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

Date of decision: 1st April, 2019

+ **O.M.P. 219/2011**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Ms. Padma Priya & Mr. Dhruv Nayar,
Advocates (M-9910531145)

versus

M/S JSC CENTRODORSTROY Respondent

Through: Mr. Sandeep Sharma & Mr. Konika
Mitra, Advocates (M-9911901102)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 has been filed challenging award dated 30th June, 2010 passed by a three-member Arbitral Tribunal. The National Highways Authority of India (*hereinafter*, 'NHAI') had awarded works for "*Four Laning and Strengthening of Existing Two Lane Section between Km.38 and Km. 115 on NH-2 in the State of UP, Construction Package II-C*" vide contract dated 12th March, 2001 bearing No. TNHP/25 to M/s JSC Centrodorstroy (*hereinafter*, 'Contractor'). The total value of the contract was over Rs.295.53 crores. One of the claims that was raised by the Contractor was in respect of payment for the work of '*loosening and re-compacting the ground supporting the embankment*' (*hereinafter* 'claimed work').

2. The claim of the Contractor was that the Contractor could not achieve

the mandatory 95% of compaction level, without doing the additional work of loosening and re-compaction. According to the Contractor, the Engineer had recommended that loosening and re-compaction work be carried out, which was beyond the BOQ items, which provided for only 'scarification, watering and rolling'. The claim was referred to the Arbitral Tribunal which concluded that the Contractor was entitled to this claim and accordingly awarded a principal sum of Rs.43,52,235/- along with the price adjustment of Rs.6,57,381/-. Thus, the total principal amount awarded by the Arbitral Tribunal was a sum of Rs.50,09,616/-. The Ld. Tribunal, thereafter awarded interest in the following manner:

5.17 Interest

- a) The Claimants have claimed interest on the delayed payments, upto the date of actual payment. The AT is of the considered view that the Claimants are entitled to receive interest on the sums, as due which, the AT has held to be Rs. 50,09,616/- (Rs. 43,52,235/- + Rs.6,57,381/-).*
- b) Taking all facts into account, the AT considers it reasonable to allow the payment of interest w.e.f. 01.04.2004 (i.e. 60 days after expiry of the concerned month of January, 2004), upto the date of award.*
- c) The AT considers it reasonable and fair to allow interest @ 12% per annum simple. Accordingly, the interest has been computed on the amount due (i.e. Rs. 50,09,616/-) @ 12% per annum for the period of 78 months from 01.04.2004 to 30.09.2010 i.e. upto the date of the Award. This amount is worked out to be Rs.39,07,500/*
- d) The AT also considers that Future Interest will be payable on the amount of Rs. 50,09,616/- from 01.10.2010 to the date of actual payment at the rate of 12% P.A. simple.*

e) No Future Interest shall be payable if the Awarded amount is paid within 3 months of the Award i.e. by 31.12.2010.

6.0 Award

Based on the findings and conclusions as above the Arbitral Tribunal unanimously awards as follows:

6.1 The Respondents shall pay to the Claimants a sum of Rs. 89,17,116/- (Eighty Nine Lakh, Seventeen thousand. One Hundred and Sixteen only) towards settlement of their claim for the Varied Work of loosening and recompaction of ground supporting embankment. This amount includes the value of work accepted to have been executed, as also price adjustment thereon, in terms of the Contract and interest upto the date of Award i.e. 30.09.2010.

6.2 Future Interest shall be payable to the Claimants on the amount of Rs.50,09,616/- from 01.10.2010 to the date of actual payment at the rate of 12% P.A. simple.

No Future Interest shall be payable if the Awarded amount is paid within 3 months of the Award i.e. by 31.12.2010.

6.3 The quantity paid for through para 6.1 above is 7,37,667/- sq.mtr., accepted to have been executed. Any quantity which is executed over and above the stated quantity upto the completion of work, shall be payable on the same basis as above.

6.4 Each party will bear its own expenses and costs towards the Arbitration. Fees and expenses payable to the Arbitrators are to be shared equally by the parties.

6.5 The Award is engrossed on a non-judicial stamp paper of Rs. 100/- (Rupees One Hundred) provided by the Claimants. Shortfall, if any, shall be made good by the Claimants.

6.6 This Award is made on the 30th day of September, 2010 at New Delhi."

3. The main contention of Mrs. Padma Priya, Ld. counsel appearing for NHAI is that there is no evidence on record to show that the work of loosening and re-compaction was actually carried out by the Contractor. She submits that the evidence on record, including the letters, show that repeatedly correspondence has been exchanged between the Contractor and the Engineer where rates are being called for and breakup is being given. According to her, there is no document on record to show that the additional work was actually carried out. She specifically relies upon letter dated 28th December, 2002 written by the Contractor to the effect that the Contractor was well aware that the work carried out would not entail making of any extra payment. She further submits that on the basis of this letter, and the other letters which are on record, it is clear that the Contractor never carried out the work and no evidence was led before the Ld. Tribunal to establish that loosening and re-compaction was carried out. On the basis of letters dated 17th January, 2003 (CK-57), 21st January, 2004 (CK-58), 31st January, 2004 (CK-61), 19th February, 2004 (CK-64), it is submitted that only the rates are being discussed in these letters and vide letter dated 27th July, 2007 (CK-78), the Contractor was clearly informed that the NHAI did not approve making of any extra payment to the Contractor.

4. The second submission of Ld. counsel for NHAI is that item No.1.01 of the BOQ items, clearly covers the work of loosening and re-compaction, when read with technical specification no. 201.1. She submits that achieving the requisite compaction level was already prescribed in the BOQ items and hence no extra payment was liable to be made.

5. Mr. Sandeep Sharma, Ld. counsel appearing for the Respondent, on the other hand, submits that the Arbitral Tribunal was a technical Tribunal

and has considered all these aspects. He specifically relies upon Technical Specification 305.9.1, which clearly states that the compacting of ground to support the embankment is covered in the BOQ items, except where loosening and re-compaction is involved. It is his further submission that the letters on record, especially letter dated 4th April, 2005 (RK-93), clearly shows that the team leader/Engineer has confirmed that the additional work was in fact carried out by the Contractor.

6. It is further submitted by Mr. Sandeep Sharma that the conditions of particular application (COPA) also permit the Engineer to issue variation orders, so long as the same is same not beyond 1% of the total contract price. By placing reliance on the claim petition, para 10.3, it is submitted that the variation approved by the Engineer in this case was 0.39% i.e. less than 1% of the total value of the contract which did not require approval of the employer – NHAI.

7. There are three aspects in this matter. First, as to whether the additional work of loosening and re-compaction was carried out. A perusal of letter dated 30th August, 2005 (CK-83) and 4th April, 2005 (RK-93) clearly show that the Engineer has confirmed that the additional work was carried out. The relevant portions of the said letters are extracted herein below:

“Letter dated 30th August, 2005

Ref No. 13078/PIU/NHAI/KNP/9501 dated 30.08.2005

To:

*The Chief General Manager (DK)
National Highways Authority of India
Plot No.G5 & G6
Sector 10, Dwarka
New Delhi – 110075*

Subject: Package IIC - Variation Order for Loosening & Re-compaction of Ground Supporting Embankment

Reference:1. Engineer letter no. NH-2IIA&IIC/TL/6:06/252/dated 06.07.2005 (copy already endorsed to NHAI Had Office)

2. NHAI Head Office letter No. 11016/2/2000/Tech/GM (WB))/654 dated 04.07.2005

3. This office letter No. 13078/PIU/NHAI/KNP/8891 dated 18.04.2005

Sir,

With reference to the above cited letters and discussion with the Engineer regarding the Contractor's claim for above matters, the Engineer of the project has further clarified vide ref. letter No.1 (copy enclosed) regarding entitlement of additional payment for the work which have already been executed by the Contractor of package IIC.

It is, therefore, recommended that the same may be got approved from the Competent Authority.

Yours faithfully

Sd/-

(A.Gautam)

Project Director

Letter dated 4th April, 2005

Further, on 5 December 2001 there was an instruction from NHAI reference 11016/2/2000/Tech/GM(WB)/887 to raise the embankment height. This could not be universally implemented on IIC since at the time many of the cross culverts had already commenced. However, to ensure adequate ground compaction beneath the embankment, it was considered prudent to persist with the standard technical specification and achieve the minimum specified density confirmed by field density tests. This required the loosening and re-compaction of the ground supporting the embankment, this additional work is not covered in the pay item and hence requires

additional compensation. We have reviewed the claim and consider that the Contractor is fairly and reasonable entitled to additional compensation for these works that have already been executed.”

8. This is also evident from CK-84 wherein the Project Leader in fact recommended additional payment be made to the Contractor. The said letter is extracted herein below:

*“Reference: NH2-IIA & IIC\TL\6:06\252\05
Date: 16 July 2005*

*National Highways Authority of India
Roli House, 128/681
‘K’ Block, Kidwai Nagar, Kanpur – 208011*

*....
Dear Sirs,*

*....
....
....*

With respect to your letter referenced above concerning the Contractors claim for additional costs for loosening and compaction of the ground supporting embankment.

The standard technical specification requires a minimum of 95% relative density on the ground supporting embankment. The area of the project is prone to flooding. The existing road exhibited a high degree of deformation, hence it was considered prudent to ensure good compaction to the existing ground beneath the embankments. The Inspection Note of Contract Package IIC made by the Chief General Manager, reference: 11016/2/2000/Tech/GM(WB)/887 dated 5 December 2001 in which he stressed the necessity to ensure that natural ground compaction after clearing and grubbing was as per Clause 305.3.4 of the Technical Specification. This was emphasised a few days later in which a circular was issued to several projects, reference: 11016/2/2000/Tech/GM(WB)/914

dated 11 December 2001.

We agree with your statement that indeed “it was the responsibility of the main contractor to achieve the desired density on package IIC.” We confirm that the desired density, as described by the Specification, was achieved on contract package IIC. The claim of the Contractor is that in doing so they were required to loosen and re-compact the ground, for which in our opinion they are entitled to additional payment.”

9. On the basis of these letters, it is clear that the Arbitral Tribunal has rightly concluded that the additional work of loosening and re-compaction was, in fact, carried out and the Engineer as also the Project Leader has recommended payment for the same.

10. Secondly, on the question as to whether the carrying out of loosening and re-compaction was covered by the BOQ items or not, the relevant clauses relied upon by the Ld. counsels are extracted herein below:

<i>Items</i>	<i>Description</i>	<i>Unit</i>	<i>Quantity</i>	<i>Unit Rate (Rs.) in word</i>	<i>Unit Rate (Rs.) in figures</i>	<i>Total price in word</i>	<i>Total price</i>
<i>Bill No.1</i>	<i>SITE CLEARANCE</i>						
<i>1.01</i>	<i>Clearing and grubbing for road, embankment, drains and cross drainage structures as per specifications section 20</i>	<i>Ha</i>	<i>160</i>	<i>Rupees Thirteen thousand three hundred ninety three and Paise Forty only</i>	<i>13393.40</i>		<i>2142944.00</i>

<i>Bill No.2</i>	<i>EARTHWORK</i>						
2.02	<i>Construction of embankment as per drawings with approved material complete with all lead and lift as per Technical Specification Clause 305</i>	<i>Cu m.</i>	640000	<i>Rupees One hundred nine and Paise Thirty nine only</i>	109.39		7000960 0.00
2.05	<i><u>Loosening and recompacting</u> sub-grade in all kinds of soil complete as per Technical Specification Clause 301 & 305</i>	<i>Cu m.</i>	12500	<i>Rupees Fifty two and Paise Nine only</i>	52.09		651125.0 0

Clause 52.1

All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as “varied work”), shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable, if the Contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract, shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices

shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such rates or prices as are, in his opinion appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisioned rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

Clause 201.1 Scope

Replace with following para

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 150mm minimum thickness rubbish etc., which in the opinion of Engineer is unsuitable for incorporation in the work including draining out stagnant water if any from the area of road land, drain, cross drainage structure and other area as specified in the drawing by Engineer. It shall include necessary excavation by barrow discs or any other suitable equipment, back filling of the pits, by suitable soil, resulting from uprooting of trees & 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 material. Clearing and grubbing shall be performed in advance of earthwork operation and in accordance with requirement of these specification.

.....

Clause 305.3.4 Compacting ground supporting embankment/subgrade: *Where necessary, the original ground shall be levelled to facilitate placement of first layer of embankment, scarified, mixed with water and*

then compacted by rolling so as to achieve minimum dry density as given in Table 300-2.

In case where the difference between the subgrade level (top of the subgrade on which pavement rests) and ground level is less than 0.5m and the ground does not have 97 per cent relative compaction with respect to the dry density as given in Table 300-2, the ground shall be loosened upto a level 0.5m below the subgrade level, watered and compacted in layers in accordance with Clauses 305.3.5 and 305.3.6 to not less than 97 per cent of dry density as given Table 300-2.

Where so directed by the Engineer, any unsuitable material occurring in the embankment foundation shall be removed and replaced by approved materials laid in layers to the required degree of compaction.

Embankment or subgrade work shall not proceed until the foundations for embankment/subgrade have been inspected by the Engineer for satisfactory condition and approved.

Any foundation treatment specified for embankments especially high embankments, resting on suspect foundations as revealed by borehole logs shall be carried out in a manner and to the depth as desired by the Engineer. Where the ground on which an embankment is to be built has any of the material types (a) to (f) in Clause 305.2.1, at least 500 mm of such material must be removed and replaced by acceptable fill material before embankment construction commences.

Clause 305.9.1 *The Contract unit rates for the items of embankment and sub-grade construction shall be payment in full for carrying out the required operation including full compensation for:*

(i) -----

(ii) -----

(iii) Compacting ground supporting embankment / sub-grade except where removal and replacement of

unsuitable material or loosening and recompaction is involved.”

11. A combined reading of the above clauses shows that the construction of embankment is covered by item no.2.02 of the BOQ items. Insofar as loosening and re-compaction of the sub-grade is concerned, the same is covered by item no.2.05. However, when construction of the embankment is undertaken, the work which is covered by the BOQ item is to the extent of scarification, watering and rolling as per clause 305.3.4. In fact scarifying, mixing with water and then compaction by rolling has to be for achieving the density of not less than 95 for the Embankment. If that cannot be achieved then loosening and re-compaction is required. On the basis of the conditions at site, loosening and re-compaction was recommended by the Engineer and carried out by the Contractor. The Engineer has also recommended the rate which is to be paid to the contractor for this additional work which was carried out. The Ld. Arbitral Tribunal has considered the submissions of the Contractor in para 3.12(d) that the loosening and re-compaction has been provided for sub-grade under BOQ item no.2.05, however, the same has not been provided insofar as embankment is concerned. The finding of the Arbitral Tribunal on this aspect is at paragraph no. 5.10, where the Tribunal concludes that the loosening and re-compaction of the ground is not the items included in the contract rate, insofar as embankment is concerned.

12. The findings of the Arbitral Tribunal are set out herein below:

“5.10 In view of the above facts the AT is of the opinion that:

(a) In terms of the Contract, the Engineer is authorized to instruct the Contractor to carry out

additional/varied works as, in his opinion are necessary for the completion of works.

(b) It was on the basis of field tests that Engineer concluded that the ground at site was such that the prescribed density was obtainable only with loosening and recompaction of ground supporting embankment which was a Varied Work.

(c) As per Clauses 305.3.4 and 305.9.1 of Technical Specifications, loosening and recompaction of ground is not an item included in the contract rate for construction of embankment. The Engineer's opinion that this operation was payable as Varied Work at extra cost is accepted. As such, the Respondents' contention that the work was already paid for through payment under BOQ Item 2.02 for construction of embankment is not acceptable.

(d) The rate for the Varied Work determined by the Engineer and accepted by the Contractor is justified.”

Thus, the Tribunal has clearly arrived at the conclusion that the work carried out was an extra work and was not covered in the specification. The Tribunal has accepted the Engineer's recommendation and thus no fault can be found with the same.

13. Insofar as IPCs (Interim Payment certificates) which have been submitted by the Contractor, from time to time, are concerned, the Ld. Arbitral Tribunal has considered the quantities which have been executed by the Contractor and has determined the principal amount that is payable on the basis of the Engineer's recommendation. A perusal of the conditions in COPA makes it clear that, if the variation was not beyond 1%, the Engineer was fully within his power to recommend the payment. Relevant clause of COPA is extracted below:

“COPA Sub-Clause 2.1 Engineer's Duties and

Authority

The Engineer shall obtain the specific approval of the Employer before taking any of the following actions specified in Part I:

- a) consenting to the subletting of any part of the Works under Clause 4;*
- b) certifying additional cost determined under Clause 12;*
- c) determining an extension of time under Clause 44;*
- d) issuing a variation under Clause 51, except:*
 - i) in an emergency situation, as reasonably determined by the Engineer; or*
 - ii) if such variation would increase the Contract Price by less than the amount stated in the Appendix to Bid; or*
- e) fixing rates or prices under Clause 52.*

.....

Appendix to Bid

<i>Engineer's Authority to Issue Variations</i>	<i>*2.1(d)(ii)</i>	<i>one percent of the contract price at a time subject to a maximum of 10 (Ten) percent of the Contract Price in aggregate."</i>
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14. A combined reading of the condition set out above along with the Appendix bid makes it clear that the Engineer can recommend variations up to 1% and the same would not require specific approval of the Employer. Further, a perusal of CK-84 clearly shows that the Engineer opined that the Contractor is entitled to the additional payment.

15. The letter dated 28th December, 2002 of the Contractor relied upon by NHAI was submitted at the initial stage when the work was yet to be executed. The circumstances which unfurled thereafter show that the loosening and re-compaction had to be carried out. The same was approved

and recommended by the Engineer, which was within his powers. The same did not need the approval of the NHAI. Considering the scope of challenge under Section 34 of the Act, and this being a case where the Engineer has recommended payment to the Contractor and there is no doubt that the work has actually been carried out, the award is not liable to be interfered with.

16. The award of Rs.89,17,116/- is, accordingly, upheld. The rate of interest @ 12% per annum would apply from the date of award till today. If the payment is made within the period of 8 weeks, no future interest would be payable. In case of default of payment or any delay in the payment, future interest @ 9% per annum would be liable to be paid in future upon the expiry of the period.

17. Accordingly, the OMP is disposed of in the above terms. All pending applications also stand disposed of.

**PRATHIBA M. SINGH
JUDGE**

APRIL 01, 2019

Rahul

(corrected and released on 5th April, 2019)