

\$~R-263

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

+

O.M.P. 524/2009

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Ms. Gunjan Sinha Jain & Mr. Mukesh Kumar,
Advocates.

versus

PCL – SUNCON (JV)

..... Respondent

Through: Dr. Amit George & Mr. Swaroop George,
Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

30.01.2017

%

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 (Act) by the National Highways Authority of India ('NHAI') challenges an Award dated 9th May, 2009 passed by the Arbitral Tribunal ('AT') in the disputes between the NHAI and the Respondent PCL-SUNCON JV arising out of a Contract Agreement (CA) dated 28th March 2002 for the work of four-laning and strengthening of the existing two lanes between km 317 and km 65 on NH-2 in the States of Uttar Pradesh and Bihar, which was awarded by NHAI to the Respondent.

2. The contract was an item rate contract. The Respondent had quoted its rates for various items as per the details given in the Technical Specifications ('TS') and Bill of Quantities ('BOQ'), which formed the part of the Contract Agreement ('CA') between the parties. The dispute pertained to the rate

payable for a non-BOQ item i.e., Granular Sub-Base ('GSB') for emergency repairs and maintenance of shoulders and main carriageway. It is not in dispute that the work of the GSB was a non-BOQ item for which rates were not specified elsewhere in the CA.

3. The genesis of the claim of the Respondent was a letter dated 11th September 2002 by which the Team Leader i.e. the Engineer ordered emergency repairs and maintenance of shoulders and carriageway with GSB from the existing stockpiles of Chunar from the Ram Nagar Camp situated at a distance of 40 km from the Chunar quarry. By a letter dated 29th October 2002, the Team Leader decided that the applicable rate for doing the non-BOQ work of GSB would be as per the BOQ Item 3.02 i.e., at Rs. 720 per cum. Subsequently a new rate of Rs. 665 per cum was finalised by the Team Leader after discussions with the Respondent. This according to the Respondent was a rate derived from the rate for BOQ Item 3.02. This was also consistent with the procedure envisaged under Clause 52.1 of the General Conditions of Contract (GCC). It is sought to be explained by the Respondent that the reduction of Rs. 55 per cum from the quoted rate of Rs. 7620 per cum for BOQ Item No. 3.02 was by way of adjustment for not so proper compaction, grading of surface and less quality control. By letter dated 1st July 2003 the Team Leader stated that deductions would be carried out in the invoice for the month of June 2003.

4. After nearly two years, a new Team Leader by a letter dated 24th May 2005 determined unilaterally that the rate would be Rs. 479.58 per cum based on 'market rates and laying charges'. By letter dated 16th September 2005 the Team Leader informed the Respondent that recoveries would now be effected

on the basis of the new rate from the Interim Payment Certificate (IPC). By a letter dated 20th September 2005 the Respondent raised objections to the above proposal. Thereafter the Team Leader undertook a further review and by letter dated 28th November 2005 recommended another rate of Rs. 488.69 per cum. This letter was forwarded to NHAI, which by letter dated 15th February 2006 reduced the rate further to Rs. 476.18 per cum.

5. The Respondent contended that the above unilateral reduction of the rate to Rs. 479.58 per cum by the Team Leader was illegal. It is contended that once a rate had been determined in terms of Condition 2.1 (e) of the Conditions of Particular Application (COPA), it could only be reconsidered in terms of Clause 2.6 of GCC and Clause 67.1 of COPA as there are no other provisions in the GCC other than Clause 52.1 and 52.2 for determination of variation. The Respondent sent a notice dated 3rd April 2006 to the NHAI under Para 9(b) of the Annexure 'B' to COPA (Disputes Review Board's Rules and Procedures) seeking a decision on the rates for the GSB work. With no response forthcoming, a second notice was sent on 24th April 2006 under Para 9 (c) of the above Rules. With no response even to this notice, the Respondent invoked Sub-clause 67.1 of COPA and sought a decision from the Dispute Review Board (DRB) within the stipulated period of 56 days.

6. Before the DRB it was contended by the NHAI that the material specifications for the GSB work were not in conformity with that specified for BOQ Item 3.02. Included in the documents submitted before the DRB by the NHAI was the report of a Committee which got the materials used in the GSB work tested through an independent laboratory. The Committee observed that "the material used for such works are generally comparable to closely graded

GSB material (except for marginal variation with regard to percentage passing through IS Sieve size 0.42 mm and 0.07 mm) as specified in the MOST Specifications outlined in the Contract Agreement." In its recommendation dated 7th September, 2006 the DRB referred to the Committee's aforementioned report and concluded that "the GSB material used met the requirements of the Specifications." However, the procedure in carrying out the GSB work in accordance with BOQ Item 3.02 "was probably not wholly adhered to." The DRB analyzed the rates based on a comparative statement furnished by NHAI and recommended that a rate of Rs. 596 per cum be paid to the Respondent for the GSB work together with interest for any delay in terms of Clause 60. 8 (b) of COPA.

7. The Respondent points out that although the basic rate of Chunar quarry considered by the DRB was Rs. 128.75 per ton, while converting it to arrive at the rate per cubic meter from per ton, the figure of Rs.128.75 was multiplied by 1.65 instead of 2.12 as required in light of the fact that the density of the GSB being 2.12. If so multiplied the rate worked out to Rs. 693 per cum. Pointing out this 'inadvertent error', the Respondent again approached the DRB by letters dated 7th and 15th September 2006. Since no response was received from the DRB, the Respondent invoked the arbitration clause and the AT was constituted.

8. The claims filed by the Respondent before the AT were as under:

Claim No. 1: Work of GSB done in emergency repairs, maintenance of shoulders and main carriageway as ordered by the Engineer in the sum of Rs. 1,03,19,827.50.

Claim No.2(a): Past interest at 12% per annum in the sum of Rs. 28,81,393.03.

Claim No.2(b): *Pendente lite* interest @ 18% per annum on awarded the amount of claim.

Claim No.2(c): Future interest @ 18% per annum on awarded amount of claim plus amount of past and *pendente lite* interest.

Claim No.3: Cost of Arbitration in the sum of Rs. 10,00,000.

9. By the impugned Award, the AT held that the Respondents were entitled to payment at Rs. 665 per cum for the GSB work and a further premium of 2.7% above the said rate along with interest at 12% per annum. Both parties were directed to bear their own costs of arbitration.

10. Ms. Gunjan Sinha Jain, learned counsel appearing for NHAI, submitted that despite noting in the Award that the Respondent had itself agreed for a rate of Rs. 665 per cubic metre, the AT awarded it a premium of 2.7% over the said rate, which was not even asked for by the Respondent. She submitted that there was no basis for the AT to fix a rate for GSB much higher than that recommended by the DRB, which was comprised of technical personnel, unless there were sound reasons for doing so. She further submitted that the decision of the AT was also inconsistent with the engineering practice. She submitted that there were no reasons afforded by the AT for proceeding on the basis that the maximum input for compaction in the cost of a GSB work was 16.794%. Ms Sinha further submitted that the claim was time barred as the since it had not been made within 28 days of the first recovery made from the IPC as

required by Clause 53.1. Finally, she submitted that the Award of interest at 12% was uncalled for and excessive.

11. Replying to the above submissions, Dr. Amit George, learned counsel for the Respondent, pointed out that the contract was essentially a unit rate contract. The rates had to be quoted for the BOQ items. Dr. George also pointed out that in the grounds of challenge in the petition, there was no plea taken regarding the AT having awarded a premium of 2.7% over and above the rate accepted by the Respondent. In fact all that was urged in Ground D was that the AT erred in simply applying the percentage of non-compliance of specifications in relation to the compaction (30%) and quality control measures (2%) to the BOQ rate. In fact the AT had given cogent reasons for arriving at the figure of 669.32 per cum which it limited to Rs. 665 per cum since the Respondent had accepted that figure even before the Team Leader.

As noted by the AT, even for the BOQ rates, the Respondent had claimed a uniform premium of 2.7% which had been accepted by NHAI. The award of interest was according to the recommendations of the DRB and consistent with Clause 60.8 (b) COPA. He accordingly submitted that there were no grounds made out under Section 34 of the Act for interference with the well-reasoned Award of the AT which comprised technical experts.

12. Before proceeding to deal with the above submissions the Court would like to recapitulate the well-settled legal position regarding the limited scope of its powers under Section 34 of the Act to interfere with a reasoned Award. The high threshold of the Award being contrary to the fundamental policy of Indian law has to be met by the applicant, which in this case is NHAI.

13. The Court would also like to emphasise that an applicant has to clearly state in the petition the precise grounds of challenge to the impugned Award. A broad plea that the Award is opposed to the fundamental policy of Indian law will be a mere repetition of the language of Section 34 (2) (d) (ii) of the Act and does not help the Court of limited jurisdiction in undertaking the task of reviewing the Award within the narrow parameters of Section 34. The very nature of the arbitration proceedings and the legislative intent behind Section 34 of the Act mandate the laying down of a strict procedural regimen concerning pleadings. The Petitioner should be clear about the grounds of challenge and the Respondent should be made aware of the precise case it has to meet.

14. In other words, in the normal course, the Court should not permit a party to urge during the course of arguments pleas or grounds that are not specifically raised before the Arbitrator or AT as the case may be or in the petition. A party wishing to raise a plea that has not earlier been urged as such in the arbitral proceedings or the petition under Section 34 should seek the leave of the Court by filing an application. The grant of such application cannot obviously be a mechanical ritual. For instance, depending on when such application is filed, the Court might have to consider whether such a prayer can be granted from the point of view of limitation. Also, such a plea may be refused if the Court finds it to be vexatious, or with a view to interminably delaying the proceedings or defeating the ends of justice. In short a party should generally be made to adhere to the pleadings as far as the challenge to an Award is concerned.

15. As far as the present petition by NHAI is concerned, to begin with, it is required to be noted that the points urged during arguments by Ms. Gunjan

Sinha Jain to attack the impugned Award do not find mention in the petition. In other words, there is no ground urged in the petition that (a) the AT erred in awarding a premium of 2.7% over Rs. 665 per cum which was not even sought by the Petitioner (b) that the AT erred in proceeding on the premise the maximum input for compaction in the cost of a GSB work was 16.794% and (c) the AT ought not to have fixed a rate much higher than that fixed by the DRB unless there were good grounds for doing so.

16. The attempt by Ms. Sinha Jain to refer to Ground D of the petition to cover this lapse is an exercise in futility. The said ground reads thus:

"Because the Ld. AT has erred in working out the rate based on BOQ Item No. 3.02 even after taking into account the objections of the Employer/Respondent regarding non compliance of specifications relating to compaction done for this work to the extent of 30% and non compliance of quality control measures amounting to 2% of the cost. The Ld. AT has erred in simply applying these percentages to the BOQ rate of 3.02 and worked out the rate for this work, which is improper."

17. Apart from the fact that the above ground cannot be read as even remotely alluding to any of the grounds urged during arguments as noted above, Ground D contains statements that are factually erroneous. It ignores the fact that a Committee appointed by NHAI itself had given a report confirming that the material used for the GSB work was "generally comparable to closely graded GSB material (except for marginal variation with regard to percentage passing through IS Sieve size 0.42 mm and 0.07 mm) as specified in the MOST Specifications outlined in the Contract Agreement." The DRB relied on that report to conclude in its recommendation dated 7th September, 2006 that "the GSB material used met the requirements of the Specifications." The NHAI not having questioned the findings of the DRB cannot now be heard to plead to the

contrary.

18. On its part the AT did account for the deviations from the specification as pointed out by the NHAI. In para 5.5 of the impugned Award the AT notes:

"From the record submitted before us, including the Rate Analysis approved by the Respondents, AT further observes that the Engineer / Employer found the work of Non-BOQ Item deficient viz-a-viz BOQ Item No. 3.02 in respect to the following:

(i) Non compliance of Specifications relating to compaction to the extent of 30%.

(ii) Non compliance of Quality Control measures amounting to 2% of cost."

19. For ascertaining the percentage of input for compaction of GSB work, the AT itself prepared a comparative statement (which forms part of the Award) based on the Rates Analysis prepared by different authorities including the Engineer, the subsequent Team Leader, the NHAI and the DRB.

20. The AT then invited comments from both parties. The AT observed that NHAI had confirmed the percentages of inputs like labour, machinery, materials etc., "which were also matching the inputs worked out by the AT". It was then observed by the AT in para 5.9 of the Award as under:

"5.9 AT observes that Respondents have already stated in the Variation Order that material used was GSB equivalent material. However, the concern of Respondents was only about Compaction and Quality Control measures.

We find that the maximum input for compaction, in the cost of GSB work, comes to 16.794%. The Respondents have assessed that the compaction of the non-BOQ item is lesser by 30% viz-a-viz a compaction of the GSB work as per MORT&H specifications. So, when

we take 30% of 16.794% it comes to 5.038%. Further when we add 2% on account of inadequate Quality Control measures as assessed by the Respondents, the total comes to 7.038%.

So, when we reduce the BOQ item rate of 720/- per cum by 7.038%, it comes to Rs. 669.32 per cum.”

21. There has to be some basis for NHAI to question the above observation of the AT that "the maximum input for compaction, in the cost of GSB work, comes to 16.794%." It must be recalled that the members of the AT were qualified engineers themselves. If according to NHAI, the maximum input for compaction was a different percentage, then NHAI ought to have placed material before the Court in support of such plea. This is apart from the fact that no such specific plea has in fact been urged in the petition. A bald assertion that the above determination is erroneous is not helpful for the Court to conclude that the Award is against the fundamental policy of Indian law. The AT has, in fact, accounted for the lesser compaction as well as inadequate quality control and after factoring that it reduced the BOQ item rate of Rs. 720 by 7.038%. On this basis it worked out the rate as Rs. 669.32 per cubic metre.

22. There is merit in the contention of Dr. George that when the Respondents agreed to the rate of Rs. 665 per cubic metre, they were basing their claim on the BOQ rate itself. Further, even the NHAI did not dispute that the Respondent entitled to a premium of 2.7% over and above the BOQ rates quoted by them. In the circumstances, there is no legal error in the AT also granting the Respondent a premium of 2.7% over the above the accepted rate of Rs. 665 per cubic metre.

23. As regards the plea that the claim of the Respondent was barred by

limitation, the Court notices that the AT has dealt with this issue in para 5.2 of the Award. It was noted that initially the Team Leader had by its letter dated 1st July, 2003 finalised the rate of Rs. 665 per cubic metre after discussions with NHAI. This was in terms of clause 52.1 of the GCC. On this basis, payments were made by NHAI to the Respondent till November 2005. This rate was derived after making adjustments for the not-so-proper compaction, grading of the surface and less quality control. However, a subsequent Team Leader by a letter dated 24th May, 2005 proposed a new rate of Rs. 479.58 per cubic metre purportedly based on market rates and laying charges. This was informed to the Respondent only by the letter dated 16th September, 2005. This was immediately disputed by the Respondent by a letter dated 20th September 2005. NHAI nevertheless proceeded to recover the amount paid earlier at Rs.665 per cubic metre from IPC 13 and IPC 40. Therefore it cannot be contended that Clause 53.1 was not adhered to. The further developments leading up to the decision of the DRB have already been referred to earlier in this order. The Court, accordingly, does not find any infirmity in the conclusion reached by the AT that the claim of the Respondent was not barred by limitation.

24. In any event, as pointed out by learned counsel for the Respondent, to the extent that Clause 53.1 of the GCC requires the claimant to issue a notice of its intention to the Engineer within 28 days after the event, failing which the claim would be time barred, is hit by Section 26 of the Contract Act 1872 as explained by this Court in *National Highways Authority of India v. Mecon-Gea Energy Systems India Ltd. JV 199 (2013) DLT 397*.

25. As regards the grant of interest at 12%, the AT's view is consistent with

what was recommended by the DRB itself and this in turn was in conformity with Clause 60.8 (b) COPA.

26. Consequently, the Court finds that there are no grounds made out for interference with the impugned Award dated 9th May 2009 of the AT. The petition is, accordingly, dismissed but in the circumstances, with no orders as to costs.

JANUARY 30, 2017
b'nesh

S. MURALIDHAR, J.

