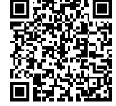

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 24.04.2025

\+ **O.M.P. (COMM) 255/2016**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Petitioner

Through: Mr. KK Sharma, Sr. Adv with Mr. Naman Saraswat, Mr. Ram Pranesh Rai, Advs.

versus

M/S PCL-SUNCON

.....Respondent

Through: Mr. Apoorv Kurup, Sr. Adv with Arjun D Singh, Mr. Yimyanger, Ms. Niddhi Mittal, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (*ORAL*)**

1. This is a petition filed under section 34 of Arbitration and Conciliation Act, 1996 seeking setting of the impugned majority award dated 27.02.2014 passed by the learned Arbitral Tribunal.

2. Brief facts are that the respondent (Joint Venture) had entered into a Contract with the petitioner i.e. NHAI on 20.09.2001 for execution of the work of Four Laning and strengthening of the existing two Lane Highway from Km 320 to Km 398.75 of NH2 in Jharkhand, Construction Package V-C, the contract price valued at Rs.

2,99,71,101.00/-.The Contract was an item rate contract and the respondent had quoted its rate for various items of activities as per Bill of Quantities ("*BOQ*") and conforming to the relevant technical specifications.

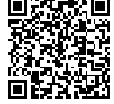
3. During the execution of the work, a dispute arose between the parties with respect to "non-execution of work of lean concrete bed (100 mm thick) below RCC kerb" (dispute No. 9).

4. In accordance with the arbitration procedure envisaged under the Contract, after completion of the pre-arbitral process, an Arbitral Tribunal of 3 members was formed and the dispute No. 9 was referred to the learned Arbitral Tribunal.

5. The respondent sought to set aside the letters of the petitioner dated 28.10.2010 and 15.12.2010, wherein the petitioner had sought a recovery of Rs. 1,55,07,401/- for non-execution of lean concrete bed of 100 mm below RCC kerb along with the cost of arbitration of Rs. 10 lakhs.

6. The Arbitral Tribunal *vide* Majority Award dated 27.02.2014 set aside the above-mentioned letters of the petitioner and directed that no such recovery of Rs. 1,55,07,401/- would be made from the respondent. Relevant paras of the Majority Award are extracted below:-

> *"11.9 In view of analysis of BOQ item No. 3.04(a) in light of the substantive law and the terms of the Contract as done above, the findings of AT are summarized asunder:-*
>
> *(i)It has been established the kerb and channel was to be laid on the extended width of pavement as clearly shown in the*



drawings provided in the Contract which also meets the requirement of technical specifications. The work was also done accordingly by the Contractor. (ii) As gathered from various-provisions of the Contract like nomenclature of BOQ item, the drawing and technical, specifications, it has been established that the Employer had no intention that any lean concrete bed was to be provided underneath the kerb and channel although there was an express provision of providing such concrete bed in the nomenclature of BOQ item no. 3.04(a). In view of various judgments of the Apex Court, it is a settled principle of law that intention of the parties at the time of formation of the agreement is the base for deciding the disputes. So the interpretation of BOQ item No. 3.04(a) is to be done as per intention of the Employer behind this BOQ item and not otherwise.

(iii) It is also established that with the dimensions-of the kerb and channel and its location as shown in the drawing, there was no possibility of any concrete bed (M-10 Grade) to be provided in the execution of this BOQ item No. 3.04(a). So in terms of section 36 of the Indian Contract Act, the provision of cement concrete bed in BOQ No. 3.04(a) becomes void.

(iv) From the conduct of the parties throughout the long period of seven years of execution of the work, in this case, it is concluded that both parties understood that for BOQ item No. 3,04(a), the kerb and channel was required to be laid on

the-extended pavement width and not on the lean concrete bed.

(v) The main purpose of BOQ item No. 3.04(a) was to provide kerb & channel. The provision of lean cement concrete bed has been found to be inconsistent with the main purpose of this BOQ item and hence in light of law laid down by Lord Halsbury, such provision of lean concrete bed hasto be rejected.

(vi) In the BOQ item No.3.04(a), as drafted by the Employer, there is an ambiguity whether lean cement concrete bed is to be provided or not. By invoking principle of contra-preferentem, this BOQ item has to be read against the Employer and in favour of the other party i.e. the Contractor.

(vii) The Respondent pleaded that the BOQ item in question comprises of two components;

a) RCC Kerb& channel,

b) 100 mm thick bed below (M-10 Grade concrete).

The main contention of the Respondent-is that since the-Contractor has not provided 100 mm thick bed while executing the BOQ item 3.04(a), whereas he has been paid fully as per his quoted rate, the recovery of Rs. 1,55,07,401/-is justified.

AT finds no merit in this contention when it has been established that in light of law of the land, and the terms of the Contract as discussed above, there was no obligation on

the Claimant to provide 100 mm thick bed while executing the BOQ item in question.

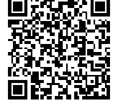
In view of our findings as above, the Contractor was not under, any contractual obligation to provide any lean concrete bed (M-10 Grade) while executing BOQ item No. 3.04(a) nor it was physically possible to provide such bed. Therefore, in our view, recovery notice issued by the Respondent, vide their letters dated. 28-10-2010 and 15-12-2010 for Rs. 1,55,07,401/- are arbitrary and not maintainable contractually and thus, liable to be set aside."

7. Aggrieved by the majority Award, the present petition has been filed by the petitioner.

8. Mr. Sharma, learned senior counsel for the petitioner has argued that in the present case, BOQ Item No. 3.04(a) provided construction cast-in-situ reinforced cement concrete kerb and channel of Grade M-20 including concrete Grade M-10 below as bed (100 mm thick) of the kerb excluding reinforcement complete as per drawing and Technical Specification Clause 408. Since the same was not provided, the respondent had no right to charge for the same.

9. The petitioner had wrongly cleared the said payment and hence, is correct in asking for refund of the said amount.

10. It is also urged that since it is an admitted fact that the respondent had not constructed the lean concrete bed of 100 mm below RCC kerb and hence, the respondent was not entitled to the said payment. Reliance is placed on section 72 of Indian Contract Act, 1872 that if the payment is



made by mistake, the same is to be returned.

11. He also draws my attention to paragraph 9 of the Majority Award wherein the Presiding Arbitrator had categorically put the question to the respondent and the respondent did not reply to the same clearly showing that it had not provided 100 mm bed below M-10 Grade concrete.

12. Thus, there is a patent illegality which goes to the root of the matter.

13. Mr. Kurup, learned senior counsel for the respondent states that the priority of the documents forming the Contract is as under:-

"1. The Contract Agreement (if completed).

2. The letter of Acceptance;

3. The Bid and Appendix to Bid;

4. The conditions of contract, Part - II;

5. The conditions of contract, Part -1;

6. The specifications;

7. The drawings;

8. The priced Bill of Quantities; and

9. Other documents, as listed in Appendix to Bid."

14. He submits that the BOQ is at S. No. 8 and is below "specifications" and "drawings" meaning thereby the specifications and drawings will take precedence over BOQ.

15. He further submits that the Arbitral Tribunal has considered all the submissions and has passed a well-reasoned Award.

16. I have heard learned senior counsels for the parties and perused the material available on record.

17. The BOQ Item No. 3.04(a) reads as under:-

> *"Providing and construction cast-in-situ reinforced cement concrete curb and channel of grade M-20 including concrete grade M-10 below as bed (100 mm thick) of the kerb excluding reinforcement complete as per drawing and technical specifications Clause 408."*

18. The word "reinforced" in the first line was deleted in the pre-bid meeting.

19. Further, Clause 408.5.1 of Technical Specifications reads as under:-

> *"Kerb shall be laid on firm foundation of minimum 150 mm thickness of cement concrete of M-l0 grade cast-in-situ or on extended width of pavement as shown in the drawings. The foundation shall have projection of 50 mm beyond the kerb stone. Before laying the foundation of lean concrete, the base shall be leveled and slightly watered to make it damp"*

20. The Technical Specification which is at S. No. 6 is higher than the BOQ items and is clear that the kerb has to be either laid on the extended width of pavement or on the lean concrete foundation of M-10 grade. The Arbitral Tribunal in its Award has gone through the said arguments and has observed as under:-

> *"Keeping in view the ratio of the above judgment, in Arbitral Tribunal's view, from the conduct of the parties throughout the long period of 7 years of the execution of the work in this case, the inevitable conclusion is that both parties understood BOQ item No. 3.04(a), for cement concrete kerb*

and channel as required to be done on the extended pavement and not on the lean concrete bed, as now contended by the Respondent."

21. A perusal of the above paragraph shows that the Arbitral Tribunal has come to a finding that the Technical Specifications permitted the respondent that the kerb could be laid on the extended width of the pavement. The Arbitral Tribunal has also analysed that it was not possible to provide the foundation of the lean concrete M-10 grade as the same would be too much below the bottom level of the kerb. Additionally, the Arbitral Tribunal also held that if the lean concrete bed below the bottom of the kerb was to be provided, the same would endanger the structural stability of the pavement. Relevant para is extracted below:-

"If one thinks of exploring the possibility of providing the foundation of the lean concrete M-10 grade, it is just not possible because the earthen sub-base on which such lean concrete foundation is laid, is too much below the bottom level of the kerb. Moreover, if one tries to provide the lean concrete bed just below the bottom of the kerb and channel, then such concrete bed has to be laid on the second layer of WMM and in that situation first layer of DBM cannot be provided in that portion nor the extended width of DBM layer can be provided. It can endanger the structural stability of the pavement. Thus, evidently it is not possible to provide the foundation of leap concrete M-10grade in the scheme of

things envisaged in BOQ item No. 3.04(a).

During the course of hearing, the Respondent was directed by the Presiding Arbitrator to clarify by way of a drawing as to where the Employer intended to put the lean cement concrete bed as mentioned in the BOQ item 3.04(a). The Respondent did reply vide their letter dated 7th August 2013, stating that during the execution of the work the Claimant was allowed by the Engineer to cast the foundation of the kerb on the extended width of pavement and was not required to lay bed of cement concrete below foundation of kerb. However, the Respondent could not produce any drawing showing as to how the cement concrete bed as stated in BOQ item No. 3.04(a) could be put in place."

22. Lastly and most importantly, the work of laying the kerb over the extended width was done with the approval of the Project Director of the petitioner who was supervising the work and the same was carried out under his supervision. No objection at any time whatsoever was raised by the petitioner during the execution of the work. The petitioner for 7 years continued to make payment while the respondent was laying down the kerb on the extended pavement and in fact even issued a taking over certificate.

23. The Hon'ble Supreme Court in ***Batliboi Environmental Engineers Ltd. v. Hindustan Petroleum Corpn. Ltd., (2024) 2 SCC 375*** has observed as under:-

"45. *Referring to the third principle in Western*

Geco [ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in State of Haryana v. Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] (for short Gopi Nath & Sons) and Kuldeep Singh v. Delhi Police [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons [State of Haryana v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh [Kuldeep Singh v. Delhi Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] clarifies that a finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse.

This Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral Tribunal is the ultimate master of quality and quantity of evidence. An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be overturned under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious.

…………………………..

Further, "patent illegality" refers to three sub-heads : (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C

Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the Arbitral Tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do."

24. Applying the said principles, I am of the view that the Arbitral Tribunal consists of technical experts who have correctly analysed the terms of the Contract as well as the work carried out by the respondent and arrived at a conclusion that it was a physical impossibility to construct lean concrete bed as per the dimensions and location given. Even assuming for the sake of argument that the contentions of the petitioner have some merit, the same are purely on factual disputes which, this Court under Section 34 of 1996 Act, cannot entertain.

25. The Tribunal is the best interpreter of the term of the Contract. This Court, while exercising jurisdiction under section 34 of 1996 Act, is not required to substitute its views taken by the Arbitral Tribunal. Hence, there is no perversity and illegality in the Award dated 27.02.2014

passed by the Arbitral Tribunal which calls for interference by this Court. The Award is well reasoned based on the material placed before the Arbitral Tribunal and is sound both in law and facts.

26. For the said reasons, there is no merit in the petition and hence, the present petition is dismissed.

JASMEET SINGH, J

APRIL 24, 2025 / (MS)

(Corrected and released on 30.04.2025)

Click here to check corrigendum, if any