

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 339/2004

Reserved on: November 29, 2011

Decision on: December 15, 2011

M/S NATIONAL HIGHWAYS AUTHORITY
OF INDIA

..... Petitioner

Through: Mr. Chetan Sharma, Senior Advocate
with Mr. Vikas Goel and
Ms. Pooja Sharma, Advocates.

versus

M/S PRAKASH ATLANTA JV AND ORS.

..... Respondents

Through: Mr. Sandeep Sethi, Senior Advocate
with Ms. Kanika Singh, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

15.12.2011

1. The issue involved in the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') has been summarised in an order dated 16th November 2007 passed by this Court, the relevant portion of which reads as under:-

“This is a petition whereby the National Highway Authority of India has challenged the award dated 26.06.2004 passed by an Arbitral Tribunal comprising of three Arbitrators. The work that was assigned to the respondent by the petitioner was for the construction of a segment of the Lucknow Bypass connecting NH-25 and NH-28 via NH-56 passing through Lucknow City (Contract package No. EW-15/UP). The entire dispute relates to

the claim in respect of the foundation beams (U Beams) which were laid by the respondent. According to the respondent, the foundation beams/U beams did not comprise part of the contract and, therefore, they are entitled to extra payments in respect thereof. The award has been passed in favour of the respondent allowing them payment for the extra work in respect of the foundation beams/U beams.

According to the learned counsel for the petitioner Item 5.41(a) of the Bill of Quantities (BOQ) specifically included foundation beams in the scope of work. However, interpreting the very same item 5.41(a), the arbitral tribunal has concluded that the concept of foundation beam is included in Item 5.41(a) but with the proviso “if required”. It has also come to the conclusion that the correct interpretation of the specifications, drawings and the bill of quantities with reference to the BOQ item 5.41(a) would be that the “foundation beam” is included in that item, provided it is required, as per design. According to the learned counsel for the petitioner, the foundation beam was required from the very inception and it was included with the contract and, therefore, was within the technical specifications 700 as well as approved drawings, bill of quantities. Consequently, there is no question of paying anything extra in respect of the foundation beams to the respondents. The learned counsel for the respondents contends otherwise.”

2. The dispute between the parties arising out of the claim of the Respondent of a separate rate for the Foundation Beam (‘U Beam’) in terms of the Contract dated 10th August 2001 was first referred to the

Dispute Review Expert ('DRE') on 27th July 2002. On 30th August 2002 after considering the materials placed by both parties, the DRE ruled as under:-

- “(i) Since the decision of the Engineer vide letter dated 12 July, 2002 came to the knowledge of the Contractor on 18 July, 2002, the objection raised by the Employer that the issue is time-barred is rejected.
- (ii) Accordingly, I conclude that even though agreement item No. 5.41 (a) is an all inclusive item and includes foundation beam also, foundation beam was clearly not envisaged, at the time of tendering and no prudent contractor would have been able to take this into account, while quoting the rate of this item. Thus foundation beam is beyond the scope of work as tendered for which extra payment is admissible to the contractor.”

3. The National Highways Authority of India ('NHAI') then invoked Clause 25.3 of the Agreement and appointed Shri D. P. Gupta as an Arbitrator on 22nd October 2002. M/s Prakash Atlanta JV ('PAJV'), Respondent No. 1 appointed Shri R. T. Atre as an Arbitrator on 26th October 2002. Both of them appointed Shri A. D. Narain as the Presiding Officer on 30th November 2002. Oral hearings before the Arbitral Tribunal concluded on 21st May 2004 and thereafter the impugned Award dated 26th June 2004 was passed. The Arbitral Tribunal rejected the preliminary objection of the NHAI that the Respondent's reference to the

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DRE was time-barred. The Arbitral Tribunal further proceeded to hold as under:-

- (i) The correct interpretation of the specifications, drawings and Bill of Quantity ('BOQ') with reference to the BOQ item 5.41 (a) would be that the 'Foundation Beam' is included in that item, provided it is required, as per design.
- (ii) U Beam was not necessitated due to any deficiency on the part of the Respondent for reinforced earth wall ('REW') of height up to 6 m and for heights of REW above 6 m.
- (iii) U Beam was a part of Ground Improvement Scheme as accepted by both the parties and needs to be considered as a variation item on par with the other components of the Ground Improvement Scheme which have been accepted as variation items by NHAI. As such the whole work involved in providing the U Beam for all heights of REW needs to be covered by a variation order and needs to be paid at an appropriate rate and is not covered by the payment under BOQ item 5.41 (a).

4. The Arbitral Tribunal then considered the counter-claims of NHAI. After modifying the rates contained in the contract document for BOQ items 6.09 (b) and 5.08 (ii) to reflect the extras needed to execute the item of U-beam, it awarded a rate of Rs. 1300/- per running meter in favour of the Respondent. The Respondent was also held eligible for payment of

price adjustment as per Clause 47 of the Conditions of Contract. For the work done in future under Counter Claim No. 2 as per paras 7.3.2 and 7.3.3, the NHAI was directed to continue to pay to the Respondent at the rate of Rs. 22,275/- per metric ton, together with price adjustment as per Clause 47.

5. Interest at 12% per annum was awarded to the Respondent from 22nd October 2002, the date of invocation of the arbitration clause. The award of interest was to be valid up to the date of award and the amount of interest was to be included in the total amount of the Award. Each party was to bear the fees and expenses incurred in the arbitral proceedings.

6. This Court has heard the submissions of Mr. Chetan Sharma, learned Senior counsel and Mr. Vikas Goel learned counsel appearing for the NHAI and Mr. Sandeep Sethi, learned Senior counsel and Ms. Kanika Singh, learned counsel appearing for the Respondent.

7. Item 5.41(a) of the BOQ reads as under:-

“Construction of reinforced earth walls with precast panels, reinforcing element, foundation beam, capping beam including ground treatment, if required, complete as per drawings and Technical Specification 700”.

8. The main issue that has given rise to the claim of the Respondent is

whether the U beam, i.e., a foundation beam constructed below the reinforced earth wall ('REW') to support the precast panels of the REW, is an 'extra item' or is it included in the rate quoted by the Respondent in construction of the REW in Item 5.41(a) BOQ.

9. According to the NHAI, the Respondent on 10th October 2001 submitted drawing No. DB-1 to the Engineer which did not contain the foundation beam. According to the NHAI, the Respondent submitted the final drawing by a letter dated 29th May 2002 approved by the NHAI. It is the case of the Respondent that the foundation beam was not a part of the original drawing. The Respondent states that it was not aware that it had to undertake the construction of the foundation beam as part of the contract. It submitted a tender for the work of "Construction of segment – Lucknow Bypass connecting NH-25 and NH-28 via NH-56 passing through Lucknow City (Contract Package No. EW-15/UP)" for an amount of Rs. 1,58,80,42,413/-. After commencing the work, the Project Management Consultants ('PMC') required the Respondent to submit a revised project. On 25th October 2001, the PMC gave a suggestion for preparing a suitable ground improvement scheme in view of the sub-soil condition. The Respondent, on 2nd November 2001, clarified that this was not included in the scope of work. On 17th November 2001 the PMC asked it to submit a ground improvement design. At the meeting on 28th

November 2001, the PMC suggested that in case the panels being

provided were in weak sub-grade and higher load intensity zones, a U shaped trough below the bottom of the panels should be designed for the actual load intensity.

10. In a letter dated 12th December 2001, the Respondent referred to the discussions on 28th November 2001 and stated as under:

“We wish to bring it your kind notice that items such as i) Ground improvement of (a) back fill portion (b) for facia wall portion ii) Providing reinforcing elements for R.E.S. in linear meter iii) Drainage for RES iv) Reinforcement in facia panels shall be variation item as per the provision of agreement and shall be paid extra. We are submitting herewith the rates for these along with rate analysis (Appendix-7 pages) in terms with agreement clause 40 for your early approval please.”

11. On 28th December 2001, the Engineer wrote to the Respondent that “Ground Improvement Scheme envisaged vide your Drg. No. DB-5/R2 and revised design calculations submitted regarding the same for height of REW retaining walls more than 3 m has been reviewed and found acceptable. Please submit a method statement and working drawing for clarity to construction works for different sections of the approach ramps of the project.” The Respondent on 1st January 2002 wrote to the PMC that while ground treatment was included in Item 5.41(a) and treatment of REW with pre-cast panels as per drawings and Technical Specifications 700, they did not include “ground improvement”. Attention was invited to

the Ministry of Surface Transport (MOST) Specification.

12. Clause 703.1 and 703.5.1 reads as under:

“703.1. Scope

The work covers the construction of reinforced earth structures, together with the construction of earthwork in layers, assembly and erection of reinforcing elements and placement of facing panels and all associated components.

703.5. Construction Details

703.5.1. The plan area of the reinforced earth structure shall be excavated to provide a nominally level base which may be stepped at the back as required to receive the horizontal element grid.

The depth of the foundation below the finished ground level at the foot of the slope or wall shall not be less than 1000 mm.

Additional strip footing, trough guide made of concrete or anchor key pad shall be provided at founding level to receive the fascia or the bottom most reinforcement connection. This shall have adequate soil cover against erosion and scour in particular cases.”

13. In response to the letter dated 1st January 2002, the PMC wrote to the Respondent on 7th January 2002 clarifying that in point 2 of its letter dated 28th December 2001, for ‘3m’ please be read ‘6m’. The typographical error is regretted.” On 22nd January 2002 the Respondent again requested NHAI to consider the ground improvement work, the foundation beam

works and variation item. On 27th February 2002 it submitted to the PMC two typical cross-sections; one with ground improvement for REW height more than 6m, and another without ground improvement for REW height less than 6m.

14. The next letter which is important is the one dated 28th March 2002 from the Engineer to the Respondent which reads as under:-

“Dear Sir,

Approval from chainage 450m to 660m is accorded subject to following conditions:-

1. Ground improvement is required from height 6M & above .e from chainage 540M onwards.
2. Ground improvement proposal should be submitted & approval be sought.
3. Before commencement of the work joint ground levels below RE wall be recorded jointly.”

15. It becomes clear in view of the above correspondence that it is only on account of the directions of the PMC that on 6th April 2002 the PMC wrote to the Respondent reiterating that the drawings submitted by the Respondent were accepted and approved with few further minor modifications. It is only upon the insistence of the PMC that the Respondent was required to submit drawings based on the decision to go in for ground improvement work and to provide for foundation beams for the entire length of the REW irrespective of its height.

16. Consequently, this Court does not find any merit in the submission of the Petitioner that without approved drawings, the Respondent could not have undertaken the work of providing the foundation beam, and that the Respondent ought to have been aware that the drawings initially submitted by it were to be only used as reference. The claim of the Respondent did not depend only on the initial drawing submitted by it but on the subsequent revised drawings which had been expressly approved by the PMC.

17. NHAI has contended before the Court that in the Patentee's brochure, the requirement of RCC foundation base has been recognised. In response to this, the Respondent has referred to a letter written by the said Patentee which clarifies that the mention of U-beam in its Kolon Brochure "is in general and not mandatory. Provision of U-beam is dependent upon the site conditions." This Court is unable to accept the stand of the NHAI that the provision of the foundation beam was envisaged right from the beginning at the stage of entering into the contract and was an integral part of the actual work.

18. As regards the rates at which extra variation item had to be computed, this Court is unable to be persuaded to hold that the Arbitral Tribunal has committed any serious error that calls for interference.

19. Consequently, this Court finds no merit in this petition and dismisses it as such with costs of Rs. 10,000/- which will be paid by the Petitioner to the Respondent within four weeks from today.

S. MURALIDHAR, J.

DECEMBER 15, 2011

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