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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) 551/2011 & 552/2011

NATIONAL HIGHWAYS AUTHORITY OF INDIA .. Appellant
Through : Mr.Sudhir Nandrajog, Sr.Adv. with
Mr.Bibhakar Mishra and Mr.Sumit Gupta,
Advocates.

versus

AGRAWAL JMC JV Respondent
Through

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

% 17.11.2011

**FAO(OS) No.551/2011 and CM Nos.20695/2011 (Stay) and 20696/2011 (For
Condonation of Delay of 29 days in filing the appeal)**

**FAO(OS) No.552/2011 and CM Nos.20706/2011 (Stay) and 20707/2011 (For
Condonation of Delay of 30 days in filing the appeal)**

The respondent was awarded a contract for Four Laning and
Strengthening of Existing Two Lane Road from Tavarankurchi to Madurai –
from km 60.950 to km 124.840 in Tamil Nadu.

FAO(OS) Nos.551-552/2011

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The agreement between the parties contained the arbitration clause and a dispute arose over a limited issue qua the payment for additional work of stumps and roots removal and back filling of pits while removing the trees of girth beyond 300 mm.

This dispute, in view of the arbitration clause, was referred to an arbitral tribunal of three arbitrators. The appellant has a dispute resolution board and thus initially the matter was referred to the said board which unanimously took a decision in favour of the respondent i.e. they were entitled to payments for this work. The recommendation of this board was, however, not accepted by the appellant and the matter was thus referred to an arbitral tribunal of three arbitrators – Sh. Sh. H.S. Bhatia, Ex-Member (Engg.), International Airports Authority of India; Lieutenant General (Retd.) Prakash Suri, PVSM; and Sh. Prem Nath, Ex-Executive Director, Airports Authority of India. The arbitral tribunal made and published the award dated 04.07.2009. The appellant being once again aggrieved, filed an application under Section 34 of the Arbitration and Conciliation Act, 1996, as OMP No.640/2009. We may note that a similar dispute arose qua another stretch of the road which also gave rise to a dispute with similar factual position and was referred to the same arbitral tribunal

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which made an award on the same date on the same terms. OMP No.641/2009 was filed qua that award. Learned single Judge in terms of the impugned order dated 10.08.2011 has dealt with both the OMPs vide a common order and has upheld the award except to the extent that the rate of interest awarded by the arbitral tribunal of 10% per annum has been reduced to 8% per annum.

The dispute in question revolves around the interpretation of Section 201.1 and 201.5 of the Ministry of Surface Transport (MOST) Instructions. In order to appreciate the submission, we reproduce the section 201.1 as under:

“201.1 Scope: This work shall consist of cutting, excavating, removing and disposing of all materials such as trees of girth upto 300 mm, bushes, shrubs, stumps, roots, grass weeds, rubbish etc. and top soil upto 150mm, which in the opinion of engineer is unsuitable for incorporation in the work including draining out stagnant water if any from the area of roadway, drain, cross drainage structure and other area as specified in the drawing or by Engineer. It shall include necessary excavation by suitable equipment, back filling of pits by suitable soil resulting from uprooting of trees & stumps and making the surface in proper grade by motor grader or any other suitable equipment and compacted by power roller to required compaction complete as per section 300.” (underlining added).

It is the consistent say of the learned senior counsel for the appellant that there is no dispute qua the fact that the trees of girth up to 300 mm are covered under Section 201.1 and a separate work order is given in respect of the trees of girth of more than 300 mm. The dispute is that in terms of the section the work of backfilling of pits by suitable soil resulting from uprooting of trees and stumps and making the surface in proper grade by motor grader or any other suitable equipment and compacted by power roller which required compaction completed as per Section 300 is stated to be included in the scope of the work as per Section 201.1.

It is the say of the appellant that this work has to be carried out as inclusive in the original scope of the work whether the trees are of girth up to 300 mm or more than 300 mm. Thus, the two parts of said Section are said to be read in a separate manner – first portion confined to trees of girth up to 300 mm and the latter portion in respect of trees of unlimited girth. This plea has been rejected.

On hearing learned counsel for the appellant, we are in agreement with the view taken both by the arbitral tribunal and the learned single Judge.

We fail to appreciate how Section 201.1 can be read in this manner when

it is apparent that it deals with removal of trees of girth up to 300 mm etc. and top soil up to 150 mm. The latter part of the clause would be relatable to the initial part of the work to be carried out as it only specifies that certain natures of work would be inclusive of the work defined in the first part of the section.

The second part of the section is actually about the consequences of uprooting of trees. We may also refer to Section 201.5 which reads as under:

“201.5. Measurements for Payment Clearing grubbing for road embankment, drains and crossdrainage structures shall be measured on area basis in terms of hectares. Clearing and grubbing of borrow areas shall be deemed to be a part of works preparatory to embankment construction and shall be deemed to have been included in the rates quoted for the embankment construction item and no separate payment shall be made for the same. **Cutting of trees upto 300 mm in girth including removal of stumps and roots, and trimming of branches of trees extending above the roadway shall be considered incidental to the clearing and grubbing operations. Removal of stumps left over after trees have been cut by any other agency shall also be considered incidental to the clearing and grubbing operations.**

Cutting, including removal of stumps and roots of trees of girth above 300 mm and backfilling to required compaction shall be measured in terms of number according to the sizes given below.

- i) Above 300mm to 600 mm
- ii) Above 600mm to 900mm
- iii) Above 900mm to 1800mm
- iv) Above 1800mm

For this purpose, the girth shall be measured at a height of 1 metre above ground or at the top of the stumps if the height of the stumps is less than one metre from the ground.”

(emphasis supplied)

It is the aforesaid clause which has been relied upon by the counsel for the respondent before the learned single Judge to further contend that the measurement in respect of the cutting of trees and removal of stumps and roots of trees of girth above 300 mm and backfilling to required compaction is a measurement on a separate basis altogether as per this section and thus for that reason also the interpretation put forth qua Section 201.5 is not acceptable.

Insofar as the factual matrix is concerned, the contract was awarded to the respondent on 29.11.2005 and on 01.02.2006 it was conveyed that the competent authority of the appellant had accorded in principle approval to carrying out the work of cutting and removal of trees which was not covered under the scope of the main contract as it was causing encumbrance and obstruction in execution of the contractual work. This was to be done as a

separate job and related to trees of girth of more than 300 mm. Learned single Judge has noted in para 4 of the impugned order that on 06.02.2006 the respondent conveyed its concurrence to carry out the said job of cutting and removing trees, subject to, inter alia, the condition that the “valuation indicated do not cover the scope of uprooting/removal of roots and disposing of the same, filling of pits including rolling & compaction etc. which shall be paid separately as per the mutually agreed rates as a variation order in the main contract agreements.”

It is on 07.02.2006 that the appellant awarded the said work to the respondent by referring to both the aforesaid communications.

Learned counsel for the appellant has drawn our attention to the letter dated 07.02.2006 as also to the minutes of the meeting dated 31.03.2006 where the aspect of urgency in removal of stumps and roots and backfilling qua trees of girth of more than 300 mm has been dealt with. The relevant portion of the minutes of the meeting is as under:

“ Clearing and Grubbing : Refer to Section 201 of TS.

The Contractor is required to record the Original Ground Levels (OGL) before start of operations of C7G and also after doing C&G. The necessary RFI's will be raised by the Contractor.

The Employer informed that the trees of girth more than 300 mm will be cut by the same Contractor under separate work order. The Contractor requested for variation order for removal of stumps and roots and back filling of pits by suitable soil resulting from uprooting of trees and stumps and also making the surface in proper grade by Motor Grader and compacted by Power Roller to required compaction as per Section 300 of TS. The Employer/Consultant informed the Contractor to carry out the removal of stumps and roots and back filling immediately in view of safety of road users. The Contractor was requested to make proposal for Variation Order. The CSC requested the PD to identify the locations for disposal of deleterious and other unsuitable materials.”

Learned counsel for the appellant submits that since work order was already given on 07.02.2006, there was no emergency situation for the engineer in charge of the appellant to take such a call. The minutes of the meeting dated 21.04.2006 have also been relied upon by the learned single Judge.

The aforesaid is a submission in the context of what has been observed by the learned single Judge regarding engineer's duties and authority more specifically clause 2.1 of the COPA Part-II. The engineer is required to obtain prior permission and specific approval of the employer before taking a decision *inter alia* certifying additional costs determined under clause 12. It is, however, not disputed that the engineer and project director had recommended

provisional rates to the headquarters of the appellant for payment to the respondent for the work of removal of stumps and roots and backfilling of pits of trees above 300 mm girth and, in fact, provisional payments were also made in those terms. It is to meet the aforesaid plea that learned counsel for the respondent before the learned single Judge had referred to clause (viii) of clause 2.1 of COPA Part-II which provided as under:

“notwithstanding the obligation, as set out above, to obtain approval, if, in the opinion of the Engineer, an emergency occurs affecting the safety of life or of the works or of adjoining property, he may, without relieving the contractor of any of his duties and responsibilities under the contract, instruct the Contractor to execute all such work or to do all such things as may, in the opinion of the Engineer, be necessary to abate or reduce the risk. The contractor shall forthwith comply, despite the absence of approval of the employer. The Engineer shall determine an addition to the Contract Price, in respect of such instruction, in accordance with Clause 52 and shall notify the contractor accordingly, with a copy to the employer.”

We are thus of the view that the learned single Judge rightly upheld the plea that in view of the emergency work required to be done, the engineer had invoked the power under clause 2.1 (viii) of COPA Part-II, which is apparent from the minutes of the meeting dated 31.03.2006. This position is, in fact, sanctified by release of the provisional payments in this behalf.

Learned senior counsel for the appellant does seek to contend that the provisional payments are released with the object of work not being stalled, but then it is not a case where there is an issue of discrepancy of the amount payable, but the plea of the appellant is that no amount is payable whatsoever on this count. Therefore, the occasion to release any payment on this count could not have arisen but with concurrence of the concerned authorities including the engineer present at site; which power having been exercised as per specific clauses of COPA Part-II.

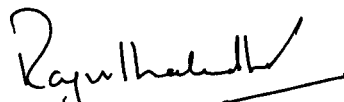
We may also note that in para 13 & 14, learned single Judge has dealt with the issue of pre-bid queries raised by the respondent and the consequent answers/responses as a result of which the respondent did not include the work of removal of stumps and roots and backfilling of pits in relation to trees of girth more than 300 mm and thus under the existing contract, there could not have been enlargement of that work.

We may note in the end that the matter really involves interpretation of terms of the contract for which the arbitral tribunal of technical people was constituted which has dealt with the matter and for this reason it does not call for any interference in appeal as there is no perversity.

We make it clear that since the respondent is not represented before us and we are not aware whether any challenge has been laid or may be laid on the issue of reduction of interest, our order aforesaid, would in no manner preclude the respondent from laying a challenge, if so advised, on the issue of reduction of interest from 10% per annum to 8% per annum vide the impugned order.

Dismissed.


SANJAY KISHAN KAUL, J


RAJIV SHAKDHER, J

NOVEMBER 17, 2011/dm