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

F-440.

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O.M.P. 382/2011

NATIONAL HIGHWAYS AUTHORITY OF INDIAPetitioner

Through: Mr. Abhishek Kumar with

Ms.Arushi Gupta, Advocates.

versus

M/S PCL-STICCO (JV)

..... Respondent

Through: Dr. Amit George, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER

30.01.2017

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1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') filed by the National Highways Authority of India ('NHAI') challenging a majority Award dated 7th January 2011 passed by the Arbitral Tribunal ('AT') in the disputes between the Petitioner and Respondent M/s. PCL-STICCO (JV) arising out of a Contract Agreement dated 28th August 2001 whereby the Respondent undertook to execute and complete the work of widening of 4/6-lanes and strengthening of existing 2-lane carriageway of NH-5 in the State of Orissa from Km.284.000 to 338.000 (Ganjam-Sunakhala) (NH-5 Package).

2. The dispute in the present petition concerns the construction of a granular sub-base ('GSB') as described in bill of quantities ('BOQ') 3.01. The said BOQ item reads as under:

“Constructing Granular Sub-base (GSB) using crushed stone aggregate only conforming to Grading 1 of Table 400-1 complete as per Drawing and Technical Specifications Clause 401.”

3. The bid tendered by the Respondent consisted of technical specifications (‘TS’) as well as supplementary TS. TS 401 referred to in the above BOQ reads as under:

“The material to be used for the work shall be crushed stone, aggregate, natural sand, gravel or combination thereof depending upon the grading required. Use of Moorum for GSB either alone or in combination shall NOT be allowed. The material shall be free from organic or other deleterious constituents and conform to the Grading1 given in Table 400-1.”

Add the following as the third paragraph of clause 401.2.1.

Where the layer is intended to serve as a drainage layer in addition to being a part of the structural pavement the material must satisfy drainage criteria. For such requirement, material passing sieve 2.36 mm and down should be as per Table 400.1.A.”

4. Table 400.1.A sets out the specifications for the drainage layer of the GSB.

5. In addition to the above, the general conditions of contract (‘GCC’) and special conditions of contract (‘SCC’) and the Conditions of Particular Application (‘COPA’) also formed part of the CA.

6. Clause 1.1.4 of the preamble of the TS states: "should there be any detail of construction or materials which has not been referred to in the Specifications or the Bill of Quantities and Drawings but the necessity for

which may be implied or inferred therefrom or which is usual or essential to the completion of the work in the trades then the same shall be deemed to be included in the rates and prices entered by the Contractor in the BOQ."

7. The contract was a unit rate contract and the rates against each item were to be filled by the supplier/contractor.

8. During the execution of contract on 1st April 2002, the Respondent sought clarification of the Engineer in relation to the TS of the new carriageway to be executed. By a letter dated 12th April 2002 the Engineer instructed the Respondent to do the work of 150mm thick lower layer of GSB to be provided as drainage layer as per Table 400.1. A and as per BOQ Item 3.01. By its letter dated 20th April 2002, Respondent disagreed with the above direction of the Engineer. On 15th May 2002 while reiterating the direction, the Engineer clarified that the gradation requirement of Table 400.1.A. of the supplementary TS "is deemed to be covered under BOQ Item No. 3.01" and that the said decision "remains unchanged".

9. Admittedly, the work continued even thereafter. NHAI states that the Respondent did not raise any dispute and submitted the interim payment certificate ('IPC') at the rate agreed upon between the parties. It is stated that no claim for the varied rate was made immediately thereafter.

10. It is then stated that the Respondent by a letter dated 18th November 2005 claimed the varied rate under Clause 52.2 of the GCC. This was refuted by the Engineer by a letter dated 18th March 2006. The resultant dispute was taken by the Respondent first before the Dispute Review Board

(‘DRB’). However, with the DRB not giving its decision within the stipulated time, the Respondent invoked the arbitration clause. After the AT was constituted, the Respondent submitted the following three claims before it:

“(a) Claim for construction of 150 mm thick Granular Sub-Base as drainage layer-Rs.2,15,32,510/- for the work done till Jan, 07 and fixation of rate of Rs.1102/- per cum for future work.

(b) Past interest, *pendente lite* and future interest.

(c) Cost of Arbitration-Rs.2,50,000/-.”

11. It was pointed out by the Respondent in support of its claim that the drawings at the stage of bidding showed only the GSB and did not indicate that the drainage layer had to be provided in accordance with the TS. Further the BOQ 3.01 also did not make any specific mention of a drainage layer. According to the Respondent the requirement of a drainage layer in terms of Table 400-1A was introduced only in the 'good for construction' drawing provided to it by NHAI subsequently. Therefore, this it was a new item of work. Being a variation item it required fixation of a rate.

12. The case of NHAI was that the claim itself was barred by limitation since the cause of action in relation to such claim arose on 12th April 2002 when the Engineer instructed the Respondent to construct the first GSB layer as the drainage layer. Further, under Clause 52.2 advance notice of 14 days was required to be given by the Respondent for claiming varied rates. In the present case, the Respondent failed to issue any such notice. It is further submitted that Tables 400.1 and 400.1.A were an integral part of the

contract and that the Respondent was aware of their applicability even at the time of submission of the bid. At the pre-bid meeting held on 30th March 2001 the Respondent did not seek any clarification in this regard. Even under Clause 5.2.2 of the COPA, the Respondent did not seek any clarification from NHAI in this regard.

13. It was further contended by NHAI that in both Table 400.1 and 400.1.A of the supplementary TS, the size in relation of the material were identical. There was a difference in the grading in respect of the aggregate sieve 2.36 mm and below. It is accordingly concluded that inasmuch as both the Tables are part of the contract, the BOQ Item 3.01 would cover both gradation lines.

14. By majority of 2:1, the AT held as under:

(i) The right of the Respondent to raise a claim subsisted till the final bill was submitted and refuted by the NHAI. The written correspondence between the parties would not amount to refutation of the claim of the Respondent since it was the Engineer who was to give a decision under Clause 12.2 and 66.1 of COPA. Therefore, the claim subsisted till such time the final bill was submitted and refuted by the NHAI.

(ii) The contract drawings made available at the time of the submission of the bid by the Respondent showed only GSB as per Table 400.1. Drainage layer was dealt with under Table 400.1.A and this was inserted only in the 'goods for construction drawings'. Therefore, there was no doubt that the drainage layer as per Table 400.1.A was a new item of work. It was a

variation item which required fixation of a new rate. BOQ 3.01 refers to Table 400.1 only.

(iii) 20% extra was allowed for working to the specifications of the grading as per Table 400.1.A. Therefore, the BOQ rates were required to be enhanced by 20%. NHAI was asked to pay the Respondent Rs. 34,16,555.70 after adjusting the amount already paid by the NHAI. Further compound interest in terms of Clause 60.8 (ii) of the Appendix to bid was also allowed.

15. The dissenting Award was given by a third Member who held that BOQ Item 3.01 had to be read along with Clause 401 of the TS and which formed part of the BOQ Item 3.01 itself. The dissenting Award accepted the plea of NHAI that the mention of Table 400.1.A in Clause 401 was specifically to be followed for the drainage layer. Therefore, both Clauses 401 and Table 401.1.A were integral parts of BOQ 3.01. The rate of Rs.590 per cum applied for both grades i.e. for Table 400.1.A and in respect of BOQ items. The dissenting Award held that the Respondent was not justified in demanding a higher rate for the varied item under Table 400.1.A.

16. This Court has heard the submissions of Mr. Abhishek Kumar, learned counsel for NHAI and Dr. Amit George, learned counsel appearing for the Respondent.

17. Mr. Abhishek Kumar submitted that the majority erred in holding that the Respondent's claim was not barred by limitation. It was raised first on 18th November 2005 more than three years after 12th April 2002 when the Engineer first instructed the Respondent to construct the drainage layer of

the GSB. Further, under Clause 52 the Respondent was to give 14 days' notice before commencing the varied work. Failing such notice, the claim on that score was inadmissible.

18. Mr Kumar next submitted that the majority proceeded on a misreading of BOQ 3.01 and TS 401. According to him, there was a specific reference in BOQ 3.01 itself to the Drawings and TS Clause 401. On a perusal of Clause 401, it was plain that there had to be a drainage layer. The drainage layer was necessarily to be inferred from the Drawings. At the pre-bid meeting held on 30th March 2001, the Respondent did not raise any query. In addition, Clause 1.1.4 of the Preamble to the TS clarified that any construction not referred to in the specification or BOQ or the Drawings but “the necessity for which may be implied or inferred therefrom or which is usual of essential to the completion of the works in the trades” shall be deemed to be included in the rates and prices entered by the contractor in the BOQ.

19. Mr Kumar submitted that the majority Award wrongly brushed aside the contention of NHAI if there was any ambiguity it should be resolved under Clauses 5.2.1 and 5.2.2 of the COPA which provide that TS would have priority over BOQ. The majority Award erred in holding that the said provision was not applicable. This was contrary to the express terms of the contract and, therefore, the Award was unsustainable under Section 28(2) read with 28(3) of the Act.

20. It was further submitted that the quantification of Claim No.1 was totally unreasoned and without basis. The findings were arbitrary. This reflected the

non-application of mind on the part of the majority. It arbitrarily allowed 20% extra over the quoted rate for BOQ Item 3.01 towards construction of drainage layer. On the other hand, the dissenting Award brought out that the material used in construction of drainage layer was cheaper than the material used in construction of GSB under Item 3.01 of the BOQ.

21. Mr. Kumar further made a grievance about the learned Arbitrators having revised their fee midway. It is submitted that by an order dated 16th November 2007, the AT revised its fee by increasing it by three times than what was fixed at the earlier meeting on 11th January 2007. It was submitted that this should be construed as a legal misconduct disentitling the AT to further proceed in the matter.

22. Dr. Amit George, learned counsel appearing for the Respondent first submitted that the claim preferred by the Respondent was within limitation. He clarified that the Respondent had raised the claim first as variation item under Clause 51.1 of GCC priced under clause 52.1 of GCC. However, NHAI did not that it was a variation item and denied its applicability. The Respondents then raised the claim under Clause 53.1 of GCC. Under Clause 53.4 of GCC, the AT was competent to determine the amount in terms of relevant record furnished at that stage. The rate claimed by the Respondent was based on MOST Standard Data Book and the relevant quotations when the work was carried out.

23. Dr George pointed out that the Respondent asked for fixation of the rate for the variation item of drainage layer and submitted the break-up details by the letter dated 18th November 2005. The team leader of the NHAI rejected

the said request by letter dated 18th March 2006. By further letters dated 8th April 2006, 30th May 2006 and 31st May 2006, the Petitioner insisted that the drainage layer was a new item of work. Finally, the Respondent approached the DRB on 15th July 2006. It is submitted that the cause of action to prefer the claim accrued only after the pre-arbitration mechanism in the contract failed. In the present case, the DRB could not give its recommendation within the stipulated period as laid down in Clause 60.1 of the COPA and, therefore, the Respondent was constrained to invoke the arbitration clause. Further since the work was still underway a final bill was not submitted at that stage, the cause of action was continuing.

24. Referring to Clause 52, Dr George submitted that a clause in the contract that curtailed the right of a party to pursue its claims under law would be hit by Section 28 (a) and (d) of the Indian Contracts Act, 1872 (ICA) as explained by this Court in *Union of India v. Pt. Munshi Ram & Associates Pvt. Ltd.* 2013 I AD (Del) 801 and *National Highways Authority of India v. Mecon-Gea Energy Systems India Ltd.* 199 (2013) DLT 397.

25. Turning to the merits of the case, Dr. George submitted that a careful reading of BOQ Item 3.01 and TS 400.1 would show that it was only where the layer was intended to serve as a drainage layer, material passing sieve 2.36 mm as per Table 400.1.A would be attracted. This was not specified at the time of the bid. The determination by the AT of the rate was neither arbitrary nor inconsistent with the trade practice much less the terms of the contract. In any event, this was not a ground as envisaged by Section 34 of the Act on which the Award could be set aside.

26. As regards the enhancement of fees of the Arbitrators, Dr. George pointed out that there was no agreement between the parties as contemplated under Section 31(8) of the Act with regard to fees to be paid to the Arbitrators. In these circumstances, the AT was entitled to fix a reasonable fee. Under Section 34 of the Act the Court could not interfere with such orders of the AT. Reliance is placed on the decision of this Court in ***National Highways Authority of India v. DS Toll Road Ltd. 2015(2) Arb. LR 416 (Del).***

27. The above submissions have been considered. As regards the question of limitation, the majority rightly notes that the cause of action for raising such a claim could not have arisen earlier than the rejection by the Team Leader of the claim of the Respondent for fixing the rate for the variation item. As pointed out by the Respondent that refutation by the Engineer of its claim for enhanced rates was only by a letter dated 18th March 2006. Further the Respondent went before the DRB which failed to give its decision within 56 days i.e. by 12th September 2006. The arbitration clause was invoked on 14th September 2006. Factually, therefore, the Respondent was able to demonstrate that the claim was not barred by limitation. The Court concurs with such reasons and the conclusion of the majority Award as regards the claim of the Respondent not being barred by limitation.

28. Turning to the merits, a careful perusal of BOQ 3.01 reveals that it talks of GSB having to conform to Grade I of Table 400.1 and Clause 401 of the TS. BOQ Item 3.01 makes no mention of the GSB having a drainage layer. It is not possible to draw an 'inference' that the construction of a drainage

layer of the GSB was deemed to form part of BOQ 3.01. Although learned counsel for the NHAI sought to argue that the drawing submitted at the pre-bid stage showed a separate drainage layer, this was denied by counsel for the Respondent. In fact NHAI was unable to make good such assertion even before the AT. The factual finding in this regard returned by the AT, and which has been unable to be shown to be erroneous by the NHAI, is that the requirement for construction of drainage layer was indicated only at the stage of submission by the NHAI of the 'good for construction' drawings. The deeming Clause 1.1.4 thus did not get attracted. The Court is unable to find any legal infirmity in the conclusion of the majority that the construction of the drainage layer of the GSB was a varied item of work which was not provided for in BOQ Item 3.01.

29. Dr. George is also right in the submission that the Clause 5.2.2 regarding priority of the TS over BOQ would arise only if there is any ambiguity regarding an item of work. Clearly, there was no ambiguity since the construction of a drainage layer was not specified in BOQ 3.01 itself. The mere fact that the Respondent claimed the BOQ rates at the initial stage even for the varied item of works would not mean that it accepted the varied item of work as forming part of BOQ Item 3.01 and was precluded from seeking a different rate for such varied item. This is what the Respondent, in fact, did and thereafter pursued the matter before the DRB.

30. As regards the orders passed by the learned Arbitrators for enhancement of fees, in the first place it requires to be noticed that there is no prayer in the petition questioning the orders passed by the learned Arbitrators in that

regard. Learned counsel for the NHAI was unable to show how such a prayer could have been made within the scope of Section 34 of the Act. Even an appeal against such an order would not be maintainable within the scope of Section 37(2) (a) of the Act as been held by this Court in ***DS Toll Road Ltd.*** (*supra*). In the absence of an agreement between the parties under Section 31 (8) of the Act, the AT was free to fix a fee which it considered to be reasonable. This being an order passed prior to the coming into effect of the amendment to the Act with effect from 23rd October 2015, there is no yardstick to determine whether the enhancement of fee as determined by the AT is reasonable or not. Consequently, the contention of learned counsel for the Petitioner that the Award should be interfered with on account of the orders passed by the AT enhancing the fees of the Arbitrators is hereby rejected.

31. For the aforementioned reasons, the Court finds that no grounds have been made out for interference with the impugned majority Award. The petition is accordingly dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

JANUARY 30, 2017

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