

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

+ **OMP No. 491/2008**

14th January, 2010

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

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

VERSUS

M/s. PCL – SUNCON J.V. Respondent

Through: Mr. Sanjay Jain, Sr. Advocate with
Ms. Anuradha Mukherjee, Ms. Prabsahay
Kaur, Mr. Gyanendra Kumar, 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

% **JUDGMENT (ORAL)**

VALMIKI J.MEHTA, J

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the Award dated 06.11.2007 of the Arbitration Tribunal deciding one dispute between the parties pertaining to the work of Four Laning and Strengthening of the existing two lane Highway Section from km 320.00 and km 398.75 of NH-2 (Construction Package V-C), in the State of Jharkhand (TNHP-8).

2. The issue decided is that during the performance by the contractor/respondent of the work of clearing and grubbing in terms of Clause 201.1, if there is required, on the directions of the Engineers, removal of top soil upto 150 mm, then, whether the subsequent work of filling of this very top soil upto 150 mm depth, is or is not included in performing the obligations under Clause 201.1 by the contractor or the same has to be paid as an additional work to be measured under Clause 305. The Award has held that contractor is entitled to be paid for such work under the earth work which is dealt with in Clause 305, and this filling up work was not included in the work of clearing and grubbing under Clause 201.1.

3. I have by an order of today's date in OMP No. 138/2006 dealt with the interpretation of the relevant Clauses and this portion of my judgment in the said case I reproduce hereunder:-

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.

From the interpretation of the aforesaid Clauses and the relevant portion of the judgment in OMP 138/2006 it is clear that the back-filling, which is the obligation of the contractor, is limited to the filling of pits caused by removal of the stumps of the trees and does not extend to filling/levelling of dug up soil of depth upto 150 mm, when such work is required of the contractor by the Project Engineer under Clause 201.1. Once we read Clause 201 alone, it is clear that, it is only the back-filling of the pits caused by removal of stumps of trees, which is to the account of the contractor and not any other back-filling if so required while performing the work after completion of the work of clearing and grubbing. Mr. Sandeep Sethi, learned senior counsel for the petitioner, to urge the contrary has drawn my attention to Clause 201.6.1 of the Technical Specification part of the contract and which reads as under:

“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 to required density*, where necessary, and handling,

salvaging, piling and disposing of the cleared materials with all lifts and upto a lead of 1000 m.”

4. Mr. Sethi, learned senior counsel has placed special emphasis on the expression “and back-filling to required density” in this Clause 201.6.1. It was the contention of Mr. Sethi that by virtue of this Clause, back-filling should also include back-filling of that much scraped portion of the earth which the contractor is required to do upto 150 mm depth while performing the work of clearing and grubbing. Mr. Sethi, learned senior counsel, contended that there should be a harmonious construction of Clauses 201.1 and 201.6.1.

5. To the extent that Mr. Sethi says that there should be harmonious construction of the two Clauses I agree with him. However, on such harmonious construction, I disagree with Mr. Sethi that, the conclusion is that back-filling includes entire back-filling even when it is so done for filling the removed portion of 150 mm of top soil on the directions of the Engineer when the contractor does such work while doing the work of clearing and grubbing under Clause 201.1. I may state that Clause 201.1 is in fact the main Clause which describes the scope of work and thus the substantial Clause dealing with the work required to be undertaken, and Clause 201.6, the later clause, is only a Clause of the rates of payment and not the scope of work.

6. In any case, the best contention of the petitioner can be that two views are possible of Clause 201.1 in view of Clause 201.6.1 i.e. when Clause 201.1 talks of back-filling it is back filling of every type and not only of the pits because,

Clause 201.6 talks of filling without mentioning of what type and to what extent of the filling to required density. Once two views are possible, and the contention of the counsel for the petitioner is that there should be harmonious construction so that only one view should be adopted instead of the second view, I feel that this takes away my jurisdiction while hearing objections under Section 34 to interfere with the Award because unless and until the interpretation is completely perverse this Court has no jurisdiction to interfere with the interpretation of the contractual Clauses by the Arbitrators. In any case, in my opinion and as stated above, the interpretation given by the Arbitrator is correct and definitely not perverse.

7. At this stage I must take on record the statement of the learned senior counsel Mr. Sanjay Jain, on behalf of the respondent wherein he has categorically stated that what the contractor/respondent was seeking under the subject claim was the cost incurred by the respondent in re-filling the removed portion of earth upto 150 mm in depth, which should be paid independently as work of embankment / earth work under Clause 305 and be not included in the work of clearing grubbing under Clause 201 and the respondent is entitled to refund of the amounts wrongfully recovered by wrongly treating the filling work of top soil of 150 mm depth as forming part of the work executed under Clause 201.1. Meaning thereby, what Mr. Jain urged, was that, the respondent is seeking payment, not for anything else, but, only for soil filling pursuant to work of scraping upto 150 mm depth done under Clause 201 inasmuch as the

re-filling of the removed portion of top soil upto 150 mm depth was required to be done because in the final place the scraping work itself was as per directions of the Engineer under Clause 201. Mr. Jain, further to clarify, again said that the work of the removal of the top soil was work under Clause 201, but, re-filling thereof and the entitlement to payment for the work of refilling of 150mm so done, would fall under Clause 305. I agree with this contention of Mr. Jain, learned senior counsel and hold that if there is any confusion in the Award at internal page 26 of the same, in sub-para of para 10, then, these paras should be so understood to mean that the claim of the present petitioner before the Arbitrator was objected to by the respondent herein on the ground that it was entitled to refund of the wrong deductions made by the petitioner for work which the respondent did for filling up the 150 mm of soil by the petitioner failing wrongly in not treating the same as earth work done under Clause 305 inasmuch as the work was necessitated because the work of removal of top soil of 150mm for clearing and grubbing under Clause 201 was done, on the directions of the project Engineer.

8. That takes me to the last issue as urged by Mr. Sandeep Sethi, learned senior counsel for the petitioner that the Arbitrators ought to have arrived at a definitive finding of the amounts payable to the respondent on allowing of the claim and ought not to have left the amount to be determined by the Engineer. I find that this objection is correct. The judicial function of determination of the amount and passing of the Award for such amount has necessarily to be done by

the Arbitral Tribunal and not by the Engineer. The present case was like a case in a Civil Court of where there is required passing of two decrees i.e. a preliminary decree and then a final decree. Once the Arbitrator arrives at a finding and in effect passes a preliminary decree, on the basis of which a conclusion is reached, holding that a particular amount was payable to the respondent, then, the Arbitrator should not have concluded the proceedings and should have thereafter called for report either from the Engineer, or, more preferably from the petitioner itself as to what were the amounts which the petitioner had deducted from various interim bills with respect to the bills which were raised by the respondent for the earth filling upto 150 mm in depth.

9. The issue therefore is now what is therefore to be done. On the one hand I can remand the matter back to the Arbitrator, to once again seek the formal response of the petitioner, as to the details of the amounts which had been deducted wrongly treating the earth filling work upto 150 mm as being included in Clause 201.1, and which is basically a formal administrative work as the amounts which have been deducted under this head are really not disputed amounts. I was inclined initially to remand the matter back to the Arbitral Tribunal, however, in my opinion this will involve great cost and wastage of time of the parties as also of the Arbitrators because the Tribunal is of a three Member Bench, of which one of the member (Sh.C.C.Bhattacharya) does not reside in Delhi. Therefore, in the peculiar facts of this case I direct that the petitioner should file in this Court within a period of four weeks from today

on an affidavit of the Project Director the complete details of the amounts which it has deducted for earth filling upto 150 mm of work undertaken by the respondent under Clause 305 treating the same not to be payable on the ground that it was already included in payment under work done under Clause 201.1.

10. On such an affidavit being filed of the concerned Project Director and which should be prepared in consultation with the concerned Engineer the amount stated in this affidavit shall be treated as the amount payable under the Award and the awarded amount would be read as the amount filed in the abovesaid affidavit. Though there will be none, but if, there are any disputes with regard to the quantum of such amount then, such dispute, if any, would be decided by this Court on an application being filed in these proceedings or if so required and permissible by a Court executing such Award.

11. With the aforesaid observations, the present petition stands disposed of.

VALMIKI J.MEHTA, J

January 14, 2010

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