

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 07.08.2009

+ **OMP 23/2007**

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

... Petitioner

- versus -

M/S ITD CEMENTATION INDIA LTD ... Respondent/ Claimant
(Formerly M/s Skanska Cementation India Ltd)

Advocates who appeared in this case:

For the Petitioner : Mr Chetan Sharma, Sr Advocate with Mr Vikas Goel
and Mr R. N. Sharma

For the Respondent : Mr George Thomas with Mr G. K. Jose and K. J. Joseph

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in Digest? YES

BADAR DURREZ AHMED, J

1. Through this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act'), the petitioner is seeking the setting aside of the Award dated 11.10.2006 made by the Arbitral Tribunal comprising of Sh. K. K. Madan

(Presiding Arbitrator), Lt. Gen. A. K. Puri (retired) and Justice A. B. Rohtagi (Retired) in the matter of arbitration for the work of widening of four lane and rehabilitation of existing two lane carriageway of NH-4, Pune-Satara stretch from Satara (Km 725) to Wathar (Km 760), Package-I. The respondent herein had preferred six claims. The petitioner herein is aggrieved by the decision of the Arbitral Tribunal in respect of the claim Nos. 1-5.

2. As indicated in the impugned Award a contract bearing agreement No. NHAI/13011/17/97-P1/182 dated 10.05.2001 had been entered into between the petitioner and the respondent for the execution of the work of widening the existing two lane highway to four lanes as well as rehabilitation of the existing two lane carriageway of National Highway-4 in the Pune-Satara stretch. The contract was in respect of the portion of the road between Satara (Km 725) and Wathar (Km 760) which, in other words, implied a stretch of 35 Km. The contract value was Rs 95,97,02,707/-. It may be pointed out that initially the contract was between the National Highway Authority of India (employer) (hereinafter referred to as the 'NHAI') and M/s Skanska Cementation India Limited (contractor), whose name was subsequently changed to the present name — ITD Cementation India Limited (hereinafter referred to as 'ITD Cementation').

3. The scope of the works involved the widening of the existing two lane stretch of 35 km between Pune-Satara, constructing new bridges and flyovers, widening and repairing existing bridges, constructing toll plaza, junctions and intersections including service roads and all road appurtenances and miscellaneous works. The date of commencement of the work was agreed to be 01.07.2001 and the date of completion, as per the contract, was 31.12.2003, which meant a period of 30 months for completing the work. The work was actually completed on 30.03.2004, that is, in 33 months. Disputes had arisen between the parties and, therefore, the respondent/ claimant invoked arbitration by its letter dated 29.06.2004 and simultaneously nominated Justice A. B. Rohtagi (retired) as an arbitrator. In response to the said invocation of the arbitration clause, the petitioner nominated Mr A. K. Puri as an arbitrator and the two arbitrators appointed Mr K. K. Madan as the Presiding Arbitrator. The following claims were made by the respondent / claimant:-

- (1) **Claim No.1:** Amounts payable by NHAI for varied work done by claimant (ITD Cementation) and payment due under price adjustment on the basis of rebate offered in the tender.

The modified claim under claim No.1 was of Rs 9,14,71,312/-. As against this, the Arbitral Tribunal awarded an amount of Rs 2,34,23,656/-.

- (2) **Claim No. 2:** Payment due on account of redesigning of pavement layers.

This claim was split into four parts being claim Nos. 2(a), (b), (c) and (d). Claim No. 2(a) related to the effect of deletion of CTSG (cement treated sub-grade). The amount awarded by the Arbitral Tribunal was a sum of Rs 41,57,025/- in respect of the claim 2(a) as against a modified claim of Rs 1,05,49,494/-. Claim No. 2(b) was in respect of the effect of deletion of CTUSB (cement treated upper sub-base). The Arbitral Tribunal awarded an amount of Rs 32,73,618/- under this head as against the modified claim of Rs 1,27,49,618/-. Claim No. 2(c), which pertained to under utilization of key plants and equipments and quarry infrastructure was withdrawn by the NHAI by their letter dated 29.03.2006. Claim 2(d) pertained to additional cost of borrow material. The Arbitral Tribunal awarded an amount of Rs 51,41,202/- to the claimant (ITD Cementation) on account of additional cost incurred towards additional borrow material against the modified claim of Rs 1,48,79,786/-.

- (3) **Claim No.3:** Payments due on account of change in the thickness of DBM (Dense Bitumen Macadem) layer of 100 mm for new carriageway (NCW) from one layer into two layers of 65 mm each and due to reduction of thickness of DBM for existing carriageway (ECW) from 100 mm to 80 mm. This claim

comprises of two parts. The first part pertains to the new carriageway (NCW) and the second part pertains to the existing carriageway (ECW). Insofar as the claim pertaining to NCW was concerned, the Arbitral Tribunal awarded an amount of Rs 91,11,070/- as against the original claim of Rs 2,34,69,654/-. The second part of the claim pertaining to ECW was rejected by the Arbitral Tribunal.

(4) **Claim No. 4:** Reimbursement of increase in royalty charges.

The Arbitral Tribunal awarded an amount of Rs 68,66,175/- on account of increase in royalty charges consequent upon the notification dated 28.10.2002 issued by the Government of Maharashtra.

(5) **Claim No. 5:** Interest.

The Arbitral Tribunal awarded interest at the rate of 12% per annum compounded monthly in respect of the pre-reference period, *pendente lite* interest as well as future interest on the amount awarded under claims 1-4.

(6) **Claim No. 6:** Costs of arbitration, which the claimant (ITD Cementation) claimed at Rs 10 lacs.

This claim was rejected and the Arbitral Tribunal directed that the cost of arbitration be shared equally. The summary of the Award in respect of claim Nos. 1-4 and 6 as given in the impugned Award itself is set out herein below:-

Summary of the Award for Claim Nos. 1 to 4 & 6

Claim No:	Brief description	Amount Claimed (Rs)	Amount Awarded (Rs)
1.	a) Varied work Quantities	6,74,02,347	1,07,90,139
	b) Additional Structures	1,26,33,517	1,26,33,517
	c) Price Adjustment	1,14,35,448	Nil
	Total	9,14,71,312	2,34,23,656
2.	a) Loss of overhead and profits due to deletion of cement stabilized upper sub grade	1,05,49,494	41,57,025
	b) Loss of overhead and profit due to deletion of cement treated upper sub base	1,27,49,618	32,73,618
	c) Under utilization of Key Plants and Equipments and Quarry structures	1,15,24,775 (withdrawn subsequently)	Nil
	d) Additional cost of borrow material	1,48,79,786	51,41,202
	Total	3,81,78,898	1,25,71,845
3.	a) Change in thickness of DBM layer, 100 mm to two layers of 65 mm each in NCW	2,34,69,654	91,11,070
	b) Change in thickness of DBM layer 100 mm to 80 mm on ECW	30,25,260	Nil
	Total	2,64,94,914	91,11,070
4.	Reimbursement of increase in royalty charges	68,66,175	68,66,175
6.	Cost of Arbitration	10,00,000	Nil
	Grand Total of Claims 1 to 4 and 6	16,40,11,299	5,19,72,746

4. I shall take up the objections to the Award claim-wise.

Claim No. 1: Amounts payable by NHAI for varied work done by claimant (ITD Cementation) and payment due under price adjustment on the basis of rebate offered in the tender.

5. In the summary of bill of quantities, which is Annexure P-2 to the impugned Award, as against the total bid amount of Rs 115,07,22,670/-, the respondent (ITD Cementation) had offered a rebate of 16.6% on all items and, therefore, the final bid amount, after rebate, was indicated as Rs 95,97,02,707/-. The issue that arises under claim No. 1 is whether the rebate of 16.6% would be applicable only to the bill of quantities (BOQ) or it would also extend to any variations and/ or additional work. According to the claimant (ITD Cementation), it gave a rebate of 16.6% on the BOQ items only and the rebate did not extend to variations. Furthermore, the rebate definitely did not extend to additional structures. Since the petitioner (NHAI) had made payment to the respondent (ITD Cementation) on the basis of 16.6% rebate not only on the BOQ items but also on variations and additional structures, the respondent (ITD Cementation) was seeking a refund of such rebate on the variations and additional structures.

6. It is the case of the petitioner (NHAI) that the rebate of 16.6% offered by the respondent (ITD Cementation) applied to all work including variations and additional structures. According to the petitioner the whole contract was an item rate contract and, therefore, the rate of the rebate could not have a separate existence.

7. The Arbitral Tribunal, while considering the issue of variations, interpreted clauses 51.1, 51.2, 52.1 and 52.2 of the General Conditions being part of the Conditions of Contract for Works of Civil Engineering Construction issued by the *Federation Internationale Des Ingenieurs- Counseils* (FIDIC). The said provisions read as under:-

Alterations, Additions and Omissions

- Variations** **51.1** The engineer shall make any variation of the form, quality or quantity of the works or any part thereof that may, in his opinion, be necessary and for that purpose, or if for any other reason it shall, in his opinion, be appropriate, he shall have the authority to instruct the contractor to do and the contractor shall do any of the following:
- (a) increase or decrease the quantity of any work included in the contract,
 - (b) omit any such work (but not if the omitted work is to be carried out by the employer or by another contractor),
 - (c) change the character or quality or kind of any such work,
 - (d) change the levels, lines, position and dimensions of any part of the works,
 - (e) execute additional work of any kind necessary for the completion of the works, or
 - (f) change any specified sequence or timing of construction of any part of the works.

No such variation shall in any way vitiate or invalidate the contract, but the effect, if any, of all such variations shall be valued in accordance with Clause 52. Provided that where the issue of an instruction to vary the works is necessitated by some default of or

breach of contract by the contractor or for which he is responsible, any additional cost attributable to such default shall be borne by the contractor.

Instructions for variations **51.2** The contractor shall not make any such variation without an instruction of the engineer. Provided that no instruction shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an instruction given under this Clause, but is the result of the quantities exceeding or being less than those stated in the Bill of Quantities.

Valuation of variations **52.1** All variations referred to in Clause 51 and any additions to the contract price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as “varied work”), shall be valued at the rates and prices set out in the contract if, in the opinion of the engineer, the same shall be applicable. “If the contract does not contain any rates or prices applicable to the varied work, the rates and prices in the contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the engineer with the employer and the contractor, suitable rates or prices shall be agreed upon between the engineer and the contractor.” In the event of disagreement the engineer shall fix such rates or prices as are, in his opinion, appropriate and shall notify the contractor accordingly, with a copy to the employer. Until such time as rates or prices are agreed or fixed, the engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

Power of engineer to fix rates **52.2** Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the works or to any part thereof, is such that, in the opinion of the engineer, the rate or price contained in the contract for any item of the works is, by reason of such varied

work, rendered inappropriate or inapplicable, then, after due consultation by the engineer with the employer and the contractor, a suitable rate or price shall be agreed upon between the engineer and the contractor. In the event of disagreement the engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the contractor accordingly, with a copy to the employer. Until such time as rates or prices are agreed or fixed, the engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

Provided also that no varied work instructed to be done by the engineer pursuant to Clause 51 shall be valued under sub-clause 52.1 or under this sub-Clause unless, within 14 days of the date of such instruction and, other than in the case of omitted work, before the commencement of the varied work, notice shall have been given either:

- (a) by the contractor to the engineer of his intention to claim extra payment or a varied rate or price, or
- (b) by the engineer to the contractor of his intention to vary a rate or price.

According to the Arbitral Tribunal the basic difference between the points of view of the parties appears to arise from different interpretation and meaning of the term rebate given by the respondent (ITD Cementation) in the tender and the BOQ rates. The basis of the respondent's stand is that the rebate and unit rates are two distinctly separate and independent terms as defined in the contract documents. The unit rates and prices for the items are to be used for arriving at the

bid price while the discount/ rebate is to be used to arrive at a contract price. Thus, as per the respondent, the rebate offered did not amount to change in the quoted unit rate and price but was a discount offered in the BOQ items and was applicable for BOQ quantities of various items and not for items executed under Clause 51 of the General Conditions of Contract for which the relevant contract provisions would apply. On the other hand, it was the contention of the petitioner that the rebate was a reduction in the unit rates of each BOQ item and the rate was the net rate after reducing the unit rate by the percentage of rebate offered. As per the petitioner, the rebate applied to all BOQ quantities as well as deviated quantities. As per the Arbitral Tribunal, there are two kinds of variations. The first is the automatic increase or decrease in the quantity of any work included in the work as indicated in Clause 51.1 (a). Similar is the position, with the variation indicated in Clause 51.1(c), (d) and (e). Referring to Clause 51.2 the Arbitral Tribunal observed that all variations which are to be made by the Contractor under Clause 51.1 are to be made only upon instructions of the engineer. The proviso to Clause 51.2 indicates that no instruction would be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an instruction given under the said clause, but is the result of the quantities exceeding or being less than those stated in the bill of quantities. On the basis of this, the Arbitral Tribunal was of the view that there were two kinds of

variations. One, which was on the basis of instructions and, therefore, could be regarded as instructed variations and, two, variations for which no instruction was necessary and was merely the result of the quantities exceeding or being less than those stated in the bill of quantities. The latter kind of variation was regarded by the Arbitral Tribunal as automatic.

8. The Arbitral Tribunal took the view that the automatic changes in quantities which resulted from any inaccuracy in the bills of quantities did not constitute a variation inasmuch as the employer had at the very beginning in the preamble to the BOQ in Clause 2 made it clear that “the quantities given in the BOQ are estimated and provisional and are given to provide a common basis for bidding”. Further reference was made to the clause to indicate that the basis of payment will be the actual quantities of work ordered and carried out, as measured by the contractor and verified by the engineer and valued at the rates and prices bid in the priced BOQ, where applicable, and otherwise at such rates and prices that the engineer may fix in terms of the contract.

9. In view of the line of reasoning adopted by the Arbitral Tribunal, it came to the conclusion that it is only the increased quantities ordered by the engineer in writing which constituted varied work and such variation must be paid at the rates and prices set in the

contract without deduction of rebate. The automatic increase or decrease as a result of inaccuracy in the BOQ cannot be considered as varied work and in respect of such changes, the rebate of 16.6% would apply. Thus, the Arbitral Tribunal drew a clear distinction between instructed variations, which, according to it, constituted varied work and automatic changes which did not constitute varied work. The Arbitral Tribunal came to the conclusion that it is only for the varied work that the BOQ rates without rebate would apply “because the contractor did not promise rebate on varied works as defined above”. Consequently, as against the claim of Rs 6,74,02,347/- under the head of variations, the Arbitral Tribunal awarded an amount of Rs 1,07,90,139/-.

10. Considering the arguments advanced by the counsel for the parties on both sides which were reiterations of their stands before the Arbitral Tribunal, I am of the view that the Arbitral Tribunal has come to the aforesaid conclusion on the basis of a particular interpretation of the relevant clauses of the contract. It is well settled that the interpretation of a contract is within the domain of the arbitrator. Even if the Court does not agree with the interpretation given by the Arbitral Tribunal, the Award cannot be set aside if the interpretation employed by the Arbitral Tribunal is a plausible one and is not absurd [see: (i) **McDermott International Inc. v. Burn Standar Co. Ltd: 2006(2)**

Arb.L.R. 498 (SC); (ii) Pure Helium India (P) Ltd v. ONGC: 2003(8) SC 593; (iii) Himachal Pradesh State Electricity Board v. R. J. Shah & Co.:JT 1999(3) SC 151; (iv) Union of India v. Suchita Steels: 2005(4) RAJ 378 (Delhi); and (v) Sudershan Trading Co. v. Govt. of Kerala: AIR 1989 SC 890]. It is also a well settled principle that the Court while examining a petition under Section 34 of the said Act does not sit as a Court of appeal over the findings of fact or law of the Arbitral Tribunal. The Court is not required and, in fact, does not reappraise the evidence. The interpretation of a contract or the terms thereof is also within the jurisdiction of the Arbitral Tribunal [see: State of UP v. Allied Constructions: 2003(7) SCC 396]. Of course, if the interpretation or construction given to a particular clause of a contract by the Arbitral Tribunal is absolutely implausible or absurd, the same can be interfered with by the Court under Section 34 of the said Act. Furthermore, if a particular clause of the contract admits of only one interpretation and if the Arbitral Tribunal chooses to ignore the only plausible interpretation and comes up with an interpretation which does not appear plausible, the Court is not obliged to accept that interpretation [see: Wee Aar Constructive Builders v. DDA & Ors: 2001(2) Arb. L. R. 71 (Delhi)]. Also, the arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The Arbitral Tribunal is selected by the parties to decide their disputes according to law and if it does not, its Award

can be set right by the Court [see: **Continental Construction Co. Ltd. v. State of M.P:** AIR 1988 SC 1166]. It is clear that an arbitrator being a creature of the agreement between the parties, has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the Award and the same could be corrected by the Court [see: **Food Corporation of India v. Chandu Construction and Another:** (2007) 4 SCC 697].

11. These principles, which have been culled out from the decisions cited by the counsel for the parties on both sides, are clear. The sum and substance is that the Arbitral Tribunal cannot ignore terms of the contract or go contrary to the same. But, where the Arbitral Tribunal arrives at one of the plausible interpretations of the terms of a contract, the Court does not interfere under Section 34 of the said Act. The Court also does not interfere with findings of fact unless and until there is perversity writ large in the impugned Award.

12. In the present case the Arbitral Tribunal has examined clauses 51.1, 51.2, 52.1 and 52.2 and has, upon such examination, gleaned a distinction between an instructed variation and an increase or decrease in the quantity of any work which is not a result of an instruction given by the engineer but is the result of the quantities exceeding or being less than those stated in the bill of quantities.

Clause 51.1 indicates that any variation in the work, as indicated therein, will not, in any way, vitiate or invalidate the contract but the effect, if any, of all such variations are to be valued in accordance with Clause 52. Clause 52.1 deals with valuation of variations. It specifically provides that all variations referred to in Clause 51 shall be valued at the rates and prices set out in the contract if, in the opinion of the engineer, the same shall be applicable. According to the Arbitral Tribunal, the expression “rates and prices set out in the contract” referred to the unit prices mentioned in the BOQ prior to the application of rebate of 16.6%. Interpreting the clauses in such manner, the Arbitral Tribunal came to the conclusion that the respondent (ITD Cementation) was entitled to a refund of the rebate only in respect of instructed variations which fell within the expression “varied work” as appearing in Clause 52.1 of the GCC. The Arbitral Tribunal, therefore, rejected the respondent’s claim of refund of rebate in respect of the increase in the quantity of work which was not consequent upon any instruction issued by the engineer, but was the result of quantities exceeding those stated in the bill of quantities. According to the Arbitral Tribunal, such increase was to be expected as was apparent from the preamble of the bid document and, therefore, when the contractor (ITD Cementation) made the bid it was aware that the 16.6% rebate would apply to such increase or decrease in quantities.

13. I feel that the interpretation given by the Arbitral Tribunal to the relevant clauses of the contract between the parties is certainly a plausible interpretation. Once I come to this conclusion, there is no scope for any further challenge on this aspect of the matter. Consequently, the finding of the Arbitral Tribunal with regard to the refund of the rebate on variations does not call for any interference.

14. The conclusion of the Arbitral Tribunal with regard to additional structures also does not call for any interference. The Arbitral Tribunal held:-

“3.1.33 The AT is of the view that for prices set out in the contract to be applicable to varied work, it is essential that it must be similar work executed under similar conditions. If time and sequence show that the additional work was ordered to be executed months after the commencement of the original work and after the contractor has made all arrangements for completion and demobilization then in that case time, sequence and changed conditions as a whole, will have to be taken into account in fixing the price for varied work. To apply rebate to altered and additional work executed under changed conditions as explained above, when prices had increased, is to misapply it, since the claimants had offered the rebate in 2001, when tenders were invited, while varied work was ordered much later after considerable progress has been made.

3.1.34 In this case six underpasses were architecturally sufficient as originally designed and conceived. But additional eight structures were ordered as per demand of the local population, which were not provided in the contract as these were not originally designed, planned or conceived. Therefore the AT holds that these structures cannot be strictly covered under clause 51.1(e) of GCC i.e. necessary for completion of the work.

3.1.35 AT is, further of the view that the rebate was given on original contract work and to extend it to varied work in all circumstances and condition, favourable and unfavourable, is not justified. If we do so, the result will be that under the guise of “additional work”, the employer can get any amount of work executed at the rebated rate. Therefore in case of varied work, its nature, extent, timing and sequence must be seen in each case, before applying the rebated rate. In changed conditions and in changed circumstances, additional work will certainly call for fixing a rate on a reasonable basis.

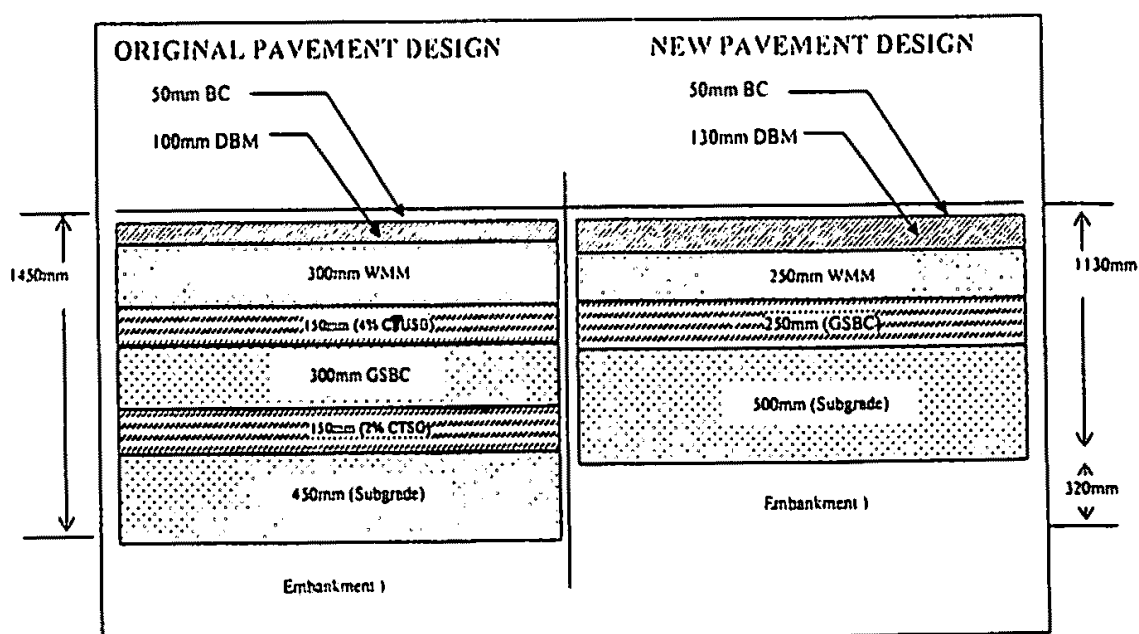
3.1.36 AT therefore holds that the rebate given on overall contract price and grossed up by the contractor while tendering has no application to additional work in the facts of this case and awards an amount of Rs 1,26,33,517 to the claimants on account of rebate deducted on additional structures as per his modified claim (vide Annexure-2 of written arguments on pg. 73), against original claim Rs 2,14,53,873 as per SOC.”

The reasoning adopted by the Arbitral Tribunal is plausible.

Consequently, no interference is called for.

Claim No. 2: Payment due on account of re-designing of pavement layer.

15. There was a change in the pavement design. This is indicated by the diagram indicated below:-



From the above diagram, it is apparent that two items have been omitted from the original pavement design. Those two items are 150 mm CTUSB (cement treated upper sub base) and 150 mm CTSG (cement treated sub grade). According to the respondent/ claimant (ITD Cementation), the omission of these items resulted in loss of profits/ overheads. As noted in the impugned Award in paragraph 3.2.4, there is no dispute between the parties to the change in the design of the road crust and the consequent omission of the items. The claimant / respondent valued the effect of the deletion of the two items due to loss of overheads and profits by considering the same as analogous to existing BOQ items 2.06(a) and 3.01(a), respectively, and claimed the rate difference between the two. On the other hand, the petitioner contended that the BOQ items 2.06 (a) and (b) as also items 3.01(a) and (b) were not analogous and thus the effect of variations claimed by the respondent / claimant was not correct. According to the

petitioner, the Arbitral Tribunal has given no reasons for treating the said items as analogous items. However, in paragraph 3.2.10 of the impugned Award, it is clearly indicated that the items were treated or considered to be analogous because the only different was the cement content. Items 2.06 (a) and (b) and items 3.01 (a) and (b) are as under:-

Item	Description
2.06	Construction of subgrade /shoulder with approved materials from borrow pits complete as per Technical Specification Clause 305 with all leads and lifts and as directed by the Engineer:
	(a) Lower Subgrade of 450 mm thickness
	(b) Cement Treated Upper Subgrade of 150 mm thickness (with 2% cement content)
3.01	Constructing Granular Subbase full width or part width with approved materials:
	(a) Lower Granular Subbase (GSB) as per Technical Specification Clause 401 conforming to Grading-I of Table 400-1.
	(b) Cement Treated Upper Subbase with 4% cement content as per Technical Specification Clause 403 conforming to Grading as shown in Table 400-4 and as directed by the Engineer.

16. An examination of the above BOQ items clearly shows that the Arbitral Tribunal has not taken an unreasonable view in treating items 2.06 (a) and (b) as analogous as also items 3.01 (a) and (b) as analogous. The only different being the absence or presence of cement. Consequently, I do not see any reason to interfere with the finding of

the Arbitral Tribunal that the said items are to be considered analogous for working out the loss of overheads and profits. The claims 2(a) and 2(b) to the extent awarded by the Arbitral Tribunal are, therefore, upheld. Similarly, I see no reason to interfere with the award of the amount of Rs 51,41,202/- to the respondent on account of additional cost incurred towards additional borrow material.

Claim No. 3: Payment due on account of change in the thickness of DBM layer of 100 mm for new carriageway from one layer into two layers of 65 mm each and due to reduction of thickness of DBM for existing carriageway (ECW) from 100 mm to 80 mm.

17. In the present petition I am not concerned with the claim in respect of the existing carriageway inasmuch as the same has not been granted by the Arbitral Tribunal and the respondent has not made any grievance in respect of this. I am concerned with the change in the thickness of DBM in respect of the new carriageway (NCW). As can be seen from the diagram given earlier in this judgment with regard to the change in the pavement design, the original pavement design indicated a thickness of 100 mm for the DBM. This has been increased to 130 mm in the new pavement design. As per the applicable technical specifications, it is only permissible to lay a single layer of DBM up to 100 mm thickness. Since the new pavement design required the DBM to be of 130 mm, it could not be executed by laying a single layer and consequently, had to be executed by laying two

layers of 65 mm each. As per the claimant / respondent (ITD Cementation), the BOQ rate for DBM in the contract was quoted for laying of 100 mm thickness DBM in a single layer. Due to reduction in the thickness of the layers of DBM to be laid in two layers of 65 mm each, the efforts and resources required per cubic meter of the finished DBM layer had increased. On the other hand, the petitioner contended that the rate quoted in the BOQ had to be adhered to inasmuch as it was on the basis of per cubic meter of DBM, irrespective of the thickness of the DBM. It may be pointed out that the engineer acknowledged the fact that additional efforts would be required as a result of the increase of the thickness of the DBM from 100 mm to 130 mm and he allowed an additional payment of Rs 78 per cubic meter which was subsequently revised to Rs 82 per cubic meter in respect of the DBM for the new carriageway. This was, however, not acceptable to the respondent / claimant, who claimed a much higher amount. The respondent had claimed an additional amount at the rate of Rs 407 per cubic meter. The Arbitral Tribunal noted that insofar as the question of laying the second layer of DBM was concerned, it entailed further operations. There was a need to return for laying of the second layer of DBM over the previously laid surface after every 48 hours, inasmuch as prior to laying the second layer several operations such as cooling of the first layer, taking core from the first layer and getting test result of the core taken also needed to be completed before the second layer

could be put in place. Computing the figures, as noted in the impugned Award, the Arbitral Tribunal held:-

“3.2.8 In this analysis, AT has considered as reasonable the overall loss of efficiency for laying the DBM into two layers as 25% for each layer and accordingly the incremental rate works out to be Rs 158 per cum. Based on the above A/R the amount payable to the Claimant is Rs 91,11,070/- against the original claim of Rs 2,34,69,654.”

The incremental rate which was computed on the basis of the analysis taken by the Arbitral Tribunal was Rs 240/- per cubic meter. It is to be noted that the increment recommended by the engineer and which had already been paid by the petitioner to the respondent was Rs 82/- per cubic meter. The difference in the incremental rate, therefore, worked out to Rs 158/- per cubic meter (Rs 240 - Rs 82). Consequently, the amount payable to the claimant/ respondent was worked out at Rs 91,11,070/-.

18. The learned counsel for the petitioner referred to the above conclusion arrived at by the Arbitral Tribunal and submitted that the computation was erroneous. He further submitted that in any event the Arbitral Tribunal has considered the loss of efficiency for laying the DBM in two layers “to be 25% for each layer”. It was contended that there could not have been a loss of efficiency in respect of the first layer and it is only in respect of the second layer that such a computation could have been done. The overall logic adopted by the

Arbitral Tribunal with regard to the loss having been occasioned to the respondent/ claimant on account of two layers having to be laid rather than one cannot be found to be faulty. However, I do agree with the submission of the learned counsel for the petitioner that the loss of efficiency of 25% would only be in respect of the second layer and not in respect of the first because, the first layer would have to be laid in either eventuality, whether it was the original design or the new design. It is only because the new design required two layers to be laid rather than one that there has been a loss of efficiency. Thus, the 25% loss of efficiency would not be in respect of each layer but only in respect of the second layer. Consequently, the amount of Rs 91,11,070/- would have to be halved and the awarded amount under this claim would stand reduced to Rs 45,55,535/-.

Claim No. 4: Reimbursement of increase in royalty charges.

19. The claim under this head was based upon the notification of the Government of Maharashtra under Section 15 of the Mines and Minerals Act, 1957 which took effect from 28.10.2002 whereby royalty charges on stone, sand and earth were increased. The respondent/ claimant (ITD Cementation) had requested for price adjustment consequent to the increase in the rates of royalty. It may be pointed out that the engineer had certified payments for increased royalty and the employer (the petitioner herein) had made payment for about one year

as certified by the engineer. In October, 2003 the engineer reversed his decision and directed recovery of the amounts already paid to be claimant on the ground that this increase in royalty charges could not be paid separately as the same was covered under the price variation sub clause 70.3(B), for general materials. Upon an interpretation of the relevant clause of the contract between the parties, the Arbitral Tribunal held the claim of Rs 68,66,175/- on account of increase in royalty charges consequent upon the said notification issued by the Government of Maharashtra with effect from 28.10.2002 to be justified and accordingly awarded the same to the respondent/ claimant.

20. A similar conclusion had been arrived at in the case of another contract between the same parties by the Arbitral Tribunal in that case. However, after arriving at such a conclusion, namely, that the claimant was entitled to be compensated for the increase in the royalty charges, the Arbitral Tribunal in that case had left the amount to be quantified by the National Highway Authority of India. That Award became the subject matter of OMP 432/2006 which was dismissed by a learned Single Judge of this Court vide his judgment dated 14.05.2007. The same was made the subject matter of an appeal being FAO(OS) 216/2007 before a Division Bench of this Court. The issues which arose before the Division Bench were essentially two in number. One issue touched upon the interpretation of the terms of the contract

and the other related to the quantification of the extra cost allegedly incurred by the claimant therein. By a judgment delivered on 30.11.2007 [**NHAI v. ITD Cementation India Ltd: 2008 (100) DRJ 431 (DB)**], the Division Bench was of the view that insofar as the first issue was concerned, no interference was called for in respect of the decision on the interpretation placed by the Arbitral Tribunal. The Division Bench specifically noted that it had been well settled by a long line of decisions rendered by the Supreme Court that a Court dealing with a petition under Section 34 of the said Act does not sit in appeal over the Arbitral Tribunal. After noting the decision of the Supreme Court in the case of **ONGC v. Saw Pipes Ltd: AIR 2003 SC 262**, the Division Bench concluded that there was no reason for it to take a view different from the one taken by the learned Single Judge that the Award made by the arbitrators could not be interfered with simply on the ground that another interpretation of the terms of the contract, no matter equally plausible, was possible. However, on the issue of quantification, since the same had been left to the one of the parties to the dispute, the Division Bench set aside the order passed by the learned Single Judge as also that part of the impugned Award. The Division Bench observed that it was incumbent upon the Tribunal to have quantified the amount payable as revised seigniorage fee and the Tribunal could not have permitted one of the parties to the dispute to determine that issue. Consequently, the Division Bench set aside the

Award on the question of quantification of the amount and remitted the matter to the Arbitral Tribunal for deciding the issue.

21. From this discussion it is apparent that the issue with regard to reimbursement on account of the increase in royalty charges is no longer open to debate. In the present case, unlike in the earlier case reported in **2008(100) DRJ 431 (DB)**, the Arbitral Tribunal has not left the issue of quantification open but has arrived at a specific figure of Rs 68,66,175/- and, therefore, even that lacuna is not there in the present Award. Consequently, the conclusion of the Arbitral Tribunal in respect of claim No. 4 cannot be interfered with.

Claim No. 5: Claim for interest.

22. The plea of the petitioner with regard to claim No. 5, which pertains to the rate of interest to be computed, also does not call for any interference. It is within the domain of the Arbitral Tribunal to fix the rate of interest within reasonable bounds and as permissible under the contract. The Arbitral Tribunal noted that as per Section 37(7) of the said Act, it had the power to award interest from the date of the cause of action till the date of actual payment. It also noted that as per provision made in the appendix to the bid of the contract and sub-clause 60.8 of the contract agreement, the rate of interest payable on unpaid sums was 1/30th of 1 % per calendar day, which worked out to

12% per annum compounded monthly. According to the petitioner, the stipulated amount of interest was only in respect of undisputed sums certified by the engineer and did not extend to the amounts ultimately awarded by the Arbitral Tribunal. However, I agree with the submission made by the learned counsel for the respondent that in terms of the contract, the parties could have easily envisaged that if an amount was found to be due the compensation for the delay in making the payment cannot be computed at 12% per annum compounded monthly. Furthermore, there is no reason to distinguish between the undisputed sums certified by the engineer and uncertified payments as a result of succeeding in a claim before an Arbitral Tribunal. The learned counsel for the respondent submitted that the interest awarded at the rate of 12% per annum to be computed monthly would approximately equivalent to 14% simple interest. He submitted that even Section 31(7)(b) of the said Act contemplated interest at the rate of 18% per annum. In view of these submissions, I agree with the submissions made by the learned counsel for the respondent that the interest awarded was not unreasonable and not beyond the contemplation of the parties at the time they entered into the contract. Consequently, there is no reason to interfere with this part of the Award either.

23. As a result of the aforesaid discussion, the impugned Award is upheld except in respect of claim No. 3 where the awarded amount is reduced from Rs 91,11,070/- to Rs 45,55,535/-. To this extent only, the petition is allowed. All the other objections raised by the petitioner in respect of the impugned Award are rejected. The petition stands disposed of accordingly. There shall be no order as to costs.

**BADAR DURREZ AHMED
(JUDGE)**

**August 07, 2009
SR**