IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on:13.04.2022*

\+ **O.M.P. (COMM) 422/2019 and IA No. 14163/2019**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Petitioner

versus

CONTINENTAL ENGINEERING CORPORATION (CEC) ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mrs. Asha Gopalan Nair, Ms. Nivedita Nair & Mr. Arun Gopalan Nair, Advs.

For the Respondent : Dr. Amit George & Mr. Kapil Kher, Advs.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The National Highways Authority of India (hereinafter '**NHAI**') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter 'the **A&C Act**') impugning an Arbitral Award dated 30.04.2019 (hereinafter 'the **impugned award**') delivered by the Arbitral Tribunal comprising of three members (hereinafter 'the **Arbitral Tribunal**') in respect of disputes that had arisen between the parties in relation with an agreement dated 20.02.2007 (hereinafter 'the **Agreement**').

Factual Context

2. NHAI invited bids for the work of "*four laning of Hyderabad-Bangalore section from KM 293.400 to KM 336.000 of NH-7, in the State of Andhra Pradesh*" (hereinafter the '**Project**') from all eligible contractors.

3. The respondent (hereinafter '**CEC**'), a company incorporated in Taiwan, submitted its bid on 18.09.2006, pursuant to the aforesaid invitation to bid. CEC's bid was accepted by a Letter of Acceptance (LoA) dated 22.11.2006, and the contract for executing the Project was awarded to CEC.

4. Thereafter, on 20.02.2007, the parties entered into the Agreement. The date of commencement of works was stipulated as 15.03.2007, and the works were to be completed within a period of thirty months, that is, by 14.09.2007. The Project was not completed within the stipulated period and the causes of delay are also a subject matter of dispute between the parties.

5. NHAI claims that it granted Extension of Time (EOT) to complete the Project up to 15.02.2011 due to delay attributable to CEC. However, it did not levy any liquidated damages on the delay.

6. Thereafter, disputes arose between the parties. CEC contends that certain amounts were due to it on account of the work executed but NHAI disputes the same.

7. The disputes were referred to the Dispute Adjudication Board (hereinafter the '**DAB**') on 18.09.2017, however, the DAB failed to give its recommendation within the stipulated period of eighty-four days, that is, by 11.12.2017.

8. On 04.01.2018, CEC, issued a letter invoking the Arbitration Agreement – Clause 67.4 of the Conditions of Particular Application (COPA) – and sought reference of the disputes to arbitration.

9. Before the Arbitral Tribunal, CEC filed its Statement of Claims. The claims made by CEC are tabulated below:

Claim No.	Particulars of Claim	Amount of claim
1.	Non-payment of executed quantities of Retaining Wall constructed in lieu of RE Wall	₹8,32,38,846/-
2.	Non-payment of BOQ item 7.16a; 7.16b; 7.16d (Construction of Water harvesting unit alternately on either side of the carriage way)	₹1,19,54,697/-
3.	Additional Royalty charges deducted by the Engineer by applying varying compaction factors for calculating the quantities of Soil for various Permanent Works	₹1,46,20,178/-
4.	Additional expense incurred on account of extension of Bank	₹69,03,621/-

	Guarantees beyond Defect Liability Certificate	(Reduced to ₹59,63,309/-)
5.	Refund of amount deducted against increase in VAT (WCT/Sales Tax) from 4% to 5%	₹33,37,240/- (Reduced to ₹21,62,071/-)
6.	Interest on delayed payments of IPCs	₹5,82,35,217/- (Reduced to ₹3,29,81,083/-)
7.	Claim towards *pendente lite* and future interest @ 10% p.a. on the total claim amount from 01.07.2018 till date of Award	
8.	Cost of Arbitration	

10. NHAI filed its Statement of Defence, however, it did not raise any counter-claims.

11. By the impugned award, the Arbitral Tribunal awarded (i) an amount of ₹7,23,30,632/- against CEC's claim for a sum of ₹8,32,38,846/- in respect of the works relating to RE Retaining Wall (Claim No. 1); (ii) a sum of ₹1,09,58,464/- against CEC's claim for a sum of ₹1,19,54,697/- in respect of payment for construction of water harvesting units (Claim No. 2); (iii) an amount of ₹1,34,01,819/- as against CEC's claim for a sum of ₹1,46,20,178/- on account of

additional royalty charges deducted by the Engineer (Claim No.3); (iv) an amount of ₹54,66,362/- against CEC's claim for a sum of ₹59,63,309/- in respect of additional expenses incurred due to extension of Bank Guarantee (Claim No. 4); (v) a sum of ₹19,81,897/- as refund of amount deducted against increase in VAT, against CEC's claim for a sum of ₹21,62,071/- (Claim No. 5); and (vi) a sum of ₹2,84,14,356/- against CEC's claim for a sum of ₹3,29,81,083/- in relation to the interest on delayed payment of IPCs (Claim No. 6). In addition, the Arbitral Tribunal awarded a sum of ₹1,10,46,128/- as interest at the rate of 10% for a period of ten months from 01.07.2018 up to the date of the award, that is, 30.04.2019. The Arbitral Tribunal also awarded future interest at the rate of 10% per annum on the aforesaid amounts from the date of the impugned award till realisation, in the event NHAI failed to pay the sums awarded to CEC within a period of ninety days from the date of the impugned award.

12. Aggrieved by the impugned award, NHAI has filed the present petition.

Reasons & Conclusion

13. NHAI has assailed the impugned award as vitiated by patent illegality on several grounds. According to NHAI, the Arbitral Tribunal has gravely erred in allowing the claims raised by CEC. Ms Asha Gopalan Nair, learned counsel appearing for NHAI, made submissions in respect of each of the claims allowed by the Arbitral

Tribunal and contended that the decision of the Arbitral Tribunal to accept the claims of CEC is manifestly erroneous.

14. At the outset, it is necessary to observe that none of the grounds, as urged, support the contention that the impugned award is in conflict with the public policy of India. The grounds raised by NHAI are directed to assail the impugned award as patently illegal. It is well settled that the ground of patent illegality under Section 34(2A) of the A&C Act, is not available to assail an arbitral award resulting from an international commercial arbitration. (See: ***Ssangyong Engineering & Construction Company Limited v. National Highways Authority of India: (2019) 15 SCC 131***)

15. In the present case, CEC is a company incorporated outside India and the impugned award has been rendered in an international commercial arbitration. In view of the above, there are no grounds to interfere with the impugned award.

16. Having stated the above, this Court also considers it apposite to consider the contentions advanced on behalf of NHAI in respect of each of the claims awarded in favour of CEC.

17. Ms Asha Gopalan Nair had contended that the Agreement provided for construction of a Reinforced Earth Wall (RE Wall) at the approaches for three structures – (i) PUP at Km 296-440: (ii) VUP at Km 302-305: and, (iii) PUP at Km 314-510. The BOQ Item 7.14 covers the execution of different items of works required for construction of the RE Wall. However, CEC proposed a change in the

scope of work. It suggested that RC Retaining Walls be constructed instead of RE Walls to accelerate the progress of the works. It also submitted the proposed drawings for the same. She contended that NHAI accepted the proposal, however it stipulated that the RC Retaining Walls be constructed at the three structures without any financial implications. CEC accepted the same and by a letter dated 15.10.2008, it furnished an undertaking to the aforesaid effect. She stated that the Engineer had also stipulated that the *"change is subject to the condition that any financial implication shall be at contractor's risk and cost and without any extension of time"*. She contended that there was no ambiguity in the understanding between the parties that CEC would not be paid any extra amount for constructing the RC Retaining Wall.

18. The Arbitral Tribunal examined the aforesaid defence and rejected the same. It did not accept the contention that the value of variation was *"restricted to the cost of RE Wall"*. The Arbitral Tribunal found that CEC had agreed to maintain the BOQ rate and provide the agreed rebate as well. However, there was no restriction on the actual quantities executed. CEC had not sought any increase in the BOQ rates. It had only claimed that it be paid for the quantities executed.

19. The undertaking submitted by CEC – which was relied upon by NHAI in support of its case – reads as under:

> "We hereby undertake that we will not be claiming any excess rate for Retaining Wall quantities and

> Rebate on BOQ rate will prevail for quantities in variation."

20. It is clear from the above that CEC had agreed that it would not claim any "excess rate". It had not agreed that the total cost of Reinforced Cement Concrete Retaining Wall would be the same as the estimated cost of Reinforced Earth Retaining Wall (RE Wall).

21. The Arbitral Tribunal had thus, entered an award in favour of CEC for the actual quantity of work executed. CEC was also held to its bargain to provide the rebate as it had agreed. This Court finds no infirmity with the decision of the Arbitral Tribunal.

22. CEC had claimed a sum of ₹1,19,54,697/- for executing the work of Water Harvesting System at site. NHAI had contested that CEC had not executed the works on several grounds. It submitted that CEC had not furnished the RFIs at the material time. It was contended that the draft final statement submitted by CEC did not show any material utilized for works under BOQ Item 7.16. In addition, there was no record of seigniorage charges for use of granular filled material. No test reports were provided by CEC to substantiate that the technical specifications had been met.

23. The Arbitral Tribunal had examined the said contention. It had also examined the contemporaneous documents and found that the execution of work was acknowledged by the Engineer.

24. The question whether CEC had executed the work relating to Water Harvesting System is a question of fact. After examining the

material on record, the Arbitral Tribunal had concluded that in fact CEC had executed the work. It is stated that CEC had also offered to excavate the site to allay any doubts that that the work as claimed had been executed. However, NHAI declined to do so. It is important to note that after the defect liability period was over, a Defect Liability Certificate was also issued to CEC, which did not record any reservation regarding the work of Water Harvesting System.

25. The findings of the Arbitral Tribunal are based on appreciation of material on record. This Court is unable to accept that the decision of the Arbitral Tribunal is perverse or one that no reasonable person could accept. Clearly, there is no ground to interfere with the decision of the Arbitral Tribunal. In any view of the matter, the Arbitral Tribunal's decision in respect of CEC's Claim No.2 is not in conflict with the public policy of India.

26. CEC had claimed a sum of ₹1,46,20,178/- on account of excess royalty deducted from the Interim Payment Certificates. The royalty on soil used for various permanent works was required to be paid by CEC. The dispute essentially relates to the multiplication factor used by NHAI in determining the royalty payable on soil. NHAI had computed the royalty by using a multiplication factor of 1.2 on the volume of compacted earth used for construction of road embankment. CEC had disputed the levy of additional 20% royalty.

27. CEC had contended that there was no such contractual or statutory basis for using any multiplication factor for enhancing the

royalty payable by CEC. NHAI had contested the said claim principally on the ground that the deduction on account of royalty computed by applying the multiplication factor had been made from Interim Payment Certificates without any protest. NHAI contended that since no notice has been issued under Clause 53.1 of the General Conditions of Contract (GCC) objecting to the said deductions from the Interim Payment Certificates; CEC was disentitled to raise any such claim.

28. The Arbitral Tribunal had rejected the said contention and accepted CEC's claim. The question whether a contractor is entitled to make a claim notwithstanding that it had not issued a notice under Clause 53.1 of GCC is also covered by the decision of this Court in ***National Highways Authority of India v. OSE-GIL J.V.: 2014 SCC OnLine Del 7051***. In that case, the Court had held as under:

> "5.3 A conjoint reading of clause 53.1 and 53.4, persuades me to accept the submission of Mr. Airi, learned counsel for the respondent, that the provisions of clause 53.1, which required issuance of notice before a claim can be lodged for additional payment, is not mandatory, and that, it is only a directory provision. Failure, to issue notice, does not envisage a situation that the contractor, i.e., the respondent in this case, would lose his right to agitate his claim for additional payment. If notice is not issued, as contemplated under clause 53.1, then, the engineer or the arbitrator(s) appointed to adjudicate upon the claim lodged, can assess its tenability and value with reference to contemporary record."

29. This Court finds no infirmity with the decision of the Arbitral Tribunal.

30. The next question to be examined is regarding CEC's claim for additional expenses for extension of Bank Guarantee beyond the Defect Liability Period. The Arbitral Tribunal had considered the said claim and awarded an amount of ₹54,66,362/-.

31. Clause 10.2 of the GCC expressly provided that the Performance Bank Guarantee would be released within a period of fourteen days of the issuance of the Defect Liability Certificate. The said clause is set out below:

> "10.2 The performance security shall be valid until the Contractor has executed and completed the Works and remedied any defects therein in accordance with the Contract. No claim shall be made against such security after the issue of the Defects Liability Certificate in accordance with Sub-Clause 62.1 and such security shall be returned to the Contractor within 14 days of the issue of the said Defects Liability Certificate."

32. In the present case, the Defect Liability Certificate was issued to CEC on 17.10.2012 and therefore, the Performance Bank Guarantee was required to be released by 31.10.2012. However, NHAI did not release the Bank Guarantee within the said period; it released the same on 18.02.2014. NHAI had contended that CEC was precluded from making any claim in this regard as it had entered into a Supplementary Agreement dated 25.07.2016. The Arbitral Tribunal did not accept the said contention as the Supplementary Agreement was in regard to

prolongation of the contract beyond the contemplated period and did not absolve NHAI from releasing the Bank Guarantee upon issuance of the Defect Liability Certificate.

33. NHAI's contention that the decision of the Arbitral Tribunal is erroneous, is unmerited. There was no justifiable ground for NHAI to withhold the Performance Bank Guarantee contrary to the contractual provisions.

34. CEC's Claim No.6 relates to refund of the amount deducted against increase in the rate of VAT. According to CEC, it was entitled to reimbursement of the increase in VAT from 4% to 5%. CEC relied on Sub-Clause 70.7 of the COPA, which reads as under:

> **"Sub-Clause 70.7: Subsequent Legislation**
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> If, after the date 28 days prior to the latest date for submission of bids for the Contract there occur in the country in which the Works are being or are to be executed, changes to any National or State Statute, Ordinance, Decree or other Law or any regulation or by-law of any local or other duly constituted authority, or the introduction of any such State Statute, Ordinance, Decree, Law regulation or by-law in India or States of India which causes additional or reduced cost to the Contractor, other than under the preceding Sub-Clauses of this Clause, in the execution of the Contract, such additional or reduced cost shall, after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be added to or deducted from the Contract Price and the Engineer shall notify the Contractor accordingly, with a copy to the Employer. Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid

> or credited if the same shall already have taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of Sub-Clause 70.1 to 70.6."

35. In terms of the Agreement, sales tax at the rate of 4% was required to be deducted and deposited with the Commercial Tax Authorities. The Government of Andhra Pradesh had increased the rate of VAT from 4% to 5%, with effect from 14.09.2011. Thus, CEC had claimed additional 1% increase in VAT. NHAI had contended that since the works were complete prior to 14.09.2011, it had no liability to reimburse any increase in the rate of VAT. Before the Arbitral Tribunal, NHAI withdrew its claim for the sum of ₹7,86,855/-, which was paid by it directly to the Commercial Tax Department as NHAI had deposited the tax deducted from IPC-40, IPC-41 and IPC-42, which pertain to the months of October, 2010, December, 2010 and January, 2011 with the Tax Authorities on 01.06.2012. CEC had claimed that in view of the delay in depositing the tax with the concerned authorities, it had to pay an additional 1% VAT along with 10% penalty amounting to ₹7,86,855/-. However, it withdrew the said claim before the Arbitral Tribunal and confined its claim to additional VAT at the rate of 1%, which had been deducted by NHAI from the payments made to CEC.

36. The Arbitral Tribunal found that in terms of Clause 70.7 of the COPA, NHAI was required to bear the increase in the rate of VAT and accordingly, awarded an amount of ₹19,81,897/- in favour of CEC, which comprised of an amount of ₹17,78,530/- on account of

additional 1% VAT deducted by NHAI in respect of payments made to CEC after 14.09.2011 (the date on which Notification increasing the VAT from 4% to 5% was issued by the Government of Andhra Pradesh) and ₹2,03,357/- as interest at the rate of 10% from the date of deductions. CEC's claim for reimbursement of additional tax clearly falls within the ambit of Clause 70.7 of the COPA. This Court finds no infirmity with the decision of the Arbitral Tribunal in directing NHAI to reimburse the same along with interest.

37. The Arbitral Tribunal also awarded a sum of ₹2,84,14,356/- as interest on delayed payment of IPC. Undisputedly, interest was computed in terms of Clause 60.8 of the COPA. NHAI's contention that the said award is without any basis, is unmerited.

38. NHAI had also contested CEC's claim on the ground that it had not issued a notice under Clause 53.1 of GCC as noted above. The said contention is unpersuasive as notice under Section 53.1 of GCC is not mandatory and non-issuance of such a notice does not preclude the contractor from raising the claim at a subsequent stage.

39. The petition is unmerited and, accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

APRIL 13, 2022
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