

\$-R-3

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

Date of decision: 20th November, 2018

+ O.M.P. 378/2012

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Ms.Soumya Priyadarshinee &
Ms.Kritika Shukla, Advs.

versus

M/S ITD-SDB (JV)

..... Respondent

Through: Ms.Kiran Suri, Sr. Adv. with
Mr.Arvind Minocha &
Ms.Aishwarya Kumar, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 04.10.2011 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Contract for work of Four laning and Strengthening of existing two lane highway section between Km. 393 and Km. 470 of NH-2 in Uttar Pradesh (Package-IIA). The dispute between the parties was in relation to the unit of measurement of BOQ item no. 1.04, that is, "Scarifying the existing bituminous surfacing layer or stone metal crust complete as per Technical Specification Clause No. 501.3.2".
2. The BOQ item no. 1.04 provided the unit of measurement as

cubic metres. The respondent had quoted rate of Rs. 200 per unit against the said item. Dispute arose because the respondent later contended that the unit of measurement for this item should be in Sq. M. instead of Cu. M. The respondent carried the said dispute before the Engineer, who by letter dated 05.12.2003, responded as under:-

“With respect to the above referenced letter regarding the measurement and payment of the scarification of the bituminous surfacing on the existing carriageway.

As you have stated in your letter under Clause 501.6.2 of the Technical Specification the measurement is defined as square metres. In the Bill of Quantities you have provided a price for cubic metres. Thus there is indeed a discrepancy in the contract documents. The drawings show a variable thickness of bituminous surfacing hence there is good reason why the rate was requested per cubic metre. Pursuant to sub-clause 5.2 of the Conditions of Contract it is our opinion that the BoQ should have asked for a price per square metre, however, since you have obviously priced the item based on a cubic rate, if you wish now to convert such to a square metre rate please submit a revised until rate analysis.”

(Emphasis Supplied)

3. Later, the Engineer rejected the claim of the respondent holding that the unit of measurement of the subject BOQ item provided in the Agreement, that is, cu. m. is binding between the parties. The respondent escalated the claim before the Dispute Review Board (DRB), which also by its majority recommendation rejected the claims of the respondent. Aggrieved with this recommendation, the respondent invoked the Arbitration Agreement between the parties and the arbitration proceedings have resulted in the Impugned Award.

4. The Arbitral Tribunal has held that there was an ambiguity in the Contract document regarding the unit of measurement of the BOQ item

no. 1.04 and applying the principle of *contra proferentem* had held that such ambiguity should be interpreted against the petitioner, who was the author of the Contract. The Arbitral Tribunal has further placed reliance on the preamble to the BOQ items which provides that the method of measurement shall be in accordance with provisions of “MOST Specification for Road and Bridge Works (Third Revision) published by Indian Roads Congress, New Delhi”. The Arbitral Tribunal has further held that applying sub-clause 5.2 of the Conditions of Particular Application (COPA), the priced BOQ would rank lower to the Conditions of Contract and Specification and therefore, the Specification would get preference in the matter of interpretation. The Arbitral Tribunal has thereafter worked out the quantity of the work done by the respondent as 3,78,617.13 sq. mtrs. and awarded a sum of Rs. 2,68,77,252/- in favour of the respondent.

5. The learned counsel for the petitioner submits that there was no ambiguity in item no. 1.04 of the BOQ which clearly and in no ambiguous words defines the unit of measurement of the work as cu. mtr. The respondent having quoted price of the work on the basis of this unit of measurement cannot, after completion of the work, assert that the unit of measurement be changed to sqr. mtr. She further submits that allowing the respondent to change the unit of measurement would give an unfair advantage to the respondent, who had succeeded in award of work on the basis of its own quotation in the bid. The learned counsel for the petitioner further submits that in any case, there is no basis for the Arbitral Tribunal to have arrived at the rate on which the respondent is to be paid incase the unit of measurement is to be changed from cu.

mtrs. to sqr. mtrs.

6. On the other hand, the learned senior counsel for the respondent submits that even the Engineer in its communication dated 05.12.2003 had recognised that there is an ambiguity in the unit of measurement as mentioned for item no. 1.04 of the BOQ items. The Engineer had asked for rate justification on the basis of unit of measurement being sqr. mtrs. She further submits that the respondent had always raised its bills by using sqr. mtrs. as unit of measurement for this work. She submits that the Arbitral Tribunal having interpreted the Contract in a particular manner, this Court cannot interfere with the same in exercise of its power under Section 34 of the Act. She further submits that two of the bills had been paid by the petitioner by using the unit of measurement as sqr. mtr. It is only thereafter that the petitioner resisted the claim of the respondent.

7. As far as the rate is concerned, drawing reference to the averments made in the Statement of Claim alongwith a justification annexed thereto, she submits that the respondent had relied upon the rates which were based on the Guide Book published by Central Water Commission, Government of India and submits that the Arbitrator has accepted this rate. The learned senior counsel for the respondent submits that the respondent has quoted its rate in sqr. mtr. while submitting its bid and infact, if quoted in cu. mtrs. it would have been Rs. 1600 per cu. mtrs.

8. The learned senior counsel submits that the Arbitral Tribunal constitutes of technically qualified arbitrators and they are not supposed to write an Award as a judgment of this Court. Relying upon the

Judgment of this Court in *DDA v. Bhagat Construction Co. Pvt. Ltd.*, MANU/DE/0602/2004; *Rajesh Khanna v. Govt. of NCT of Delhi and Ors.*, MANU/DE/0055/2005 and of the Supreme Court in *Harish Chandra and Company v. State of Uttar Pradesh*, (2016) 9 SCC, 478, she submits that the ground of inadequacy of reason cannot be a justification for setting aside the Award. She further submits that incase this Court is of the opinion that the Arbitral Tribunal has not given adequate reasons, the respondent be given an opportunity to file an application under Section 34 (4) of the Act.

9. I have considered the submissions made by the learned counsels for the parties. Item no. 1.04 of the BOQ is quoted hereinbelow:-

<i>Item</i>	<i>Description</i>	<i>Unit</i>	<i>Qty.</i>	<i>Unit rates</i>		<i>Amount in Rs.</i>	
				<i>In words</i>	<i>In figure</i>	<i>In words</i>	<i>In figure</i>
1.04	Scarifying the existing bituminous surfacing layer or stone metal crust complete as per Tech Specification Clause NO.501.3.2	Cu.M	40000	Two hundred rupees	200.00	Eight Million	8,000,000.00

10. The said item clearly mentions the unit of measurement as cu. mtrs. There is absolutely no ambiguity in the same. It is correct that in the preamble to the BOQ a reference has been made to the MOST Specification, which, in turn provides for unit of measurement as sqr.

mtrs., however, in view of the specific condition put in the BOQ, a perceived dispute cannot be said to have arisen so as to require an interpretation from the Arbitral Tribunal.

11. The Engineer in its letter dated 05.12.2003 has also stated that the drawings show a variable thickness of bituminous surfacing hence there is good reason why the rate was requested per cubic metre. It may be true that the Engineer thereafter called upon the respondent to justify the rate demanded by it with the unit as sqr. mtr., however, the said claim having being rejected by the Engineer and thereafter by DRB by applying the contractual terms strictly, no fault can be found against such decision. The respondent having quoted the bid on the basis of the unit of measurement as cu. mtr. cannot now turn around and seek modification of the Agreement at a later stage. I cannot agree with the submission of the learned senior counsel for the respondent that the respondent had quoted a rate of Rs. 200 per sq. mtr. in its bid. This is clearly an afterthought. I may only note that even as per the respondent, if the unit of measurement is taken as sqr. mtr. the rate would be Rs. 80 per sqr. mtr. There is absolutely no justification provided by the respondent to have quoted Rs. 200 in its bid. Clearly at the time of the submission of the bid the respondent itself has taken the unit of measurement as cu. mtr. and submitted its bid on that basis. Having submitted its bid on that basis it cannot now turn around and challenge the same. Also relevant is that the measurement book always recorded the measurement in three dimensions. Therefore, there was no ambiguity in the bid document.

12. As there was no ambiguity in the terms of the Agreement, there

was no occasion for the Arbitral Tribunal to have applied Clause 5.2 of COPA or any other principle of interpretation as has been done in the Impugned Award.

13. In ***Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Another***, (2018) 11 SCC 508, the Supreme Court has held as under:-

“49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock test of giving “business efficacy” to the transaction, as must have been intended at all events by both business parties. The development of law saw the “five condition test” for an implied condition to be read into the contract including the “business efficacy” test. It also sought to incorporate “the Officious Bystander Test” [Shirlaw v. Southern Foundries (1926) Ltd.]. This test has been set out in B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. v. West Bromwich Building Society and Attorney General of Belize v. Belize Telecom Ltd. Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.”

14. Be that as it may, there is not even a whisper in the Impugned Award on the rate being awarded in favour of the respondent. The rate has not even been discussed by the Arbitral Tribunal in its Impugned Award. A reading of the Statement of Claim filed by the respondent itself would suggest that the respondent had given different methods by which the rate can be calculated if the unit of measurement is taken as sq. mtrs. In such a scenario, it was for the Arbitral Tribunal to have arrived at a decision on the rate after giving reasons for the same. The Award does not show any application of mind on the issue of rate to be applied if the unit of measurement is taken as sq. mtr. instead of cu. m. This is not a case of inadequacy of reason but a case of no reasons being given. The acceptance of the rate by the Arbitral Tribunal is totally devoid of any reason. It is not even the case where this Court can deduce from any part of the Award the basis of acceptance of the rate. Therefore, the Judgments relied upon by the learned senior counsel for the respondent would have absolutely no application to the facts to the present case.

15. In view of the above, the Impugned Award cannot be sustained and is set aside. There shall be no order as to cost.

NAVIN CHAWLA, J

NOVEMBER 20, 2018/rv