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

+ **Date of Decision: 10.08.2011**

% **O.M.P. 640/2009 and O.M.P. 641/2009**

THE NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Mr. Sudhir Nandrajog, Senior
Advocate, with Mr. Bibhakar Misra
& Mr. Sumit Gupta, Advocates.

versus

AGRAWAL – JMC (JV)

.....Respondent

Through: Mr. Harish Malhotra, Senior
Advocate, with Mr. S.K. Chandwani,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may
be allowed to see the judgment? : No
2. To be referred to Reporter or not? : Yes
3. Whether the judgment should be reported
in the Digest? : Yes

VIPIN SANGHI, J. (Oral)

1. The petitioner-NHAI by this petition under Section 34 of the Arbitration & Conciliation Act, 1996 (the Act) assails the arbitral award dated 04.07.2009 made by a Arbitral Tribunal consisting of three learned Arbitrators, namely, 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; in favour of the petitioner and against the petitioner. The Tribunal primarily considered only one claim. The issue which arose before the Tribunal was *“Whether the work of stumps and roots removal and back filling of pits of the trees above 300 mm girth, cut and not forming part of the BOQ of the contract, is incidental to the project or payable separately”*. The Tribunal has held that the said work is payable separately.

2. The submission of Mr. Sudhir Nandrajog, learned senior counsel for the petitioner, is that the award made by the learned Tribunal is in ignorance of Section 201.1 of the Ministry of Surface Transport (MOST) Instructions. Section 201.1, as amended by the technical specifications, reads as follows:

“201.1 Scope: This work shall consist of cutting, excavating, removing and disposing of all materials such as trees of girth upto 300mm, 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).”

3. Mr. Nandrajog submits that the scope of the work covered by Section 201.1 includes cutting and removal of trees of girth up to 300 mm. He submits that the work of removal and disposal of stumps and roots of the cut trees, irrespective of the size of the girth, is also covered by Section 201.1.

4. Before proceedings further, it would be appropriate to refer to a few relevant facts. The contract was awarded to the respondent on 29.11.2005. On 01.02.2006, the petitioner conveyed that the competent authority of NHAI has accorded *in-principle* approval to the carrying out of work of cutting and removal of trees, which is not covered under the scope of the main contract and are causing encumbrance and obstruction in the execution of the contractual work, as a separate job. The respondent-contractor was asked to give its concurrence to carry out the work of cutting and removal of trees. It is not in dispute that the trees in respect whereof this correspondence took place, were of girth more than 300 mm and above. 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."*

5. On 07.02.2006, the petitioner awarded the work of cutting and removal of trees earmarked on both sides of the Highway in question. The petitioner referred to its communication dated 01.02.2006 and the respondent's letter dated 06.02.2006. One of the conditions in this work order was that the trees are to be cut at ground level.

6. The respondent carried out the work of cutting and removal of trees of girth more than 300 mm under the work order dated 07.02.2006. It is not in dispute that the Engineer as well as the Project Director of the NHAI approved provisional payment for the work of stumps and roots removal and back filling of pits of the trees of girth 300 mm or more. The respondent made payment on provisional basis up to IPC 8 for the said work. However, the petitioner, in its communication dated 28.08.2007, issued from the Headquarters of NHAI, stated that, based on the stipulation of Section 201.5, and considering that the work of cutting of trees was entrusted to the respondent as a separate job outside the scope of the contract agreement, it had been decided that variation proposal for stumps, roots removal including pit filling is not acceptable, and cannot be paid as variation item.

7. The dispute travelled to the Dispute Resolution Board, which unanimously took a view in favour of the respondent. Thereafter, the arbitration agreement was invoked by the petitioner and that is how the arbitration award in question has come to be rendered.

8. The submission of Mr. Nandrajog is that the question framed by the Tribunal itself was erroneous. It proceeds on the assumption that the work of stumps and roots removal and back filling of pits of the trees of above 300 mm girth does not form part of the BOQ of the contract. He submits that this is contrary to a plain reading of Section 201.1, as aforesaid. He further submits that the work order dated 07.02.2006 pertained only to the cutting and removal of the trees of girth more than 300 mm, about which there is no dispute. The said work having been done, the stumps and roots of the cut trees had to be removed and the back filling of pits had to be carried out under Section 201.1. The respondent was not entitled to claim any extra rates for carrying out the said work.

9. Mr. Nandrajog submits that the Tribunal has been influenced by the fact that the Engineer and the Project Director had recommended provisional rates to the NHAI Headquarters for payment to the respondent for the work of removal of stumps and roots and back filling of pits of trees above 300 mm girth. He submits that the mere recommendation made by the Project Director is neither here nor there, as the employer, who is alone entitled to approve the additional rates, is the Chairman of the NHAI. He submits that the authorization of the Project Director as the authorized representative of the employer is only for the purpose of Clause 68.2 of the contract agreement. Clause 68.2 provides that *any notice to be given to the*

Employer or to the Engineer under the terms of the Contract shall be sent by post, cable, telex, facsimile transmission to or left at the respective addresses nominated for that purpose in Part-II of these conditions. He submits that the nomination of the authorized representative, i.e., the Project Director was only for the purposes of Clause 68.2 and for no other purpose. Therefore, the provisional decision of the Project Director to pay provisional rates for the work in question cannot be said to be the final decision of the employer.

10. He further submits that under Clause 2.1 of COPA Part-II, it defines the Engineer's duties & authority. It is provided that the Engineer shall obtain prior permission from, and specific approval of, the employer before taking the decision, inter alia, "*certifying additional cost determined under Clause 12*"; "before issuing orders to execute new items of work (non BOQ item), Engineer shall obtain technical approval from employer".

11. Mr.Nandrajog submits that the understanding of the respondent-contractor was also very clear in this regard, that the approval granted by the Project Director was only provisional and subject to the approval by the employer. In this regard, he places reliance upon the respondent's pleading contained in para 19 of the statement of claim, which reads as follows:

"The Claimant commenced the removal of stumps and roots and back filling of pits and continued to execute the

item pending final approval from the employer. The Engineer certified the payments for the work done at provisional rates and Respondent duly released the certified payments till June 2007 on provisional rates recommended by Engineer and paid by Employer per tree subject to the approval of rates by NHA HQ."

12. The next objection of Mr. Nandrajog pertains to the award of interest @ 10% per annum. He submits that the rate of interest is excessive.

13. On the other hand, the submission of Mr. Harish Malhotra, learned senior counsel for the respondent, is that even prior to the award of contract the petitioner had given clarification on various issues to the pre-bid queries. He refers to the following queries and the answers given by the petitioner in this regard:

Sl. No	Queries	Clarification
2.	<i>The Co-ordination for shifting of utilities is thrown on contractor for which he is not entitled for any payment. It is invariably seen that utility agencies/Tee authorities take their own sweet time and do not bother to shift/cut in time putting the work progress to complete disruption. Please hence do take up with them instead of saying 'hands up', and go to hell.</i>	<i>The Contractor is required to co-ordinate only with the respective authorities. Responsibility of shifting lies with NHAI.</i>
31.	<i>It is seen that there is no BOQ item included for cutting of trees. It is hence presumed either no cutting of trees are involved or the same is</i>	<i>The same has been clarified in Sl.No.2.</i>

	<i>not to be done by the Contractor.</i> <i>Delay on this affecting the progress shall be to the account of Employer.</i>	
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14. He submits that the rates quoted by the respondent were based on the answer to the aforesaid queries given by the petitioner. Mr. Harish Malhotra submits that the contractor, in view of the aforesaid pre-bid clarifications, did not include the work involved in removal of stumps & roots and back filling of pits in relation to the trees of girth more than 300 mm. Therefore, the petitioner cannot, now, seek to enlarge the scope of the respondents responsibility under Section 201.1. Mr. Malhotra submits that a meeting was held between the representatives of the petitioner, the Engineer and the contractor on 31.03.2006. In this meeting, the representative of the petitioner, namely, the Project Director informed that trees of girth more than 300 mm will be cut by the respondent-contractor under a separate work order. The respondent requested for variation order for removal of stumps & roots and back filling of pits by suitable soil resulting from uprooting of trees & stumps and also making the surface in proper grade by Motor Grader and compacted by Power Roller to the required compaction as per Section 300 of TS. The petitioner-employer and the consultant informed the respondent-contractor to carry out the removal of stumps & roots and back filling immediately in view of

safety of road users. At the same time, the respondent-contractor was requested to make proposal for variation order.

15. Mr. Malhotra further submits that the Engineer is not powerless to issue instructions to the contractor, without approval of the employer. He refers to Clause (viii) of Clause 2.1 of COPA Part-II, which provides that, *"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."*

16. Mr. Malhotra submits by reference to the minutes of the meeting held on 31.03.2006 that the instruction to remove the stumps & roots of trees of girth more than 300 mm was issued by the Engineer *"in view of safety of road users"*. This was an emergency and the power under Clause 2.18 A of COPA Part-II was invoked by the Engineer. He further submits that the work order dated 07.02.2006 had also been issued by the Project Director on behalf of the employer. He submits

that the Chairman of the NHAI, who is the employer, does not individually deal with the construction contracts and it is the Project Director, who represents him in all matters. He submits that the rate analysis provided by the respondent was approved by the Engineer in its communication dated 17.11.2006. He also submits that the petitioner has not even questioned the rate analysis relied upon in the calculation of the amount awarded to the respondent.

17. Mr. Harish Malhotra also refers to Section 201.5 of the MOST Specifications, which provide as follows:

“201.5. Measurements for Payment

*Clearing grubbing for road embankment, drains and cross-drainage 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”
(emphasis supplied)

- 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."

18. He submits that the measurement in respect of cutting, including removal of stumps & roots, of trees girth above 300 mm and back filling to required compaction is measured on a separate basis altogether, i.e., in respect of each such case, the measurement is to be taken separately and the amount is to be paid depending on the girth of the tree that is cut and removed, and of which the stumps and roots are removed and for filling done to the required compaction. On the other hand, the payment of work of cutting and removal of trees and for back filling and compaction, where the girth of the trees is up to 300 mm is to be paid on per hectare basis.

19. It is also submitted by Mr. Malhotra that before the Arbitral Tribunal the submission of the petitioner was that the activity of clearing and grubbing, i.e., removal of the stumps and roots and the activity of rolling and compaction in relation to the trees with girth more than 300 mm formed part of the scope of the work awarded under the work order dated 07.02.2006. It was claimed by the petitioner that the said work was incidental to the work awarded by the said work order. This submission of the petitioner has been rejected by the Tribunal by referring to Clause 3 of the respondent's

communication dated 06.02.2006. He submits that Section 201.1 was not even specifically relied upon by the petitioner before the Tribunal.

20. Having heard the submissions of learned counsels for the parties, perused the award and the materials relied upon by the parties, in my considered view, the petitioner has failed to make out a case of either a patent illegality in the impugned award, or a case of the tribunal ignoring, or acting contrary to a contractual term (and therefore exceeding its jurisdiction) while making the impugned award. The view taken by the arbitral tribunal, which is a body of three experienced experts in the field, is a plausible view and, that being the position, does not call for interference in these proceedings under Section 34 of the Act.

21. A perusal of Section 201.5 supports the contention of the respondent that the activity of not only the cutting and removing of trees of girth more than 300 mm was excluded from the scope of the work detailed in Section 201.1, but even the work of removal of stumps and roots of such trees and of backfilling to required compaction was not covered by Section 201.1. It is precisely for this reason that the said activity is to be paid for not on hectorage basis, but on the basis of individual cases, depending on the girth of the trees.

22. Even a reading of Section 201.1 does not support the submission of the petitioner. The said section uses the expression "... .. *It shall*

include excavation backfilling resulting from uprooting of trees and stumps ”. Therefore, the process of excavation, backfilling and compaction is a process which is to accompany the process of cutting and removal of the trees. Since Section 201.1 talks of cutting and removal of trees of girth upto 300 mm only, the process of excavation, filling and compaction provided in Section 201.1 would only pertain to those trees and not to trees having girth more than 300 mm. The process of excavation, filling and compaction in relation to stumps and roots of trees, for it to be covered by Section 201.1 has to relate to those trees which have girth upto 300 mm and no more.

23. I also find force in the respondents submission that clause (viii) of clause 2.1 of COPA-II entitles the Engineer, in emergency situations – which affect the safety of life or of the works, to instruct the contractor to carry out works as may be necessary to reduce or abate the risk. Such instructions do not require the approval of the employer. The correspondence shows that the petitioner invoked the said clause while requiring the respondent to carry out the work of cutting and removal of trees of girth more than 300 mm. The respondent accepted the said work while making it clear that the respondent would be entitled to be paid extra for carrying out the work of removal of stumps, excavation, backfilling and compaction. The petitioner did not question this stand of the respondent by placing reliance of Section 201.1 of MOST specifications as applicable. The

respondent was entitled to be paid extra in accordance with clause 52. The view taken by the arbitral tribunal appears to be a perfectly plausible view and it cannot be said that its view does not take into account the contractual terms and conditions.

24. So far as the rate of interest is concerned, I am of the view that considering the period in question, the fair and reasonable rate would have been 8% p.a. Accordingly, the rate of interest awarded by the tribunal stands reduced to 8% p.a.

25. With the aforesaid modification in the impugned award, this petition stands disposed of.

26. Parties are left to bear their respective costs.

VIPIN SANGHI, J

AUGUST 10, 2011

'BSR'