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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. No.491/2007

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7th December, 2015

NATIONAL HIGHWAY AUTHORITY OF INDIA (NHAI) Petitioner
Through: Ms. Nimita Kaul, Advocate.

versus

M/S. ORIENTAL STRUCTURAL ENGINEERS PRIVATE LIMITED
..... Respondent
Through: Mr. Anil Airi, Advocate with Ms.
Bindiya Airi, Advocate and Mr. Ravi
K. Chandna, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This matter was called out on 4.12.2015 when counsel for the petitioner informed that petitioner is not giving instructions to its counsel. Time was taken for filing on record the notice of discharge given under Order III of the Code of Civil Procedure, 1908 (CPC). Today, a photocopy of the Notice dated 5.12.2015 alongwith the registered receipt is placed on record on behalf of the counsel for the petitioner.

2. In my opinion, it is not permissible for the counsel for the petitioner at a very late stage when the matter comes up for hearing in finals

to give notice of discharge. If notice of discharge has to be given, it has to be given sufficiently in advance for the client to ensure representation. In any case, I am not dismissing the petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') in default but I am deciding the same on merits by passing a judgment after hearing the counsel for the respondent and perusing the record.

3. In this petition under Section 34 of the Act, two objections are raised on behalf of the petitioner with respect to two claims allowed by the impugned Award. First is the claim for bitumen tack coat below mix seal surface and second is for additional entry tax paid by the respondent to the governmental authorities. Both these claims have been allowed by the Arbitral Tribunal in terms of the impugned Award dated 10.4.2007 and which is challenged by means of the present petition.

4. So far as the challenge by the petitioner to the allowing of the payment of Bitumen Tack Coat (BTC) below mix seal surface is concerned, a reading of the objection petition shows that the case of the petitioner is that the bitumen tack coat is included in the Mix Seal Surfacing (MSS) and once as per the petitioner an item is included in the contract for payment, additional payment cannot be sought for a part of the item. Contention of

the respondent is that the BTC is not included in the MSS but is an additional work which is done by the respondent/contractor.

5. The Arbitral Tribunal in the impugned Award has dealt with this claim filed by the respondent after reproducing various clauses of the contract as under:-

“7. It can thus be seen from the Specifications of all the items that the phrase *“rate shall be payment for carrying out the required operations including full compensation for all components listed in Clause 401.8(i) to (v)/ 504.8 to (vi)”* are common to all the items. The components listed in Clause 401.8(i) to (v) in the case of Tack Coat & Prime Coat and Clause 504.8(i) to (vi) relate to making arrangements for traffic, preparation of base, providing materials, labour, arrangements for stock yard, royalties, fees, rents etc., machinery, quality control, and carrying out work in part width etc., which are essentially incidental to the item of work to be executed. It is also explicitly clear from these specifications that a separate specific mode and unit of measurement is specified for the work of Prime Coat/Tack Coat/MSS/DBM as also the unit “Rate” for payment for these items is separately specified in the “Specifications”. Prime Coat and/or Tack Coat are, to our knowledge, never applied in isolation and are invariably followed by another substantial layer of carpet/wearing course or Bituminous Macadam/Dense Bituminous Macadam. If the layers overlying the Prime Coat &/or Tack Coat are supposed to include the cost of Prime Coat/Tack Coat, then there would have been no necessity of providing the mode of measurement and unit rate for payment for the Prime Coat & the Tack Coat in these specifications. It is admitted by the parties that in the Data Book prepared, on the basis of these specifications, by the Ministry also, the element of the cost of materials & labour for Tack Coat is not included in the analysis for the item of MSS etc., although it was averred by the respondents that the said Data Book is not a part of the Contract Document.

8. As has been mentioned supra, the Specifications for Tack Coat provide in Sub-Clause 503.7 the “Rate” for payment of this work. It is evident from the “Note” below Sub-Clause 503.3.2 that “there is no need to apply a tack coat on a freshly laid bituminous course if the subsequent bituminous course is overlaid the same day without opening it to traffic”.

It is thus clear that it is not always necessary that a tack coat may be laid prior to laying a layer of MSS or Bituminous Macadam. How can, then, the specifications of MSS or BM be deemed to essentially and always include the not so insignificant cost of Tack Coat even though this work may not be sometimes necessary and so not executed? We admit that the language of the sub-clauses relating to “Rate” in the specifications of all items of substantial bituminous layers, like the Premix Carpet/BM/DBM/BC, is ambiguous. But a harmonious reading of all these specifications can only lead to a conclusion that the items like tack coat & prime coat are required to be separately measured and paid for. In certain items like the BM/DBM or Bituminous Concrete (though not MSS) the unit of measurement and payment would be in cubic meters whereas that for Tack Coat or Prime Coat would be in square meters.

9. Much reliance has been placed by the respondents on the amendments made to the specifications in Clauses 503, 507 & 512. Therefore, we now try to fathom the reasons for the amendments made to the specifications of Clauses 503, 507 and 512 at pages 42-43 of Vol. II (Technical Specifications) of the Contract Agreement. The reason for amendment to the Specification in Clause 507 (for Dense Bituminous Macadam) and Clause 512 (for Bituminous Concrete) appears to be mainly to stipulate the use of “Rubberised Bitumen” instead of the usual conventional bitumen. The amendment to Clause 503 (for Tack Coat) appears to be consequential or to provide for “80/100 grade of bitumen” instead of the bituminous emulsion or cutback specified in the un-amended specifications. And the addition of the phrase “*except tack coat*” in Sub-Clauses 507.9 and 512.9 by amendment, in these circumstances, appears to us to be incorporated only as a clarification.

10. To further reinforce our finding, we must also look to BOQ Items 4.01, 4.02, 4.03 & 4.04. The first item 4.01 is for payment of Prime Coat, Item 4.02 for Tack Coat and Items 4.03 & 4.04 for overlaying Dense Bituminous Macadam (DBM) and Bituminous Concrete (BC). The amendment to specifications have clarified that Tack Coat shall be paid separately, but there is no amendment in specifications relating to the Prime Coat. The Specifications for DBM in Sub-Clause 507.4.2 (which is a part of the “Construction Operations”) provide a prime coat as per Clause 502 or as directed by the Engineer shall be provided where needed (similarly as for Tack Coat). If the interpretation of the Specifications as advocated by the Respondents is to be accepted, there shall be no separate payment for the item of “Prime Coat” also. But contrary to the stand of the Respondents, Respondents have made separate payment for the item of

Prime Coat as per BOQ Item 4.01. Therefore, what is true for ‘Prime Coat’ must also hold for ‘Tack Coat’.

11. It is evident that both the parties and the Engineer understood the contract in the same manner till the CTE observed otherwise. The items of work were also stipulated in the bid documents in accordance with the earlier understanding of the parties. The evaluation of the contract price also appears to have been made after inclusion of the cost of Prime Coat and Tack Coat separately, and payment up to 23rd IPC was also made on the same mutual understanding. We hold that the contract was correctly interpreted by the parties, before the Respondents and the Engineer changed their stand, influenced by the observations of the CTE. The mention of Tack Coat in the “Construction Operations” for DBM or BC is, to our mind, merely a narration of the sequence of operations, especially when a separate mode of measurement and rate is specifically stipulated in the specifications of the work of “Tack Coat”.

12. In view of the discussion supra, we hold that the work of “Tack Coat” is separately payable to the Claimant, and the action of the respondents in recovering the payment made up to the 23rd IPC for this work, and not paying it for this work executed after the 23rd IPC is not justified.” (underlining added)

6. I do not find any illegality or perversity in the aforesaid discussion given by the Arbitral Tribunal. The Arbitral Tribunal notes various aspects including payment of tack coat was in square meters whereas for Bituminous or Bituminous Concrete the payment was to be in cubic meters, an amendment was made with respect to Clauses 503, 507 and 512 of the contract agreement but these amendments had no bearing on the inclusion of otherwise of BTC in MSS and that any amendment for Dense Bituminous Macadam under Clause 507.4.2 showed that a Prime Coat may or may not apply and only if applied charges were payable with the

consequence that similar logic would apply to Prime Coat it must apply to Tack Coat, and finally that as many as 23 interim payment certificates were paid for work of Bitumen Tack Coat and only on account of objections being raised by the CTE that payment was stopped by the petitioner to the respondent. It is settled law that once two views are possible this Court will not interfere with one possible and plausible view which is taken by the Arbitral Tribunal. Arbitral Tribunal has considered all the applicable clauses of the contract fairly and squarely and has arrived at a conclusion that Bitumen Tack Coat is not necessarily always applied and therefore when the same is applied as per the direction of the owner/petitioner, payment necessarily has to be made by the petitioner and such Bitumen Tack Coat would not be included in MSS. In my opinion, therefore, findings and conclusions of the Arbitral Tribunal with respect to awarding of the claim for Bituminous Tack Coat cannot be interfered with.

7. So far as the claim of the respondent for additional entry tax is concerned, the Arbitral Tribunal has applied the relevant Clause 70.8 of the contract agreement and has noted that as a matter of fact that additional entry tax was in fact paid by the respondent for the State of Bihar in terms of the notifications of the State of Bihar. Arbitral Tribunal also notes that the

present petitioner has not shown any evidence to show that the entry tax was included as an input to indexing of the Wholesale Price Index. Accordingly, the Arbitral Tribunal applied Clause 70.8 of the contract agreement and held that the additional entry tax is a subsequent legislation and the present respondent has to be compensated for the additional entry tax paid as per the notifications of the State of Bihar. The relevant discussion in the impugned Award is from the last part of para 16 to para 22 and which discussion is as under:-

“16. XXX XXXX XXXX
Sub-Clause 70.8:

Subsequent Legislation

If, after the date 28 days prior to the latest date for submission of tenders for the Contract there occur in the country in which the Works are being or are to be executed, changes to any National or State Statute, Ordinance, Decree or other Law or any regulation or by-law of any local or other duly constituted authority, or the introduction of any such State Statute, Ordinance, Decree, Law regulation or by-law which causes additional or reduced cost to the execution of the Contract, such additional or reduced cost shall, after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be added to or deducted from the Contract Price and the Engineer shall notify the Contractor accordingly, with a copy to the Employer. *Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have (been) taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of Sub-Clauses (1) to (7) of this Clause.* (Emphasis supplied).

Sub-Clause 73.2:

Local Taxation

The prices bid by the Contractor shall include all custom duties, import duties, business taxed and income and other taxed local/stage govt., octroi, royalty etc. that may be levied in accordance with the laws and regulations in being on the date 28 days prior to the latest date for submission of bids, in the Employer's country on the Contractor's Equipment, Plant, materials and supplies (permanent, temporary or consumable) acquired for the purpose of the Contract and on the services performed under the Contract. Nothing in the Contract shall relieve the Contractor from his responsibility to pay any tax that may be levied in the Employer's country on profits made by him in respect of the Contract. All taxes shall be deducted from Contractor's payment as per relevant legislation.

17. It is an undisputed fact that the State of Bihar had, by Notification issued vide S.O. dated 25th July 2001 and S.O. 159 dated 22nd August 2003, increased/imposed the Entry Tax on various goods. Any increase in cost as a consequence of a change in legislation is reimbursable to the Contractor as per the stipulation in Sub-Clause 70.8 of Clause 70 supra, provided such costs shall not have been taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of the Sub-Clauses (1) to (7) of this Clause-70. The crux of the dispute resolution, therefore, is to ascertain whether the effect of the cost increase because of increase in the Entry Tax on certain goods has been taken into account in the indexing of any inputs to the Price Adjustment Formula in Sub-Clause 70.1 to 70.7 of Clause 70.

18. We are satisfied that the Notifications issued by the Government of Bihar under the "Bihar Tax on Entry of Goods into Local Areas for Consumption, Use & Sale therein Act 1993" imposing the entry tax on more goods or increasing the rate of entry tax, are legislative acts and therefore, come under the scope of 'subsequent legislation'. We have the benefit of AIR 1977 MP 68, State of MP v. Ramcharan & AIR 1986 SC 1323, D.K. Trivedi etc. v. State of Gujrat to come to this conclusion.

19. To come to a just decision therefore, we are required to ascertain:

(1) Whether this increase in the rates of Entry Tax/imposition of entry tax on other goods has caused additional cost to the Claimant and

(2) Whether the increase in cost because of increase in the rates/imposition of Entry Tax on these goods has been taken into account in the indexing of any inputs to the Price Adjustment Formula in Sub-Clauses 70.1 to 70.7 of Clause 70.

If the Claimant had to incur additional cost because of this change in the rates of Entry Tax and the effect of increase in the rates of this Tax has not been taken into account in the indexing of any inputs to the Price Adjustment Formula for these materials, then the claimant is entitled to be paid this additional cost to it. On the contrary, if this increase in the rates of Entry Tax has not, for any reason, caused any additional cost to the Claimant, or the effect of increase in the rates of Entry Tax is found to have been taken into account in the indexing of any inputs to the Price Adjustment Formula for these materials, then the claimant is not entitled to any additional amount.

20. We are not inclined to agree with the contention of the Respondents that Sub-Clause 70.8 is redundant and need not be given effect to. For one, the matter in the Box at the top of Clause 70 essentially is an instruction for drafting the contract. But even if we do treat it as apart of the clause, it does not imply that Sub-Clause 70.8 should not be retained in a contract that is not a fixed price contract.

21. We have before us a letter dated 27th November 2003 (CD/8-page 6) written by Mr. Shrawan Nigam, Economic Advisor, Ministry of Commerce & Industry, Govt of India, to Shri Anand Bordia, Member Finance, NHAI, clarifying that “entry tax” is not likely to be included in the WPI. We also have before us a letter dated 19th January 2005 from Mr. Vidya Dhar, Director, Office of the Economic Advisor, Ministry of Commerce & Industry, GOI, to M/s Somdatt Builders, clarifying that Entry Tax is not included in the wholesale price of cement utilized for compilation of the Wholesale Price Index (WPI). The Respondents have not produced any evidence to show that entry tax is included in the input to indexing of the WPI.

22. We, accordingly, hold that the cost of entry tax is not included in any input to the indexing of WPI in the goods for which compensation is claimed by the claimant, except for the item of POL. The escalation for POL is stipulated to be adjusted on the basis of the retail price of HSD at Dhanbad and not on any index. The retail price of POL is likely to include all local taxes, including taxes like entry tax. Dhanbad now may be Jharkhand State, but we have not been shown that there is no entry tax levied in Jharkhand and that the element of Entry Tax even of that state is not an input into the retail price of HSD at Dhanbad. We do not, accordingly, hold the claimant entitled to any relief in respect of additional entry tax it may have paid on Petrol, Diesel or Lubricants. The claimant is entitled to reimbursement of the additional cost of entry tax because of

subsequent legislation on goods other than the POL.”

(underlining added)

8. In my opinion, the aforesaid discussion and conclusion of the Arbitral Tribunal cannot be said to be illegal or perverse for this Court to interfere with inasmuch as it is settled law that once two views are possible, this Court will not interfere with one possible view which has been taken under the Award. I also note that the issue is no longer *res integra* and has been pronounced upon by the Supreme Court in its recent judgment in the case of *National Highways Authority of India Vs. ITD Cementation India Limited (2015) 5 SCALE 554* wherein the identical Clause 70.8 of the contract agreement was in issue and the Supreme Court held that the additional charges payable on account of any statute or notification is to be paid to the contractor under Clause 70.8. The relevant observations of the Supreme Court in this regard are contained in paras 20 and 21 of the judgment and these paras read as under:-

“20. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do.

21. We now turn to the reasoning given by the Arbitral Tribunal in paras 21 to 23 of the award, as quoted above. The award considers the impact

of Sub-clauses 70.1 to 70.7 and agrees with the contention that the provision for cost escalation based on the agreed price adjustment formulae falls in one compartment while the compensation for additional cost resulting from a subsequent legislation falls in a separate category. In other words, the contention that stands accepted was, that the escalation in price premised on fluctuation in market value of the inputs stands on one footing, while the additional cost resulting from the impact of any statute, decree, ordinance, law etc as referred to in Sub-clause 70.8 stands on the other. Resultantly the governing clauses in the instant case were held not to be Sub-clauses 70.1 to 70.7 but the substantive part of Sub-clause 70.8. The award also considered whether minor minerals in question were or were not included in the basket of materials whose cost variation was taken into account as an input while arriving at WPI. It also considered that the WPI is an index applicable uniformly in all states while the increase in Seigniorage Fee would vary from state to state. It further dealt with the aspect that NHAI itself was of the opinion that the additional impact as a result of subsequent legislation was admissible separately, as signified by the letter dated 03.09.2003 to the Economic Advisor. In the backdrop of the law laid down by this Court, the construction of the terms of the contract by the Arbitral Tribunal is completely consistent with the principles laid down by this Court. Upon construing the terms and the material on record it concluded that the instant matter would be covered by substantive part of Sub-Clause 70.8 of COPA. It also noted that NHAI itself was of such opinion. The view so taken by the Arbitral Tribunal after considering the material on record and the terms of the contract is certainly a possible view, to say the least. We do not see any reason to interfere. The Division Bench in our considered view, was completely right and justified in dismissing the challenge.” (underlining added)

9. In view of the above, there is no merit in the objection of the petitioner with respect to the Award of additional entry tax which has been paid by the respondent in the State of Bihar.

10. Also I would like to note that reliance placed by the petitioner upon Clause 70.2 of the contract agreement of price adjustment will not help

the petitioner because that very clause states that it will apply if there are no other clauses of the contract and in the present case there is another clause in the contract being Clause 70.8 dealing with subsequent legislation and additional costs to the contractor/respondent on account of subsequent legislation.

11. Finally, I may note that there is also a challenge to the rate of interest awarded by the Arbitral Tribunal at 12% per annum simple, but noting that this is a commercial matter, I do not find that rate of interest of 12% per annum simple can be said to be illegal or perverse for this Court to interfere with the same. Objection to the grant of rate of interest is also therefore misconceived and rejected.

12. In view of the above, I do not find any merit in the petition and the same is therefore dismissed, leaving the parties to bear their own costs.

DECEMBER 07, 2015

VALMIKI J. MEHTA, J.

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