

(2018) 11 DEL CK 0275

In the Delhi High Court

Case No : Original Miscellaneous Petition No.(Comm) 178 Of 2017

M/S National Highways Authority Of India

APPELLANT

Vs

R.N. Shetty & Company-Sunway Constructions BHDJV

RESPONDENT

Date of Decision : 19-11-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2018) 11 DEL CK 0275

Hon'ble Judges : Prathiba M. Singh, J

Bench : Division Bench

Advocate : Shambhu Sharan, Sehrachika, Shashank, Arun Mohan, Sharan Thakur, Ritu Chopra, Vijay Kumar

Final Decision : Disposed Off

Judgement

.....

Prathiba M. Singh, J",

I.A. 13108/2018 (for restoration),

1. This is an application seeking restoration of the petition. For the reasons stated in the application, the petition is restored. I.A. is disposed of.",

O.M.P. (COMM) 178/2017,

2. The present OMP has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award dated 25th September, 2007",

passed by the Ld. Arbitrator. The background of the litigation is that a contract was awarded to the Respondent/contractor by the NHAI for â??four,

laning and strengthening of KM 433 to 495 of Dharwar - Belgam section of NH-4 in the state of Karnataka.â? The contract was awarded on 31st,

January, 2002 and the agreement was entered into between the parties on 28th

February, 2002." ,,,,,,

3. Disputes arose between the parties in respect of the measurement and embankment quantity for the purpose of payment. The matter was sent to ,,,,,,

the Disputes Review Board (hereinafter "DRB") of NHAI. However, the recommendations of the DRB were not accepted and the Arbitral ,,,,,,

Tribunal was constituted. Claim IIB is the only claim which is under dispute in this petition. On this, the Ld. Arbitrator has awarded a sum of" ,,,,,,

Rs.63,59,608/. There is no dispute between the parties that the contractor did carry out the work in respect of clearing and grubbing prior to the" ,,,,,,

building of the embankment. The only question is as to whether the actual measurements were on record and if the contractor had lead any evidence ,,,,,,

to prove as to how much he is entitled on this claim. ,,,,,,

4. The contentions of the parties have been recorded by the Arbitrator as under: ,,,,,,

21.2.4 There is no dispute about the execution of the item of Clearing and Grubbing, which stipulates removal of top organic soil up to a depth of" ,,,,,,

150 mm. from the original ground level as also the execution of embankment work between the original ground level and the ground level after ,,,,,,

grubbing. But the claimants have contested that the Respondents are not eligible for getting the payment for the embankment quantity between the ,,,,,,

original ground level and the grubbed level, in view of the stand taken by the claimants that in MORTH 305.8 specifications the original position means" ,,,,,,

original ground level. We are of the view that this stand does not stand to reason because of the following :- ,,,,,,

a. The original position means the ground level after clearing and grubbing as already concluded under claim 1(a). ,,,,,,

b. Specifications of clearing and grubbing does not stipulate that the item includes refilling cost of the embankment conforming to the specification of ,,,,,,

the embankment. ,,,,,,

c. The Claimants cannot deny payment for the work done. ,,,,,,

5. A perusal of the award reveals that it is an admitted position between the parties that the contractor executed the work of clearing and grubbing ,,,,,,

However, the exact measurements etc. were not carried out jointly during the execution of the work. The contractor took the maximum depth of 150" ,,,,,,

mm to claim the sum of Rs. 1,10,99,106/-. The Arbitral Tribunal records that the

Engineer who was posted at site by the NHAI was regularly present" ,,,,,,

and had given the approvals for the purposes of excavation, clearing and grubbing. The contentions of the Contractor are recorded in para 21.2.6 of" ,,,,,,

the award which is extracted herein below: ,,,,,,

â??21.2.6 Briefly contentions and arguments of the respondents are furnished below: ,,,,,,

a. The method of measurement adopted for the embankment is as adopted in the adjacent package II which is accepted by the Engineer and the ,,,,,,

NHAI for which payment was made up to 23 IPCs. ,,,,,,

b. The Engineer has deducted 150 mm. from the original ground level to arrive at the excavation quantity and no levels were taken and this procedure ,,,,,,

is accepted NHAI (Claimants) ,,,,,,

c. The RFIs were being approved by the Engineer after clearing and grubbing. ,,,,,,

d. Clearing and grubbing and removal of top soil was being inspected by the Engineers/his representative and one could see that the grubbing and ,,,,,,

removal of top soil was more than 150 mm. ,,,,,,

e. The respondents continued to claim embankment quantity as arrived at by deducting 150 mm. from the original ground level and the Engineer did ,,,,,,

not raise the issue of taking levels after grubbing neither at the time of submission of IPCs nor after receiving the guide lines of NHAI but continued to ,,,,,,

deduct arbitrary quantities towards 150 mm. grubbing depth from the quantities claimed in the IPCs.â?? ,,,,,,

6. Since the measurements or the levels taken for carrying clearing and grubbing were not available on record, the Arbitral Tribunal in fact permitted" ,,,,,,

the parties to jointly assess the quantity of work that may have been undertaken by the contractor. This is clear from para 21.2.9 of the contract which ,,,,,,

reads as under: ,,,,,,

â??21 .2.9 To assess the quantity of work executed on this account, we requested both the Claimants and the Respondents in our letter" ,,,,,,

No.VRN/ARB/EMB/21, dated 16th November 2006 to furnish certain clarifications and the types of soil in the areas where clearing and grubbing" ,,,,,,

work is carried out in gravelly murrum reaches and organic soil/black soil reaches separately under (i) embankment work executed with borrowed ,,,,,,

earth, (ii) embankment work executed with available excavated earth in two formats enclosed there in. We also requested that the details prepared",,,,,,

in the two formats be verified and signed by both the Claimants and the Respondents.â??,,,,,,

7. Thereafter, the parties carried out a joint inspection and verification. A report was filed which was also duly countersigned by the NHA. The",,,,,,

details of clearing and grubbing were taken on an estimated basis on the basis of the soil in the area concerned. A reading of paras 21.2.11 and,,,,,

21.2.12 clarifies this position.,,,,,,

â??21.2.11 In view of the foregoing paras, we have come to the conclusion that adoption of uniform depth of 150 mm. of clearing and grubbing for",,,,,,

areas in the organic soil and black cotton soil reaches and the uniform depth of 50 mm. of clearing and grubbing for areas of gravelly murrum reaches,,,,,

would be fair and meet the ends of justice.,,,,,,

Sl.

No.",Description,"AreaÂ Sq.

M.", "Dept

h

mm.", "Quantity

Cu. M.", "Rate.

Rs.*", "Amount

Rs.

1,2,3,4,5= 3x 4.,6,7= 5x6

1.

a.", "Embankme

nt executed

in areasÂ of

organic

soil/black

cottonÂ soil;

with

borrow

material.

Chainage

2850 to

3150", "3,64,693", 150, "54,703.95", 60, "32,82,237

b., "Embankme

nt executed

in areasÂ of

organic

soil/black

cottonÂ soil:

with

excavated", "1,32,952", 150, "19,942.8", 33, "6,58,112

, "material.

Chainage

2850 to

3150", , , , ,

2.

B", "Embankme

nt executed

in areas of

gravelly

murrum

reaches

with

borrow

material.

Chainage -

1050 to

2850", "6,13,466", 50, "30,673.3", 60, "18,40,398

b., "Embankme

nt executed

in areas of

gravelly

murrum

reaches

with

excavated

available

material.

Chainage-

1050 to

2850", "3,50,825", 80, "17,541.25", 33, "5,78,861

TOTAL,,,,,, "63,59,608

quantities executed above. (Less sums already paid, if any) towards the volume of embankment between the original ground level and -the ground",,,,,,

level after clearing and grubbing. Payment of this amount to the Respondents will meet the ends of justice.â??,,,,,

9. The Arbitral Tribunal has undoubtedly gone on an estimated basis for awarding this amount. The actual measurements were not available. Neither,,,,,

party has furnished the actual measurements. However, it is not disputed that the requests for inspection were being approved by the Engineer after",,,,,,

the clearing and grubbing was done by the contractor. Arbitral proceedings are not strictly bound by provisions of the CPC. The Arbitral Tribunal may,,,,,

arrive at a reasonable estimate of the work done. Since the work done is itself not disputed in this matter and the Engineer on behalf of NHAI having,,,,,

remained on site and having approved the requests for inspection, the Arbitral Tribunalâ??s approach to arrive at an estimate cannot be faulted.",,,,,

Moreover, the NHAI never contested the Arbitral Tribunalâ??s attempt to arrive at an estimate and in fact agreed to jointly participate in the",,,,,,

verification which was undertaken.,,,,,,

10. Under these circumstances, the objections are not maintainable against this claim.",,,,,

11. Simple interest @12% on the awarded amount shall be payable till date. The

payment shall be made within three months, failing which, simple",,,,,,

interest @15% on the entire awarded amount would be liable to be paid. O.M.P.
is disposed of.,,,,,,