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**(2012) 05 DEL CK 0713**

**In the Delhi High Court**

**Case No : O.M.P. 365 of 2006 and I.A. No. 8793 of 2006**

M/s. B.B.M. Enterprises

APPELLANT

Vs

National Highways Authority of India and Others

RESPONDENT

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**Date of Decision : 10-05-2012**

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 34

**Citation : (2012) 05 DEL CK 0713**

**Hon'ble Judges : Dr. S. Muralidhar, J**

**Bench : Single Bench**

**Advocate : Ramesh Singh and Ms. Shipra Ghose, for the Appellant; Amit Bansal and Mr. Aseem Chaturvedi, Advocates for R1 and R2, for the Respondent**

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## **Judgement**

Justice S. Muralidhar

1. The challenge in this petition u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act") is to an Award dated 4th May 2006 passed by the Arbitral Tribunal ("Tribunal") in the dispute between the Petitioner M/s. B.B.M. Enterprises and Respondent No. 1 National Highways Authority of India ("NHAI") arising of the award of work for the "periodic renewal work of NH-6, from Dankuni to Uluberia in the State of West Bengal from KM 17/6 to KM 60/0" awarded to the Petitioner by the NHAI. The Petitioner's tender submitted on 5th May 2000 was found to be the lowest and accepted by NHAI by its Memo dated 16th May 2000. A contract was entered into between the parties on 25th July 2000. The contract had to be read along with General Conditions of Contract ("GCC"), Special Conditions of Contract ("SCC") and the Bill of Quantities ("BOQ"). The time OMP No. 365 of 2006 Page 1 of 11 for completion was three months starting 29th May 2000. According to the Petitioner, NHAI was required to hand over the site without any hindrance/obstruction. NHAI was also required to supply necessary design, drawings, charts etc. as was required for the work and to prepare and pay the Running Account ("RA") bills every month. The Petitioner alleged that NHAI had failed to perform its obligations and thereby committed a breach of contract. It is

further alleged that the site was not handed over at a stretch but in a truncated manner at different points resulting in breakage in the work at every stage. According to the Petitioner, immediately after being handed over the pin-pointed site, the Petitioner informed NHAI that there were existing potholes which were required to be repaired and/or mended properly for the purpose of execution of the Profile Corrective Course ("PCC"). It is stated that the tender item did not provide for execution of such potholes work.

2. The Petitioner claimed that a series of correspondence was exchanged with the NHAI and that NHAI had prepared an estimate for approval of its higher authorities for execution of such pothole works. According to the Petitioner, the said estimate was sanctioned by NHAI. The Petitioner stated that it had executed a total quantity of 7295.349 m<sup>3</sup> of pothole repairing work, Bituminous Macadam ("BM") works of 3114.798 m<sup>3</sup> and Bituminous Concrete ("BC") works of 5635.17 m<sup>3</sup>. It is stated that since the said works were not incorporated in the contract or the sanctioned estimate NHAI could not have compelled the Petitioner either to perform the said work or to accept a lesser quantity. In particular the Petitioner relied upon NHAI's reply dated 17th July 2000 to the Petitioner's letter dated 30th June 2000 acknowledging that the contract did not include any work of potholes repairing and that the said potholes repairing work would be treated as a separate contract. Reliance was also placed on a letter dated 17th July 2000 by the Manager of NHAI to the Project Director of Petitioner as well as notes accompanying the said letter which acknowledged that almost the entire stretch of road was full of potholes which required immediate repairing before doing PR works. Reliance was also placed on a letter dated 25th July 2000 from NHAI to the Petitioner stating that "the provisions of this contract agreement are to be used for PR works only without diverting to OR works (e.g. Pot hole filling)." It was urged that the potholes repairing work was not mentioned in the BOQ.

3. It may be mentioned at this stage that NHAI had consistently denied that it had either by the aforementioned letter or by any letter accepted that the contract did not include work of potholes repairing or that the said work should be treated as a separate item or contract. NHAI's case was that the potholes repairing work was to be paid for in accordance with Clause 501.6.1 of the Ministry of Surface Transport ("MOST") Specifications and amended in its application to the contract in question.

4. With disputes arising between the parties, the Petitioner invoked the arbitration clause. The disputes were referred to a three-member Tribunal. The Petitioner submitted a statement of claim on 1st December 2002 wherein an amount of Rs. 4,80,47,913 was claimed under 10 heads along with interest. A supplementary affidavit on behalf of the Petitioner was submitted on 3rd July 2003 whereby the amounts as claimed under the various heads were restricted to Rs. 4,04,72,523 with interest. NHAI submitted its counter statement on 3rd January 2003 disputing the statement of claim of the Petitioner. Both the parties filed their respective affidavits by way of evidence.

5. A preliminary objection was raised by NHAH stating that the Final Bill in the sum of Rs. 97,09,804 after deduction of tax at source for an amount of Rs. 2,02,205 had been paid and therefore there was a "full and final settlement" on 6th December 2001. In the payment voucher in relation to the payment of the outstanding amount in terms of the Final Bill prepared in the office of NHAH on 5th December 2001 it was recorded "payment made in full and final settlement (excl S/D) of the Final Bill raised against Contract No. 021/NH-6/PR works/GM/(E)/2000 dated 25th July 2000 vide Ch. No. 881916 dated 5th December." The said payment voucher contained the signatures of the partner of the Petitioner. The Arbitral Tribunal held that the fact that the payment of the Final Bill was made by way of full and final settlement would not preclude the Petitioner from raising a dispute regarding its entitlement to further amounts and accordingly rejected the said objection.

6. Claim No. 1 by the Petitioner was for a sum of Rs. 50,17,741 on account of potholes filling by BM to the extent of 7295.349 m<sup>3</sup> @ Rs. 687.80. The case of the Petitioner was that the filling of potholes was not part of the contract and therefore, it was not governed by the rate of Rs. 2512.20 per m<sup>3</sup> for laying BM as laid down in Item No. 1 of the BOQ and that the payment should have been made at a higher rate of Rs. 3200 per m<sup>3</sup>. Accordingly, a differential amount of claim @ Rs. 687.80 per m<sup>3</sup> was claimed. With regard to the above claim, the Arbitral Tribunal negatived the plea of the Petitioner and held that the work involving potholes fell within the ambit of the work. The claim of the Petitioner that the extent of pothole filling was 7295.349 m<sup>3</sup> and not 3333.18 m<sup>3</sup> as recorded by the NHAH in the Measurement Book ("MB") was negatived by the Tribunal. It observed that the Petitioner did not produce any material in support of such claim whereas the NHAH had produced the MB to substantiate its stand.

7. Claim No. 2 was for a sum of Rs. 9,38,459 in relation to extra cost for laying BM with 50 mm thickness in place of 75 mm which was specified in the original contract. This said amount was revised by supplemental affidavit dated 3rd July 2003 to Rs. 4,23,934 and by an affidavit dated 25th September 2003 it was further revised to Rs. 2,76,697. Claim No. 3 was for an amount of Rs. 20,03,303 for laying BM and BC over tack coat of 25 mm thickness as per the original contract. The same amount was revised to Rs. 4,19,934 by the Petitioner as per the affidavit dated 3rd July 2003. The Tribunal held that in view of the revised agreement for acceptance of revised quantity dated 3rd February 2001 whereby the Petitioner had accepted the revised thickness of BM as well as BC, the said claims for extra costs had to be rejected.

8. Claim No. 4 was for a sum of Rs. 78,24,995 on account of BM consumed in the PCC. By supplemental affidavit dated 3rd July 2003, the amount was revised to Rs. 23,47,499. Here again on account of the revised agreement, the claim was disallowed by the Tribunal.

9. Claim No. 5 was for a sum of Rs. 12,80,000 towards short payment made for BM work in filling of potholes. The Tribunal accepted the entries in the MB

produced by NHAI, although the loose measurement sheets on the basis of which entries were made could not be produced as they were not preserved. Accordingly the claim was rejected.

10. Claim No. 6 for a sum of Rs. 12 lakhs was towards interest for delayed payment of admitted dues under the RA bills, the Final Bill and the refund of security deposit. During the course of the submission, the learned counsel for the Petitioner confined the claim to the delay in payment in regard to the 1st RA Bill, 4th RA Bill and the Final Bill. The Tribunal held that the Petitioner was entitled to interest for the period of one month on the amount of the 4th RA Bill @ 10% per annum which worked out to Rs. 51,981. It was held that there was no delay in payment of the 1st RA Bill and Final Bill.

11. Claim No. 7 was for a sum of Rs. 49,14,350 on account of increased cost of works due to rise in prices of diesel from Rs. 14.21 to Rs. 16.90 per litre in respect of all works executed. Claim No. 8 was for Rs. 24,35,253 on account of increased cost of works due to increase in wages of labour and price of materials in respect of spill-over works and/or excess works, i.e., works beyond 20% of original contract value. It was held by the Tribunal that in view of Clause 2.52.1 of the SCC as well as the revised agreement, the Petitioner's claim could not be maintained and accordingly Claim Nos. 7 and 8 were disallowed.

12. Claim No. 9 was for a sum of Rs. 56,000 by way of extra/additional bank charges incurred for extension of the Bank Guarantee for another year. Since there was an obligation on the Petitioner to keep the Bank Guarantee alive during the period of execution of contract, this claim too was disallowed.

13. Claim No. 10 was in relation to damages and losses suffered due to breaches and defaults on the part of NHAI and were divided into sub-heads 10.1 to 10.4. The Tribunal found that these claims were made on the basis of the work being extended and prolonged but the Petitioner had accepted the additional work assigned to it without any change in rates and the extension for completion of the work was also granted by NHAI on the basis of the request made by the Petitioner. Accordingly, the said claim was rejected.

14. Claim No. 11 with regard to interest was allowed only to the extent of a sum of Rs. 59,981 under Claim No. 6 being the interest on the 4th RA Bill for one month @ 10% per annum on the aforementioned sum from 3rd May 2001 till the date of the Award. The further interest @ 10% per annum was allowed from the date of the Award till the payment of the Award. The parties were directed to bear their respective costs.

15. Mr. Ramesh Singh, learned counsel appearing for the Petitioner raised an objection to the impugned Award with regard to Claim No. 1 which was for payment for completion of pothole work. It was submitted at the outset that the Petitioner was not disputing the measurement of pothole work as recorded by NHAI, i.e., 3333.18 m<sup>3</sup>. His contention was that the said work ought to have been paid at the rate of Rs. 3200 m<sup>3</sup> and not at Rs. 2512.20 per m<sup>3</sup>. He referred

to Clauses 501.6.1 as well as 504.2.3 of the MOST Specifications and submitted that the said provisions applied only to potholes of 25 mm or less depth. In the present case the overall depth of the pothole work filled was more than 75 mm. He submitted that the amendment to the BOQ on 3rd February 2001 is to be seen in perspective and the claim was restricted only to the work prior to the amendment. As regards Claim No. 4, it was submitted that, it ought to have been allowed in view of the revised agreement. As regards Claim No. 5, the submission was that the Tribunal could not have accepted the explanation offered by NHAI that the loose measurement sheets for the period from 29th May 2000 to 15th October 2000 were not preserved when in fact the measurement sheets for the work done during other periods were available. As regards Claim Nos. 7 and 8, reliance was placed on the decision of the Supreme Court in K.N. Sathyapalan v. State of Kerala (2007) 13 SCC 43. As regards the substantiation for the claim by the Petitioner for Rs. 3200 per m<sup>3</sup> for pothole filling, reliance was placed on the supplemental affidavit dated 3rd July 2003 filed by the Petitioner before the Tribunal and to the Schedule of Rates ("SOR") announced by the Public Works (Roads) Department, National Highway Wing, Government of West Bengal for the year 2000-2001 for National Highway Works (Roads & Bridges).

16. Mr. Amit Bansal, learned counsel for NHAI on the other hand submitted that it was made clear in the contract itself that the rate of Rs. 2512.33 per m<sup>3</sup> was to remain firm and this was not disputed even by the Petitioner. In particular he referred to the Schedule to the revised agreement which was accepted by the Petitioner. The revised agreement was enclosed by the Petitioner with its rejoinder as Annexure C. There was, therefore, no scope for any revision of rates to Rs. 3200 per m<sup>3</sup>. He pointed out to the finding of the Tribunal that the letter dated 30th June 2000 was prepared by the Petitioner subsequently and therefore could not be taken into account at all. He submitted that the Award was based on an analysis by the Tribunal of the evidence on record and given limited scope of interference u/s 34 of the Act, the impugned Award required to be upheld.

17. As regards the pothole filling work, the Tribunal considered in great detail, the actual work involved, relevant clauses of the MOST Specifications as well as the contract. As noticed by the Tribunal the road surface consists of three layers - the lowest layer is composed of water bound macadam, over which there is a layer of BM and at the top is the layer of BC. The potholes found at the road surface can be of different depths. Some potholes would be confined to the level of BM layer while some may be deeper and may extend to the water bound macadam layer. Clause 501.6.1 of the MOST Specifications was amended in its application to the contract in question. The amended version read as under:

Clause 501.6.1

Amend the first para as under:

The work of filling potholes and depressions will be considered incidental to the

construction of Profile Corrective Course/ bituminous course for which the existing pavement surface is prepared.

Add para 3 as under:

The work of full depth repair shall be paid for separately under relevant item of BOQ.

18. With regard to patching of potholes, Clause 501.3.3 of the MOST Specifications was amended in its application to the contract. It provided for shallow potholes excavations as well as deep potholes excavations (where the depth was more than 75 mm) to be filled with material and duly compacted. Admittedly, the work involving filling of potholes with BM was measured and the Petitioner was paid at Rs. 2512.20 per m<sup>3</sup> as stipulated in Item No. 1 of the BOQ. This was as per the measurements recorded by NHAI. Learned counsel for the Petitioner has not, before this Court, pressed the point about the measurement of the potholes work by NHAI at 3333.18 M<sup>3</sup>.

19. In support of its claim for a higher rate of Rs. 3200 per m<sup>3</sup>, the Petitioner placed reliance on the letter dated 17th July 2000 from the Manager (East), NHAI to the Petitioner. The aforesaid letter referred to a letter dated 30th June 2000 of the Petitioner. There were however two letters of that date. One of those letters was admittedly received by NHAI but not by others. According to NHAI, it was fabricated and the repairing of potholes would be a separate item and for such a separate item, the work can be taken up at the rate of Rs. 3200 per m<sup>3</sup>. In the other letter dated 30th June 2000, the receipt of which had been admitted by NHAI, the Claimant therein stated that it had already taken up the job of repairing of potholes on NH-6.

20. As regards the letter dated 30th June 2000, the receipt of which was denied by NHAI, the Tribunal examined the peculiar features of the said letter and concluded that there were "serious doubts on its genuineness". The Tribunal further observed:

The telephone numbers 2287-0655 and 2247-5363 (8 digits) as mentioned on the letterhead of letter dated June 30, 2000 (Vol. VII, p. 12) were not in operation on June 30, 2000. This leads to the inference that the said letter dated June 30, 2000 (Vol. VII, p.12) was not sent on June 30, 2000 as claimed but was prepared subsequently.

21. Learned counsel for the Petitioner did not even attempt to defend the letter dated 30th June 2000, the receipt of which was denied by NHAI. He sought to rely on the rates specified by the Government of West Bengal. There is no mention in the contract in question of the applicability of the said rates. Although a reference has been made to the said rates in the supplemental affidavit dated 4th July 2003, the Petitioner appears to have also placed reliance on its own letter dated 30th June 2000 which was held by the Tribunal not to be a genuine document. The other factor that weighed with the Tribunal was in the RA Bill

which was certified for payment by NHAI, there was no separate item regarding filling of potholes by BM. That work was included in Item No. 1 and certified to be paid at Rs. 2512.20 per m<sup>3</sup>. No objection was raised by the Petitioner to the certification of payment by NHAI on that basis. With the agreed amount being Rs. 2512.20 per m<sup>3</sup> as prescribed in Item No. 1, no fault can be found with the finding of the Tribunal that the Petitioner was not entitled to be paid at the higher rate of Rs. 3200 per m<sup>3</sup>. This Court is unable to find any error having been committed by the Tribunal with regard to Claim No. 1.

22. As regards the objections of the Petitioner with regard to the remaining claims decided by the Tribunal, there is nothing therein that has been shown to be patently illegal or opposed to the public policy of India. The Award is based on an appreciation of evidence and does not call for interference. 2 The petition is dismissed. The application is disposed of.