2024 INSC 388

Non-Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4702 OF 2023

National Highways Authority of India ... Appellant

Versus

M/s Hindustan Construction Company Ltd. ... Respondent

with
CIVIL APPEAL NO. 4703 OF 2023
CIVIL APPEAL NO. 4704 OF 2023
CIVIL APPEAL NO. 4705 OF 2023
CIVIL APPEAL NO. 4706 OF 2023
CIVIL APPEAL NO. 4707 OF 2023
CIVIL APPEAL NO. 4708 OF 2023
and
CIVIL APPEAL NO. 4709 OF 2023

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS IN CIVIL APPEAL NO. 4702 OF 2023

1. The appellant- National Highways Authority of India Ltd. has been constituted under Section 3 of the National Highways Authority of India Act, 1988. On 2nd June 2004, the appellant awarded a contract to the respondent for the work of the Allahabad Bypass Project, which involved the construction of a road from km 158 to km 198 (except a bridge on the river). The total cost of the project was Rs.4,46,99,12,839/-. A dispute

between the parties was referred to the Dispute Resolution Board. The Board gave its recommendations. Ultimately, the dispute was referred to an Arbitral Tribunal of three arbitrators. There were three claims referred to arbitration, which are as follows:

- Claim no.1 - Reimbursement of additional expenditure incurred due to an increase in the rates of royalty and associated sales tax on soil, sand and crushed stone aggregates;

- Claim no.2 - Non-payment for executed work of embankment with soil/pond ash for the initial 150 mm depth stripped in accordance with the requirements of the contract and

- Claim no.3 - Reimbursement of additional costs incurred due to an increase in the forest transit fee rates.

2. The Arbitral Tribunal made an award on 30th March 2010. The summary of the award is as follows:

- Claim no.1 – The Arbitral Tribunal granted an amount of Rs.2,69,91,248/- as an additional cost to the respondent till 31st December 2008, along with interest and future interest of 12% per annum. A direction was also issued to the appellant to pay an additional cost to the respondent post-31st December 2008 on account of an increase in royalty charges and associated sales tax;

- Claim no. 2 - Two members of the Arbitral Tribunal consisting of three members held that the respondent was entitled to Rs.3,47,35,522/- towards the formation of the embankment for an initial 150 mm, along with a price adjustment on the said amount in accordance with clause 70.3 of the contract, with interest and future interest at 12% per annum. The third member of the Arbitral Tribunal dissented and held that the respondent was not entitled to any amount under the said claim.

- Claim no.3 - The respondent was granted Rs.3,77,74,427.39/- along with interest and future interest at 12% per annum.

3. Being aggrieved by the award, the appellant filed a petition under section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Arbitration Act'). By the impugned judgment and order dated 30th November 2011, the learned Single Judge confirmed the award in respect of Claim no.1 and Claim no.3, relying upon the decision of the High Court in the case of ***National Highways Authority of India v. M/s. ITD Cementation India Limited***[1]. Regarding Claim no.2, the learned Single Judge held that the award was a majority decision of the Arbitral Tribunal based on an analysis of the material placed before the Arbitral Tribunal. Therefore, the

[1] 2008 (100) DRJ 431

award for Claim no.2 was upheld. Being aggrieved by the said judgment and order, the appellant preferred an appeal under Section 37 of the Arbitration Act before a Division Bench of the Delhi High Court. By the impugned judgment, the said appeal has been dismissed. From the impugned judgment, it appears that the submissions made before the Division Bench of Delhi High Court were confined to Claim nos. 1 and 2. By the impugned judgment, the appeal preferred by the appellant was dismissed. Being aggrieved by the Arbitral Tribunal's award and the judgments of the High Court, the appellant has preferred the present appeal. At the outset, we may note here that one of the grounds of challenge in the present appeal was that the decision of the High Court in the case of ***National Highways Authority of India v. M/s. ITD Cementation India Limited***[1] was the subject matter of challenge before this Court. We may state that by judgment and order dated 24th April 2015[2], the said appeal has been partly allowed by setting aside the award made on claim no.8.

SUBMISSIONS

4. The learned senior counsel appearing for the appellant pointed out that an increase in the rates of royalty on soil, sand and crushed stones which aggregates through a notification, would be adjusted as per sub-clause 70.3 (vii) of the contract, which provides for a price adjustment for all local material based on Wholesale Price Index (WPI). The learned counsel submitted that while submitting the bid, the appellant

[2] (2015) 14 SCC 21

accepted that WPI would be the only yardstick to be used in the matter of price adjustment. The learned counsel submitted that the Division Bench erroneously interpreted clause 70.8 of the agreement.

5. The learned senior counsel submitted that though the contract provided for partly fixed and partly adjustable prices, the adjustment in costs for inputs would be covered only to the extent to which they are covered by a formula in clause no. 70.3 of the agreement. She submits that the learned Single Judge and Division Bench of the High Court have failed to notice that clause 70.8 starts with a non-obstante clause. It provides that such additional or reduced costs shall not be separately paid or credited if the same has already been taken into consideration in the indexing of any inputs to the price adjustment formulae in accordance with clauses 70.1 to 70.7. She submits that in the present case, such additional costs have been dealt with in Clause 70.3 (vii). She submitted that the sales tax was not increased based on legislation. The learned senior counsel submitted that the work of embankment construction is a part of the work of clearing and grubbing, which includes backfilling up to 150 mm. She submitted that when topsoil is removed as it is unfit for construction, this activity has to be a part of clearing and grubbing. On facts, she submitted that no evidence had been placed on record to show that the Engineer had required the respondent to remove the top 150 mm of soil in all places. She submitted that the Arbitral Tribunal and the Courts must strictly interpret the contract. Just because the respondent has

incurred some expenditure, it would not amount to a liability on the appellant which is covered by clause 70.8 of the agreement. She has pointed out the factual aspects of the connecting cases.

6. The learned counsel representing the respondents in the appeals pointed out that the scope of interference in a petition under Section 34 of the Arbitration Act is narrow, and the jurisdiction of the Appellate Court under Section 37 is still narrower. The learned counsel pointed out that the impugned judgments relied upon a decision of the Delhi High Court in the case of the ***National Highways Authority of India v. M/s. ITD Cementation India Limited*[1].** He submitted that the said decision had been upheld by this Court by judgment and order dated 24th April 2015[2] in Civil Appeal no. 9799 of 2010 and other connected cases. The submission is that the decision of this Court completely covers the respondent's claims nos. 1 and 3. The learned counsel invited our attention to the majority view of the Arbitral Tribunal on the claim regarding expenses incurred for making an embankment. It was submitted that the view taken by the majority is the view of the experts, which does not call for any interference.

CONSIDERATION OF SUBMISSIONS

7. We may note here that the impugned judgments in all connected appeals are based on the impugned judgment in Civil Appeal no. 4702 of 2023. In this case, we are dealing with concurrent findings arrived at by the Arbitral Tribunal, the learned Single Judge in a petition under Section 34 of the

Arbitration Act, and the Division Bench in appeal under Section 37 of the Arbitration Act. In this case, we are concerned with the construction of the terms of a contract between the parties. In the case of ***Parsa Kente Collieries Ltd. v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.***[3], in paragraphs 9.1 and 9.2, this Court held thus:

> **"9.1.** In *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204], this Court had an occasion to consider in detail the jurisdiction of the Court to interfere with the award passed by the Arbitrator in exercise of powers under Section 34 of the Arbitration Act. **In the aforesaid decision, this Court has considered the limits of power of the Court to interfere with the arbitral award. It is observed and held that only when the award is in conflict with the public policy in India, the Court would be justified in interfering with the arbitral award. In the aforesaid decision, this Court considered different heads of "public policy in India" which, inter alia, includes patent illegality.** After referring Section 28(3) of the Arbitration Act and after considering the decisions of this Court in *McDermott International Inc.* v. *Burn Standard Co. Ltd.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006) 11 SCC 181] , SCC paras 112-113 and *Rashtriya Ispat Nigam Ltd.* v. *Dewan Chand Ram Saran* [*Rashtriya Ispat Nigam*

[3] (2019) 7 SCC 236

Ltd. v. *Dewan Chand Ram Saran*, (2012) 5 SCC 306] , SCC paras 43-45, it is observed and held that an Arbitral Tribunal must decide in accordance with the terms of the contract, **but if an Arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. It is further observed and held that construction of the terms of a contract is primarily for an Arbitrator to decide unless the Arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. It is further observed by this Court in the aforesaid decision in para 33 that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the Arbitrator on facts has necessarily to pass muster as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. It is further observed that thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.**

9.2. Similar is the view taken by this Court in *NHAI* v. *ITD Cementation (India)*

> *Ltd.* [*NHAI* v. *ITD Cementation (India) Ltd.*, (2015) 14 SCC 21 : (2016) 2 SCC (Civ) 716] , SCC para 25 and *SAIL* v. *Gupta Brother Steel Tubes Ltd.* [*SAIL* v. *Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] , SCC para 29.
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> (underline supplied)

8. This Court laid down the law regarding the scope of interference in a petition under Section 34 of the Arbitration Act in the case of ***MMTC Ltd. v. Vedanta Ltd.***[4]. Paragraph 11 reads thus:

> **"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(*b*)(*ii*)** i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [*Associated Provincial Picture Houses* v. *Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] reasonableness.

[4] (2019) 4 SCC 163

> **Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract."**
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> (emphasis added)

9. This Court, in the case of ***UHL Power Company Ltd. v. State of Himachal Pradesh***[5] held that the jurisdiction of the Court under Section 34 is relatively narrow and the jurisdiction of the Appellate Court under Section 37 of the Arbitration Act is all the more circumscribed. In the light of the limited scope for interference under Section 37 appeal, we will have to deal with the submissions.

10. We have carefully perused the material part of the award of the Arbitral Tribunal and the impugned judgments. For convenience, we refer to the impugned judgment in Civil Appeal no. 4702 of 2023. As can be seen from the impugned judgment, the present appellant confined the challenge only to two issues, which are set out in paragraph 2 of the impugned judgment.

> "**2**. Learned senior counsel for the appellant submits that there are two aspects, which are required to be examined in the present appeal:
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> i) The allowing of the claims of the respondent on account of increase in royalty, sales tax and in the forest transit fee, stated to have been imposed by subsequent legislations;

[5] (2022) 4 SCC 116

> ii) The allowing of the claim for balance amount for construction of embankment which according to the appellant, formed a part of the activity of clearing and grubbing and was not payable as embankment work."

11. The Division Bench held that the imposition of a tax or upward revision of an already existing tax or levy through subsequent legislation is admittedly akin to the levy of additional royalty. The Division Bench relied upon a decision of the same Court in the case of the ***National Highways Authority of India v. M/s. ITD Cementation India Limited*[1].** The Division Bench in the impugned judgment held that the claim made on account of the increase in royalty, sales tax, forest transit fee, etc., was covered in favour of the respondent by the said decision. As stated earlier, the decision in the case of the ***National Highways Authority of India v. M/s. ITD Cementation India Limited*[1]** was confirmed by this Court by judgment dated 24th April 2015[2] with a partial modification. A perusal of the said judgment shows that the issue therein was also regarding a claim based on an upward revision of royalty. Clauses 70 to 70.8 of the agreement quoted in the judgment are identical to those in the agreement subject matter of these appeals. The argument before this Court was also the same that the WPI assessment would include a claim for enhanced royalty. In paragraph 21 of the decision, this Court dealt with the impact of clauses 70.1 to 70.7 and 70.8. In paragraph 21 of the said decision, this Court held thus :

"26. We now turn to the reasoning given by the Arbitral Tribunal in paras 21 to 23 of the award, as quoted above. The award considers the impact of sub-clauses 70.1 to 70.7 and agrees with the contention that the provision for cost escalation based on the agreed price adjustment formulae falls in one compartment while the compensation for additional cost resulting from a subsequent legislation falls in a separate category. **In other words, the contention that stands accepted was, that the escalation in price premised on fluctuation in market value of the inputs stands on one footing, while the additional cost resulting from the impact of any statute, decree, ordinance, law etc as referred to in sub-clause 70.8 stands on the other. Resultantly the governing clauses in the instant case were held not to be sub-clauses 70.1 to 70.7 but the substantive part of sub-clause 70.8.** The award also considered whether minor minerals in question were or were not included in the basket of materials whose cost variation was taken into account as an input while arriving at WPI. It also considered that the WPI is an index applicable uniformly in all states while the increase 2 Page 30 in Seigniorage Fee would vary from state to state. It further dealt with the aspect that NHAI itself was of the opinion that the additional impact as a result of subsequent legislation was admissible separately, as signified by the letter dated 03.09.2003 to the Economic Advisor. **In the backdrop of the law laid down by this court, the construction of the terms of the contract by the Arbitral Tribunal is completely**

> **consistent with the principles laid down by this court. Upon construing the terms and the material on record it concluded that the instant matter would be covered by substantive part of Sub-Clause 70.8 of COPA.** It also noted that NHAI itself was of such opinion. The view so taken by the Arbitral Tribunal after considering the material on record and the terms of the contract is certainly a possible view, to say the least. We do not see any reason to interfere. The Division Bench in our considered view, was completely right and justified in dismissing the challenge."
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> (emphasis added)

12. There was some controversy before the Division Bench on the issue whether there was an actual increase in the sales tax. However, after perusing the circular dated 1st December 2004, the Division Bench concluded that there was an addition of 3% in the amount of sales tax, as a result of which applicable sales tax increased from 22% to 25%. In the light of the law laid down by this Court in the case of ***National Highways Authority of India*[2]*,*** the contention based on the first claim made by the respondent has no merit.

13. Now, we turn to the issue of whether the claim for the construction of embankment forms part of the activity of clearing and grubbing and was not payable as embankment work. We may note here that two expert members of the Arbitral Tribunal held in favour of the respondent on this point, whereas the third member dissented. There cannot be any

dispute that as far as the construction of the terms of a contract is concerned, it is for the Arbitral Tribunal to adjudicate upon. If, after considering the material on record, the Arbitral Tribunal takes a particular view on the interpretation of the contract, the Court under Section 34 does not sit in appeal over the findings of the arbitrator. The Division Bench has adverted to the findings recorded by the two members of the Arbitral Tribunal. After considering the view taken by the Arbitral Tribunal, the High Court observed that the real controversy was whether the work of backfilling had been done and whether the said work was liable to be excluded from the work of the embankment construction by the respondent. The Division Bench held that nothing is shown that indicates that the construction of the embankment can be said to have been done in a manner where the lower part of the embankment is made only by carrying out the activity of backfilling. The High Court also noted that the appellant sought to make deductions after initially paying the amounts for the embankment. The Division Bench was right in holding that the majority opinion of technical persons need not be subjected to a relook, especially when the learned Single Judge had also agreed with the view taken by the Arbitral Tribunal. We have also perused the findings of the majority in the Award. We find nothing perverse or illegal about it.

14. In our view, the learned Single Judge and the Division Bench of the High Court have examined the challenge to the award within four corners of limitation imposed by Sections 34

and 37 of the Arbitration Act. The view taken by the Arbitral Tribunal, the learned Single Judge and the Division Bench cannot be found fault with.

15. Therefore, we find no merit in the appeals, and they are dismissed with no order as to costs.

.....J.
(Abhay S. Oka)

.....J.
(Pankaj Mithal)

New Delhi;
May 7, 2024.