

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

F-163

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O.M.P. No. 347 of 2007

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner
Through: Ms. Padma Priya & Mr. Mukesh
Kumar, Advocates

versus

**SSANGYONG ENGINEERING & CONSTRUCTION
CO. LTD. – ORIENTAL STRUCTURAL ENGINEERS
LTD. (JV)** Respondent
Through: Mr. Anil Airi & Ms. Bindiya L.
Loganney, Advocates

CORAM: JUSTICE S. MURALIDHAR

ORDER

11.12.2012

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') by the Petitioner National Highways Authority of India ('NHAI') is to an impugned Award dated 14th March 2007 passed by the arbitral Tribunal ('AT') in the disputes between NHAI and the Respondent, Ssangyong Engineering & Construction Co. Ltd. – Oriental Structural Engineers Ltd. (JV) arising out of awarding of a contract dated 12th February 2001 for four laning and strengthening of the existing two lane sections on National Highway No.2 between Km.140 and Km.180 in Bihar.

2. The subject matter of the impugned Award were four claims which read as under:

I. Claim No.1: Dispute regarding non-payment under item 2.02 of BOQ of earthwork against 15 cm fill due to clearing and grubbing.

II. Claim No.2: Dispute regarding non-payment of bituminous tack coat below SDBC layer.

III. Claim No.3: Additional Entry Tax – Subsequent Notification.

IV. Claim No.4: Dispute regarding payment for Temporary Diversion at Punpun Bridge.”

3. Of the above Claims, Claim No.4 was rejected by the AT and the Respondent has not challenged that part of the impugned Award. NHAI is aggrieved by the impugned Award as regards Claim Nos.1, 2 and 3.

4. At the outset, it must be noted that as far as Claim No.1 is concerned, the issue stands covered by the decision of this Court dated 30th November 2011 in OMP No.455 of 2010, which has been affirmed by the Division Bench by its decision dated 22nd November 2012 in FAO (OS) No. 47 of 2012 (*National Highways Authority of India v. Hindustan Construction Company Ltd.*). Consequently, the challenge to the impugned Award in respect of Claim No.1 is rejected.

5. As regards Claim No.3, viz., “Additional Entry Tax – Subsequent

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Notification”, the issue stands covered by the decision of the Division Bench of this Court in *National Highways Authority of India v. ITD Cementation India Ltd.* 2008 (100) DRJ 431 (DB) which has been followed in a large number of subsequent judgments including *National Highways Authority of India v. Hindustan Construction Company, Ltd.* (*supra*). Consequently, the challenge to the impugned Award as regards Claim No.3 is also rejected.

6. Claim No.2 concerned “non-payment of bituminous tack coat below SDBC layer”. The relevant Bill of Quantities (‘BoQ’) items as regards work of tack coat are as under:

“4.02 Providing bituminous tack coat complete with bituminous emulsion as per Technical Specifications Clause No.503.

a) On granular surface treated with primer/hungry bituminous surface @ 2.50-3.00 kg/per 10 Sq.m.

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4.04 Providing semi dense bituminous concrete for service roads and internal roads in rest areas complete as per Technical Specifications Clause 511.

....

6.03 Providing and lying 25 mm thick semi dense bituminous concrete as per Technical Specifications Clause 511.

...

6.07 Providing bituminous tack coat complete as per Technical Specifications Clause No. 503.

On normal bituminous surface @ 2.00-2.50 kg./per 10 Sq.m.

.....

9.16 Providing renewal coat with 25mm semi dense Bituminous carpet including profile correction course as per Technical Specifications Clause No.511.”

7. The above BoQ items referred to in the Technical Specifications ('TS') Clause 511 deal with the scope of work of semi dense bituminous concrete ('SDBC'). TS Clause 511.1 defines the scope as consisting of “construction in a single course of semi-dense bituminous concrete binder/wearing course on a previously prepared bituminous base to the requirements of the Specifications”. TS Clause 511.4 details the 'Construction Operations' and sets out how the SDBC should be prepared. It reads as under:

“511.4.1. Weather and seasonal limitations: Clause 504.3.1 shall apply.

511.4.2. Preparation of base : The base on which semi-dense bituminous concrete is to be laid shall be prepared, shaped and conditioned to the specified lines, grades and cross-sections in accordance with Clause 501 or as directed by the Engineer.

511.4.3. Tack Coat: A tack coat as per Clause 503 shall be applied on the base.

511.4.4. Preparation of mix: Clause 507.4.4 shall apply.

511.4.5. Spreading of mix: Clause 507.4.5 shall apply.

511.4.6. Rolling: Clause 507.4.6 shall apply.”

8. It is not in dispute that for preparing/laying SDBC tack coat as per TS Clause 503 it has to be applied on the base which is to be prepared in

terms of TS Clause 511.4.2. TS Clause 503 titled 'Tack Coat' sets out the entire scope of work of tack coat. Under TS Clause 503.1, the work of tack coat consists of "application of a single coat of low viscosity liquid bituminous material to an existing road surface preparatory to another bituminous construction over it." Significantly, a table, which is part of TS Clause 503, specifies the rate of application of tack coat as the quantity of liquidated bituminous material in kg. per 10 sq. m area. Incidentally, the payment for the tack coat under BoQ Items 4.02 and 6.07 is also only in sq. m as distinguished from BoQ Items 4.04 and 6.03 where the work of providing SDBC is paid in cubic meter ('cu. m').

9. The controversy between the parties arises out of the claim made by the Respondent separately for laying tack coat which had to be paid in sq. m at the rate specified in BoQ Items 4.02 and 6.07 whereas according to the NHAI, the work was integral to the work of SDBC for which payment was made under BoQ Item 4.04. Reliance was placed by NHAI on TS Clause 511.9 which reads as under:-

"511.9 Rate

The contract unit rate for semi-dense bituminous concrete shall be payment in full for carrying out the required operations including full compensation for all components listed in Clause 504.8 (i) to (vi). The rate shall cover the provision of bitumen in the mix at 4.5 per cent of the weight of the total mix, with the provision that the variation of quantity of bitumen will be assessed and the payment

adjusted as per the rate of bitumen coated.”

10. TS Clause 511.8 specifies that the SDBC shall be measured as finished work “in cubic metres or tonnes as directed by the Engineer.” Inasmuch as TS Clause 511.9 makes a reference of TS Clause 504.8, reference may be made to the said clause, which reads as under:

“504.8 Rate

The contract unit rate for the work shall be payment in full for carrying out the required operations including full compensation for:

- (i) Making arrangements for traffic to Clause 112 except for initial treatment to verge, shoulders and construction of diversions;
- (ii) Preparation of base except for laying of profile corrective course but including filling of potholes;
- (iii) Providing all materials to be incorporated in the work including arrangement for stock yards, all royalties, fees, rents where necessary and all leads and lifts;
- (iv) All labour, tools, equipment, plant including installation of hot mix plant, power supply units and all machineries, incidental to complete the work to the Specifications;
- (v) Carrying out the work in part widths of the road where directed;
- (vi) Carrying out all tests for control of quality; and
- (vii) The rate shall cover the provision of bitumen at 3.25 per cent of weight of total mix, with the provision that the variation of quantity of bitumen will be assessed and the payment adjusted as per the rate of bitumen quoted.”

11. The Engineer rejected the contention on the ground that the laying of tack coat was integral to the operations involved in the SDBC work. In the impugned Award, the AT upheld the contention of the Respondent by observing that the contract unit rate for tack coat is governed by TS Clause

503.7. Further, the “whole clause 503 is applicable to all the three works wherein the tack coat has been provided to be measured and paid separately”. It was held that “except tack coat made in amendment to clause 507.9 and 512.9 is superfluous” and that the payment for the tack coat work under SDBC was admissible to the Respondent.

12. Ms. Padma Priya, learned counsel for NHAI, submits that the wording of TS Clause 511.9 is unambiguous when it states that the contract unit rate for SDBC shall be payment in full for carrying out the “required operations” which has been set out as part of TS Clause 511.4 sub head “Construction Operations”. The contention is that inasmuch as under TS Clause 511.4.3, tack coat is included as part of construction operations, it cannot be paid separately. Further, TS Clause 511.9 only states that the payment for SDBC would include full compensation for components listed in TS Clause 504.8 (i) to (vi). That did not mean that merely because the tack coat was not mentioned in TS Clause 504.8 (i) to (vi), it was required to be paid for separately. It is reiterated that wherever when it was intended that the tack coat had to be paid for separately, appropriate amendment was carried out in the clauses like TS Clause 507.9 (rate for dense bituminous macadam) and TS Clause 512 (bituminous concrete). In other words, it is contended that since the impugned Award is contrary to the specific provisions of the

contract, insofar as Claim No.2 is concerned, it is opposed to the public policy of India and has to be set aside.

13. On behalf of the Respondent, it is pointed out by Mr. Anil Airi, learned counsel that there is a distinction drawn in the contract itself in the BoQ items between the work of SDBC which is measured in cu.m and the work of laying the thin layer of tack coat which is required to be measured in sq. m. It is explained that since the layer of tack coat is very thin it cannot possibly be measured in cu. m as it is literally spread over a base on which the SDBC mix is laid. It is, therefore, measurable only in sq. m and paid for as such. While it is not disputed that the operations work SDBC would include laying of tack coat, it is submitted that TS Clause 511.9 does not exclude separate payment for tack coat.

14. The present controversy is narrowed to the payment for the work of tack coat and the interpretation of TS Clause 511.9 which talks of the rate for payment for the SDBC work. It also turns on the interpretation of the work 'including' in TS Clause 511.9. The question that arises is whether TS Clause 511.9 implies that the unit rate for the SDBC would include the work of tack coat and full compensation for all components listed in TS Clause 504.8 (i) to (vi) and, therefore, impliedly excludes any separate payment for

tack coat in terms of TS Clauses 503.6 and 503.7 read with BoQ Items 4.02 and 6.07.

15. TS Clause 503.6 makes it clear that "tack coat shall be measured in terms of surface area of application in sq. m." Further, TS Clause 503.7 specifies the rate for payment of tack coat. There is no doubt that the work of SDBC includes construction operations which are specified in TS Clause 511.4 and includes laying of tack coat as per TS Clause 503. TS Clause 511.9 makes it clear that payment for SDBC would be made in full and this would include payment for components listed in TS Clause 504.8 (i) to (vi). Payments for SDBC, in fact, have been separately indicated also in BoQ Item 4.04. There appears to be a conscious distinction made in the manner of measuring and making payments for tack coat in TS clauses as well as BoQ items. The laying of tack coat has been dealt with in TS Clause 503 and described in great detail. It is not possible to interpret TS Clause 511.9 as excluding payment for tack coat in the manner required under TS Clause 503.6 and TS Clause 503.7. The reference to tack coat in TS Clause 511.4.3 is only to make it clear that "a tack coat as per Clause 503 shall be applied on the base." That by no means suggests that payment for the tack coat in terms of TS Clause 503.6 read with TS Clause 503.7 should not be made separately. In fact, if TS Clause 511.8, which talks of measurements for payment of

SDBC (which is to be made in cu. m) is compared with TS Clause 503.6 which clearly shows that measurement for payment of tack coat shall be made in sq. m, it becomes clear that TS Clause 511.9, as it is worded, is not intended to, and in fact does not, exclude separate payment for tack coat. On the contrary, if there was an intention not to make payment for tack coat separately, that should have been made explicit in the wording of TS Clause 511.9.

16. The decision of the AT, on an interpretation of the above clauses, is certainly a plausible one and cannot be said to be suffering from any illegality. In the circumstances, the Court is not inclined to interfere with the impugned Award as regards Claim No.2.

17. It is submitted by NHAH that the AT erred in awarding the Respondent interest on interest. A perusal of the impugned Award shows that in respect of Claim No.1, the AT has, in para 10 of the findings, awarded to the Respondent interest @ 12% per annum on the sum of Rs. 1,83,96,562 and then again in para 11 awarded interest @ 12% per annum on the same principal + interest in terms of paras 9 and 10. Likewise, in deciding Claim No.3, while determining the principal amount in para 6.1 and the interest @ 12% per annum in para 6.2, the AT has, in para 6.4, awarded further post-

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Award interest @ 12% per annum on the aforementioned sums, inclusive of interest.

18. In light of the decision of the Supreme Court in *State of Haryana v. M/s. S.L. Arora and Company AIR 2010 SC 1511*, the above award of interest on interest by the AT cannot be sustained in law. Although the correctness of the said decision is pending consideration for a larger Bench of the Supreme Court, this Court is bound by the decision in *State of Haryana v. M/s. S.L. Arora and Company* as it presently holds the field. Consequently, the post-Award interest awarded by the AT @ 12% per annum will be applicable only to the principal amount awarded under Claim Nos.1 and 3.

19. Subject to the above modification as regards the post-Award interest, this Court finds no reason to interfere with the impugned Award as regards Claim Nos.1, 2 and 3. The petition is disposed of in the above terms, but in the circumstances, with no order as to costs.



S. MURALIDHAR, J.

DECEMBER 11, 2012

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