

\$~R-32

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

+ O.M.P. 808/2012

Date of Decision : 29th January, 2019

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Ms.Kritika Shukla, Adv.

versus

M/S ORIENTAL STRUCTURE ENGINEERS PVT. LTD.

..... Respondent

Through: Mr.Anil Airi, Sr. Adv. with
Mr.Ravi K Chandana,
Ms.Bindiya Logawney and
Ms.Sukanya Lal, 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 27.04.2012 passed by the Arbitral Tribunal adjudicating the disputes that had arisen between the parties in relation to the 'Allahabad Bypass Project Construction of road from KM 198.000 to KM 242.708 construction package: ABP-3 contract agreement No: ABP/3 dt.04.11.2004 (Reference No.3)'.

2. In the petition, the petitioner had challenged the Award of Claim nos.1, 4, 5, 6, 7 and 8. This Court by its order dated 11.09.2012 rejected the challenge of the petitioner in respect of claim nos.1 and 8 and thereafter issued notice confined only to claim nos.4,5, 6 and 7.

3. Claim nos.4 and 5 pertain to issue of Entry Tax as well as increase in royalty. Learned counsel for the petitioner fairly submits that these issues are now no longer *res integra* and are covered by the judgment of the Supreme Court in ***National Highways Authority of India v. ITD Cementation India Limited*** (2015) 14 SCC 21, against the petitioner.

4. As far as the claim no.6 is concerned, the said claim was for the refund of the amount deducted by the petitioner from the bills payable to the respondent on account of use of Grade 43 Cement in place of Grade 53 Cement during the execution of the work.

5. Admittedly, the respondent had used Grade 43 Cement as approved by the Engineer appointed for the project.

6. The Engineer by its letter dated 12.12.2006 called upon the respondent to stop using Grade 43 Cement and instead use only Grade 53 Cement in accordance with and as stipulated in Clause 1006 of the Supplementary Technical Specifications (STS). The relevant extract from Clause 1006 of STS is reproduced as under:

“1006 CEMENT

Add the following at the end of this clause,

Manufactures test certificate shall be submitted to the Engineer by the Contractor for every consignment of cement. The certificate should cover all the tests for chemicals, requirements, physical requirements and chloride content as per the provisions of IS: 12269.

Independent tests of samples drawn from the consignment shall be carried out at the site laboratory or in an independent laboratory approved by the Engineer, immediately after delivery. The following properties shall be tested.

i) Settling Time

ii) Compressive Strength

The cost of the tests shall be borne by the Contractor. In case the cement is stored beyond 90 days from the date of delivery at site, the following tests shall be carried out at the site laboratory before the cement is used.

i) Settling Time

ii) Compressive Strength

Lot size for independent testing of cement at site shall be the quantity received at site on any day subject to a maximum of 500 tones.”

7. Learned counsel for the petitioner submits that the above specification clearly mandates that the respondent shall use only Grade 53 Cement in the construction. Admittedly, the respondent has used Grade 43 Cement and therefore, made unjustified profit by cost saving. The petitioner was, therefore, entitled to make the deduction of such amount. She further submits that the respondent had agreed to

such deduction and produce invoices and other materials for determination of the exact figure of the same. However, as the respondent failed to give these details, the petitioner arrived at the figure of Rs.71,04,640/- as a fair amount to be deducted from the amounts payable to the respondent.

8. On the other hand, learned senior counsel for the respondent submits that Clause 1006 of the STS merely requires the respondent to produce a certificate clearing all the tests for chemical requirements, physical requirements and chloride content as per provisions of IS:12269. On being asked by the Engineer, the respondent had not only produced such certificate from the manufacturer but also the cement used by the respondent had been sent for testing to an independent laboratory, Shri Ram Institute of Industrial Research, New Delhi, which also confirmed that the cement being used by the respondent conformed to the provision of IS:12269.

9. As far as the submission that the respondent had agreed to make the payment of the differential amount, learned senior counsel for the respondent places reliance on letter dated 09.01.2007 refuting such suggestion of the petitioner. He submits that the assertion of the petitioner that the respondent had agreed to pay differential is therefore, incorrect.

10. I have considered the submission made by the learned counsels for the parties. The Arbitral Tribunal in the Impugned Award has held as under:

“f) During the protracted correspondence, the Claimant produced manufacturer's certificates (CD – 01/ pages 628, 629) and independent laboratory certificate (CD-11/ pages 1112, 1113). These certificates indicate that OPT 43- grade provided for tests by Claimant meets the requirements of IS: 8112 (43-grade cement) and also IS: 12269 (53-grade cement) to the extent stipulated in the CA. The Engineer however stated vide letter dt 13.01.2007 (CD – 01/ page 627) that manufacturer's certificate should state that the cement "conforms to IS:12269 in all respects" and remarked that chloride content is of concern (when it was 0.015 % in the test against 0.05 % max stipulated as per IS:12269). These observations of Engineer are not justified as the GTS CI 1006 as modified by STS CI 1006 on page 216 of CA stipulates that "The certificate should cover all the tests for chemical requirements, physical requirements and chloride content as per provisions of IS: 12269". It does not stipulate that certificate should state that the cement confirms to "IS: 12269 in all respects" as asked for by Engineer. The chloride content was also within limits of IS: 12269. As the tests were for OPC 43-grade, the manufacturer's certificates stated cement complies with IS: 8122 and also recorded additional remarks that test results are in line with IS: 12269, after such requirement was asked for on the advice of Engineer. The requirements like marking the words "53-Grade Ordinary Portland Cement" on the bags as per CI 8.1 of IS:12269, as pointed out by Respondent during defence arguments are untenable (if not frivolous). The cement supplied and tested was 43-grade OPC and though it meets the requirements of IS: 12269 as stipulated in STS CI 1006 on page 216 of CA, it could not have been

marked as "53-Grade Ordinary Portland Cement" on the bags."

11. A reading of the above finding would show that the Arbitral Tribunal not only interpreted Clause 1006 of the STS in the contract but also found that the certificates filed on record show that the cement used by the respondent conformed to the specifications of IS:12269. The Arbitral Tribunal further held that the contract does not mandate that only Grade 53 Cement is to be used in the construction process. This being a matter of interpretation of contract and also appreciation of evidence in form of certificates produced on record by the respondent and the same not been unreasonable or perverse, this Court cannot re-appreciate the same in exercise of its power under Section 34 of the Act.

12. As far as the submission of the learned counsel for the petitioner that the respondent had agreed to such deduction being made, reference to letter dated 29.12.2006, from the Engineer to the respondent, and its reply dated 09.01.2007, from the respondent to the Engineer, do not show any such agreement or concession being given by the respondent. I therefore, find no merit in the challenge to Claim no.6.

13. The other challenge of the petitioner is to Claim no.7 awarded in favour of the respondent. Claim no.7 is for payment of BOQ item no.10.04 for soil investigation.

14. Learned counsel for the petitioner places reliance on Clause 2413 as also Clause 1102 of the GTS and Clause 18.1 of the Condition

of Particular Application to submit that a bare reading of these Clauses would show that no payment was payable to the respondent for the work of boring for soil investigation. She submits that there being a specific condition dealing with the work of boring, the claim of the respondent relying upon general BOQ items, cannot be sustained.

15. I am unable to agree with the submission of the learned counsel for the petitioner. The Arbitral Tribunal while allowing this claim in favour of the respondent has held as under:

“c) As per CI. 1101.4 of STS on page 221 of CA, scope of piling work does not include soil investigation. The subsoil investigation referred to in CL 1102.1 of GCC is to be done "in advance" for the purpose of design and drawings of foundations which were already carried out and bore logs were provided in the contract drawings as indicated in Claimant's letter dt 20.01.2005 (RD – 14/ page 338) and not during execution of work. The boring instructed by Engineer in this particular case during execution was additional/ confirmatory boring to validate the design and drawings based on previous subsoil investigation. As per GCC CI. 18.1 on page 49 of CA, such boring during execution is subject of instruction in accordance with GCC CI 51 (as varied work) unless an item or a provisional sum in respect of such work is included in the BOQ. In this CA, BOQ item No 10.04 is provided for boring for soil investigation and therefore no instruction is required under GCC CI. 51 as varied work. The Engineer had also confirmed in its letter dt 22.01.2005 (RD – 12/page 323) that the payment will be as per provisions of contract and there was no requirement for any instruction in this regard pursuant to GCC CI. 18.1.

d) Subsequently Engineer changed its stand on the plea that as per GTS CI. 2413, "boring is incidental to

foundation work and nothing extra shall be paid". The Engineer has ignored the further provision that "unless otherwise provided in the contract" in the same GTS Cl. 2413. The exploratory boring done during execution is payable as per GCC 18.1 and rate is also provided in BOQ item 10.04. Therefore, payment is justified within the provisions of Contract Agreement.

e) However BOQ item 10.04 being day work item, written instructions of Engineer were required as per Cl. 1 of day work schedule (page 324 of CA) which was not done by Engineer /Employer on the misconceived plea that boring was incidental to foundation work and is not payable. Details of day work labour, material and plant were not required to be sent to Engineer as per Cl. 2 to 7 of Day work schedule (pages 324 to 326 of CA) in this case, as the rates for BOQ 10.04 are on LM basis. The joint measurements of length of boring done have been recorded jointly with the Engineer and have not been denied by Respondent. Therefore, there should be no difficulty in payment for this work as claimed by Claimant in its claim."

16. A reading of the above finding would clearly show that the Arbitral Tribunal has again interpreted various Clauses of the Agreement and found that while the Clauses relied upon by the petitioner would have no application to the work done during the execution of the construction work at the specific asking of the Engineer. The Arbitral Tribunal has held that Clause 1102 refers to the subsoil investigation for the purpose of design and drawings of foundations, while Clause 2413 is applicable unless otherwise provided in the contract. This being an additional work, the Arbitrator has held that the same would fall under Clause 18.1 and payable as

BOQ item 10.04. This again being a matter of interpretation of contract, this Court cannot interfere with the same in exercise of its power under Section 34 of the Act, especially where the same is not found to be perverse or unreasonable.

17. In view of the above, I find no merit in the present petition and the same is accordingly dismissed. There shall be no order as to cost.

NAVIN CHAWLA, J

JANUARY 29, 2019/Arya