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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. No. 392/2007

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12th August, 2015

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

**Through Mr. Vikas Goel, Advocate with
Mr. Abhishek Kumar, Advocate**

versus

M/S PRAKASH-ATLANTA JV Respondent

**Through Mr. Kirti Uppal, Sr. Advocate along
with Mr. Chirag Shroff, Ms.Sahiba
Pantel and Mr. Bhaskar Das,
Advocates**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeking to set aside the Award dated 12.02.2007 and the amended Award dated 02.04.2007 with respect to two claims which have been awarded to the respondent/contractor. The first claim is the claim with respect to the construction of a viaduct instead of a reinforced earth structure, and consequently the respondent/contractor is claiming cost of the viaduct as a

new item being not covered in the contract. The second dispute pertains to the respondent/contractor claiming reinforcing elements included in the reinforced earth walls which have to be constructed under the contract.

2. The Contract in question is dated 10.08.2001. It was for a sum of Rs.158,80,42,413/- for construction of a segment of Lucknow Bypass connecting NH-25 and NH-28 via NH-56 passing through Lucknow City in the State of U.P. (Contract Package No.EW 15 UP). The salient dates with respect to the Contract in question are as follows:-

“Issuance of invitation to bid (Annexure P-2-a)	19.2.2001
Pre bid meeting	07.3.2001
Issuance of addendum to the tender (Annexure P-2-b)	15.3.2001
Submission of bid by the Respondent (Annexure P-2-c)	20.3.2001
Opening of tender	21.3.2001
Issuance of letter of acceptance (Annexure P-2-d)	27.7.2001
Contract Agreement (Annexure P-2-e)”	10.8.2001

3. The Contract in question was an item rate contract containing quantities as well specifications of the contract.

4. With respect to the issue of the claim of the cost of a viaduct constructed, the facts are that from km. 1.400 to km. 2.920 the petitioner/owner directed construction of a viaduct in place of the reinforced earth structure. As per the petitioner/owner in terms of the meeting held on 29.11.2003 the respondent/contractor agreed that the respondent/contractor will not claim viaduct as a new item. Accordingly, petitioner/owner contended before the Arbitration Tribunal that construction of a viaduct should not be taken as a new item but should be taken as an item of reinforced earth walls and payment should only be made in terms of the contract as per the item rates as provided therein.

5. The Arbitration Tribunal considered this claim and held that once the work in question under the contract is written as a reinforced earth work, a direction to instead construct a viaduct would if not be a new item of work will be at least a varied item of work. The Arbitration Tribunal therefore treated the work as a varied item of work and in terms of the contractual provisions accordingly passed an Award with respect to a viaduct treating the same to the extent of quantities up to 125% (limit provided under the Contract for an item to be done at contractual rates) as per the rates provided in the Contract by virtue of Clauses 1.1, 38.1 and 40.2

of the Contract and beyond that at higher rates than the contractual rates. The relevant portion of the Award is contained in para 8.4.2 and para 10.1 thereof and which paras have been reproduced by the petitioner/owner in its petition as under:-

“Para 8.4.2

- (iv) A closer look at the wording of the Clause No.9 of the Contract data would reveal that the Road works and Bridge works mentioned thereunder were required to be carried out in accordance with the drawings and provisions of the contract. At the stage of signing the contract, the drawings and Bill of Quantities provided in the contract did not envisage construction of a viaduct, but envisaged construction of RES between chainage Km. 1.400 to Km. 2.920. Thus it is clear that the construction of the said viaduct is outside the original scope of the Contract. It could be brought within the scope of the contract by mutual consent of the parties to agree to a variation, which by definition (given in Cl.1.1 of the conditions of contract) is an instruction, given by the Engineer, which varies the works. In fact Team Leader’s Letter dt. 17.05.02 (Exhibit C-1) is an instruction to vary the nature of work between chainage Kms. 1.400 and Km. 2.920 from RES to a Viaduct. The said variation has been accepted and has been implemented by the Claimant.
- (v) While evaluating the items of varied work, reliance can be placed on B.O.Q. items, only if the conditions spelt out in the first half of G.C.C. 40.2 fulfilled. But if the original scope of work is varied, GCC clause 38.1 does not remain applicable and the second part of GCC Cl. 40.2 which reads as following becomes relevant.

“If the cost per unit of quantity changes or if the nature or timing of the work in the variation does not correspond with items in the Bill of Quantities, the quotation of the Contractor

shall be in the form of new rates for the relevant items of work”.

In view of the above the AT finds strength in the Claimant’s argument that the basis of his quoted rates included places and position where the works were to be executed for calculating leads, lifts etc. of major resources and agrees with the Claimant’s view that the BOQ rates-per say-would not be applicable in such a situation.

- (vi) The Contract Agreement was signed on 18.08.2001. The period of completion was 36 months. The variation was ordered on 17.05.02 i.e after 9 months of signing the Contract. Under such a situation the cost per unit of quantity would change irrespective of the price adjustment clause because of the timing and location of the work as per variation did not correspond with those of the items in the Bill of Quantities. In fact, a statement of additional resources to be deployed for viaduct work, was indeed furnished by the Claimants with his letter dated 05.07.02 (Exhibit C-6). The Engineer on 16.07.02 (Exhibit C-7) also accepted the need for at least some additional resources. Hence, as per GCC Cl.40.2, the quotation from the Contractor in the form of new rates for the relevant items of work needs to be given due weightage.*
- (vii) The Respondent has relied on the minutes of the meeting held on 29.11.03, wherein the Claimant had stated that they would not claim viaduct as a new item. The circumstances under which such an undertaking was given had been clarified by the Claimants in his letter dated 16.07.04 (Exhibit C-24) to which there was no further reply either from the Engineer or from the Employer. Moreover, the Claimant had agreed not to Claim viaduct as a new item, but had not conceded not to claim it as a varied item of work i.e. as a variation.*

- (x) *The AT therefore, is of the opinion that various items in the viaduct portion from Km.1/400 to km. 2/290 need to be treated as varied work under Cl.40.2. However as certain quantities of these items of work in the above stretch, were already covered as per the contract agreement and drawings (i.e.) for the flyovers/grade separators etc. planned as per contract agreement drawings), only contract rates with usual escalation should be applicable for the quantities as per the original scope of work in this reach plus 25% and new rates as varied item as per agreement condition should be considered only for quantities beyond it.*

Para 10.1

- (i) *The claim of the Claimant is accepted partially. The quantities of work of viaduct beyond 125% of the BOQ quantities of various items shall be treated as varied work and the rates for such excess quantities should be arrived as per GCC Cl.40.2 and 40.3.*
- (ii) *The AT directs the Employer to get the new rates for the above referred excess quantities of various items of work fixed by the Engineer, based on an examination of the Claimant's rate analysis and market rates to determine the balance payment due to the Claimant"* (underlining is mine)

6. This Court has power to interfere if the Award passed by the Arbitration Tribunal is either not in accordance with law [Section 28(1)(a) of the Act], or is against the contractual terms between the parties [Section 28(3) of the Act] or the Award is perverse. The law in this regard is laid down in the judgments of the Supreme Court in the cases of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd., (2003) 5 SCC 705* and *Oil &*

Natural Gas Corporation Ltd. Vs. Western Geco International Ltd., AIR 2015 SC 363. Putting it differently once two views are possible, this Court will not interfere if the Arbitration Tribunal arrived at one possible and plausible view.

7. In the present case the Arbitration Tribunal can be said to have arrived at a possible and plausible view as regards treating viaduct construction as a varied item of work, inasmuch as, the Contract in question required the work to be of reinforced earth walls and which work is definitely different than construction of a viaduct. Specifications of a viaduct are admittedly different than specifications of reinforced earth walls and therefore the Arbitration Tribunal has rightly held that taking the minutes of the meeting held on 29.11.2003 as final, yet, respondent/contractor at best has agreed not to claim this as a new item, however it cannot be said that respondent/contractor cannot claim the same as a varied item. This is one possible and plausible view and once higher cost is incurred by the respondent/contractor, the Arbitration Tribunal was perfectly justified in awarding the respondent/contractor the claim with respect to a viaduct in a limited manner. The objection in this regard of the petitioner/owner to the impugned Award is therefore dismissed.

8. I may note that the Arbitration Tribunal has left the issue of calculation in terms of the Award to the employer and though it would have been advisable for the Arbitration Tribunal to determine the amount itself, however, since there are no disputes at present as to the respondent/contractor questioning the calculations to be done by the petitioner/owner, I observe that in case there are any disputes which would remain as regards the calculations made by the petitioner/owner in terms of the portion of this Award, then, the respondent/contractor will always be at liberty to raise any fresh dispute or seek necessary amendment to the Award with respect to the amount which is calculated by the petitioner/owner on the issue of the cost of the viaduct.

9. That takes us to the second claim urged on behalf of the petitioner/owner and which is as to whether the reinforcing element is or is not included in the reinforced earth walls work which was required to be done by the respondent/contractor in respect of one of the items on the side of the bypass for the purpose of holding intact the soil under the constructed bypass. The Arbitration Tribunal has dealt with this issue in paras 9.4 and 10.2 of the Award and which paras have been reproduced by the petitioner/owner in its petition as under:-

“Para 9.4

- (i) *The working of B.O.Q. item No.5.41 refers to construction of reinforced earth structures together with construction of earth work in layers, assembly & erection of reinforcing elements & placement of facing panels etc. B.O.Q. item No.5.41 (a) reads construction of reinforced earth walls with precast panels, reinforcing element, foundation beams etc. From this wording, it appears that providing reinforcing element has not been specifically mentioned, although assembly and erection of reinforcing elements and placement of facing panels etc. has been mentioned. However, the concept of providing reinforced earth walls with precast panels, reinforcing elements etc. suggests the necessity of providing reinforcing elements.*
- (ii) *The AT has also noted from the contract agreement that it was the responsibility of the Contractor to design the Reinforced Earth Structure. As such the Claimant was aware of the type and quantity of the reinforcing elements right at the time of submitting its tender.*
- (iii) *Considering the preamble to the BOQ and the specification cl.703.6 it is clear that there is a conflict, regarding separate payment for reinforcing elements, between the interpretations of the wording of BOQ item 5.41(a) and the provisions of the specifications. The Respondent Employer failed to modify the specifications to make them in tune with the wording of the BOQ item.*
- (iv) *Under this conflicting situation the Claimant ought to have got, the matter about separate payment for the reinforcing elements, clarified from the Employer in the prebid meeting particularly because it knew about the type and quantity of reinforcing elements to be provided. This was not done by the Claimant in spite of the very apparent ambiguity and availability of an opportunity.*

- (v) *The ambiguity between the interpretations of the wording of BOQ item 5.41(a) and the provisions of the specification as regards separate payment for reinforcing elements, the possibility of alternative interpretation of the wording of BOQ items 5.41 and 5.41(a) and the failure of the Claimant to seek clarification in the prebid meeting, all need to be considered together.*
- (vi) *Under the above circumstances, the AT is of the view that both the Claimant and the Respondent are equally responsible for this conflict and as such they should equally share the cost of providing reinforcing elements. The Claimant is, therefore, entitled to 50% of the cost of procurement of reinforcing elements.*

Para 10.2

- (i) *This claim of the Claimant is also allowed partially. The Claimant is entitled to additional payment equivalent to 50% of the cost incurred by it for providing the reinforcing elements in the Reinforced Earth Structure plus 10% towards Contractor's overheads and profit. The Respondent should get the amount payable worked out by the Engineer based on duly verified procurement rates of various types of reinforcing elements.*
- (ii) *The claimant is not entitled to relief under price adjustment clause.”* (underlining is mine)

10. A reading of the aforesaid discussion and conclusion of the Arbitration Tribunal shows that the Arbitration Tribunal has instead of proceeding in accordance with the contractual terms and the law, has imposed a panchayati solution by creating a via media of putting liability on each party to the extent of half. This is an unacceptable situation because the

Arbitration Tribunal has to act in accordance with law and the contract vide Section 28(1)(a) and Section 28(3) of the Act.

11. The Arbitration Tribunal has in my opinion committed a clear cut perversity in holding that a conflicting situation exists although the Arbitration Tribunal did find that reinforcing element work would automatically be included in B.O.Q and reinforcing element under item 5.41. Not only that, the Arbitration Tribunal has in a most illegal manner totally overlooked the addendum issued on 15.03.2001 by the petitioner/owner before opening of the tender on 21.3.2001 and as per which addendum, the Clause 703 of the technical specifications instead of using “high adherence galvanized steel strips with accessories”, the respondent/contractor was to use “reinforcing element conforming to relevant Indian standards”. Once the petitioner/owner even before the opening of the bid has issued the necessary clarification that the technical specifications would include reinforcing element, the Arbitration Tribunal was totally unjustified in arriving at a finding that the reinforcing element cost is not included in B.O.Q item 5.41. As already stated above, even on a singular reading of B.O.Q item 5.41, it included assembly and erection of reinforcing element i.e the work in question could not have been done till first reinforcing elements were made

by the respondent/contractor for fixing in accordance with the item and only thereafter the reinforcing elements could have been assembled and erected in the work in question.

12. Looking it in any manner whether in accordance with interpretation of the contractual terms or the addendum issued on 15.03.2001 before opening of the tender on 21.03.2001, or the fact that the Arbitration Tribunal has devised an unknown formula of dividing the liability 50:50, clearly the Award in this regard is perverse and is set aside by holding that the petitioner/owner will only be liable to pay to the respondent/contractor reinforcing element under B.O.Q. item 5.41 and reinforcing element is held to be already included in B.O.Q. item 5.41 and payments have to be made only as per the item rate of this B.O.Q item. This part of the Award is therefore set aside.

13. The only other aspect which is argued before this Court on behalf of the petitioner/owner is the challenge to the 'high' rate of interest at 12% p.a. if the awarded amount is paid within 90 days of the date of the Award and if not paid within the stipulated period then at 12.5% p.a. In this regard I may take judicial notice of the fact that surely in this relevant period if the respondent/contractor had gone to take a loan from even a nationalized

bank then it would have been charged interest at 12/12.5% p.a., and therefore, I do not think the Award with respect to the rate of interest needs to be interfered with, inasmuch as, the Award cannot be said to be perverse with regard to the rate of interest. Once two views are possible, this Court would not like to interfere with the grant of interest at 12/12.5% p.a. by an Award.

14. No other issue is pressed before me.

15. In view of the above, the petition is partially allowed with respect to claim of reinforcing element but is dismissed with respect to the Award passed of granting the respondent/contractor cost of the viaduct at varied rate. Parties are left to bear their own costs.

AUGUST 12, 2015
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VALMIKI J. MEHTA, J.