IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 23.03.2021

\+ **O.M.P. (COMM) 96/2016**

M/S NATIONAL HIGHWAYS
AUTHORITY OF INDIA ..... Petitioner

versus

M/S AFCONS INFRASTRUCTURE LTD ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Shambhu Sharan and Mr Yaman
: Kumar, Advocates.
For the Respondent : Mr Sandeep Sethi, Senior Advocate with
: Mr Manu Seshadri, Mr Abhijit Lal,
: Mr Aveak Ganguly, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereinafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act'), *inter alia*, impugning the Arbitral Award dated 30.08.2012 (hereinafter 'the impugned award') passed by the Arbitral Tribunal comprising of Mr. SK Jain (Presiding Arbitrator), Mr. Amar Singh Chauhan and Mr. P Sridharan.

2. The impugned award was rendered in respect of disputes that had arisen between the parties in relation to a contract dated 22.05.2001 (hereinafter 'the agreement') entered into between the parties for execution of the project involving "*Widening to 4-lanes and Rehabilitation of Existing 2 lane Carriageway of Poonamalle-Kanchipuram Road (NH-4), Package 1, from km 13.80 to km 70.20*." (hereinafter 'the Project")

3. The respondent (hereinafter 'Afcons') submitted its bid on 22.02.2001, which was accepted by NHAI vide Letter of Acceptance dated 09.04.2001 and subsequently, an agreement dated 22.05.2001 was executed between the parties.

4. The parties had entered into the agreement for execution of the Project at a contract price of ₹164,37,67,899/-. The Project was to be executed within a period of thirty months from 02.07.2001 with a completion date of 31.12.2003.

5. Disputes arose between NHAI and Afcons due to a disagreement on the rate of Item No. 3.02, Wet Mix Macadam (WMM) mentioned in the Bill of Quantity (BOQ). The BOQ indicated an estimated quantity of 1,91,212 cum. Afcons had quoted a rate of ₹545 per cum for execution of WMM and the quoted amount for executing 1,91,212 cum was ₹10,42,10,540/-. The total bid submitted by Afcons for executing the works was ₹169,29,67,899/-. However, Afcons also gave a lumpsum rebate of ₹4,92,00,000/- and revised its bid to ₹164,37,67,899, which was accepted by NHAI. In view of the above rebate, the unit item

of ₹545 per cum for BOQ Item No. 3.02 – WMM stood reduced to ₹529.16 per cum and the total amount accepted for executing 1,91,212 cum of the said works amounted to ₹10,11,81,742. This constituted 6.15% of the Contract value after applying the necessary rebate.

6. Admittedly, the quantity of the said BOQ item No. 3.02 – WMM exceeded the estimated quantity beyond the limits as envisaged under Clause 52.2 of the Conditions of Particular Application (hereinafter 'COPA'). In the circumstances, Afcons sent a letter dated 08.10.2007 to the Engineer submitting its analysis of the rates for determining a new rate for WMM. Afcons claimed a rate of ₹831/- per cum which was based on the Ministry of Road Transport and Highways (MoRTH) norms.

7. The Engineer accepted that there was a change in the quantity that had triggered Clause 52.2 of COPA. However, it did not accept the rate of ₹831/- per cum as submitted by Afcons and fixed a price of ₹591/-per cum. The same was not acceptable to NHAI. The disputes were escalated and the parties were referred to Arbitration.

8. In terms of Clause 67.1 of COPA, the disputes between NHAI and Afcons were required to be referred to the Engineer. If the decision of the Engineer was not accepted, the disputes were required to be settled by arbitration.

9. In terms of Clause 67.1 of COPA, Afcons sent a letter dated 22.04.2008 and referred the disputes to the Engineer. The Engineer rendered his decision on 15.07.2008 accepting the rate of ₹591 per cum

for the construction of WMM. Afcons did not accept the said decision and notified its intention to refer the disputes to arbitration. Thereafter, it nominated an Arbitrator. NHAI also nominated an Arbitrator and both the nominated Arbitrators appointed a Presiding Arbitrator.

10. Afcons filed its Statement of Claims, claiming a new rate of ₹831 per cum along with price adjustment for the execution of BOQ Item no. 3.02 – WMM. It further claimed that the said rate would be applicable for the entire quantity of WMM executed. Afcons claimed a sum of ₹8,18,89,761/-, as due on account of execution of the said item. It further claimed interest at the rate of 18% per annum from the date of cause of action till the date of payment of the aforesaid amount.

11. The Arbitral Tribunal considered the rival contentions. It held that in view of the increase in quantities of WMM, the BOQ rate contained in the Contract for Item No. 3.02 had been rendered inappropriate and Afcons was entitled to a new rate for the said item. Thereafter, the Tribunal proceeded to examine the factors to be considered for determining a new rate and thereafter, determined the same.

12. However, the Tribunal had restricted the new rates to the quantities of WMM executed beyond the stipulated period of the Contract.

13. The Tribunal found that Afcons had executed 2,10,007.17 cum of WMM during the extended period of the Contract (that is, beyond the initial period of thirty months). It held that Afcons would be entitled

to a rate of ₹972 per cum for the said item of WMM work. Thus, Afcons was entitled to ₹20,41,26969/- for the said works. After accounting for the price adjustment and the amount already paid by NHAI, the Arbitral Tribunal awarded a sum of ₹6,99,98,873/- in favour of Afcons. The Tribunal also awarded further interest at the rate of 1/30th of 1% per calendar day compounded annually on the aforesaid amount from 07.03.2008 till the date of payment.

Submissions

14. Mr Shambhu Sharan, learned counsel appearing for NHAI had assailed the impugned award on, essentially, two fronts.

15. First, he submitted that the impugned award was fundamentally flawed as the Arbitral Tribunal had accepted a higher rate in respect of the WMM work executed during the extended period of the Contract. However, there was no provision in the Contract, which contemplated applying new rates during the extended period of the Contract. He submitted that the disputes before the Arbitral Tribunal were in regard to new rates to be determined on account of increase in the quantity of WMM to be executed by Afcons. According to Afcons, a new rate was required to be determined in terms of Clause 50.2 of COPA for the entire quantity of WMM executed by it. NHAI contested the said claim, as according to NHAI, only the quantities that were executed in excess of 125% of the original BOQ quantity would be required to be paid at the new rate. He submitted that neither party had claimed that the new rates would be applicable only for work executed during the extended

period. He submitted that the delay in completion of the Contract weighed with the Arbitral Tribunal. However, the Tribunal erred in not considering Clause 42.2 of COPA, which provided for an additional amount to be paid on a lumpsum basis on account of any extension in the period of the Contract. He submitted that the Arbitral Tribunal had erred in taking the same into account while considering Afcons claim in terms of Clause 50.2 of COPA.

16. Second, he submitted that the increase had been instructed by the Engineer after due consultation with Afcons. He submitted that Afcons in a meeting held on 13.09.2001 agreed to execute the additional works on the same specifications and at the same rate, as provided under the Contract and therefore, was precluded from claiming any further amounts.

17. Mr Sandeep Sethi, learned Senior Counsel appearing for Afcons countered the aforesaid submissions. He referred to the impugned award and submitted that the increased quantities of WMM covered under the existing Variation Orders, were erroneous. He submitted that the Arbitral Tribunal had only considered the quantity of WMM executed that were not covered under the accepted Variation Orders. Next, he submitted that while Afcons had claimed that it was entitled to a new rate over the entire quantity of WMM executed by it and the Arbitral Tribunal had accepted its claim, yet the Arbitral Tribunal had restricted the same to works executed during the extended period. He submitted that the Arbitral Tribunal had not extended the benefit of the new rate to the works executed during the original Contract period as it

proceeded on the basis that Afcons had agreed to a pre-determined rate for executing the works during the said period and therefore, ought to be bound by it. He submitted that although Afcons could have questioned the manner in which the Arbitral Tribunal had restricted its claim, nonetheless, it had chosen not to do so. However, that could not be a ground for NHAI to assail the impugned award, as restricting the award in favour of Afcons was not prejudicial to NHAI.

18. Next, he submitted that Afcons had not agreed to execute the additional quantity at existing rates and the Minutes of the Meeting dated 13.09.2001 did not record any such Agreement. He stated that the said minutes merely mentioned execution of certain works on the same specifications and NHAI's contention in this regard is mis-conceived.

Reasons and Conclusion

19. At the outset, it is necessary to note that there is no dispute as to the quantity of WMM work executed by Afcons. The Arbitral Tribunal had noted that Afcons had executed 2,65,229 cum of WMM, which included WMM executed under various Variation Order Nos. 5,6 & 7. In all 54,856 cum had been executed under Variation Order Nos. 5,6 & 7. The rates in respect of the said quantities had been fixed and were also subject matter of disputes before another Arbitral Tribunal. Therefore, the said quantity was required to be excluded from the total quantity of WMM work executed by Afcons. The Tribunal found that after excluding the said quantity, Afcons had executed a total quantity of 2,46,068 cum of WMM which had exceeded the estimated Contract

quantity by 54,856 cum. The increased quantity was more than 25% of the estimated quantity of WMM under the BOQ. There is also no dispute that the contract value of the additional quantity of WMM (BOQ Item No. 3.02) exceeded 5% of the contract value. Thus, undisputedly, Clause 52.2 of COPA was attracted.

20. At this stage, it will be relevant to refer to Clause 52.2 of the General Conditions of Contract (GCC) as well as Sub-clause 52.2 of COPA, which is the heart of the controversy between the parties. The said Clause is quoted below: -

> **"Clause 52.2 of the GCC- Power of Engineer to Fix Rates**
>
> Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the Works or to any part thereof, is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any time of the Works is, by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement, the Engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable an-account payments to be included in certificates issued in accordance with Clause 60.
>
> Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub-Clause 52.1 or under this Sub-Clause unless, within 14 days of the date of such instruction and, other

than in the case of omitted work, before the commencement of the varied work, notice shall have been given either:

(a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price or

(b) by the Engineer to the Contractor of his intention to vary a rate or price."

Clause 52.2 of COPA- Power of Engineer to Fix Rates
Provided further that no change in the rate or price for any item contained in the Contract shall be considered unless such item accounts for an amount more than 5 percent of the Contract Price, and the actual quantity of work executed under the item exceeds of falls short of the quantity set out in Bill of Quantities by more than 25 percent."

21. In view of the above, it is not disputed that Clause 52.2 of COPA is applicable in the given facts. This is because the quantity of WMM (BOQ Item No. 3.02) had exceeded the estimated Contract quantity by more than 25%, as against the estimated quantity of 1,91,212 cum. Concededly, 2,46,068 cum was executed by Afcons. Admittedly, this is more than 25% of the estimated quantity. The BOQ Item No. 3.02 also accounts for more than 5% of the Contract value.

22. In term of Clause 52.2 of COPA, Afcons was entitled to revision in the rate. In the aforesaid backdrop, the disputes between the parties were, essentially, related to the question as to whether Afcons was entitled to a new rate for WMM and whether the same was to be applied for the entire quantity, that is, 2,46,068 cum or only the quantity that

was in excess of 125% of the estimated quantity (125% of 1,91,212 cum).

23. It is NHAI's case that Clause 52.2 of COPA only made Afcons eligible for seeking a revised rate, but did not automatically entitle it to a new rate. It was contended that a new rate would have to be determined only if it was found that the contracted rate was rendered "*inappropriate or inapplicable*".

24. Afcons claimed that the rate, as quoted under the Contract had become inapplicable and inappropriate for several reasons, including the period during which the said quantities were executed. It was admitted that the actual quantities were executed over a period of more than seventeen months as against a period of thirty months as agreed under the Contract. The additional work also occasioned by variation in the scope of work inasmuch as, the Engineer/NHAI had changed the instructions to direct asymmetrical widening of the road. The market price of material had also changed and thus, it was necessary that a new rate be determined.

25. Afcons had sent a letter dated 08.10.2007 to the Engineer stating its analysis of the new rate, which was based on MoRTH norms. The petitioner had claimed a new rate of ₹831 per cum for the total quantity of WMM works of 2,46,068 cum.

26. In response to the said letter, the Engineer had issued a letter dated 18.02.2008. The relevant extract of the said letter is set out below:

"……..Item 3.02 (WMM) is stated in the BOQ with a quantity of 191,212 cum and corresponding value of Rs. 104,210,540/- which is 6.34% of the Original Contract value (Rs. 1,643,767,899).

The Contractor has executed so far 263,938 cum representing 38.03% more than the BOQ quantity.

As per Clause 52.2 of CPA the change in rate or price is considered when an item exceeds 5% of the Contract price and 25% of the quantity set out in the BOQ.

As per Contract Clause 52.2 of CPA the Contractor is entitled to a new rate or price.

The Contractor has submitted the enclosed rate analysis of Rs. 831/cum subject to escalation for the Engineer evaluation. The new rate of the Contractor is applicable to the total quantity executed of item 3.02.

The Engineer, based on Sub Clause 52.2 having established that due to the excess quantity over the BOQ, the rate in the Contract is inappropriate and has carried out the rate analysis enclosed in Variation Order No. 16 herein attached which takes into consideration the BOQ rate plus weighted escalation till August'07

As per Sub Clause 52.2 "after due consultation by the Engineer with the Respondent and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor".

As there is disagreement with the rate of the Contractor, the Engineer has fixed the rate of item

> 3.02 as per the Engineer rate analysis of Rs. 591/cum stated in Variation Order 16.
>
> However pending the agreement with the Contractor and the Employer on the rate of item 3.02, the Engineer will apply in the IPC the BOQ rate to enable the payment according to Sub Clause 60.2 till an agreement is reached…""

27. In view of the aforesaid letter, there is no real dispute that Clause 52.2 of COPA was applicable and a new rate was required to be determined. The dispute was escalated since the parties could not concur on the rate as determined by the Engineer. It is also relevant to note that NHAI had contended before the Arbitral Tribunal that due to an increase in the quantity, the rate of WMM is required to be reduced.

28. The Arbitral Tribunal had after examining the rival contentions concluded that Afcons was entitled to a new rate, which was based on all aspects and circumstances. In arriving at the said conclusion, the Arbitral Tribunal noted various aspects which were relevant for determining whether the rate had become inappropriate or inapplicable. The Tribunal also noted that in Variation Order No. 7, a new rate of ₹950 per cum had been worked out. The said rate had been determined after considering the increase in the rate of plant & machinery, fuel indices of petrol oil and lubricants.

29. Afcons had contended that once it is found that the rate has become inappropriate or inapplicable on account of a variation in the quantity of the BOQ item, then the new rate so determined, would be applicable for the item and, the same would be applicable for the entire

quantity of the item executed. Although, the Tribunal found the said contention to be persuasive, it did not accept the same in entirety. The Arbitral Tribunal held that Afcons was bound to execute the BOQ items at the rates quoted during the period of the Contract even if the same had become unworkable. But at the same time, Afcons could not be compelled to execute WMM at the same rates after the initial period of the Contract had expired, as the rates had become inappropriate and inapplicable.

30. In ***National Highways Authority of India v. Hindustan Construction Co. Ltd.: OMP (COMM) 73/2016, decided on 28.11.2016***, this Court had considered a challenge to an arbitral award, where the Arbitral Tribunal had observed as under: -

> "(7) Therefore, considering the above analysis, Arbitral Tribunal is of the firm view that the revised rate would substitute the existing rate would substitute the existing rate in BOQ and would apply to the revised quantum of the work included in the contract i.e., BOQ item as whole."

31. This Court had found no ground to interfere with the aforesaid view. A similar view was also expressed by the Division Bench of this Court in ***JSC Centrodostroy v. National Highways Authority of India: (2014) 1 HCC (Del) 297***.

32. The learned counsel appearing for NHAI also did not dispute that the said question has been a subject matter of disputes before various Arbitral Tribunals and the said view has not been interfered with.

Undisputedly, the subject controversy stands covered by the aforesaid decisions.

33. The Engineer had issued Variation Order No. 16 and the rates therein were not accepted and the disputes had been escalated. The letter dated 18.02.2008 sent by the Engineer also records the controversy in this regard. The Arbitral Tribunal has also noted the decision of this Court in ***National Highways Authority of India v. Som Datt Builders – NCC- NEC (JV): FAO (OS) 527/2007,*** wherein this Court had held that "*if the variation exceeds the tolerance limit sat in the Contract, renegotiation of the rates would be called for*". This would obviously mean, the rate for a particular item and not the quantities executed beyond the specified limits.

34. In view of the above, there is merit in Mr Sethi's contention that NHAI cannot be aggrieved by the impugned award inasmuch as, the Arbitral Tribunal has further restricted the applicability of the new rates only to WMM works executed beyond the initial period of thirty months.

35. In any view of the matter, a plain reading of the impugned award does indicate that the Tribunal had rejected NHAI's contention that the new rates were only applicable to quantities executed in excess of 125% of the original estimated quantities, as the said interpretation was not supported by the plain language of Clause 52.2 of COPA. There is no ground to interfere with this view. This Court in ***JSC Centrodostroy v. National Highways Authority of India*** (*supra*) as well as in ***National***

Highways Authority of India v. Hindustan Construction Co. Ltd. (*supra*) has found no flaw with the interpretation that once a rate has been found to be inappropriate or inapplicable on account of variation in the quantity beyond the stipulated limit, then the new rate would be applicable to the entire item of the work executed.

36. It is trite law that the scope of interference in an Arbitral Award is limited and this interpretation cannot by any stretch be held to be patently illegal or in violation of the fundamental policy of Indian law. In this view, this Court finds no reason to interfere with the impugned award inasmuch as, it holds that Afcons would be entitled to a new rate for BOQ Item No. 3.02 (WMM) executed after the initial period of thirty months.

37. The next contention to be examined is whether Afcons is precluded from claiming any change in the rates, in view of the Minutes of the Meeting dated 13.09.2001. The attention of this Court was drawn to Paragraph 2 of the said minutes which indicate that certain issues were discussed and decisions were taken. Clause (iv) of Paragraph 2 of the said minutes records that "*the contractors representatives agreed for change in specification and construct the items at the rates provided in the contract*". It is important to note that the said meeting took place on 13.09.2001. At that time, there was no revision in the quantity of WMM to be executed. It is also apparent that the representatives of Afcons had agreed for a change of specification and had agreed to construct the items at the rates provided in the contract. The said agreement was in the context of change of specifications and it is

difficult to accept that the same amounted to Afcons agreeing to give up its right under Clause 52 of COPA.

38. In view of the above, this Court finds no ground to interfere with the impugned award. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

MARCH 23, 2021
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