

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

+ **OMP No.514/2009**

% **Date of decision: 9th September, 2009**

LARSEN & TOUBRO LIMITED Petitioner

Through: Mr. Sumit Bansal with Mr. Ajay Monga, Mr. Ateev Mathur & Mr. Manish Paliwal, Advocates

Versus

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA** Respondent

Through: None

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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 the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1 The petition under Section 34 of the Arbitration Act, 1996 with
respect to the arbitral award dated 13th May, 2009 is for admission.
After hearing counsel for the petitioner for one and a half hour, the
petition was dismissed with reasons to follow.

2 The Arbitral Tribunal comprised of three arbitrators in
accordance with the agreement of the parties. This petition is
preferred with respect to the award dismissing the claims No.1, 2(i),
3, 5, 6 and 8 of the petitioner. As far as the award on claim No.1 is
concerned, the same is split; the majority of the arbitrators have
dismissed the claim while the minority award is in favour of the

petitioner. The award dismissing the other claims aforesaid is unanimous. The counsel for the petitioner has addressed to the maximum length with respect to the challenge to the majority award dismissing the claim No.1 and also stated that the petition is mainly with respect to the dismissal of the said claim.

3 Claim No.1 of the petitioner was for “reimbursement of enhanced royalty charges” in the sum of Rs 65,61,664/-. Shorn of legalese, the claim was, i) that the contract was an item rate contract; (ii) it provides in clause 70 of COPA (Conditions of Particular Application Part II) for “changes in cost and legislation”; (iii) that royalty charges for boulders and ordinary sand used in the contract had been enhanced by an amendment to the Karnataka Minor Mineral Concession Rules 1994; (iv) that the petitioner was entitled to such enhancement of royalty borne by the petitioner, under clause 70.8 of COPA.

4. Clause 70.8 (supra) is as under

“Sub-Clause 70.8 : subsequent legislation

If, after the date 28 days prior to, the latest date for submission of bids for the Contract there are changes to any national or State Statute, Ordinance, Decree or other Law or any regulation or by-law of any local or other duly constituted authority, or the introduction of any such State Statute, Ordinance, Decree, Law, regulation or by-law in India or States of India which causes additional or reduced cost to the Contractor, other than under the preceding Sub-Clauses of this Clause, in the execution of the Contract, such additional or reduced cost shall, after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be added to or deducted from the Contract Price and the Engineer shall notify the contractor accordingly, with a copy to the Employer. Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have taken into account in the indexing of any inputs to the price Adjustment Formulae in accordance with the provisions of sub-Clauses 70.1 to 70.7.”

5. The Arbitral Tribunal has held that though the aforesaid amendment to the Karnataka Minor Mineral Concession Rules 1994 is a subsequent legislation within the meaning of clause 70.8 aforesaid but still the plaintiff is not entitled to the claim owing to the last part of clause 70.8 i.e. because the same has already been taken into account in the price adjustment in accordance with earlier sub-clauses of clause 70, i.e., 70.1 to 70.7.

6. Clause 70.1 provides that the amounts payable to petitioner/contractors are valued at base rates as defined and shall be adjusted in respect of rise or fall in the indexed costs of labour, equipment and plant, materials and other inputs to the work, by addition or subtraction of the amounts determined by the formula prescribed in clause 70; clause 70.2 provides that to the extent the full compensation for any rise or fall in costs is not covered in the contract, the unit rates/price included in the contract shall be deemed to include the amount to cover the contingency of such rise or fall in costs; Clause 70.3A provides for variation in price of local labour; clause 70.3B provides for variation in price of general materials- it provides for variation in price of “all materials other than specifically provided in sub-clause 70.5” – such variation has been linked to the fluctuation in Whole Sale Price Index (WPI) of all commodities; clause 70.3C deals with variation in price of petroleum, oil and lubricants, with which we are not concerned; Clause 70.3D deals with variation in price of Plant and Equipment and clause 70.3E with variation in price of foreign inputs, with both of which we are not concerned; clause 70.5 deals with variation in price of specified materials, with which we are again not concerned.

7. It was the accepted position before the Arbitral Tribunal that determination of WPI is on the basis of prices of 58 commodities, just like sensex in a stock exchange is determined on the prices each day of a select number of shares and not on the basis of prices of all the listed/traded shares/stocks. It was further the established position before the Arbitral Tribunal that neither boulder nor ordinary sand on account of increase in royalty whereon, claim No.1 was made were included in the said 58 commodities, fluctuation in price whereof determined the WPI.

8. The contention of the petitioner before the Arbitral Tribunal was that since boulders and ordinary sand were not in the basket of 58 commodities determining WPI, the enhanced royalty thereon was not taken into account in the indexing of inputs to the Price Adjustment Formula in clause 70.3 B relating to "General Materials", in which category boulders and ordinary sand otherwise fell and thus they became entitled to such increased royalty under clause 70.8 (supra).

9. The Arbitral Tribunal did not accept the aforesaid contention of petitioner, hence this challenge.

10. Not only do I find the interpretation of aforesaid clauses by the Arbitral Tribunal to be a plausible one, but also the only correct interpretation.

11. Any other interpretation would be anomalous. Clause 70.3B aforesaid is with respect to "all materials" used in the contract and not only those materials included in the basket of 58 commodities determining WPI. As per the formula provided therein, the

petitioner/contractors will get variation in price of all materials irrespective of whether the price of materials used in contract have varied or not, as long as WPI has varied. In a given case say of increase in prices, it is possible that WPI has gone up owing to increase in prices of 58 commodities included in basket determining the same, but there is no increase in prices of material used in the works under the contract, say boulders and ordinary sand. The petitioner will thus benefit from increase in WPI, though has not suffered any increase in costs. A reading of the formula given in clause 70.3B does not have any doubt as to the same. Can then it be said that if there is increase in price of boulders and ordinary sand, but WPI has not varied, the petitioner would be still entitled to increase, this time under clause 70.8 because increase is on account of subsequent legislation. The answer has to be no.

12. It is further the admitted position that had the increase in royalty been with respect to any of the minerals included in the basket of 58 commodities determining the WPI, the impact thereof would be visible on the WPI. The question which arises is, whether WPI is to be confined to the 58 items in the basket determining the same only or generally for determination of variation in price of all materials. Not only does the contract in the present case makes it the index of variation in price of all materials but WPI by its very nature is representative. It tracks the movement of price of each (articles on google say it includes 435 commodities in its basket and not 58 as mentioned in the award) commodity individually and based on this individual movement, WPI is determined through averaging principle. It captures the price movement.

13. The parties in the present case have agreed to variation in prices of all materials as per WPI, the petitioner cannot be heard that variation in price of boulders and ordinary sand on account of subsequent legislation is not covered by clause 70.3B (supra) merely for the reason of boulders and ordinary sand being not included in the basket determining WPI. Clause 70.8, not only in the non obstante part towards its end, but also by use of words “other than under the proceeding sub-clauses of this clause” excludes increase in cost of materials, even on account of subsequent legislation from the purview of clause 70.8. Clause 70.2 expressly provides that even if the petitioner is not fully compensated for increase in cost on account of increase in royalty of boulders and ordinary sand, for the reason of such increase being not reflected in WPI, such increase shall be deemed to be included in the prices thereof stipulated in the contract.

14. There is yet another reason for me to hold so. Even if suppose such increase in royalty were to be reflected in the WPI directly if boulders and ordinary sand were included in the basket of commodities determining WPI; the increase would not be of the entire enhancement. Could in such a situation, the petitioner be heard to say that the balance increase should be given under clause 70.8. The answer against has to be No. Once the variation is covered by formula provided for variation of price of labour, material, petroleum, oil lubricants, plant, equipment, foreign inputs, the variation with respect thereto, even if on account of subsequent legislation cannot be covered by clause 70.8. Else, it will amount to variation under two clauses and which is not permitted.

15. The counsel for the petitioner has at the outset contended that the aforesaid award is contrary to the dicta of the Division Bench of this court in ***NHAI Vs. ITD Cementation India Limited*** MANU/DE/9104/2007. In this case also there was an increase in rates of royalty and which were held to be not covered by WPI. The Arbitral Tribunal however made a declaratory award only holding the contractor in that case to be entitled to the amounts for the reason of such increase and leaving the same to be determined by NHAI. The Division Bench of this court was not called upon to pronounce on the finding of the arbitrator of the petitioner being entitled to the increase. The challenge before the Division Bench was only that the award was bad and incomplete for the reason of not computing the amount due which the arbitrator had found due to the contractor in that case. Thus this judgment cannot be said to be the judgment on the contention raised by the petitioner before this court. The Arbitral Tribunal in the present case has interpreted Clause 70.8 and upon such interpretation held the petitioner not entitled to the claim. In fact the Division Bench has in Para 13 of the judgment held that simply because the interpretation placed by the arbitrator has not favoured one or the other party can be no reason for the court to interfere under Section 34 of the Act with the award made on any such interpretation; it being settled by a long line decisions that the court does not sit in an appeal over the award.

16. Thus all that can be said from the aforesaid judgment of the Division Bench is that the Arbitral Tribunal in that case had interpreted Clause 70.8 differently from the interpretation adopted by the Arbitral Tribunal in this case. However since the interpretation in that case was not under challenge and further since I have on detailed analysis aforesaid found the interpretation of the

same clause by the Arbitral Tribunal in this case, to be correct, no ground under Section 34 is made out. In fact I may notice that Arbitral Tribunal in that case did not go into the question analysed above and proceeded on the premise that if items on which "Seigniorage Fee" in that case were not included in the items determining Index, it would ipso facto fall under clause 70.8

17. It is not as if the Arbitral Tribunal in the present case was oblivious of the judgment in ***ITD Cementation Limited*** (Supra). The petitioner herein relied upon the judgment before the Arbitral Tribunal also and the Arbitral Tribunal has in Para 21 of the award dealt therewith.

18. The counsel for the petitioner has also contended that the report of the Engineer Incharge of the respondent is also in favour of the petitioner in this regard and in fact payments under the said head were earlier being made to the petitioner and were subsequently wrongly stopped. The Arbitral Tribunal has dealt with this aspect also and held that the decision of the Engineer Incharge was not binding and was challengeable in the arbitration proceedings. Thus no reliance can be placed by the petitioner on the decision of the Engineer Incharge or for the reason of some payments having been released on the said decision of the Engineer Incharge.

19. The counsel for the petitioner has next contended that the Arbitral Tribunal has proceeded with the matter with the intent to deny the said claim of the petitioner. On a reading of the entire award qua the said claim, I do not find any such intent. The Arbitral Tribunal has on the contrary dealt with each and every plea raised

by the petitioner and which same pleas has been raised before this court also and given their findings with respect thereto.

20. The counsel for the petitioner has also urged that if the interpretation adopted by the Arbitral Tribunal is to be accepted, the same will result in the clause becoming otiose. I do not agree with the said contention also. All that the Arbitral Tribunal has held is that the increase under Clause 70.8 is not for increase in cost of materials, provision wherefor has been made in accordance with the preceding sub-clauses of clause 70.

21. The counsel for the petitioner has also read portions of the minority award on the said claim to persuade this court to accept the same. The Division Bench of this court in ***The Fertilizer Corporation of India Ltd Vs IDI Management Inc.*** AIR 1984 Delhi 333 and the Division Bench in ***Chogule Brothers Vs Rashtriya Chemicals & Fertilizers Ltd*** MANU/MH/0114/2006 have held that it is not permissible to look at the minority award while dealing with a petition to set aside the majority award.

22. The claim No.2 of the petitioner was for reimbursement on account of increased taxes. The award allows claim under five components under this head and denies the claim for Rs.3,67,812/- for “resale tax on bitumen”. The Arbitral Tribunal has held that the said claim was made on the basis of payment of central sales tax though the sale of bitumen was for use in Karnataka State only; it was thus held that there being no interstate sale, there could be no question for compensation with respect to the same.

23. The counsel for the petitioner also upon it being inquired as to how with respect to local sale in a state, claim for central sales tax could be made, did not press the challenge with respect to the said claim.

24. Claim No.3 of the petitioner before the Arbitral Tribunal was for Rs.11,16,364/- for “price adjustment of bitumen on temporary diversions and renewal coat”. The claim was made under Clause 70.5.

25. The Arbitral Tribunal found that the adjustment of contract price under clause 70.5 (2) (a) was for bitumen for use in the permanent works only and not for temporary works. The contention of the petitioner was that the items were POQ items and hence the petitioner was entitled to price variation thereon. The Arbitral Tribunal finding works with respect where to price adjustment was claimed to be of temporary nature, rejected the claim.

26. The counsel for the petitioner has taken me to page 222 of the paper book, containing copy of Bill No.9 and with reference to items 9.02 and 9.03 thereof to show that the items are included in the BOQ. However from item No.10.03 in Bill No.10 on Page 223 of the paper book the nature of the work as temporary is apparent.

27. Again, it is a matter of appreciation of evidence as to what works are permanent and what temporary. The award contains reasons for holding the works to be temporary. The finding of the Arbitral Tribunal is a finding of fact. Section 34 does not permit a challenge to such finding of fact. This court cannot enter into

investigation whether the works were permanent, as contended by the petitioner.

28. The Arbitral Tribunal comprised of experts in the field. It has been held in *Jagdish Chander Vs Hindustan Vegetable Oils Corporation* AIR 1990 Delhi 204 that the court should be slow in interfering with the findings of such expert arbitrators.

29. The next challenge is to the award with respect to claim No.5 (Rs 67,00,521) "for payment of foreign currency component of interim payment certificates". The counsel for the petitioner has contended that under the contract 10% of the value thereof was payable to the petitioner in foreign exchange and for fluctuation in rates thereof provision was made in Clause 15.2. The counsel admits that the fluctuation as on the date of payment to the petitioner has been taken into account. The claim is for fluctuation between the date of said payment and the date of reconversion thereof into Indian currency by the petitioner. The counsel for the petitioner contends that the purport of Clause 15.2 is that the petitioner is to be unaffected by fluctuation in rate of foreign exchange; thus the petitioner needs to be saved even for fluctuation at the time of reconversion by the petitioner. On inquiry the counsel for the petitioner admits that the time of reconversion was at the sole discretion of the petitioner and the respondent had no control over the date or time when the petitioner was to reconvert the foreign exchange to Indian currency. That being the position, the interpretation of the arbitrator that the fluctuation if any of the time when the petitioner reconverts the foreign exchange is not to be considered and was not part of contractual obligation cannot be

faulted with. The petitioner by its own act could not make the respondent liable.

30. Claim No.6 of the petitioner was for Rs 2,06,47,791/- towards “price adjustment of grade 60/70 bitumen”. The price of bitumen was to vary as provided in clause 70.5 of the agreement. The “basic price” is defined in clause 70.5 as meaning the price indicated in schedule 3 of Section IX of the bidding document, copy whereof is filed at Page 238 of the paper book and wherein the basic price of the bitumen 60/70 grade is given as Rs.12,000/- per MT. “Current Price” is defined in clause 70.5 (ii) (a) as meaning the ex refinery price inclusive of sales tax and excise duty from nearest refinery, prevailing at the relevant time.

31. The Arbitral Tribunal found that the project being an Asian Development Bank project, exemption from excise duty had been granted to the petitioner. Thus the admitted component of Rs 1296 per MT was removed from the base price of Rs 12,000/- per MT given by the petitioner and the basic price of Rs 10,344.83 per MT taken. Similarly, excise duty was not included in the current price computation as well.

32. The contention of the petitioner was/is that the basic price should be taken as Rs 8100/- per MT, as the basic price of Rs 12,000/- given by him in schedule 3 (supra) was inclusive of, besides excise duty aforesaid, sales tax of Rs 1183.90p per MT and Transportation and Handling charges of Rs 1420.10p. per MT. Else it was/is urged that transportation and handling charges should also be added in the current price.

33. The Arbitral Tribunal held that Clause 70.5 clearly specifies the modality of determining the current price as well as the meaning of basic price. The Arbitral Tribunal also held the base price arrived at by the Engineer Incharge to be in consonance with several other clauses of the agreement. The Arbitral Tribunal further found that there was no basis whatsoever for the transportation and handling charges of Rs.1420.18p. per MT deemed to be included by the petitioner in arriving at the total base price of Rs.12,000/- per MT in the bid document. The Arbitral Tribunal also noticed that the petitioner had with respect to another claim, accepted the transportation cost as Rs.800/- per MT as rightly determined by the Engineer Incharge and for this reason found the figure of Rs.1420/- per MT to be arbitrary and to be only to be able to justify the rate calculation of Rs.12,000/- per MT. Thus the only tinkering with the base price of Rs.12,000/- per MT given in the schedule to the agreement was to the extent of excluding excise duty component therefrom, since the same was not leviable. Similarly the Arbitral Tribunal found that the contract did not permit inclusion of transportation and handling charges to the current price.

34. Neither do I find any ground under Section 34 of the Act to have been made with respect to the aforesaid finding of the Arbitral Tribunal nor has the counsel for the petitioner made any other submissions with respect thereto.

35. Claim No.8 of the petitioner for Rs 3,00,00,000/- was on account of "Extra rates for value of works executed during the extended period. The original end date of the contract was 31st August, 2004 and was extended to 31st December, 2004 i.e. by four months. It was also the admitted position that price variation in

respect of the work done during the said extended time had been based on the agreed rates and paid by the respondent to the petitioner. The contention of the petitioner was that the price variation so paid to him did not compensate him for the increase in rate or the prices and preferred the claim in this regard on the basis of 10% of the value of the work executed during the said extended term.

36. The Arbitral Tribunal found that the petitioner had not in accordance with Clauses 52.1 and 52.2 given notice of any intention to claim extra payment or a varied rate of price and held the petitioner not entitled to any other increase than already paid. The Arbitral Tribunal also found that the claim had not been made at any time prior to 30th January, 2006 and that the petitioner had in fact admitted that the price adjustment for the work done during the extended period of four months had been paid and the parties had no dispute on this. The Arbitral Tribunal also found that the claim was not supported by any rate analysis or the prevalent rates during the extended term. The claim was thus held to be without any basis whatsoever and rejected.

37. The petitioner has in the OMP not challenged the finding of the facts written by the Arbitral Tribunal of the petitioner having accepted the increase paid and having confirmed that there were no disputes with respect to the same. The petitioner has also not challenged the finding of the Arbitral Tribunal of petitioner having not furnished any basis for the said claim. In my view on the basis of the said factual findings of the Arbitral Tribunal alone no fault can be found with the finding of the Arbitral Tribunal rejecting the said claim. Once the parties have agreed on a formula for payment of

increase, the petitioner cannot make a claim in addition thereto and specially when the petitioner has not even given any notice, as the arbitrators have held was required to be given in terms of the contract. The petitioner has in the OMP challenged that the clauses of the contract referred to by the Arbitral Tribunal in this regard are not applicable. However it cannot be forgotten that the award is not challengeable merely because the interpretation of the contract by the arbitrator is found to be wrong by the court. The findings of the Arbitral Tribunal in this regard is neither shown to be in the face of any contractual provision nor shown to be contrary to any substantial law. Thus no ground is made with respect to the rejection of the said claim also.

38. No perversity or anything to shock the judicial conscience is found in portions of the arbitral award challenged in this petition. Resultantly, the petition is dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

September 09, 2009
J