



2024:DHC:4861-DB



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

Judgment Reserved on: 22.04.2024

% *Judgment Pronounced on: 02.07.2024*

+ **FAO(OS) 403/2014**

M/S NATIONAL HIGHWAYS
AUTHORITY OF INDIA

..... Appellant

Through: Mr Pradeep K. Bakshi, Advocate.

versus

M/S AFCONS INFRASTRUCTURE LTD

..... Respondent

Through: Mr Manu Seshadri, Mr Abhijit Lal
and Mr Sahil Manganani, Advocates.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J.:

1. The present appeal has been filed under Section 37(1)(b) (as it existed before the amendment in 2016) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') by the appellant impugning the order dated 24th August, 2012 and the judgment dated 9th June, 2014 passed by the learned Single Judge in a petition filed by the appellant under Section 34 of the Act (OMP No. 719/2012).
2. *Vide* order dated 24th August, 2012, the learned Single Judge rejected the grounds of challenge raised by the appellant in relation to,
 - (i) Clearing and Grubbing (C&G) and earthwork in embankment done below the Original Ground Level (OGL) by the respondent.

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- (ii) Delay by the respondent in approaching the Dispute Review Expert (DRE).

Accordingly, notice was issued in the petition limited to the entitlement of the respondent for escalation after price adjustment.

3. *Vide* the judgment dated 9th June, 2014, the learned Single Judge decided the aforesaid issue of price escalation in favour of the respondent and accordingly, rejected the petition filed by the appellant.

4. The prefatory facts leading up to the filing of the petition under Section 34 of the Act before the learned Single Judge are as follows:

- (i) The appellant invited bids for the work of “Four laning and strengthening” of Km. 340 to Km. 404 of Hubli-Haveri Section (Contract Package-I) on NH-4 in the State of Karnataka. The respondent submitted its bid for the said work on 7th March, 2001, which was accepted and the project was awarded to the respondent.
- (ii) An agreement dated 28th March, 2001 was entered into between the parties. The terms and conditions of the contract were contained in General Conditions of Contract (GCC), Conditions of Particular Applications (COPA) and Technical Specifications. The respondent agreed to execute and complete the project at the contract price of Rs. 1,83,65,82,676/-
- (iii) The works to be carried out, inter alia, involved the work of C&G followed by construction of earthwork embankment in accordance with Technical Specifications.
- (iv) During the course of construction, it was decided by an Engineer who was appointed on the project that the respondent was not entitled to payment for embankment work done below the Original Ground





Level (OGL). It was the respondent's contention that it should be paid for the embankment work done below the OGL. Accordingly, the respondent raised a dispute in respect of the same.

- (v) The Engineer *vide* his letter dated 10th October, 2003 informed the respondent that payment for the embankment work shall be made on the basis of the ground level prior to the commencement of the work of C&G i.e. the OGL.
- (vi) The respondent opposed the aforesaid decision of the Engineer and expressed its intention to refer the dispute to Dispute Review Expert (DRE) *vide* its letter dated 21st October, 2003. However, the DRE was not in existence at that time and came to be appointed only in the month of March, 2004. The respondent made its claim before the DRE via letter dated 5th October, 2005. The DRE passed an order dated 18th October, 2006 allowing the claim of the respondent
- (vii) Aggrieved by the same, the appellant invoked the arbitration clause *vide* its letter dated 14th November, 2006 and filed its statement of claim before the Arbitral Tribunal.

Findings of the Arbitral Tribunal

5. The Arbitral Tribunal after conducting several hearings passed an award dated 18th March, 2012 rejecting the claim of the appellant and decided the matter in favour of the respondent by allowing their claim for payment for the work of embankment done below the OGL. The Arbitral Tribunal awarded the following amounts in favour of the respondent-

- (i) Rs. 3,07,76,185/-, the amount deducted by the appellant from the Interim Payment Certificate No. 78 (hereinafter IPC),





- (ii) Rs. 1,78,02,176/- as the price adjustment on the aforementioned amount of Rs. 3,07,76,185/-,
- (iii) Rs. 36,19,230/- as interest on an amount earlier withheld by the appellant, which was adjusted later in IPC 78,
- (iv) Rs. 1,31,16,157/- as interest at the rate of 12% p.a with effect from 11th December, 2009, the date of IPC 78 till the date of the Arbitral Award on (i) and (ii), mentioned hereinabove, combined.

Hence, the respondent was awarded a cumulative sum of Rs. 6,19,22,434/- along with the future interest @ 14% p.a with effect from 19th March, 2012 till the date of actual payment to them.

6. The appellant filed an application under Section 33(1)(a) of the Act seeking modification of the award to the extent of alleged discrepancy in the calculations done by the Arbitral Tribunal. It was stated the amount which had been awarded in favour of the respondent was due since the beginning of the contract and therefore, the price adjustment applicable to the amount due to the respondent had to be calculated on the basis of the price adjustment indices pertaining to each particular IPC. The Arbitral Tribunal had erroneously applied 57.844% of the R-value as price adjustment index on the withheld amount of Rs. 3,07,76,185/-

7. The respondent also filed an application before the Arbitral Tribunal on 13th April, 2012 seeking correction of the computational error with respect to the calculation of price adjustment value.

8. The Arbitral Tribunal rejected the rectification sought by the appellant and accepted the rectification sought by the respondent. Accordingly, the award was amended via an amendment order passed on 2nd May, 2012. In





terms of the amended award, the respondent was awarded a revised amount of Rs. 6,53,13,748/- along with the future interest @ 14% per annum.

9. Aggrieved by the same, the appellant filed a petition under Section 34 of the Act challenging the award dated 18th March, 2012 as amended by the order dated 2nd May, 2012, on the following grounds-

- (i) The contract provided for a mechanism for adjudication of the dispute i.e. any claim opposing the decision of the Engineer had to be referred to the DRE within 14 days of such decision being made. The claim was raised by the respondent after a period of almost 2 years and hence the same was time barred.
- (ii) As per the contract, the respondent was entitled to payment only for the work of C&G and embankment constructed over and above the OGL and not below that level as per the contract.
- (iii) The price escalation could not have been awarded at a uniform rate at the index prevailing at the stage of the final bill (IPC 78). The price adjustment applicable to the amount allegedly due to the respondent had to be calculated on the basis of the indices pertaining to each particular IPC. Hence, the award was based on incorrect calculations.

Findings in the Impugned Orders

10. Learned Single Judge, *vide* the impugned order dated 24th August, 2012, rejected the challenge raised by the appellant with regard to sums awarded to the respondent in respect of C&G and embankment work carried out by the respondent below the OGL. Pertinently, the aforesaid issue was conceded by the senior counsel appearing on behalf of the appellant in view





of the earlier orders passed by this Court whereby a similar challenge raised by the appellant/NHAI had been rejected.

11. With regard to the ground taken by the appellant *qua* the delay on the part of the respondent in approaching the DRE, the learned Single Judge noted that there was no DRE in place at the time when the respondent expressed its intention to refer the dispute to DRE. The DRE was constituted much later and thereafter, the respondent approached the DRE, which allowed the claim of the respondent. Accordingly, the aforesaid challenge was also rejected by the learned Single Judge.

12. In these circumstances, limited notice was issued by the learned Single Judge confined only to the issue of “*adoption of a uniform price index for allowing price escalation*”.

13. Via the impugned judgment dated 9th June, 2014, the learned single judge dismissed the petition filed under Section 34 of the Act by holding as under:

- (i) The price index used by the Arbitral Tribunal for awarding price escalation is in consonance with the contractual clauses between the parties. Hence, there is no error in the interpretation of the contract clauses by the Arbitral Tribunal
- (ii) There is no illegality in the award warranting interference by the Court in exercise of its jurisdiction under Section 34 of the Act.

14. A composite appeal has been filed by the appellant impugning the initial order dated 24th August, 2012 as well as the final judgment dated 9th June, 2014.

15. In the present appeal, an order was passed on 10th September, 2014 by the Coordinate Bench directing the respondent to place on record a Bank





Guarantee of half the value of the decretal sum in favour of the Registrar General of this Court and the appellant was directed to pay the respondent the decretal amount within a week of the respondent depositing the aforementioned bank guarantee. In terms of the aforesaid directions, the Bank Guarantee was duly filed by the respondent which has been extended from time to time during the pendency of the appeal.

16. The following submissions have been made on behalf of the appellant:

- (i) The present appeal is maintainable in so far as it assails the order dated 24th August, 2012 issuing limited notice in the petition filed under Section 34 of the Act. The appellant was well within its right to challenge the aforesaid order after the dismissal of its petition. In this regard, reliance is placed on the judgment of the Full Court in **NHAI v. Oriental Structures Engineers Ltd.-Gammon India Ltd. (JV)**, 2013 (3) CTC 709.
- (ii) The respondent challenged the decision of the engineer in a highly belated manner before the DRE. While the decision of the engineer rejecting the claim of the respondent was taken on 10th August, 2003, the challenge was made by the respondent before the DRE only on 5th October, 2005, much beyond the period of 14 days prescribed in the Contract.
- (iii) The issue with regard to the entitlement of the respondent for payment for work of C&G and embankment work done below the OGL now stands decided in favour of the appellant, *vide* the judgments of the Division Bench of this Court in FAO (OS) 48/2012 titled **NHAI v. Hindustan Construction Company** dated 8th November, 2012 and





FAO (OS) 416/2012 titled **NHAI v. Sunway Construction** dated 22nd November, 2012.

- (iv) Both the Arbitral Tribunal as well as the learned Single Judge erred in awarding additional payments towards price adjustment at the time of the final bill (IPC 78).
17. *Per Contra*, the respondent has made the following submissions:
- (i) The present appeal to the extent it challenges the order dated 24th August, 2012 is not maintainable as the said order was passed on a concession made on behalf of the appellant. The appellant had conceded the issue with regard to the entitlement of respondent for payment for work of C&G and embankment work done below the OGL in view of the decisions of this Court in appellant's own cases i.e. **NHAI v. PCL Suncon JV** in OMP No. 491/2008 decided on 14th January, 2010 and **NHAI v. Sunway Construction BHD** in OMP No. 786/2011 decided on 23rd May, 2012. Therefore, the aforesaid issue had become final and binding *qua* the appellant and could not have been challenged by way of an appeal.
- (ii) There is no patent illegality in the finding of the Arbitral Tribunal, as upheld by the learned Single Judge, with regard to the delay by the respondent in approaching the DRE.
- (iii) The Arbitral Tribunal had correctly held that the price escalation was payable on the withheld amount in terms of the price index that was prevalent at the stage of the final bill (IPC 78). The learned Single Judge correctly refused to interfere with the aforesaid finding.
- (iv) The challenge raised by the appellant in the present appeal would lead to re-appreciation of evidence and re-interpretation of contractual



clauses and hence, is beyond the scope of an appeal under Section 37 of the Act. Reliance in this regard has been placed on the judgments of the Supreme Court in *Haryana Tourism Limited v. Kandhari Beverages*, (2022) 3 SCC 237, *MMTC Limited v. Vedanta Limited*, (2019) 4 SCC 163 and the judgment of Coordinate Bench in *MTNL v. Fujitsu India Private Limited*, 2015 SCC OnLine DEL 7437.

18. We have heard the parties and perused the material on record.

Maintainability of the Appeal against the Order dated 24th August, 2012

19. As noted above, the learned single judge had issued only a limited notice in the impugned order dated 24th August, 2012 in the Section 34 petition filed by the appellant, rejecting two of the grounds raised by the appellant in its petition at the initial stage.

20. Counsel for the appellant has correctly relied upon the judgment of the Full Bench of this Court in *Oriental Structures Engineers Ltd.* (supra) in support of his contention that an appeal under Section 37 of the Act can be filed against non-issuance of notice on particular issue(s) while issuing notice on remaining issues. The Full Bench has held that there is no bar under the Act in filing two appeals in respect of a petition filed under Section 34 of the Act. A person aggrieved can file an appeal against an initial order rejecting one or more of its challenges to the award as also against the final judgment passed in a Section 34 petition. Against the order refusing the issuance of notice on particular issues, the aggrieved party has the right to file an appeal at either of the two stages, at the time when the order refusing the issuance of notice has been passed or at the time of passing of final judgment in the Section 34 petition.





21. In view of the above, the appellant is entitled to file a composite appeal challenging both the impugned orders

22. Coming to the merits of the challenge, the first grievance of the appellant against the impugned order dated 24th August, 2012 is with regard to the entitlement of the respondent to payment for C&G work and for earthwork in embankment from the New Ground Level (NGL), which is the ground position achieved after completion of the C&G work. It is the case of the appellant that the respondent was not entitled to payment for the aforesaid works. However, it is a matter of record and borne out by the order dated 24th August, 2012, that the appellant had conceded the aforesaid issue in favour of the respondent. This is an issue concerning facts and law, hence concession made by the appellant cannot be recalled. Significantly, the senior counsel appearing on behalf of the appellant had himself submitted before the Court that the aforesaid issue is covered against the appellant by orders of this Court in appellant's own cases in **PCL Suncon JV** (supra) and **Sunway Construction BHD** (supra). Having conceded the aforesaid issue, the order based on the concession has become conclusive and final qua the appellant and therefore, the appellant is not entitled to raise the issue in the instant appeal.

23. The appellant has contended that the aforesaid issue has now been decided in its favour by the judgments of the Division Bench in **Hindustan Construction Company** (supra) followed in **Sunway Construction** (supra). As indicated above, in the light of the concession made by the appellant, we were not required to examine the aforesaid judgments however, in the interest of justice we did examine the aforesaid judgments.





24. The aforesaid judgments are not relevant to the dispute in the present appeal as in those cases the issue pertained to the entitlement of the contractor for payment based on different materials used for the construction of the embankment and the respective rates of those materials, which does not arise in the present appeal.

25. This brings us to the issue of delay on the part of the respondent in raising its claim before the DRE. Since this issue was not conceded by the appellant, the appellant is fully entitled to challenge the finding of the learned Single Judge in the present appeal and the same would have to be tested on merits.

26. The respondent was aggrieved with the decision of the Engineer dated 10th October, 2003 rejecting the contention of the respondent. In terms of clause 25.1 of the Conditions of Contract, the respondent was required to refer this dispute to the DRE within 14 days of such decision.

27. The respondent in its communication dated 21st October, 2003 addressed to the Engineer expressed its desire to refer the decision of the Engineer to the DRE as and when it is constituted. It is a matter of record at that point in time, the DRE was not in existence. Admittedly, the DRE was constituted by the appellant in March, 2004. The respondent referred the dispute to DRE on 5th October, 2005. The appellant contends that since the respondent was aware of the constitution of DRE in March, 2004 and yet raised the challenge only in October, 2005, the same was done in a highly belated manner and should not have been considered by the DRE.

28. This contention of the appellant was rejected by the Arbitral Tribunal holding that Clause 25.1 of the Conditions of Contract does not deal with the contingency of DRE not being in existence at the time of the decision of the





Engineer. The Arbitral Tribunal also noted that the appellant participated in the proceedings before the DRE and did not raise any objection with regard to the delay in lodging of the claim by the respondent. The ground of delay was taken for the first time before the Arbitral Tribunal.

29. The learned Single Judge *vide* order dated 24th August, 2012 held that there was no illegality in the aforesaid finding of the Arbitral Tribunal.

30. The Arbitral Tribunal has given cogent reasons in arriving at the finding that the respondent could not be held liable for delay in submitting its claim before the DRE, since the DRE itself was not in existence at the relevant point of time. In our view, no grounds are made out for interference with the aforesaid finding of the Arbitral Tribunal because if time for reference to DRE was of the essence, it had lost its significance as the appellant took its own sweet time in constituting the DRE. Although there was delay in referring the dispute to DRE (which was a contractual filter put in by the parties), after it was constituted, it was importantly not sidestepped by the respondent. Accordingly, the submission, being untenable, is rejected.

31. This brings us to the final issue relating to the price index applied by the Arbitral Tribunal on the amount withheld by the appellant in IPC 78 in respect of the embankment work done by the respondent from the NGL.

32. The provision for price adjustment exists for changes in prices of various components/materials over a period of time such as labour, cement, steel, plant and machinery, bitumen etc.

33. As borne out by the record in the final bill (IPC 78), the appellant withheld an amount of Rs.3,07,76,185/- on account of change in the method of measurement of the embankment work done by the respondent. As per the appellant, in terms of the contract, the respondent was entitled to payment





for work of embankment done over and above the OGL and not below that level. However, the Arbitral Tribunal held that the respondent was entitled to payment for embankment work from the NGL, which was arrived at after the C&G work. Accordingly, the Arbitral Tribunal awarded the aforementioned withheld amount of Rs.3,07,76,185/- to the respondent. The Arbitral Tribunal also held that the respondent was entitled to price adjustment/escalation charges on this withheld amount.

34. The Arbitral Tribunal determined the corresponding price adjustment in relation to the aforesaid withheld amount by applying the cost index in relation to IPC 78. Accordingly, a sum of Rs.1,51,31,850/- was held to be payable towards price adjustment which was subsequently modified to Rs.1,78,02,176/- in the amendment carried out to the award in terms of Section 33(2) of the Act.

35. The learned Single Judge held that there is no infirmity in the application of the price index by the Arbitral Tribunal. It is not in dispute that till the penultimate bill (IPC 77), the appellant had paid to the respondent the charges for the embankment work along with the applicable price adjustment. It was only in the final bill (IPC 78) that an amount of Rs.3,07,76,185/- was withheld by the appellant. Consequently, the Arbitral Tribunal has correctly applied the price adjustment/price escalation as per the index prevailing at the stage of final bill. Hence, there was no illegality in the arbitral award which required interference under Section 34 of the Act.

36. In our considered view, no grounds for interference with the impugned orders are made out under Section 37 of the Act. We do not find merit in the appeal and the same is accordingly, dismissed.





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37. Consequently, the Registry is directed to return the Bank Guarantee deposited by the respondent.

**AMIT BANSAL
(JUDGE)**

**RAJIV SHAKDHER
(JUDGE)**

JULY 02, 2024
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