section 37 of the Arbitration and Conciliation Act, 1996. The Courts while exercising jurisdiction in considering the correctness of the Award do not substitute their conclusion with the one arrived at by the Tribunal.

19. Applying the said law as laid down by the Apex Court in the facts of the present case, the Tribunal has come to the conclusion that the Respondent is entitled to the claim as raised in Claim No.1, and that the letter dated 27.04.2013 was written under duress for the reason that the payments were not being released. The Ld. Single Judge while exercising the jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 has refused to interfere with the conclusion arrived at by the Tribunal.

20. Taking into account the facts and circumstances of the case, this Court while exercising its jurisdiction under Section 37 of the Arbitration and Conciliation Act, 1996 is not inclined to interfere with the conclusion arrived at by the Tribunal and the Ld. Single Judge.

21. A perusal of the claim statements of the Respondent shows that



substantial amount of claim was on the Variance in the actual percentage of the Bitumen used in the work for the contract. It is also not in dispute that the letter dated 27.04.2013 was written under duress as substantial amounts were payable to the Respondent. There is a specific averment in the claim statement that the said letter was written only because the amounts were not released by the NHAI. The Tribunal came to a conclusion that the said letter was written under duress for the reason that the payments were not being released and the said conclusion has been accepted by the learned Single Judge. This Court, therefore, cannot sit over a conclusion arrived at by the two forums below while exercising its jurisdiction under Section 37 of the Arbitration and Conciliation Act.

22. Resultantly, the appeal is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

SEPTEMBER 02, 2022

S. Zakir