

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 09.11.2021

+ **O.M.P. (COMM.) 323/2021**

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

..... Petitioner

versus

M/S JMC CONSTRUCTIONS PVT. LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Gopal Singh, Advocate.
For the Respondent : Mr Kaushik Laik and Mr A. Kaushik,
Advocates.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. National Highway Authority of India (hereinafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an Arbitral Award dated 20.01.2021 (hereinafter the 'impugned award') passed by the Arbitral Tribunal comprising of three members – Shri V. Murahari Reddy, Shri Revi Samuel Ninan and Shri Madan Mohan Sangal (hereafter the 'Arbitral Tribunal'). The impugned award was delivered by Shri V. Murahari Reddy and Shri Revi Samuel Ninan. Shri Madan Mohan Sangal entered a separate dissenting opinion.

2. The impugned award was rendered in the context of disputes that have arisen between the parties in relation with a Contract Agreement dated 20.04.2010 (hereafter the 'Agreement'). By the impugned award, the Arbitral Tribunal has awarded a sum of ₹ 3,23,96,838/-, which includes the respondent's claim for variance in actual percentage of bitumen used in the Bitumen Concrete works and interest on the delayed payments. The Arbitral Tribunal did not accept the respondent's claim for reimbursement of liquidated damages.

Factual Context

3. On 07.08.2006, NHAI issued a Notice Inviting Tender (NIT) for the works regarding "*Short Term Improvement & Routine Maintenance Of Gundugolanu-Vijaywada Section NH-5, from Km. 1022.494 to Km. 1100.694 in the State of Andhra Pradesh*" (hereinafter 'the Project'), on the terms and conditions stipulated therein.

4. Pursuant to the said NIT, the respondent (hereinafter 'JMC') submitted its bid for executing the Project works on 10.11.2009. JMC's bid was accepted by NHAI and a contract for implementation of the Project for an amount of ₹41,29,30,224/- was awarded to JMC by a Letter of Acceptance dated 25.02.2010 (hereinafter the 'LoA').

5. In terms of the said LoA, NHAI called upon JMC to furnish a Performance Security, in accordance with Clause 33.1 of the Instructions to Bidders (Section-II), for an amount equivalent to ₹4,12,93,022/-, within ten days after receipt of the LoA. JMC furnished the Performance Security as required.

6. Thereafter, on 20.04.2010, the parties entered into the Agreement for execution of the said project. In terms of the Agreement, JMC was required to complete the project within a period of eighteen months from the date of commencement of work. It was agreed that the defect liability period would extend for a period of six months after the completion of the works.

7. In terms of the Agreement, the schedule period for completion of the work was 31.10.2011. However, since the work could not be completed by the aforesaid date, JMC requested NHAI for an extension of time to complete the works. NHAI extended the schedule period for completion of the works for a period of eight months, that is, till 30.06.2012.

8. The works were reported to be completed on 30.06.2012 and the defect liability period for a period of six months commenced from the said date.

9. On 08.10.2012, M/s Voyants Solutions Pvt Ltd (Consultant for NHAI) issued the Completion Certificate stipulated under Clause 49 of Section V of the General Conditions of the Contract (GCC) to JMC. It certified that the works were completed with effect from 30.06.2012.

10. Thereafter, on 23.03.2013, M/s Voyants Solutions Pvt Ltd issued the Defect Liability Certificate in accordance with Clause 1.1 read with Clause 33 of the GCC after JMC had rectified the notified defects during the extended defect liability period.

11. JMC, by a letter dated 28.12.2011, had requested for the release of amount of ₹2,15,76,543/- towards increase in quantity of bitumen used on account of additional weight of bitumen in the design mix.

12. NHAI claims that JMC was obliged to optimize the binder content in accordance with Clause 509.3.2 of the Ministry of Road Transport and Highway (MoRTH) Specifications (4th revision). In view of its obligation, on 27.04.2013, JMC issued an undertaking stating that it would not claim over and above 5% of bitumen variance for bitumen works carried out by it.

13. By its letter dated on 29.05.2014, JMC claimed ₹63,43,25/- on account of pending payments for final certified payments (IPC); ₹20,53,449/- as balance retention money to be released; ₹1,01,66,063 on account of price adjustment on labour component and other material components along with interest at the rate of 18% per annum; and ₹87,00,486/- as balance payment due on account of payment of variation of actual percentage of bitumen quantity used in the works as per approved design mix along with interest at the rate of 18% per annum. JMC also stated that the Engineer had “*wrongly and illegally deducted Rs. 47,14,000/-towards liquidated damages imposed contrary to the Agreement and law of the land*”.

14. Thereafter, on 21.06.2014, JMC, once again, requested NHAI to release the withheld amounts regarding retention money amount, price escalation on labour component and variance in actual percentage of bitumen quantity used in the works.

15. On 14.11.2014, the Project Director, Project Implementation Unit (PIU), Vijayawada released ₹91,74,615/- towards price escalation on labour component; ₹63,43,424/- as withheld amount at the rate of 25% pending EOT approval; and, ₹20,53,452/- as retention money. However, the Project Director, PIU, Vijayawada recovered ₹87,00,487/- as the amount already paid for variation in quantity of bitumen.

16. Thereafter, on 05.08.2015, JMC, once again sought payment of ₹2,22,45,119/- on account of variation in actual percentage of bitumen quantity used in the work as per technical specification; ₹67,27,876/- on account of refund of liquidated damages; ₹27,05,949/- as interest on delayed payment on the withheld amount, ₹8,75,962/- on account of retention money amount; and ₹39,13,665/- on account of payment of price escalation on labour component. NHAI rejected the aforesaid claims of JMC by a letter dated 29.12.2015.

17. In view of the disputes between the parties, by a letter dated 02.01.2016 JMC invoked the arbitration agreement as embodied in Clause 25.3 of Section-V, Part-II of the Special Conditions of the Contract (SCC). JMC appointed Shri Madan Mohan Sangal as its nominee arbitrator and requested NHAI to appoint an arbitrator.

18. NHAI vide a letter dated 28.04.2016 requested JMC to enter into discussions for an amicable settlement of the disputes that had arisen between the parties. NHAI's Settlement Committee held meetings on

21.06.2016 and 07.07.2016, however, the parties failed to resolve their disputes.

19. Thereafter, on 10.03.2017, NHAI appointed Mr Revi Samuel Ninan as its nominee arbitrator and the nominated Arbitrators appointed Shri Vijay Kumar as the Presiding Arbitrator. The Arbitral Tribunal entered reference on 28.04.2017.

20. The claims made by JMC in its Statement of Claims dated 24.05.2017 are tabulated below:

Claim no 1	Variance in actual percentage of bitumen used in the BC work for the entire stretch from Gundugolanu to Vijayawada.	₹1,74,00,974/-
Claim no 2	Reimbursement of Liquidated Damages recovered by the Respondent	₹47,14,000/-
Claim no 3: Interest on delayed payments	(a) Delay in release of withheld amounts (b) Delay in release of retention money (c) Delay in release of price escalation on labour component	₹27,09,077/- ₹6,08,609/- ₹39,18,189/-
Claim no 4: Claim for interest	Interest at 18% on Claim No.1 Interest at 18% on Claim No.2	₹1,16,44,827/- ₹47,48,407/-
Total Claim Amount		₹4,57,74,083/-

21. NHAI filed its Statement of Defence, however, it did not raise any counter claims.

22. During the course of the arbitral proceedings, Shri Vijay Kumar (the Presiding Arbitrator) expired and on 13.03.2018, the two co-arbitrators appointed Mr. A.R. Jambekar as the Presiding Arbitrator, however, Mr. A.R. Jambekar also expired on 30.03.2018. Thereafter, on 26.08.2019, Mr V. Murahari Reddy was appointed as the Presiding Arbitrator

The Impugned Award

23. Mr V. Murahari Reddy and Mr Revi Samuel Ninan rendered the impugned award on 20.01.2021 partly allowing the claims made by JMC. Mr Madan Mohan Sangal rendered a separate dissenting opinion on 06.11.2020.

24. The tabular statement summarising the award as set out in the impugned award is reproduced below:

Claim No	Details	Claim Amount	Amount allowed by the AT
Claim No. 1	The variance in actual percentage of Bitumen used in the BC work (BOQ item 3.07) for entire stretch from Gundugolanu to Vijayawada.	₹2,90,45,801/-	₹1,74,00,973/-
	Interest on the delay in releasing payment of Bitumen variance 50%		₹21,91,652/-

	Interest on the delay in releasing payment of Bitumen variance on the total amount due		₹1,14,63,064/-
Claim No. 2	Reimbursement of Liquidated damages	₹94,92,407/-	Nil
Claim No. 3A	Interest on the delay in releasing withheld amounts	₹27,09,077/-	₹10,08,264/-
Claim No. 3B	Interest on the delay in releasing the retention amounts	₹6,08,609/-	₹3,32,885/-
Claim No. 3C	Interest on the delay in payment of price escalation payment on Labour Component	₹39,18,189/-	Nil
Total Amount		₹457,74,083/-	₹323,96,838/-

25. Mr Madan Mohan Sangal dissented from the impugned award. In his view, JMC was entitled to Claim No. 1, however, he rejected all other claims preferred by JMC.

26. Aggrieved by the impugned award, NHAI has filed the present petition.

Submissions

27. Mr. Gopal Singh, learned counsel appearing for NHAI has assailed the impugned award on, essentially, two grounds. Firstly, he submits that the interpretation of the letter dated 29.05.2013 (incorrectly

mentioned as 29.05.2015 by the Arbitral Tribunal) is, *ex facie*, erroneous and therefore, the impugned award is liable to be set aside as being vitiated on the ground of patent illegality.

28. Secondly, he submits that the interest awarded by the Arbitral Tribunal is excessive and the same ought to be reduced to a flat rate of 9% per annum.

29. Mr Kaushik Laik, learned counsel appearing for JMC countered the aforesaid submissions.

Reasons and Conclusion

30. The principal controversy in the present petition relates to JMC's claim for variance in actual percentage to bitumen used in Bitumen Concrete Works (BOQ Item No. 3.07).

31. JMC claims that in terms of the Agreement between the parties, the unit rate was specified on the basis that bitumen would constitute 5% by weight of the total mixture of Bituminous Concrete. Clause 509.9 of the Technical Specifications clearly specified the same. The said clause is reproduced below:

“509.9 Rate

The contract unit rate shall be as specified in Clause 507.9, except that the rate shall include the provision of bitumen at 5.0 per cent, by weight of total mixture. The variance in actual percentage of bitumen used will be assessed and the payment adjusted up or down, accordingly.”

32. In terms of the aforementioned clause (Clause 509.9 of the Technical Specifications), the variance in actual percentage of bitumen used was required to be assessed and the payment was required to be adjusted accordingly.

33. There is no dispute that the petitioner had executed BOQ Item No. 3.07 (Bituminous Concrete) in accordance with the Technical Specifications and, as directed by the Engineer.

34. Clause 6.2.1 of Section VII of the Agreement specifically provided that the General Technical Specifications of the work would be “*SPECIFICATIONS FOR ROAD AND BRIDGE WORKS (FOURTH REVISION, August 2001) issued by the Ministry of Road Transport & Highways, Government of India and published by Indian Roads Congress*” (hereinafter referred to as ‘MORTH Specifications’).

35. The Arbitral Tribunal held that the said clause made it clear that in the event the site required the percentage of bitumen to be higher than 5%, the contractor would be entitled to additional amounts.

36. The Arbitral Tribunal noted that even prior to the issuance of LoA, JMC had furnished an undertaking assuring NHAI that it would procure the design mix ratio/formula approved by IIT Chennai at its own cost. The said undertaking was made a part of the Agreement. Pursuant to the aforesaid undertaking, JMC had secured a report dated 24.11.2010 from IIT Chennai and the said report specified the bitumen content as 5.5% of the mix by weight. Thus, in terms of the said report,

the bitumen content of the mix was required to be 0.5% more than as specified in Clause 509.9 of the Technical Specifications.

37. The Arbitral Tribunal found that the IIT Chennai report was reviewed and approved by the Engineer. The Engineer had also independently approached another entity (Siddharth Academy) for conducting a quality control test and to ascertain the actual quantity/percentage of bitumen used by JMC. The report submitted by the said entity also confirmed that the bitumen content in the mix used by JMC for executing the works was higher than 5% and ranged between 5.35% to 5.5%.

38. The Arbitral Tribunal found that the design mix formula specified the bitumen content at 5.5% and the work in question was executed as per the design formula.

39. The Engineer had assessed the additional amount payable on account of increased in the bitumen content at ₹1,74,00,974/- and had recommended that the said amount to be released to JMC.

40. The Arbitral Tribunal found that JMC had executed the works diligently and was, thus, entitled to the said payment of ₹1,74,00,974/- on account of higher bitumen content in the Bituminous Concrete Overlay.

41. NHAI had disputed the same on the ground that JMC had agreed to not charge for variation in the bitumen content in terms of its letter dated 27.04.2013 and therefore, it was bound by the same.

42. JMC claimed that the said letter was issued at the material time as NHAI had withheld payments due to JMC on various heads including price adjustment on labour component and retention amount. At the material time, against JMC's claim of ₹1,74,00,974/- as recommended by the Engineer, NHAI had released only ₹87,00,487/-. In order to secure the release of the withheld and remaining amount, JMC had issued a letter stating that it would not claim over and above 5% bitumen variation for the bitumen work carried out by it. However, the said amounts were not released. On the contrary, NHAI recovered the amount of ₹87,00,487/- that was earlier released against variance in bitumen content.

43. A plain reading of the Statement of Claims indicates that JMC had written several letters after 27.04.2013 demanding the release of withheld amounts. However, NHAI had not released the same.

44. The Arbitral Tribunal accepted the above contention and found in favour of JMC. The Arbitral Tribunal found that NHAI had called upon JMC to withdraw its claim and JMC had finally sent a letter dated 27.04.2013 communicating that it would not claim over and above 5% bitumen variation for the bitumen work carried out by them. The Arbitral Tribunal accepted that the said letter was sent by JMC as at the material time, payments of huge amount was still pending.

45. The Arbitral Tribunal found that there was no dispute that the Bituminous Concrete Works were executed using the design mix formula containing a higher content of bitumen. The Engineer had

assessed the same and recommended payment of ₹1,74,00,973/- on that count. NHAI had released 50% of the said amount and had withheld the balance 50% awaiting the confirmation test by a third party. However, even after the third party had confirmed the same by carrying out the necessary tests, NHAI had not released the remaining amount.

46. The contention that the Arbitral Tribunal has misdirected itself and has found in favour of JMC only on an assumption that JMC had sent a letter dated 27.04.2013 under coercion, is unmerited. A plain reading of the impugned award indicates that the Arbitral Tribunal had found that JMC had used a higher percentage of bitumen in the design mix formula. The same was in accordance with the design mix as recommended by IIT Chennai and as approved by the Engineer. JMC had no opportunity to further optimise the bitumen content in the Bitumen Concrete Mix design and was required to execute the works in accordance with the job mix provided by IIT Chennai and as approved by the Engineer.

47. In view of the Arbitral Tribunal's finding that JMC had no further scope or opportunity to explore optimising the bitumen content in the Bitumen Concrete Mix design, the fundamental premise being that JMC had issued a letter dated 27.04.2013 agreeing not to charge bitumen variance against its obligation to optimise the bitumen content, as claimed by NHAI, is untenable. It is also not disputed that on 27.04.2013, there were substantial sums payable by NHAI to JMC. Thus, the Arbitral Tribunal's decision to accept JMC's contention that

the said letter was written on the premise that the sums withheld by NHAI would be released, cannot be faulted.

48. It is also clear from the records that the amounts were withheld by NHAI and, were not released immediately after 27.04.2013 and remained outstanding for a considerable period of time.

49. This Court finds no infirmity with the impugned award accepting JMC's claim for bitumen variance as assessed and recommended by the Engineer.

50. The next question to be examined is regarding the award of interest. The contention that the awarded interest at the rate of 10.75% on the awarded amount, is excessive is unpersuasive. This Court does not find that the said rate of interest is excessive as contended on behalf of NHAI. The Supreme Court in a recent decision in *Punjab State Civil Supplies Corporation Limited (PUNSUP) and Anr. v Ganpati Rice Mills: SLP (C) 36655 of 2016, decided on 20.10.2021*, has reiterated that an Arbitral Tribunal has wide discretion to award interest under Section 31(7) of the A&C Act and, the same cannot be interfered with unless the same is found to be in conflict with the public policy of India or is otherwise patently illegal.

51. The petition is unmerited and, accordingly, dismissed.

VIBHU BAKHRU, J

NOVEMBER 9, 2021
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