

\$~2

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 4th December, 2018

+

O.M.P. 511/2011

**M/S NATIONAL HIGHWAYS AUTHORITY OF
INDIA**

..... Petitioner

Through: Mr. Shubham Saxena, Ms. Kritika
Shukla & Mr. Mukesh Kumar,
Advocates (M-9958207381).

versus

M/S PCL-SUNCON(JV)

..... Respondent

Through: Mr. Swaroop, Mr. George Ano &
Mrs. Omana George, Advocates (M-
9871144284)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the award of a three member Arbitral Tribunal (hereinafter '*Tribunal*') dated 24th February, 2011.
2. Brief background of the dispute is that the National Highways Authority of India ('*NHAI*') awarded the contract "Four laning and strengthening of the existing two lane section between Km 317 and Km 65 on NH-2 in U.P. and Bihar". The total value of the contract was Rs.3,96,47,901/-. Agreement dated 28th March, 2002 was entered into between the parties and the contract contained three separate sections i.e. Section I to be completed within eight months, Section II to be completed in

24 months and Section III to be completed within 36 months. The date of commencement was 31st March, 2002. Various disputes arose between the parties. The Respondent - M/s PCL-SUNCON (JV) (*hereinafter* 'Contractor') raised Claim Nos.1 & 2 in respect of the following:

"Claim No.1 - Claim for repayment of recovery made from IPC bills No.33 and amount not paid for subsequent work done at Tack Coat over Dense Graded Bituminous Macadam. (Latest details would be submitted along with rejoinder) - Rs.1,14,10,716/- (provisional)

Claim No.2 - Payment for extra work done of levelling Pad/Foundation concrete and filter media for Re retaining wall – Rs. 67,89,030.00"

Claim No.1

3. The question in this claim is as to whether the Tack Coat was required to be used in the lane of the road. The contention of the NHAI is that the Tack Coat was not mandatory and was also not approved by the Engineer-in-Charge. According to the NHAI, the Tack Coat was not a Bill of Quantities (BOQ) item as well. The Tribunal, however, after considering the contractual clauses, held that the use of Tack Coat is a good engineering principle, though it is not mandatory. The Tribunal held that if overlaying of the bituminous layer is not done within a period of two days, then the Tack Coat ought to be considered to be mandatory.

4. The Tribunal has also directed the NHAI to inform the Tribunal as to what was the practice followed by the NHAI in various contracts. The Tribunal records that except in one contract package executed by the NHAI in respect of almost all the projects of the NHAI, the Tack Coat was used. Further, the Tribunal took a note of meeting dated 5th April, 2005 held

between the Project Director and Engineer-in-Charge wherein a conscious decision was taken that the Tack Coat would be provided on top of Dense Graded Bituminous Macadam ('DBM'). On the basis of all these three reasons, the Tribunal held that the use of the Tack Coat was necessary/mandatory and was duly approved.

5. The Court has perused the reasoning given by the Tribunal in paragraph 5.1.9. The Tribunal has extracted three clauses from the contract, which are as under:

"i) Clause 501.8.7.5 - Tack Coat:

"This is to be a PROVISIONAL item, which may be used in part or not at all, at the Engineer's direction, and is to be measured and paid for, if used, on a square meter basis"

ii) Clause 503.4.3 - Application of Tack Coat:

In this clause rate of application of Tack Coat, temperature at which bituminous is to be sprayed and method of application of Tack Coat has been specified. The last part of this clause which is relevant to this dispute reads:-

"Where the material to receive an overlay is a freshly laid bituminous layer, that has not been subjected to traffic, contaminated by dust, a Tack Coat is not mandatory where the overlay is completed within two days."

iii) Clause 509.4.5 – Tack Coat:

Specification for BM have been given in clause 509. The above stated sub clause reads:

"Where specified in the contract, or otherwise required by the Engineer, a Tack Coat shall be applied in accordance with requirements of clause 503.""

6. A perusal, especially of clause 503.4.3 shows that the Tack Coat is not mandatory only if the overlaying work is completed within two days. The Tribunal comes to the conclusion that as per the contractual stipulations,

that various steps were laid down including checking of density and quality controls would itself show that the completion of the overlaying could not have been done within two days. Further, if the overlaying cannot be done within two days, as per the above clauses, the Tack Coat becomes mandatory in order to prevent rusting. This interpretation of clause 503.4.3. cannot be held to be perverse. The Tribunal has also interacted with the NHAI and collected various data from the NHAI and has come to the following conclusion.

“Section 28.3 of the Arbitration & Conciliation Act-1996 mandates that while deciding the dispute, an AT shall take into account the usages of the trade applicable to the transaction. So, during hearings, AT asked the Respondent as to what is the trade practice of the department for use of Tack Coat in such works. It was stated by the Respondent vide their letter No.4904 dated 14th November, 2008 (RD-V) that every contract has its own contract conditions and so it can not be compared with other contracts. It was also stated by the Respondent that most of the contracts of NH-2 are not having a BOQ item for Tack Coat over DBM which means that if Tack Coat is required, then it is incidental to BC as per preamble of Bill of Quantities and as per TS clause 114.2.

When the Respondent was evasive in reply to query of AT regarding the trade practice of Tack Coat in such works, information on such trade practice was sought from NHAI under RTI Act. As per information supplied by NHAI vide its letter No.11041/131/2008-Admn/RTI/Re-1020 dated 20.01.2009, and as detailed out in paras 5, 6, 7 & 8 of the minutes of the hearing of AT held on 20.02.2009, it came out that there was only one contract package executed by NHAI where BC has been laid over DBM without the application of Tack Coat. This Contract Package was in respect of

widening and strengthening of Kondhali-Talegaon (Km. 50 to K. 100) Section of NH-6 in the State of Maharashtra. However, this contract package turned out to be a BOT Project and in such projects, it is very much possible to avoid the Tack Coat over DBM because there is no contractual requirement of measuring the DBM work by the Engineer nor there is any requirement of approval of RFIs for laying BC. Moreover, the Concessionaire would always like to complete the work as early as possible for earning the toll and he would like to take care of the undulations, if appearing any, during the operation and maintenance period.”

7. Thereafter, the Tribunal has also considered the meeting between the Project Director and Engineer to hold that a conscious decision was taken for laying of the Tack Coat. The relevant extract is set out herein below:

“It is probably because of this mandatory requirement of the Tack Coat that the Project Director and the Engineer in a meeting held in the office of PD-V Varanasi on 5th April, 2005 took a conscious decision of providing Tack Coat on the top layer of DBM before laying BC and both of them agreed that if Tack Coat is not found incidental to the work, then the Contractor will get the payment for which the variation may be prepared and consequently, the Engineer even initiated the variation vide this letter No.3270 dated 7th April, 2005 (Exhibit C-VI of CD-1). It is to be noted carefully that in this meeting there was no representative of the Contractor and this conscious decision of providing Tack Coat was taken by the Project Director, Manager-Technical, Resident Engineer and Quantity Surveyor (C-D-18 annexed with CD-VII).”

8. It is additionally submitted that in fact, even if the Tack Coat is used, as per clause 1.4.2 and clause 5 with the preamble, no extra amount is liable to be paid to the Contractor. This is contrary to a bare reading of clause

501.8.7.5, which reads as under:

“This is to be a PROVISIONAL item, which may be used in part or not at all, at the Engineer’s direction, and is to be measured and paid for, if used, on a square meter basis”

9. The above clause shows that if the Tack Coat is used, the same is to be measured and paid on a square meter basis. For the NHAI to argue that this would be part of the total payment to be made to the Contractor and no extra payment is to be made for laying the Tack Coat is contrary to the expressed terms of the contract.

10. For the above reasons, the reasoning of the Tribunal for awarding payment for laying of Tack Coat cannot be faulted with and not liable to be disturbed. There is no challenge raised in terms of the actual measurement, rate or amount awarded.

CLAIM No.2

11. The present claim relates to payment for extra work done of the levelling pad, foundation concrete and filter media for the RE retaining wall. The Arbitral Tribunal has awarded Rs.58,83,702/- for this claim. The measurements and the actual work executed are not in dispute before this Court. What is however disputed is that the work done in respect of the levelling pad, foundation concrete and filter media i.e. the three components was part and parcel of the retaining wall and cannot be counted as extra work.

12. Ld. counsel for the NHAI submits that these three components were clearly part of the Bill of Quantities (*hereinafter ‘BOQ’*) items 6.12 which

reads as under:

<i>Item</i>	<i>Description</i>	<i>Unit</i>
6.12	<i>Providing reinforced earth retaining wall complete as per drawings & Technical specification Clause 700</i>	<i>Sq. M</i>
6.14	<i>Fill behind reinforced earth wall as per Technical Specification Clause 703</i>	<i>Cu. M</i>

13. Counsel further submits that during the pre-bid meeting, one of the contractors had asked for a clarification in question no.51 and it was clarified categorically that the said three components would be comprised of in the rate quoted by the contractor. The question and the answer as extracted by the Tribunal are set out below:

“5.2.5 During pre-bid meeting a query was put by some contractor listed as question No.51 which stated as under:-

Item 6.12 – Reinforced earth retaining wall – kindly clarify if rate should include cost towards earth-work, levelling pad, coping beam, filter medium, geo-grid/ geotextile required for RE Wall construction also or else it is covered under item 6.15

However, while replying, the Employer clarified: Rate will include all components. This item is not covered under item no. 6.15.”

It is thus submitted that the contractor who was an experienced contractor was well aware of the fact that the RE wall would comprise of these three components and accordingly had to bid for the same. The award of amounts on the ground that the work executed for these three items was extra work is erroneous.

14. Ld. counsel for the Respondent on the other hand relies on the

technical specifications which are provided in respect of the RE wall. The Clause 703.6 which mentions the measurements and Clause 703.7 which gives the rate, according to him clearly show that until and unless the foundation, the filter media and the levelling pad are constructed and measured, the rate cannot be paid to the contractor. He further submits that these cannot form part of the RE wall inasmuch as the two are measured by completely different units. Even the clarification according to him would not bind the contractor as the clarification was erroneous and did not result in any amendment to the contract. On this claim, the Ld. Arbitral Tribunal has come to the conclusion after an analysis of the various components forming part of the RE wall that item no. 6.14 which relates to the fill in the earth wall is different from item 6.12. According to the Arbitral Tribunal, in item 6.12, what is included is as per Clause 703.7, the following:

"5.2.11 A perusal clause 703.7(i) reveals that the rate for facia-units comprises the following :-

- i) The cost of modular blocks*
- ii) Cost of surface reinforcement inside modular blocks*
- iii) Cost of providing reinforcing elements for jointing with geogrid / geotextile reinforcement.*
- iv) Cost of joint filler and bearing pads for fixing modular blocks."*

15. The Arbitral Tribunal then comes to the conclusion that the three components are not included in item no.6.12 of the BOQ.

16. A perusal of the award reveals that the question has been determined by the Arbitral Tribunal after a technical analysis of what are the various components of the RE wall. The Tribunal has duly considered the two BOQ items no.6.12 and 6.14 as also the technical specifications i.e., Clauses 703.6 and 703.7. The Arbitral Tribunal's finding cannot be held to be perverse or

capricious. It involved a thorough analysis of the various BOQ items and the work executed by the contractor. Moreover, the technical specification clause 703.6 also shows that while the RE wall is measured and paid in terms of square meters, the filter media, the levelling pad and the foundation is measured in cubic meters and has separate rates provided therein. Thus, clearly the Arbitral Tribunal's finding that these three items are not included in 6.12 is valid and does not warrant any interference.

17. The petition is accordingly disposed of.

PRATHIBA M. SINGH
JUDGE

DECEMBER 04, 2018

Rahul



सत्यमेव जयते