

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

+ **O.M.P. No.362/2008**

8th March, 2010

M/S. NATIONAL HIGHWAYS AUTHORITY OF INDIA ...Petitioner

Through: Mr. Parag P. Tripathi, ASG, with Mr.
K. K. Patra, Advocate with Ms. Bindu
Saxena, Advocate and Mr. Rajiv
Bansal, Advocate.

VERSUS

M/S. UNITECH-NCC JOINT VENTURE Respondents

Through: Ms. Priya Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. In spite of the scope of Section 34 of the Arbitration & Conciliation Act, 1996 being now well settled, however still, the present case has been filed demonstrating the blatant abuse of the process of Section 34. If this petition is accepted, the effect would be that a perfectly valid, equitable and just interpretation of the contractual clause which entitles price variation and escalation in the contract spread over for completion in 32 months, is sought to be set at naught by the petitioner. This case was in

fact heard on 26.2.2010 and on the suggestion of the Court, as to whether the petitioner still seeks to press this petition inasmuch as if the same is allowed the effect of the same would be that in contracts which run for an extensive length of time, there is no entitlement to price escalation, though, such price escalation is naturally inbuilt in such contracts, and, in the facts of the case if a mistake under a clause of the contract, has been rectified by the appropriate authority under the contract, then still why an interpretation, which is on the face of it, is unjust and unacceptable still should be pressed by the National Highways Authority of India/petitioner? The petitioner however still seeks an adjudication. With this preface, let us turn to the impugned Award and the facts of the present case. By the impugned Award, the Arbitration Tribunal, has held that the Engineer of the project was justified in exercise of his powers under the sub-clause 5.2.1 of the contract to amend the obvious error arising in the contract and a typographical mistake in the same, whereby price variation and escalation was seemingly to be given only on deviation in the work, but not on the original quantity of contracted work as per the BOQ items.

2. In order to place this case, in the correct perspective, I would at the outset seek to refer to para 1.16.2 of the Award, and which in my opinion, is the very spirit, basis and the heart behind the interpretation as given by the Engineer of the project and as accepted by the Arbitration Tribunal. This para reads as under:

“1.16.2 It is our experience that as per sound engineering practice based on FIDIC guidelines adopted in such civil construction contracts, price adjustment clause is included in the contracts to take care of the increase/decrease in the price of materials, bitumen, cement, labour, machinery and P.O.L. (Petrol/Diesel, Oil and Lubricants) during the period of execution. The Contractors are required to quote their rates prevailing at the time of preparation of their Bid. The price adjustment clause is applicable to all items of the work. The reason is that in long term contracts the increase in the price and cost of inputs into the BOQ items during the period of execution is so uncertain and the Contractors are not expected to bear such uncertain extra burden.

This factor of usage of the trade has also to be taken into account by the Arbitral Tribunal in making their decision as per Section 28(3) of the Arbitration and Conciliation Act.”

The abovesaid rationale is indeed unexceptionable.

3. The relevant contractual clause which has caused the dispute to come to the present stage is Clause 70.3, and which sub clause is in a fasciculus of sub clauses of price variation, and this clause reads as under:

“**Sub.clause 70.3** Adjustment Formulae(page-261 of the Contract):

“The adjustment to the Interim Payment Certificates in respect of changes in cost and legislation shall be determined from the following formula:

$$P_n = A + b \frac{L_n}{L_o} + C \frac{M_n}{M_o} + d \frac{F_n}{F_o} + e \frac{B_n}{B_o}$$

Where,

“ p_n is a price adjustment factor to be applied to the amount for the payment of the work carried out in the subject month, determined in accordance with Sub-clause 60.1(d), where such variations and day work are not otherwise subject to adjustment.”

By virtue of the underlined portion of this clause, the petitioner contends that the escalation should be granted only on items of variations in the contract and not on the original items/quantity of work as agreed upon. The effect of this interpretation as is sought to be placed by the petitioner, I have already dwelled upon above, is that, in a contract of this type, no escalation should be granted during the period of performance extending to 32 months and for a project cost which is approximately Rs.146 crores.

Putting it differently, the petitioner contends that there should be no escalation on the contracted value of Rs. 146 crores, but escalation and price variation should only be qua the added/variation part of this contract i.e only for a deviation or an extra work done.

4. Since these contracts are indeed bulky containing scores of clauses in dozens of pages, the parties very sensibly inserted a Clause 5.2.1 which reads as under:

“Sub-clause 5.2.1 Interpretation of ambiguities

“If the Contractor discovers any ambiguities, omissions, errors, faults and other defects in the Drawings or in other Contract Documents, he shall immediately notify the same in writing to the Engineer, who will resolve the ambiguity or correct the error and will notify the Contractor of the interpretation to be adopted.”

This clause was surely a clause intended to iron out any unwanted creases in the contract and which creases could have obviously affected either party prejudicially. The object of this clause was that an obvious mistake should be avoided and the intention of the contract should be furthered. It is by relying upon this Clause that the Engineer to the project altered Clause 70.3 so that the same reads as under:-

“pn is a price adjustment factor to be applied to the amount for the payment of the work carried out in the subject month, determined in accordance with Sub-clause 60.1 and also Sub-clause 60.1 (d & e) where such variations and day work are not otherwise subject to adjustment.”

In my opinion the same interpretation and conclusion would have followed even if there was no Clause 5.2.1 on applying Section 95 of the

Evidence Act, 1872, which allows an interpretation of Clause 70.3 as done by the concerned engineer.

5. The petitioner before the Arbitration Tribunal besides relying upon Clause 70.3 which has already been reproduced above, also relied upon Clauses 60.1 and 70.2 to contend that price variation and escalation ought not to be granted in the present case and the contract should be interpreted to be lump sum contract for the originally contracted value only even though the contractor in the period of execution is bound to be caused additional cost on account of increased cost of inputs of labour, material, fuel and bitumen. The respondent, on the other hand, relied on other clauses of the contract, namely, Clause 70.1, 60.1, 60.2, 14.4 of bidding documents, Sub-clause 14.4 of ITB, Para 1.1(f), Clause 1.1(g)(i), Sub clause 70.6 and Sub clause 70.7. All these aforesaid Clauses being relevant are reproduced below:

“Sub-clause 70.1 The amount payable to the Contractor and valued at base rates and prices in the IPC’s issued by the Engineer pursuant to Sub-Clause 60.1 shall be adjusted in respect of the rise or fall in the indexed costs for labour, materials and other inputs to the works,.....”

“Sub-clause 70.2 : Other Changes in Cost (page 260)

“ To the extent that full compensation for any rise or fall in the costs to the Contractor is not covered by the provisions of this or other Clauses in the Contract, the unit rates and prices included in the Contract shall be deemed to include amounts to cover the contingency of such other rise or fall in costs.”

“Sub-Clause 60.1: Monthly Statements.

The Contractor shall submit a statement (3copies) to the Engineer by the 7th day of each month for the work executed up to the end of the previous month in a tabulated form approved by the Engineer, showing the amounts to which the Contractor considers himself to be entitled. The statement

shall include the following items, as applicable, which shall be taken into account in the sequence listed:

- a) the estimated value of the Permanent Works executed up to the end of the month in question, at base unit rates and prices,
- b) the actual value certified for payment for the Permanent Works executed up to the end of the previous month, at base unit rates and prices,
- c) the estimated value at base unit rates and prices of the Permanent Works for the month in question, in local currency, obtained by deducting (b) from (a),
- d) the value of any variations executed up to the end of the month in question, less the amount certified in the previous Interim Payment Certificate, expressed in the amounts of local currencies, pursuant to Clause 52,
- e) amounts approved in respect of Daywork executed up to the end of the month in question, less the amount for Daywork certified in the previous Interim Payment Certificate, indicating the amounts of local currencies as determined from the Daywork Schedule of the Bill of Quantities,
- f) amounts reflecting changes in cost and legislation, pursuant to Clause 70, expressed in the relevant amounts of local currencies,
.....”

“Sub-clause 60.2 Monthly Payments.

The said statement shall be approved or amended by the Engineer in such a way that, in his opinion, it reflects the amounts due to the Contractor in accordance with the Contract, after deduction, other than pursuant to clause 47, of any sums which may have become due and payable by the Contractor to the Employer. In cases where there is a difference of opinion as to the value of any item, the Engineer’s view shall prevail. Within 6 days of the receipt of the Monthly Statements, the Engineer shall broadly determine the amounts due to the Contractor and shall accordingly certify up to 50(fifty) percent of the payable amount to the Employer. The Engineer shall satisfy himself that up to 50% payable amount certified by him is actually due to the Contractor and no over payment in the process shall take place. Within 28 days of the receipt of the Monthly Statement referred to in Sub-clause 60.1, the Engineer shall determine the amounts due to the Contractor and shall deliver to the Employer and the Contractor an Interim Payment Certificate, certifying the amounts due to the Contractor.”

“The Bidding Data say that”

“The following specific data for the works to be procured shall complement, amend or supplement the provisions in the Instructions to Bidders. In the event of conflict between information contained herein and the ITB, the information contained herein shall prevail”

“Clause 14.4 of Bidding Documents This Contract is subject to price adjustment.”

Sub clause 14.4 Instruction to Bidders.

“The rates and prices quoted by the Bidder are subject to adjustment during the performance of the Contract in accordance with the provisions of Clause 70 of the Conditions of the Particular Application in Section-IV”.

The word “Works” is defined in **para 1.1(f)** of General Conditions of Contract as

(i) “Works” means the Permanent Works and the Temporary Works or either of them as appropriate.”

(ii) “Permanent Works” means the permanent works to be executed (including plant) in accordance with the Contract.”

(iii) “Temporary Works” means all temporary works of every kind (other than Contractor’s Equipment) required in or about the execution and completion of the Works and the remedying of any defects therein.”

“**Clause 1.1 (g)(i)** ‘Cost’ means all expenditure properly incurred or to be incurred, whether on or off the site, including overhead and other charges properly allocable thereto but does not include any allowance for profit.”

“Sub-clause 70.6 Adjustment After Completion:

Of the Contract provides as follows:

“If the Contractor fails to complete the work within time for completion under clause 43.1, increase or decrease of cost of specified materials shall be made using the indices relating to prescribed time for completion, or the current indices, whichever is more favourable to the Employer, provided that if an extension of time is granted pursuant to clause 44.1, the above position shall apply to the adjustments made after expiry of such extension of time.”

“Sub-clause 70.7 Exemption from Price Adjustment:

of the Contract stipulates as follows:

“The following items shall not be included in the price adjustment calculation:

a) Liquidated damages
b) Retention withheld and released
c) Advance payments in the form of loans and their repayments
d) The value of any additional and varied work valued at current prices.

e) Payment to “nominated” Sub-contractors included as “provisional sums” or prime cost items in the general cost.”

6. The Arbitration Tribunal has exhaustively, faithfully and with clarity reproduced the respective contentions of the parties based on the respective clauses reproduced above and has thereafter arrived at its findings

and conclusions giving the rationale for the findings and conclusions. Some of the relevant findings of the Arbitration Tribunal, and which I adopt, read as under:

“1.3.4 We have carefully considered the above arguments of both the parties.

As per Sub-clause 14.4 of ITB, the rates and prices quoted by the Bidder are subject to adjustment. The Bidder is the one who quotes rates in the tender; and while quoting rates in the tender, he quotes rates only for the BOQ items and not for any variation items. The variation items arise only during the execution of work.

Similar indication is given by Clause 31.4 of ITB which says: “The estimated effect of the price adjustment provisions of the Conditions of the Contract, shall not be taken into account in bid evaluation”. As there are no variation items at the Bid stage, this clause would be rendered superfluous in case price adjustment was available only on variation items.

Therefore, in our view, it is quite clear on reading clause 14.4 of ITB with Bidding Data Clause 14.4 and ITB Clause 31.4 that the rates of all items in the BOQ, which are quoted by the Bidder, are subject to price adjustment. However, for the quantum of price adjustment, we have to look for in Clause 70 of COPA.”

“1.4.4 Considering the above, it is our view that for the purpose of the IPC’s, the works can mean only the entire ‘permanent works’ and not merely the ‘Variations’. Therefore, as per this part of Sub-clause 70.1, the adjustment of price caused by the rise or fall in the indexed costs for labour, materials and other inputs to the entire Permanent Works is required to be made i.e. price adjustment is to be made to all BOQ items, variation items and daywork etc. at base rates included in the IPC’s issued by the Engineer under Sub-clause 60.2 pursuant to the Monthly Statements submitted by the Contractor under Sub-clause 60.1.”

“1.5.4 We have considered the contentions of both the parties at length. On going through Clause 70.3 carefully, we find it has ambiguity as well as errors. It contains the following Adjustment Formula:

$$P_n = A + b \frac{L_n}{L_o} + c \frac{M_n}{M_o} + d \frac{F_n}{F_o} + e \frac{B_n}{B_o}$$

‘pn’ is defined as a price adjustment factor. ‘pn’ is a number or a ratio.

The ambiguity is in the next part of the Sub-clause which describes the amount for the payment of the work to which ‘pn’ is to be applied.

“ pn is a price adjustment factor to be applied to the amount for the payment of the work carried out in the subject month, determined in accordance with Sub-clause 60.1(d), where such variations and day work are not otherwise subject to adjustment.”

This part is capable of two different interpretations:

1. If the middle portion of the sentence is read with the first portion, it reads as:

“..... to be applied to the amount for the payment of the work carried out in the subject month determined in accordance with Sub-clause 60.1(d), where such variations and day work are not otherwise subject to adjustment.”

This means that ‘pn’ is to be applied to the value of the work carried out in the subject month determined in accordance with Sub-clause 60.1(d). Sub-clause 60.1(d) pertains to value of variations carried out during the subject month. Therefore, ‘pn’ is to be applied to the value of variations only. Further, such variations and daywork which are otherwise subject to adjustment are not eligible.

2. If the middle portion of the sentence is read with the last portion, it reads as:

“to be applied to the amount for the payment of the work carried out in the subject month, determined in accordance with Sub-clause 60.1(d) where such variations and day work are not otherwise subject to adjustment.”

This means that pn is to be applied to the amount for the payment of the work carried out in the subject month and also to variations and dayworks. The variations and daywork are to be determined in accordance with Sub-clause 60.1(d). Further, such variations and daywork which are otherwise subject to adjustment are not eligible.

Also, there are two errors in the Sub-clause:

(i) As per the later part of the Sub-clause, the variations and daywork are to be determined in accordance with Sub-clause 60.1(d). However, daywork is valued separately under clause 60.1(e) and not under clause 60.1(d).

(ii) As per clause 70.1, the amount payable to the Contractor and valued at base rates and prices in the IPC is to be adjusted by the addition or subtraction of the amounts determined by the formulae prescribed in this Clause i.e. in clause 70.3.

It is obvious from the formula of Clause 70.3 that the factor ‘pn’ will always be more than 1 in case of any rise in the cost indices. Therefore, the price adjustment amount to be added will always work out to be more than the cost of work itself at base rates, which is patently illogical, absurd and contrary to fair and just interpretation of the spirit of the contract.”

“1.6.3 We have considered the contentions of both parties in detail. It is necessary to refer to the Adjustment formula in Sub-clause 70.3 to grasp the true meaning of Sub-clause 70.2:

$$P_n = A + b \frac{L_n}{L_o} + c \frac{M_n}{M_o} + d \frac{F_n}{F_o} + e \frac{B_n}{B_o}$$

L_n , M_n , F_n and B_n are the current cost indices of the cost elements of Labour, Material, Fuel and Bitumen for the month “n” determined pursuant to Sub-clause 70.5.

L_o , M_o , F_o and B_o are the basic cost indices corresponding to the above cost elements of Labour, Material, Fuel and Bitumen at the date specified in Sub-clause 70.5.

A is a Constant and b, c, d and e are weightings or coefficients representing the estimated proportion of each cost element i.e. labour, material, fuel and bitumen respectively having the following values:

$$A = 0.40, b = 0.15, C = 0.25, d = 0.10, e = 0.10$$

$$(A + b + c + d + e = 1)$$

On close examination, the following facts emerge:

1. The value of 'pn' depends only on the coefficients b,c,d and e and the current and basic cost indices of only four cost elements namely labour, materials, fuel and bitumen. Taken together, the coefficients, b, c, d and e represent only 0.60 or 60% of the cost of work.
2. There are other cost elements/inputs of the work which comprise balance 0.40 or 40%. No price adjustment is provided for these cost elements in the formula. They are represented by the Constant A which has a fixed value of 0.40 irrespective of whatever changes may occur in their cost indices. For example, no price adjustment is payable on plant and machinery cost because its coefficients/cost indices are not included in the formula.
3. When 'pn' is applied to the cost of the entire work (all items in BOQ plus variations and dayworks), even then full price adjustment is not available to the Contractor but only on 0.60 or 60% of the rise/fall in cost.

Clause 70.2 does not say that compensation or price adjustment is not available on all items of the work or the entire work, as contended by the Respondent. Clause 70.2 says that full compensation for any rise or fall in costs to the Contractor is not covered in this or other clauses of the Contract (actually only 60% compensation is covered as seen from Sub-clause 70.3) and requires them to include provision for the uncompensated balance 40% in their quoted rates of BOQ items. Therefore, we do not find any merit in the contention of the Respondent that Clause 70.2 becomes redundant."

“ 1.7.2 Clause 70.6 provides for cost adjustment of specified materials using the cost indices at completion. The clause provides for adjustment for cost of materials consumed in the entire works and not only in variation items. When the intention of the parties to the Contract was to give the specified materials, which are a component of the BOQ items, the benefit of the price adjustment, it is logical that all the BOQ items were also intended to be eligible for price adjustment and not just the variation items."

“1.10 Taking into account all the above arguments of the parties, we are of the considered view that on a conjoint reading of Bidding Date Sub-clause 14.4, ITB Sub-clauses 14.4 and 31.4, Sub-clauses 70.1, 70.2, 70.6 and 70.7 and 70.8, 60.1 and 60.2 of COPA, the conclusion is inevitable that all these clauses are consistent and provide that price adjustment is payable on the entire work comprising all BOQ items including variations and daywork except where such variations and daywork are otherwise subject to adjustment (that are valued at current prices). All these sub-clauses corroborate one another and are in complete harmony except for sub-clause 70.3 which has ambiguity and errors as explained in para 1.5.4.”

“1.12.3.5 We have considered the contentions of both the parties. In our view, the National Highways Authority of India (NHAI), the author of the Contract document, was conscious of the fact that tender documents are not perfect and mistakes may have occurred. Words used in clause 5.2.1 are “ambiguities”, “omissions”, “errors” “faults” and “other defects” in the Drawings or other Contract Documents. Under this clause the Engineer was given enabling power. The Engineer can resolve the ambiguity or correct

the error or supply the omission to remove contradictions and inconsistencies. By doing this, the Engineer was not re-writing the contract but only exercising a contractual power.

According to Sub-clause 67.3 of the Contract “Any dispute in respect of which the Recommendation(s), if any, of the Board has not become final and binding pursuant to Sub-clause 67.1 shall be finally settled by arbitration as set forth below. The arbitral tribunal shall have full power to open-up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation (s) of the Board related to the dispute.”

The Arbitral Tribunal has the contractual power to resolve the ambiguity or correct the error or supply the omission in the contract document emanating from Sub-clauses 67.3 and 5.2.1 of the Contract and Section 28(3) of the Arbitration and Conciliation Act, 1996. Drafting error can be corrected and defect cured under this Clause to make the contract to conform to the true intention of the parties. Removing the drafting error is not to re-write the contract. The Arbitral Tribunal is not re-writing but only interpreting the contract.”

“1.14.3 The underlying object of the principle of “contra proferentum” relating to the interpretation of documents is that the draftsman of the document, who is a party to the contract and who intentionally or unintentionally introduces an ambiguity in the document, should not be allowed to take advantage of the ambiguity. NHAI, the Respondent is the author of the contract document. We do not agree with the contention of the Respondent that because of the participation of the Claimant in the Pre-bid meeting, he becomes the co-author.

The ambiguity and errors in Sub-clause 70.3 had been resolved by the Engineer vide his letter No.AP3/203 dt. 06.05.2004(CV-3/73). We agree with the formula as corrected by the Engineer vide his letter dated 06.05.2004 and are of the unanimous view that it represents the true intention of the parties as per the terms of the Contract.

We are of the considered view that even if the Engineer had not resolved the ambiguities/errors under Sub-clause 5.2.1, by the principle of “contra proferentum”, the ambiguous clause 70.3 has to be interpreted against the Respondent so as to mean that the price adjustment is payable on all items of work including all BOQ items.”

“1.13.3 We find that the Engineer has throughout the execution of the Work firmly maintained that price escalation is payable on all BOQ items. On reference from the Contractor under Clause 5.2.1 for correction of formula in Clause 70.3, he agreed in his letter dt. 04.05.2004(CV-3/70) that clause 70.3 is ambiguous. The Engineer indicated his mind and stated: “We refer to attached letter from ourselves to Project Director No.AP3/106 dated 12th November, 2002 in which we agree that Clause 70.3 is ambiguous. We agree with your para 5,6,7,8,9 & 10 in your letter dated 17th September 2003. We have been certifying escalation due to you on a monthly basis.”

In his letter dt. 06.05.2004 (Exh.CV-3/73) intimating the Claimant/Respondent in terms of Sub-clause 5.2.1 of correction of another error noticed by the Engineer himself, it was stated that

“ Should the parties to the Contract not agree to the above correction of the formula this matter certainly have to be referred to Dispute Review Board, Arbitration or Court for final settlement.”

In our view, the conduct of the Respondent in making payment of price adjustment on the total value of work in IPC's 9 to 13 shows that Sub-clause 70.3 was interpreted by them to apply to the total value of the work at the time of entering into contract. Even in the case presented before the Board, the Respondent had submitted as under:

“Price Adjustment is envisaged in Contractor Package AP-3. However, due to inconsistency in Contract Conditions COPA sub-Clause 70.3 and 60.1 the Price Adjustment has become inadmissible. The inconsistency in the Contract Clauses regarding Price Adjustment was also not raised by the Contractor/other concerns at the time of Pre-Bid Meeting.....”(page 164,CV-2)

From the above, it is observed that the Respondent has not been consistent in his stand.”

“1.16.2 It is our experience that as per sound engineering practice based on FIDIC guidelines adopted in such civil construction contracts, price adjustment clause is included in the contracts to take care of the increase/decrease in the price of materials, bitumen, cement, labour, machinery and P.O.L.(Petrol/Diesel, Oil and Lubricants) during the period of execution. The Contractors are required to quote their rates prevailing at the time of preparation of their Bid. The price adjustment clause is applicable to all items of the work. The reason is that in long term contracts the increase in the price and cost of inputs into the BOQ items during the period of execution is so uncertain and the Contractors are not expected to bear such uncertain extra burden.

This factor of usage of the trade has also to be taken into account by the Arbitral Tribunal in making their decision as per Section 28(3) of the Arbitration and Conciliation Act.”

The last para is reproduced to complete the chain of findings and conclusions of the Arbitrators, though, this para has already been reproduced at the outset. Underlining is provided by me in the relevant portions of the Award reproduced above.

7. The Arbitrators have thus held that price escalation is payable on the “cost” of the total ‘works’ and amounts payable under IPCs valued at

base rates shall be adjusted for rise and fall in the indexed cost of the inputs and that escalation is not limited to variation items in Clause 60.1(d). It has been further held that there was an obvious error in Clause 70.3 and that it in fact intended to refer to other sub-Clauses of Clause 60.1 and not only to 60.1(d) thereof. The arbitrators also note that the parties also understood that Clause 70.3 contained an obvious mistake because payments under IPCs were regularly made ignoring the faulty Clause 70.3. In my opinion, the reasoning of the Arbitrators reproduced above is such that it brooks no cavil.

8. Mr. Parag P. Tripathi, Learned ASG appearing for the petitioner, has argued that there are three basic principles of interpretation of the contract and which are: “read the contract, read the contract and read the contract”. Mr. Tripathi contended that once the language of a document i.e. Clause 70.3 contains only a particular expression, namely, Sub clause 60.1(d), then, it is not permissible under Sections 91 and 92 of the Evidence Act, 1872 and Section 14 of the Contract Act, 1872 to alter the contract. He contended that the respondent took the contract as it is, and therefore now it is not open to the respondent to seek price variation and escalation on all the quantities and it can claim escalation only on the variation quantities.

In my opinion, the argument as raised by the learned ASG for the petitioner, in fact, begs the question. This I say so because the counsel for the petitioner presumes that Sections 91 and 92 apply so as to not cause any alteration or modification of the contract, however while so doing, the

learned senior counsel for the petitioner has very conveniently forgotten the most relevant clause, namely, 5.2.1 in the same very contract as per which when mistakes are found in the contract, power was conferred upon the Engineer of the Project to make the necessary corrections in the contract. Making such alterations thus is very much as per the contract itself and not dehors it. In the light of Clause 5.2.1, I fail to understand how at all it is open to the petitioner to rely upon Sections 91 and 92 of the Evidence Act. In fact, in my opinion, these Sections will be read against the petitioner, in the facts of the present case, because by virtue of these very Sections, a contract has to be read in terms of the clauses of the contract itself, and when so read this contract quite clearly contains a Clause 5.2.1, which enables the correction of errors and faults which have crept in the contract.

9. The scope for hearing the objections under Section 34 is now well settled. The Court can interfere with the Award only if the Award is illegal i.e the same is violative of the law of the land or if the Award is violative of the contractual provisions or if the findings in the same are so perverse that it shocks the judicial conscience. Surely, the Arbitrators are entitled to interpret different clauses of the contract the same being within their jurisdiction. Power to interpret the clauses of the contract and thereby arriving at one plausible interpretation cannot and ought not to be interfered with by the Court, more so, if such interpretation is clearly just, equitable and fair. In my opinion, in fact, it is not as if even two interpretations were

possible because only one interpretation was possible as was rightly brought into effect by the Engineer in exercise of his powers under Clause 5.2.1. By correcting the obvious errors and faults, the Engineer has allowed the price escalation and variation to the contractor/respondent on all the BOQ items and which surely was also the intention of the parties and which has been accepted by the Arbitrators. Can it be contended, that in a contract which is valued approximately of Rs.146 crores and performance of which is over 32 months, there ought not to be a price variation/escalation clause? If the contract is so interpreted to deny the price variation/escalation, then, in fact the same would mean that the contractor would, in fact, pay out of his pocket because there would be little or no profit margin once there is an increase in the inputs of the contract such as labour, material, fuel and bitumen. Possibly the contractor may even end up paying out of his pocket. In my opinion, the interpretation which is sought to be placed upon Clause 70.3 as per the original form thereof containing a typing mistake therein would lead to absurdities and which interpretation therefore has been rightly eschewed by the Arbitration Tribunal.

I also do not find that the Award is against the contractual provisions. For an Award to be against the contractual provisions, the Award has to be violative of an obviously meaning clause of the contract but which has been perversely breached by an absurd interpretation by the Arbitrators. If there are various clauses, and a harmonious construction of

the clauses read with the intendment of the contract, is done by the Engineer and so adopted by the Arbitrators, then, it cannot be said that the Award in any manner violates the contractual provisions. Also, further I do not find any perversity whatsoever in the Award. In fact, if there is perversity, it is in the arguments as raised by the petitioner because what is sought to be argued is not only perverse but would also lead to absurd conclusions. **It is for this reason that I put it to the learned senior counsel for the petitioner to point out to me even a single contract or a single case in which National Highways Authority of India has entered into a contract without any price escalation and variation clause although the contract covers a huge period of many years and cost of which runs into crores and crores of rupees. Obviously there was no answer to the query put by the Court to the Learned ASG.**

10. Accordingly, I find that there is absolutely no force in this petition. The petition is an abuse of the process of law. In terms of the para 37 of the judgment of Supreme Court in the case of *Salem Advocate Bar Association Vs. Union of India (2005) 6 SCC 344*, I find that since the respondent has been unnecessarily burdened with this litigation, it should be compensated for the costs of present litigation. I have also considered the financial capacities of the parties and the value of the disputes to arrive at a decision for awarding costs. The respondent should therefore file an

affidavit of its duly authorized officer supported by the certificates of the Advocates, that, for this litigation the fees which have been received by the Advocates and is receivable by them in terms of an existing commitment on date. On this affidavit, duly supported by the certificates of the Advocates being filed within one month, such costs will be the costs awarded in favour of the respondent and against the petitioner. In fact, in view of the aforesaid facts, I find that the present case is also a fit case that even interest on costs should be imposed as per the judgment of the Supreme Court in *U.P. Cooperative Federation Vs. Three Circles (2009)10 SCC 374* wherein the Supreme Court after referring to the 55th report of the Law Commission of the year 1973 has held that even interest can be imposed upon the costs. Therefore, I order that in case the costs are not paid within a period of 1-1/2 months from today, then, interest @ 9% per annum simple will run till actual payment of the costs.

11. With the aforesaid observations, the petition is dismissed and disposed of.

VALMIKI J.MEHTA, J

March 08, 2010
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