

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

Decided on: 17.07.2018

+ **FAO (OS) 316/2017, C.M. APPL.45401-45402/2017**
M/S. NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

Through: Sh. Narender Hooda, Sr. Advocate with Sh.
Abhishek Kumar and Ms. Arushi Gupta, Advocates.

versus

M/S. PCL-STICCO (JV) Respondent

Through: Dr. Amit George, Sh. Rishabh Dheer, Sh.
Swaroop George and Ms. Rajsree Ajay, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The National Highways Authority of India (NHAI) in its highly belated appeal (delayed by over 240 days) without any appropriate application, urges that the learned Single Judge fell into error in overlooking that the award rendered by the Tribunal was contrary to express terms of the contract.

2. The parties had entered into an agreement for construction of a stretch of the National Highway widening/road laying contract, i.e. 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. The agreement was entered into between the parties on 28.08.2001. The dispute which led to the impugned judgment related to the award by the Tribunal on 07.01.2017.

3. The Tribunal had concluded, upon consideration of the rival

submission and the evidence on the record, by majority, that the NHAI's denial of the contractor's claim for 150 mm thick layer as GSB drainage layer called for a varied rate. Before the Tribunal, the claimant contended that neither at the stage of the bid nor at the stage when the contract was concluded was it ever disclosed in the BOQ whether the layer was intended to serve as drainage layer. It is urged by the claimant/contractor that much after the conclusion of contract which means that considerably after the bid had been accepted based upon the existing standards, the NHAI indicated in the Good for Construction drawing that a particular stretch or stretches were intended to serve as drainage layer(s). It was submitted that the BOQ clause in this regard, which was sought to be pressed into service by NHAI to say that the rates were inclusive, reads as follows:

“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. The Tribunal in its majority award upon analysis of materials before it accepted the contractor's claim and awarded 20% extra for working the specification of grading as per 400.1.A; the sum awarded was ₹34,16,555.70. The relevant findings of the majority award read as follows:

“AT's Observations & Findings

Claim No. I :

5.1 AT observes that BOQ item 3.01 covers complete work of GSB. The item's description in BOQ embodies reference to Grading 1 of Table 400.1 which conveys that bidding party had to quote keeping in view the contents of Grading 1 of Table 400.1, specifically referred in the BOQ and not any other table

of grading. Although General Technical Specifications and Supplementary Technical Specifications and Amendments/ Modifications/Additions thereto are binding on Claimant but BOQ item 3.01 is for "Constructing Granular Subbase (GSB) using crushed stone aggregate only conforming to Grading I of Table 400-1 complete as per Drawing and Technical Specifications clause 401".

No separate layers are indicated in item 3.01 of the BOQ. Therefore the contention of Respondent that gradation requirement of the GSB materials laid in two distinct layers with separate gradings is not correct.

Also contention of Respondent that clause 401 and Table 401.1A are integral part of the BOQ item 3.01 is not correct as Table 401.1A was introduced in 'Good for construction drawing' after acceptance of the Contract.

Since BOQ item 3.01 refers to Table 400.1 only, the rate of Rs.540/- against this item can not be applied to both the specifications. Respondent has not included in the BOQ item Table 400.1A and thus the rate is not applicable to the specification of work done as per table 400.1 A.

Engineering practice contention relied upon by the Respondent is not relevant when specific gradation of aggregate as per Grading I of Table 400.1 has been specified in the BOQ item 3.01.

Stipulation in sub clause 1.1.4 of the Preamble to the Technical Specification will be relevant only in case of ambiguity in the description of BQQ vis-a-vis drawing but there is no such ambiguity. Similarly Sub-clause 5.2.1 regarding interpretation of ambiguities referred by Respondent is not applicable.

As such, a new rate needs to be derived in terms of the contract for the work done by Claimant as per table 400.1A for the lower layer of GSB. Claimant has claimed vide letter no. PCL/SJV/1502/2005 dated 18.11.2005 a rate of Rs.1102/- per

Cu.m. based on the rate analysis enclosed. Further, rate analysis in support of Rs. 1102/- adopted for drainage layer (Ex C-12) was also submitted by Claimant vide Appendices 4 and 5 along with supporting documents. The Respondent, vide his letter no. NHA1/P1U/BAM/85/ORV11/2010/714 dated 14-05-2010, submitted a rate of Rs.436/- per Cu.m. for GSB as per table 400.1 A and that too five years after receipt of the Claimant's rate analysis. The analysis submitted by the Respondent vide Annexure 3 to the letter dated 14-05-2010 is based on DPR, which is not forming part of the Contract. Hence the rate of Rs.436/- can not be taken as authentic.”

5. The minority award held that BOQ item 3.01 specified the item of the granular sub-base to be executed in terms of the drawing and technical specifications. The minority arbitrator thus concluded that the BOQ item 3.01 had to be read along with clause 4.01 and gradation under table 400.1.A was indicated in Table 401 which specifically talked of drainage layer. The minority award talked about engineering practice and proceeded to compare the two tables Grading I of Tables 400.1 and 400.1A. It was held that the claimant was not justified in determining the higher rate.

6. The NHAI applied for setting aside the award. The learned Single Judge rejected its arguments on this score, holding as follows:

“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 prebid 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."

7. Learned senior counsel for NHAI endeavoured to submit that the Tribunal and the learned Single Judge erred in holding that the demand was not indicated for the drainage layer and that the construction of the contract overlooked clause 400.1.A and the conditions spelt out in that. It was urged that such being the case, the Tribunal's award clearly contravened Section 28(3) of the *Arbitration and Conciliation Act, 1996* [hereafter "the 1996 Act"] as it proceeded to return findings on aspects which went beyond the contract. Learned senior counsel also submitted that the findings of learned single judge went beyond the facts and also the reasoning given by the Tribunal and consequently, needed to be set aside. On the other hand, learned counsel for the contractor urged that all in the pleadings, NHAI denied its arguments that at the stage of supply of Good for Construction drawing, it was informed for the first time about the drainage layer. The *contra proferentem* rule applies in the facts of this case as concededly these conditions were applied by the NHAI which had procured the services.

8. It was urged furthermore that given the limited jurisdiction of the Court to appreciate the factual findings, the Tribunal's reasoning is cogent and based upon materials on the record. The factual discussion, especially the extracts of the reasoning of the Tribunal and the learned Single Judge would reveal that on the particular aspect as to whether clause 401.1.A was

deemed to be part of the BOQ 3.01 was specifically in issue before the Tribunal and also considered consciously by the learned Single Judge. There is no *per se* error in the manner of consideration by the Tribunal which will be the only basis for interference by the Court. There does not appear to be any oral evidence whether in fact the said condition was an integral part of the contract. The NHAI does not seem to have produced any evidence to establish that such was the case even through the documents in the form of bid documents made available to the contract. Furthermore, the contractor appears to have led evidence in the form of copy of exhibit C-18. In the given circumstances being pure findings of fact, which this Court sitting in appeal over the order of learned Single Judge under Section 34 of the 1996 Act cannot interfere lightly.

9. As observed at the outset, the NHAI has approached this Court in a highly belated manner without disclosing any plausible reason which it ought to contend. Interestingly, the pleadings in this regard are as follows:

3. *That initially when the present matter was pending before the Ld.single Judge, the same was being monitored under the supervision of Project Implementation Unit (PIU) of National Highways Authority of India situated at Berhampur, Orissa, however, now the said PIU Berhampur has been abolished and the present matter has been transferred to PIU Bhubaneswar. That owing to the change of PIU from existing to new PIU and exigencies of the departmental procedure in obtaining the requisite clearances for filing the appeal, and the actual process of having the appeal drawn up by panel advocates of the appeal, there has been a delay of 243 days in filing the present appeal.*

4. *That the delay in filing the present appeal is neither intentional nor deliberate nor caused by any default on the part*

of the Applicant authority but has been occasioned by reasons beyond the control of the Applicant as explained above.”

10. It is apparent that the NHAI is singularly silent as to the details with respect to the facts it relies upon to request for condonation of delay. It has not disclosed any plausible or cogent explanation for the delay. For the above reasons, the application cannot be granted. NHAI is accordingly directed to pay costs of this appeal quantified at ₹50,000/-.

11. During pendency of the appeal, NHAI had deposited the decretal amounts. It is open to the respondent contractor to withdraw the amount.

12. The appeal accordingly is dismissed.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JULY 17, 2018