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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 921/2011

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Judgment dated 23.01.2012

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through; Ms.Tanu Priya Gupta and
Mr.Mukesh Verma, Advocates

versus

ITALIAN THAI DEVELOPMENT PUBLIC COMPANY
LTD AND SOMDUTT BUILDERS LIMITED Respondent

Through: Mr.S.B. Upadhyay, Sr. Advocate with
Mr.Arvind Minocha, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. This is a petition under Section 34 of Arbitration and Conciliation Act, 1996, assailing the Award passed by the learned Arbitral Tribunal on 6.7.2011.
2. In this case the arbitral tribunal has rendered the award on 05.12.2005. Thereafter this court had remanded the matter back to the arbitral tribunal to re-adjudicate issue no.1. After the matter was remanded, the arbitral tribunal has rendered the award on 06.07.2011 and issue no.1 has been decided in favour of the claimant and the stand taken by the respondent, petitioner herein, has been rejected.
3. In this case respondent was awarded a contract bearing No.TNHP/1, Construction Package-IIA on 07.02.2001 for a contract price of Rs.2,89,30,49,814/- for executing the work of 4 laning and strengthening

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By:AMULYA

of the existing 2-lane highway section from km. 393 to km. 470 on NH-2, via Sikandra-Bara Route in the state of Uttar Pradesh. *Primarily* following two disputes were raised by the respondent herein to the arbitral tribunal:

- (i) "Claim for refund of amount of Rs.45,43,842.69 wrongfully withheld/ denied by Respondent of BOQ Item 2.02.
- (ii) "Claim for refund of amount of Rs.4,67,91,578.62 wrongfully recovered denied by Respondent of BOQ Item 3.03 (Drainage Layer)."

- 4. Present objections concern the claim No.1, which was remanded to the arbitral tribunal. Learned counsel for the petitioner submits that the arbitral tribunal has passed an award which is against the law and the facts of this case. Counsel also submits that the arbitral tribunal has failed to discuss the merits and de-merits of the submissions made by the petitioner herein and has failed to specifically decide on the issues which were formulated by this court. It is also submitted that the arbitral tribunal has erroneously proceeded on the basis that the soil used for backfilling of the pits is in fact the soil, which was validly available to the respondent while performing his obligation under Clause 201.1.
- 5. It is submitted that the award has been passed without application of mind and without appreciating the facts of the case. Learned counsel for the petitioner has strenuously argued before this court that the Arbitral Tribunal has failed to interpret clause 201.1 in its right perspective. It is contended that the earth which was available to the contractor, could not have been used for filling up the pits which were created on account of removal of trees and only the existing pits could have been filled up from existing and suitable soil. It is submitted that since clause 201.1 does not provide for filling up pits from removal of trees, the respondent,

contractor could not have used the soil, which was available for filling up of the pits. It is submitted that the amount of Rs.45,43,842.69, was deducted out of the bills of the contractor by a communication addressed to the contractor dated 15.09.2001. Counsel for the petitioner does not dispute that subsequently this order of deduction was re-considered by the Engineer by communication dated 25.10.2001. It is also submitted that the second communication was also re-considered by the Engineer and the amount was deducted and thus the respondent herein cannot gain any advantage of the communication dated 25.10.2001 sought to be relied upon by the respondent herein.

6. While no notice was issued in the matter, respondent appeared on service of an advance copy and has also filed documents on record and arguments were also advanced by both the sides. Counsel for the respondent has opposed this petition, firstly on the ground that this court is not a court of appeal and it cannot re-appreciate the evidence on record, for which counsel has relied upon the observations made by a Division Bench of this court in Union of India Vs. Arctic India reported in 2010 (4), Arb. L.R, 58. Relevant portion reads as under:

“Arbitration, as an alternative dispute resolution mechanism, has now developed into a robust institution, capable of effectively and expeditiously deciding disputes, especially because of specialized knowledge of the arbitral tribunals. With this metamorphosis, the superintendence of the courts has expectedly and exponentially waned. Initially, jural interference was allowed wide amplitude by the Supreme Court, leading to a proliferation in the grounds on which awards could be assailed. Whilst initially awards were susceptible to being set aside if all questions raised were not discussed in the award, with the passage of time the fiction that all points had been duly considered and rejected came to be adopted to insulate awards from jural censure. Similarly, whilst it was earlier accepted that awards should contain reasons in clear terms, it was subsequently opined that if the trend/ chain of thought was discernible, the award was impregnable to attack. Most

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significantly, Their Lordships have gone to the extent of enunciating that judicial interference is not called for even in those instances where the arbitrator may have committed an error of fact.”

7. In support of the above submission, counsel has also relied upon a decision rendered by the Apex Court in **J.G. Engineers Private Limited Vs. Union of India & Anr.** reported in (2011) 5 SCC 758, more particularly para 10, which reads as under:

“10. A Civil Court examining the validity of an arbitral award under section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in sections 34(2)(a) (i) to (v) or section 34(2)(b)(i) and (ii), or section 28(1)(a) or 28(3) read with section 34(2)(b)(ii) of the Act, are made out. An award adjudicating claims which are 'excepted matters' excluded from the scope of arbitration, would violate section 34(2)(a)(iv) and 34(2)(b) of the Act. Making an award allowing or granting a claim, contrary to any provision of the contract, would violate section 34(2)(b)(ii) read with section 28(3) of the Act.”

8. Learned counsel for the respondent submits that the Arbitral Tribunal has considered the matter threadbare and has given a reasoned award, which is evident on bare perusal of the reasons. The reasons given by the arbitral tribunal are re-produced below:

“6.1 In their reply to the Preliminary Points, the Respondents have referred to “the issue on which dispute arose between the parties and was referred to this Ld. Arbitral Tribunal for adjudication and on which the Award has been passed and since set aside on this claim”. This statement made by the Respondent is not correct. It is to be noted that the

original Award made by the Arbitral Tribunal has not been set aside by the Hon'ble Delhi High Court, which has only passed orders that "this matter is remanded back to the Arbitration Tribunal for deciding afresh, in accordance with law, the Claim No.1.

6.2 Clause 201.1 on page 314 of contract provides for clearing and grubbing to a minimum thickness of 150 mm. As per evidence produced before us, clearing and grubbing has been done as per cross sections approved by the Engineer, Exhibit C-11. As per these approved cross sections, scraping of soil has been done to the extent where required and directed by the Engineer to a thickness of 150 mm, which has been measured and certified by the Engineer and paid by the Respondent in IPC-73 (Exhibit CH-3). There is no evidence that scraping of soil to a depth greater than 150 mm from the ground level has been carried out by the Contractor at any point along the length of the road.

6.3 The contract clause 201.1.6 provides that suitable soil obtained from clearing and grubbing is permitted to be used and only unsuitable material is required to be disposed of. Also further regarding the use of earth by the Contractor from Right of Way (ROW) or work area, it is observed that though the excavated material is the property of the Employer, as contended by the Respondent, the same can be used for filling the pits in the Right of Way (ROW) or work area, as per Clause 301.3.11 of Technical Specifications of MOST.

6.4 The soil used for filling the pits resulting from removal of the tree roots was available from clearing and grubbing operation in sufficient quantity as per details filed by the Claimant. As per IPC-73 filed by the Claimant, the quantity available from the roadway excavation was 3,14,225.396 cu.m. for Sections 1, 2 and 3 (IPC-73, BOQ item 2.01) whereas only 13,197,930 cu.m. (IPC-73, BOQ item 2.04) has been used in embankment with road excavation soil. Sufficient balance quantity was, therefore, available from roadway excavation, which is also permitted to be used for filling pits as per Clause 301.3.11. From this, we conclude that enough suitable soil was available from the work area for filling the pits after removal of the roots and there was no necessity for the Contractor to bring any soil from borrow

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areas outside the ROW.

6.5 As per the Field Density test report filed by the Claimant (Exhibit 10-B and 10-C) the Engineer has approved use of existing soil for filling the pits. Therefore the contention of the Respondent that no suitable soil was available from clearing and grubbing operation is incorrect.

6.6 At (sic. It) has also observed that the Claimant's statement that the dispute was limited to length of road in Chainage 0-34 while there is no dispute for that in Chainage 34-61, though the factual position in both these chainages is the same, has not been refuted by the Respondents."

9. Strong reliance has also been placed by counsel for the respondent on clause 201.1, hence, it would be useful to reproduce the same:

"201.1 Scope (as amended)

This work shall consist of cutting, removing and disposing of all materials such as trees of girth up to 300 mm., bushes, shrubs, stumps, roots, grass, weeds etc. and top soil 150 mm minimum thickness rubbish etc., which in the opinion of the Engineer is unsuitable for incorporation in the work including draining out stagnant water if any from the area of road land, drains, cross drainage structures and such other areas as specified in the drawings by Engineer. It shall include necessary excavation by narrow discs or an other suitable equipment, backfilling on the pits, by suitable soil, resulting from uprooting of trees and stumps and making the surface in proper grade by suitable equipment and compacted by power roller to required compaction as per clause 300. The work also includes handling, salvaging and disposing of cleared materials. Clearing and grubbing shall be performed in advance of earthwork operations and in accordance with the requirements of these Specifications."

10. While relying on Clause 201.1, counsel for the respondent submits that respondent was to carry out the work of cutting, removing and disposing

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of all material, which was to be cleared at the time of the preparation of the carriageway. This included the aforesaid clearing, including bushes, shrubs, stumps, roots, grass, weeds etc. and the contractor was entitled to remove the top soils of 150 mm minimum thickness including rubbish etc. which in the opinion of the engineer was unsuitable for incorporation in the work including draining out stagnant water. It is also submitted by counsel for the respondent that the bills raised by the respondent were approved by the Engineer in charge upon proper verification, which has been taken into consideration by the arbitral tribunal. It is submitted that the arbitral tribunal has relied upon the evidence and also upon the approval granted by the Engineer which has been marked as Ex.C-11. Counsel further submits that as per the approved cross sections, scraping of soil has been done by the contractor to the extent wherever required and on the instructions and directions of the engineer to the thickness of 150 mm, which has been duly measured and certified by the engineer and payments made by the petitioner herein in IPC -73 (Exhibit CH-3). Counsel for respondent submits that the arbitral tribunal has come to a definite finding that there was no evidence that scraping of soil to a depth greater than 150 mm from the ground level has been carried out by the contractor at any point along the length of the road. Counsel has also placed strong reliance on the observations and finding of the arbitral tribunal that the suitable soil obtained from clearing and grubbing is permitted to be used and only unsuitable material is required to be disposed of. Counsel for the respondent submits that present dispute is to be considered in the light of Clause 201.1, which is exhaustive in nature and which clearly stipulates that the backfilling of pits with suitable soil has to be carried out by the contractor, which results from up-rooting of trees and stumps and it was open for the contractor to make the surface by

suitable equipment and compacted by power roller to required compaction as per clause 300.

11. Both the parties have relied upon Clause 301.3.11 of the Technical Specifications. It would be useful to reproduce the same.

“301.3.11. Disposal of excavated materials : All the excavated materials shall be the property of the Employer. The material obtained from the excavation of roadway, shoulders, verges, drains, cross-drainage works etc., shall be used for filling up of (i) roadway embankment, (ii) the existing pits in the right-of-way and (iii) for landscaping of the road as directed by the Engineer, including leveling and spreading with all lifts and lead upto 1000 m and no extra payment shall be made for the same.”

12. While counsel for the petitioner submits that the excavated material would be the property of the employer i.e. the petitioner herein and thus the contractor was not allowed to fill up the pits from the material which was available at the site, counsel for the respondent has relied upon the clauses and more particularly wherein it has been stated that only the existing pits in the right of way, land scrapping of the road as directed by the Engineer including leveling and spreading with all lifts, could only have been done by the contractor and this would not cover the pits which were firm after the trees etc. were removed.
13. Counsel for the respondent submits that the above said clause firstly does not preclude the pits which would be created on removal of trees and secondly this clause is wide enough and it is to be read along with clause 201.1 extracted above, wherein it has been clarified that after the excavation is carried out, backfilling of the pits is to be done with suitable soil resulting from up-rooting of trees and stumps and making the surface in proper grade.

14. I have heard counsel for the parties and perused the documents placed on record. The stand taken by the petitioner herein has neither been urged before the arbitral tribunal when the first award dated 05.12.2005 was rendered, nor when the second award dated 06.07.2011 was rendered. The stand of the petitioner cannot be accepted that the contractor had lowered the soil illegally, since the arbitral tribunal has relied on the evidence, which have been recorded and had given a categorical finding that the area was not lowered greater than 150 mm at any point of time.
15. I have carefully perused the award, the documents placed on record as well as the reasoning which has been rendered by the Arbitral Tribunal and I find no infirmity or illegality in the same. Even otherwise, the law with regard to Section 34 of Arbitration and Conciliation Act, 1996, is well settled that the jurisdiction of the Court to interfere with the award made by an arbitrator is very limited and consequently the court while entertaining an objection petition under Section 34 of the said Act cannot sit as a Court of Appeal and that evidence is not to be re-appreciated. The Apex Court in the case of Markfed Vanaspati and Allied Industries Versus Union of India reported in (2007) 7 Supreme Court Cases 679, while relying on Bijendra Nath Srivastava (Dead) through LRs Versus Mayank Srivastava And Others reported in (1994) 6 Supreme Court Cases 117, has observed that "*the arbitrator is the sole judge of the quality as well as the quantity of the evidence. It will not be for the court to take upon itself the task of being a judge of the evidence before the arbitrator. The court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal*". Further in McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors reported in (2006) 11 SCC 181 it has been held by the Apex Court that "*the 1996 Act makes provision for the supervisory role of*

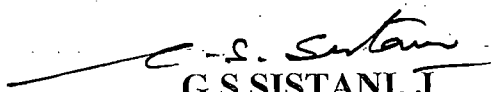
courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc". Recently, the observations of the Apex Court in para 21 in **P.R. Shah, Shares and Stock Brokers Private Limited Versus B.H.H. Securities Private Limited And Others** reported in (2012) 1 Supreme Court Cases 594 is worth noting in this respect. Para 21 reads as under:

"21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. Therefore, in the absence of any ground under section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

16. Having regard to the well-settled position of law the reasons rendered by the Arbitral Tribunal I am of the view that there is no merit in the present objections and the same are accordingly dismissed.

JANUARY 23, 2012

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G.S.SISTANI, J