

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

+ **OMP No. 138/2006**

14th January, 2010

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

Through: Mr. Sandeep Sethi, Sr. Advocate with
Ms. Padma Priya, Advocate.

VERSUS

ITALIAN THAI DEVELOPMENT PUBLIC COMPANY LTD. Respondent

Through: Mr. V.A.Mohta, Sr. Advocate, Mr. S.B.
Upadhyay, Sr. Advocate, Mr. Arvind
Minocha & Mr. Neelkanth Mohta,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? yes
3. Whether the judgment should be reported in the Digest? yes

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 which challenges the Award with respect to Claim Nos. 1 and 2 as dealt with in the Award. Under these claims, certain amounts have been awarded to the respondent herein.

2. So far as Claim No.2 is concerned, in my opinion, and for the reasons stated hereinafter, there cannot be any challenge successfully laid to the findings

and conclusions of the Arbitrators. The issue so far as Claim No.2 is concerned, the same was, with respect to an item of work being a particular type of drainage layer, which work is admittedly not provided under the Contract. The Agreement in question vide Clause 52.1 requires that if the item of work done, is not provided for under the contract, then, in such a case, if there is a similar item in the contract, then, endeavour shall be made to make the payment for the extra item of work done on the basis of the rate provided for the similar item in the contract.

3. In the present case, in the Bill of Quantities (BOQ) of the subject contract, qua the head Bill No.3, there is provided the following two entries:-

Bill of Quantities (Package-IIA)

Item	Description	Unit	Quantity	Unit Rate (Rs.)		Amount (in Rs.)	
				In words	in figures	In words	In figures
Bill No.3 – SHOULDER, SUB-BASE & BASE COURSE							
3.01	Providing and Constructing granular sub-base complete as per Technical Specification Clause No.401, grading-1 of Table 400-1	Cu.m.	140005	Five Hundred and Ninety Rupees	590.00	Eighty-Two Million, and Six Hundred and Two Thousand, and Nine Hundred and Fifty Rupees	82,602,950.00
3.03	Constructing drainage layer (granular sub base course) below rigid pavement as per drawing and technical specification clause 401	Cu.m.	212510	One Thousand, and One Hundred and Sixty Rupees	1,60,00	Two Hundred and Forty-Six Million, and Five Hundred and Eleven Thousand, and Six Hundred Rupees	246,511,600.00

4. The Arbitral Tribunal has found that the item of work in question executed by the respondent is similar to item 3.03, as stated above, and has awarded the rate for such work at Rs.1160 per cubic meter and which is the rate provided for work done under item 3.03. Before so doing, the Arbitral Tribunal has considered various factors which increased and also decreased the cost of execution of the work to the contractor, when executing this item. Some relevant paragraphs of the Award in this regard are as under:-

“3.2.4 The AT has further observed that as per Analysis of Rate (A/R) submitted by the Claimants vide letter dated 18.3.2002 (Exh.C-23) they have claimed the rate of the varied item as Rs.1400 per cum which is higher than the rate for BOQ item 3.03, due to higher density involving additional transportation and compaction cost. However, the AT is of the view that since the aggregate size covers a broader range varying from 75 mm downwards, against the earlier size of 20mm downwards, there are some savings in the cost of procurement and as such the rate should be restricted to that of BOQ item 3.03, as initially decided by the Engineer’s Representative under the power delegated to him and accepted by the Claimants.

3.2.5. The subsequent A/R for Rs.891per cum, derived by the Engineer from PWD Schedule of Rates has also been examined by the AT carefully and after considering the comments of both parties, the AT is of the view that due to increased density of modified drainage layer with changed grading, the rate works out to Rs.1170.36 per cum., as per A/R attached at Annexure 1, which is based on the A/R prepared by the Engineer.”

5. It is not in issue that the item of work in the present case is with respect to making of a drainage layer below the rigid pavement. Item 3.03 of the Bill of Quantities reproduced above, in my opinion has rightly been relied upon by the Tribunal because the language of the said Clause shows that it is surely similar to the new work executed by the contractor instead of the work falling under Clause 3.01, and therefore, the rate provided for the item 3.03 has to be adopted by virtue of Clause 52.1 of the Contract. Mr. Sandeep Sethi, Sr. Advocate , for

the petitioner ,sought to urge that item 3.01 of the Bill of Quantities applies and not item 3.03. This was so urged on the basis that there is commonality of the ingredient of “ granular sub-base” in both the items 3.01 and 3.03. I do not agree with this contention because it is not the content of the item which is material but the head of the item and its similarity with the head of the item which is executed by the contractor, which is relevant, because there are many items which may have common material for doing the works.

Even assuming that there are two views possible, as to whether item 3.01 applies or item 3.03 applies, it is settled law that until and unless, the course of action and interpretation adopted by the Arbitrator, is wholly perverse, or so unreasonable that only an unreasonable man could have taken such a view, this Court while hearing objections under Section 34 will not interfere with the plausible interpretation as given by the Arbitrators. Since, although in my opinion, a reading of Clause 52.1 necessarily shows that the conclusion of the Arbitrator is correct, in the alternative I feel that, since two views are possible, assuming the view as canvassed by the petitioner, is one of the possible view, then also, I refuse to exercise discretion in allowing the objection as regards awarding of this claim.

6. The second claim which has been awarded by the Arbitral Tribunal, and which has been challenged before this Court, is as regards Claim No.1. Before I discuss the conclusions in the Award, as regards this claim, it would be

necessary to reproduce certain relevant clauses of the contract. The relevant clauses of the contract in this regard are as under;-

“Section 200 **CLEARING AND GRUBBING**
Clause 201.1 Scope
 Replace with following para

This work shall consist of cutting removing and disposing of all materials such as trees of girth up to 300 mm, bushes, shrubs, stumps, roots, weeds etc. and top soil 150mm minimum thickness, rubbish etc, which in the opinion of Engineer is unsuitable for incorporation in the work including draining out stagnant water if any from the area of road land, drain, cross drainage structure and other area as specified in the drawing by Engineer. It shall include necessary excavation by harrow discs or any other suitable equipment, back filling of the pits, by suitable soil, resulting from uprooting of trees & stumps and making the surface in proper grade by suitable equipment and compacted by power roller to required compaction as per Clause 300. The work also includes handling salvaging and disposing of cleared material. Clearing and grubbing shall be performed in advance of earthwork operation and in accordance with requirement of these specification. (Emphasis supplied)

“**Clause 201.6.1** The contract unit rates for the various items of clearing and grubbing shall be payment in full for carrying out the required operations including full compensation for all labour, materials, tools equipment and incidentals necessary to complete the work. These will also include removal of stumps of trees less than 300 mm in girth as well as stumps left over after cutting of trees carried out by another agency, excavation and back-filling of required density, where necessary, had handling, salvaging, piling and disposing of the cleared materials with all lifts and upto a lead of 1000m.”

“**Clause 201.6.1** Delete “as well as stumps left over after cutting of trees carried out by another agency” from the second sentence.

Add the following paragraph:

“The removal from site and disposal of all materials obtained from clearing and grubbing operations, which, in the opinion of the Engineer, cannot be used or auctioned, shall be included in the Contract unit rate.”

7. The issue in the Arbitration proceedings, as regards this claim was of the payment for the work of earth filling for levelling or back filling of the pits

which is required as a result of the work done of clearing and grubbing in terms of Clause 201.1 and 201.6.1 A conjoint reading of relevant clauses brings out the following salient ingredients contained therein:-

(i) In the job of clearing and grubbing, the contractor has to cut and remove such materials and vegetation growth (including trees). The contractor has also to remove top soil of 150mm thickness, if so directed by the Engineer when the Engineer finds that such removal was necessary as surface was not of proper grade.

(ii) The work as stated in point (i) above with respect to clearing of the top soil is only required to be done for making the surface in proper grade, meaning thereby, if the surface is otherwise in a proper grade, there is no requirement of removing of 150mm of top soil and in which circumstance no directions are issued by the Engineer to remove the top soil.

(iii) If as a result of removal of the trees, shrubs etc., there are caused pits, the cost of work of back filling of the pits, is to the account of the contractor.

(iv) To the extent of removal of the top soil of 150mm, when so required in terms of the requirement of Clause 201.1 , it is open to the contractor to use such material for back filling of the pits, and in fact is bound to do so.

(v) It is nowhere provided in the contract that if earth is removed up to 150mm, the same cannot be used for back filling of the pits caused by removal of the stumps of the trees or other vegetation. This becomes further clear from the paragraph added to Clause 201.1 because it is only such material which

cannot otherwise be used has to be removed from the site but the rest has to be incorporated in the work at site and which material when used will fall within the unit rate of that subject item under the contract of clearing and grubbing.

8. Not much dispute with regard to these ingredients of the aforesaid clauses could be raised by the counsel for the parties inasmuch as the aforesaid interpretation of the clauses, in the opinion of this Court, is a correct interpretation on the conjoint reading of the relevant clauses. The disputes however in this case was more factual in nature than as regards the interpretation of the clauses. The dispute was that, whether the contractor had unnecessarily scraped the soil up to 150mm even if it was not required and directed and if scraping and clearing up to 150 mm depth was required, whether the contractor, in fact, in the work area went to depth in fact even below 150 mm. On the one hand the stand of the present petitioner, respondent in the Arbitration, was that unnecessary scraping or going to a greater depth than 150 mm was in fact done by the respondent/contractor, however, the respondent has very empathically denied such a charge and has stated that the back filling of the pits caused on account of uprooting of the trees stumps etc. was not on account of use of such soil from the work area which it could not have validly done in terms of aforesaid provisions of the contract.

9. On reading the relevant portion of the Award, which is contained at internal pages 14 to 17 of the Award, I find that there is no specific discussion as to whether the soil which is used for back filling of the pits and levelling is in

fact the soil below the depth of 150 mm or even if up to the depth of 150 mm if such soil was not such soil which was required to be cleared as per directions of the Engineer while performing the obligations by the contractor under Clause 201.1. I find that the Arbitration Tribunal has, while awarding this claim to the respondent, proceeded on the basis that the soil used for back filling of the pits is in fact the soil which was validly available to the respondent while performing his obligations under Clause 201.1. In my opinion, there cannot be any assumptions or an accepted hypothesis in a case like this which requires in fact a factual foundation and finding by the Arbitrators with regard to the fact that whether or not the soil which has been used by the respondent for back filling of the pits was the soil which was otherwise validly available, i.e. “extra soil” while otherwise performing the obligations under Clause 201.1 of the Contractor.

10. In view of the aforesaid position emerging from the interpretation of the clauses, and the conclusions/findings in the Award which are clearly inadequate for deciding this issue, the counsel for both the parties have agreed that only so far as this Claim No.1 is concerned, the same be remanded back to the Arbitrator to pass a fresh Award keeping in view the interpretation of the Clauses as already given by me above and more importantly, firstly for arriving at a factual finding as to whether the soil used for back filling of the pits was extra soil available to the respondent from the work area was or was in fact such

soil which it could not have used and also as per the observations in para 8 above.

11. Accordingly, this matter is remanded back to the Arbitration Tribunal for deciding afresh, in accordance with law, the Claim no.1. So far as Claim No.2 is concerned, objections thereto are dismissed with costs of Rs.50,000/-.

VALMIKI J.MEHTA, J

January 14, 2010

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