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

+ **ARB.P. 326/2024 & I.A. 5280/2024**

**ORIENTAL STRUCTURAL ENGINEERS PVT. LTD. KMC
CONSTRUCTION LTD (JV) OSE KMC -JV Petitioner**

Through: Mr. Anil K. Airi, Sr. Advocate
with Mr. Ravi Krishan, Mr. Mudit
Ruhella, Ms. Bindiya Logawney,
Ms. Sadhna Sharma and Mr. Girish
Shankar, Advocates.

versus

**NATIONAL HIGHWAY AUTHORITY
OF INDIA Respondent**

Through: Mr. Manish K. Bishnoi with Mr.
Hitesh, Advocate.

**CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN**

**ORDER
05.03.2024**

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1. The petitioner has filed this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”] seeking appointment of an arbitrator, in lieu of the arbitrator to be nominated by the respondent, for adjudication of disputes in terms of a contract agreement dated 04.11.2004 for construction of a road in the Allahabad Bypass Project of the respondent – National Highway Authority of India [“NHAI”].

2. The contract admittedly contains an arbitration clause [Clause



67.3]. In fact, the parties have already been through one round of arbitration, which culminated in an Award dated 28.12.2015.

3. The dispute now concerns one claim of the petitioner, which was to the tune of Rs.24,09,37,762/- and interest thereupon, on account of construction of Embankment with Pond Ash.

4. The parties were in dispute with regard to the rates specified in Bill of Quantities [“BOQ”] on this aspect. Although the Arbitral Tribunal found in favour of the petitioner on an interpretation of the agreement on merits, it rejected the petitioner’s claim, relying upon the judgment of a Division Bench in *National Highway Authority of India v. Hindustan Construction Company* [(2013) 196 DLT 498] [hereinafter “*NHAI v. HCC*”].

5. Assailing the Tribunal’s finding, the petitioner approached this Court in O.M.P. (COMM) 280/2016. The challenge before this Court was rejected by a judgment dated 16.03.2018, also relying upon the judgment in *NHAI v. HCC* [*supra*]. The petitioner’s appeal, under Section 37 of the Act [FAO(OS)(COMM) 158/2018], failed for the same reason, and was dismissed by order dated 31.07.2018.

6. However, it has since transpired that the Supreme Court has reversed the position, in Hindustan Construction Company’s [“HCC”] challenge to the judgment of the Division Bench in *HCC v. NHAI* [*supra*]. The petitioner also preferred an appeal against the Division Bench order dated 31.07.2018. Both the appeals were taken up together, alongwith other appeals on the same point, and decided by a common judgment dated 24.08.2023 in *Hindustan Construction Co. Ltd. v. National Highways Authority of India* [2023 SCC OnLine SC 1063]. The



Court considered the “*main judgment*” in *HCC v. NHAI*, and came to the conclusion that interference with the Arbitral Award, in that case, was unwarranted. It bears emphasis that the award in the case of *HCC v. NHAI*, and in some of the other cases before the Supreme Court, were in favour of the contractors and against NHAI, which had been set aside by this Court at NHAI’s instance. The operative portion of the judgment of the Supreme Court is as follows:

*“28. In view of the findings recorded earlier, this court is of the opinion that **all the appeals have to succeed.** Therefore, C. A. No. 4658/2023, C. A. No. 4659/2023; C. A. No. 4660/2023; C. A. No. 4661/2023 and **C. A. No. 4662/2023 are allowed; all judgments of the Delhi High Court, which were the subject matter of challenge in those appeals are set aside.** The awards, which were the subject matter of challenge, and to the extent they were set aside, are hereby upheld and restored. The direction in the awards, to the extent they required compounded monthly interest payments, are modified. Instead, the NHAI shall pay uniform interest on the amounts due, on the head concerned, i.e., construction of embankment, to the extent of 12% from the date of award to the date of payment, within eight weeks from today. All the above appeals are allowed in these terms. There shall be no direction to pay costs.”*

[Emphasis supplied.]

7. Following this judgment, the petitioner approached the respondent by a letter dated 28.08.2023 for payment of its claim. The respondent rejected the request by a communication dated 12.09.2023, on the ground that there was no specific direction in the judgment of the Supreme Court, with regard to the present petitioner. The petitioner, therefore, appointed its nominee arbitrator, who accepted the reference. It also invoked arbitration by a letter dated 27.10.2023, and attempted to have an arbitrator appointed by the President of the Institution of Engineers (India). By a letter dated 19.12.2023, NHAI once again rejected the request, stating that it had filed a review petition before the Supreme



Court against the judgment dated 24.08.2023, and that it “*does not find any utility in going for arbitration again for the subject matter*”, as the Arbitral Tribunal has already given its decision in the subject dispute.

8. It is in these circumstances that the petitioner has approached this Court under Section 11 of the Act.

9. Mr. Manish Bishnoi, learned counsel, appears on behalf of NHAI on advance notice. His only submission is that, by the judgment of the Supreme Court dated 24.08.2023, the awards which were the subject matter of challenge before this Court, were restored and, therefore, the petitioner’s claim stands finally dismissed.

10. I find this contention to be unmerited. The awards which were restored by the Supreme Court were “*to the extent they were set aside*”. In the present case, this Court did not set aside any award, but upheld the award against the petitioner, both at the level of the learned Single Judge and the Division Bench.

11. The Supreme Court was hearing a batch of appeals, in some of which similar claims had been allowed by the learned Arbitrator; whereas in the petitioner’s case, the claim had been rejected. The Arbitral Tribunal, while indicating a finding on merits in favour of the petitioner did not pass the award, relying only upon the Division Bench judgment in *NHAI v. HCC [supra]*. That judgment of the Division Bench was set aside by the judgement of the Supreme Court dated 24.08.2023, as were “*all judgments of the Delhi High Court, which were the subject matter of challenge,*” including in Civil Appeal No. 4662 of 2023, preferred by the petitioner herein. Thus, the judgment and order of this Court dated 16.03.2018 and 31.07.2018, respectively [both of which also proceeded



only on the basis of the Division Bench judgments in *NHAI v. HCC* (*supra*)], stood set aside.

12. The position, therefore, is that the award dated 28.12.2015 stands set aside by the Supreme Court, and the petitioner is entitled to a fresh adjudication of its claims.

13. Mr. Bishnoi states that an attempt may be made to resolve the disputes in conciliation, failing which the parties may be referred to the arbitration of a Sole Arbitrator appointed by the Court, with consent. Mr. Anil K. Airi, learned Senior Counsel for the petitioner, accepts this suggestion.

14. For the aforesaid reasons, and with the consent of the parties, the petition is disposed of, alongwith pending applications, with the following directions:

- a. The disputes between the parties will be adjudicated by arbitration of Hon'ble Ms. Justice Indira Banerjee, former Judge, Supreme Court of India [Tel:- +91-9560808777].
- b. The arbitration will be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi- 110503 ["DIAC"], and will be governed by the Rules of DIAC, including as to the remuneration of the learned Arbitrator.
- c. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.
- d. DIAC is requested to defer the proceedings for a period of six weeks from today, to enable the parties to resolve their disputes through conciliation.
- e. Either party may request DIAC/the learned Arbitrator to enter into



reference after the said period of six weeks.

15. It is made clear that all rights and contentions of the parties are left open for adjudication by the learned Arbitrator.

PRATEEK JALAN, J

MARCH 5, 2024
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