

Non-Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2529 of 2016
(Arising out of SLP (Civil) No.9223 of 2014)

National Highways Authority of IndiaAppellant

Versus

M/S JSC Centrodorstroy Respondent

WITH

CIVIL APPEAL NO. 2530 of 2016
(Arising out of SLP (Civil) No.9494 of 2014)

J U D G M E N T

Uday U. Lalit, J.

1. These appeals by special leave arise out of common judgment and order dated 20.12.2013 passed by the High Court of Delhi at New Delhi in FAO (OS) 588 of 2013 and in FAO (OS) 590 of 2013. The questions raised in these appeals being identical, the appeals are dealt with by this common judgment and for the sake of convenience, the facts leading to the filing of FAO (OS) 588 of 2013 are dealt with in detail.

2. Contract No.TNHP/2, Construction Package II-C for a contract price of Rs.295.53 crores for executing the work of 4-laning and strengthening of the existing 2 lanes sections between km 38 to km 115 on National Highway-2 in Uttar Pradesh was awarded to the Respondent on 12.03.2001.

3. Clause 14.3 of “Instruction to Bidder” was as under:-

“All duties, taxes and other levies payable by the Contractor under the contract, or for any other cause, as of the date 28 days prior to the deadline for submission of bids, shall be included in the rates and prices and the total Bid Price submitted by the bidder.”

The parties adopted FIDIC form of conditions of contract with some changes which are called Conditions of Particular Application (“COPA”, for short). Clauses in COPA in the present case are identical to those dealt with by this Court in *National Highways Authority of India Versus ITD Cementation India Ltd.*¹. Clause 70.8 dealing with effect of “Subsequent Legislation” was as under:-

“Clause 70.8: Subsequent Legislation

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If, after the date 28 days prior to the closing date for submission of bids for the Contract there are 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 clauses 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 been taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of Sub-Clauses 70.1 to 70.7 of this Clause.”

4. Disputes having arisen between the parties, the matter was referred to the Arbitral Tribunal. Two claims were raised by the respondent namely:

“(i) Dispute No. 1

Compensation for additional cost on account of increase in Service Tax on the Insurance Premium under the Insurance Policy for the Project.

(ii) Dispute No. 2

Compensation for additional cost on account of Service Tax on the Bank Guarantee charges.”

5. It was submitted by the respondent-claimant that in terms of Clause 21.1 of General Conditions of contract, for the works awarded under the contract, an insurance policy was required to be taken w.e.f. 1.4.2001 initially for a period to 13.09.2006 which was later extended to 30.09.2009. It was submitted that General Insurance Policies including insurance for works were subject to levy of service tax which would be collected by the Insurance Company along with premium chargeable. There being revisions in the rate of service tax from 5% to 10.30%, over a period of time, according to the claimant service tax paid in excess of 5% was reimbursible by the appellant under Clause 70.8 of COPA. Similarly, in terms of the Clause 10.1 of COPA, the respondent-claimant was required to furnish Bank Guarantee for due execution of the contract by way of performance security. Service tax in relation to the Bank Guarantee as collected by the Bank had risen from 5% to 10.30% during the course of the contract and as such according to the respondent-claimant it was entitled to be reimbursed by virtue of Clause 70.8 of COPA. The Arbitral Tribunal by its unanimous award dated 28.2.2013 accepted the aforesaid claims and directed that the respondent-claimant shall be paid following sums in relation to dispute No.1:-

6.1 The Claimant shall be paid by the Respondent an amount of Rs. 11,34,877/- on account of Service Tax paid by him at rates in excess of 5% of the premium paid.

6.2 The Claimant shall also be paid by the Respondent a sum of Rs. 11,22,811 towards interest on the above amount for period upto the date of this award i.e. 28.02.2013.

6.3 Post award interest shall be payable in addition, on the principal sum awarded of Rs. 11,34,877/- at the rate of 12% per annum from 01.03.2013 to the actual date of payment of amounts under pars 6.1 & 6.2 above. No post award interest shall however be payable in case the above sums are payable within 90 days of the date of award.”

Similarly the Arbitral Tribunal awarded to the respondent-claimant following sums under dispute No. 2:-

10.1 The Claimant shall be paid by the Respondent an amount of Rs. 63,58,368/- on account of additional cost incurred on the Bank Guarantees furnished to the Respondent in terms of the Contract.

10.2 The Claimant shall also be paid by the Respondent a sum of Rs. 43,84,987/- towards interest on the above amount for period upto the date of this award i.e. 28.02.2013.

10.3 Post award interest shall be payable in addition on the awarded sum of Rs. 63,58,368/- at the rate of 12% per annum (simple) from the date of award to the actual date of payment of the said sum. No post award interest may, however, be paid in case the sums awarded under 10.1 and 10.2 above are paid within 90 days of the date of the award.”

6. The award passed by the Arbitral Tribunal proceeds on the ground that the additional costs as a result of revision in service tax which the respondent-claimant was required to bear, were covered under Clause 70.8 of COPA. It was observed that service tax was not an input to the indices used in Prices Adjustment Formulae in Clause 70.3. It concluded as under:-

“The claim in question is for reimbursement of additional costs resulting from change in Central Law which came into effect after the base date as defined in Sub-Clause 70.8. In terms of the Sub-clause, such costs are not payable separately if the same have already been taken into account in indexing of the inputs in Price Adjustment Formulae under Sub-clause 70.3. The Claimant has placed on record a letter dated 24.01.2008 from the Economic Advisor, Ministry of Commerce and Industry, confirming that Service Tax was not an input into indexing of Whole Sale Price Indices, used in India.”

7. The award passed by the Arbitral Tribunal was challenged by the appellant by filing OMP No.623 of 2013 under Section 34 of the Arbitration and Conciliation Act, 1966 before the High Court of Delhi. By order dated 21.10.2013 Single Judge of the High Court dismissed said petition. In an appeal arising therefrom i.e. in FAO(OS)588 of 2013, the Division Bench of the High Court by its judgment and order dated 20.12.2013, which is presently under challenge, affirmed the view taken by Single Judge and dismissed the appeal.

8. The facts leading to the present appeal arising out of FAO(AS)590 of 2013 are more or less identical. In that matter identical claims were raised on two counts but arising out of a different contract by the very same claimant. The Arbitral Tribunal granted Rs.8,84,969/- in respect of dispute no. 1 with interest @ 12% per annum under identical two heads as found in the earlier case. Similarly, in respect of dispute no.2, the Arbitral Tribunal awarded Rs.42,35,385/- with interest @ 12% per annum.

9. In *NHAI v. ITD Cementation India Ltd.*(Supra) impact of Clauses 70.1 to 70.7 on one hand and 70.8 of COPA was considered and the view taken by the Arbitral Tribunal as affirmed by the High Court was accepted. In that case impact as a result of increase in the rates of royalty and issue whether the Arbitral Tribunal was right in observing that the case was covered under Clause 70.8 of COPA were considered by this court. The view taken by the Arbitral Tribunal was found to be consistent with the terms of the contract and challenge at the instance of National Highways Authorities of India was negated.

10. The fact that there had been revision in the rates of service tax from time to time was not disputed by the appellant. Ms. Indu Malhotra, learned Senior Counsel appearing for the appellants in both the matters, however, submitted that only those claims which were constructional inputs alone would be eligible to be covered under Clause 70 of COPA. In her submission, the service tax on bank guarantee could have been avoided by the claimant, if the bank guarantee was replaced by tendering cash and that the facility of bank guarantee was optional and at the discretion of the claimant. Similarly, money advances were given for the benefit of the claimant and any cost associated with such benefit would not come within the scope of Clause 70.8. Mr. Biswajit Das, learned Advocate appearing for the respondent-claimant in both the appeals however, submitted that the bank guarantees were required to be given under the contract itself and such requirement was stipulated by the appellant primarily to reduce its financial risk and to bind the claimant for its performance or protecting the money advanced to the respondents. In his submission, furnishing a performance bank guarantee @ 10% of the contract price was a mandatory condition of the contract under Clauses 10.1 and 10.2 of COPA. Though at some stage the option of performance bond was mentioned in COPA, such option was withdrawn making performance security to be compulsorily in the form of an

unconditional bank guarantee. Such requirement being directly referable to essential conditions and arising out of the terms of the Contract, according to him the matter was definitely within the ambit of Clause 70.8 of COPA.

11. Having considered rival submissions, we are of the view that the assessment made by the Arbitral Tribunal in the instant case as affirmed by the High Court was definitely within its jurisdiction. It has consistently been laid down by this Court that construction of the terms of a Contract is primarily for an Arbitrator or Arbitral Tribunal to decide and unless the Arbitrator or Arbitral Tribunal construes the contract in such a way that no fair minded or reasonable person could do, no interference by Court is called for. Viewed thus, we do not see any reason or justification to interfere in the matter. The view that the increase in rates of service tax in respect of bank guarantee and insurance premium is directly relatable to terms of the contract and performance under the Contract is certainly a possible view.

12. In the circumstances, we do not find any merit in the present appeals. Both the appeals are dismissed without any order as to costs.

.....J
(Dipak Misra)

.....J
(Uday Umesh Lalit)

New Delhi
April 18, 2016

SUPREME COURT OF INDIA



JUDGMENT