

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

Judgment reserved on: 31.10.2013

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Judgment delivered on: 08.01.2014

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OMP No. 627/2013

M/S. NATIONAL HIGHWAYS AUTHORITY
OF INDIA

....Petitioner

Versus

M/S. PCL SUNCON (JV)

....Respondent

Advocates who appeared in this case:

For the Petitioner: Ms. Padma Priya and Ms. Meenakshi Sood, Advocates.

For the Respondent: Mr. Amit George, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) to assail the award dated 24.02.2013.
2. The petitioner has challenged the findings returned with respect to three claims. The fourth claim, which relates to cost of arbitration, is obviously not challenged because the arbitral tribunal has not awarded any amount in respect of the same to the respondent. The respondent is the original claimant before the arbitral tribunal. The petitioner herein evidently had raised no counter claim.
3. Insofar as claim No.1 is concerned, which pertains to dispute No.7, as between the parties, as told to me, was decided in favour of the

respondent in view of the fact that it was covered by a judgment of the Division Bench of this Court dated 14.08.2013, passed in FAO(OS) No.366/2013 titled *M/s National Highways Authority of India vs. M/s Gammon-Atlanta (JV)*. This aspect was recorded by me, in my order dated 30.09.2013.

4. Therefore, all that I am required to consider is: the petitioner's objection to claim No.2, which I am told pertains to dispute No.8; and claim Nos. 3(a), 3(b) and 3(c), which relate to: "past", "*pendente lite*" and "future interest".

5. Under claim No.2, the arbitral tribunal has awarded a sum of Rs.2,29,50,919/-. In respect of past period (which is the pre-reference period), interest has been awarded at the rate of 12% p.a. compounded monthly; as per the terms of clause 60.8 (b) of Conditions of Particular Application (COPA), whereas for *pendente lite* and the period post the date of the award, it has been granted at 12% simple.

6. With the aforesaid preface in place, let me first deal with the grievance of the petitioner vis-à-vis claim No.2.

6.1 This claim has arisen on account of the fact that during the execution of the work, certain items of the Bill of Quantities (BOQ) were omitted. According to the respondent, the omission of BOQ items resulted in loss of overheads and profits. The claim, thus, pertained to reimbursement sought on that account. Though the petitioner claims that the respondent was responsible for not executing the BOQ items in issue, from the material retrieved at site, the respondent takes a completely different stand, which is that no specific directions were issued in that behalf.

6.2 It is not in dispute, though, that the respondent vide letter dated 04.04.2008 called upon the engineer appointed to issue, the necessary variation order, under clause 52.1 of the General Conditions of the Contract (GCC). The respondent sought a variation order, valued at Rs.20,14,58,749/-.

6.3 The loss claimed towards overhead and loss of profit was a percentage point of the said value. The arbitral tribunal awarded 8% for loss of overheads and 10% qua loss of profit (including loss of profit on overhead charges). The cumulative figure awarded was Rs.2,29,50,919/-.

6.4 In the context of the above, it requires to be noticed that it is also not in dispute that the engineer, vide letter dated 03.11.2008, indicated to the respondent, that no variation order could be issued at that stage, as the contract was in the process of execution. In other words, stand taken by the engineer was that the request made for issuance of a variation order at that point in time was pre-mature.

6.5 The respondent, appears, to have carried its grievance to the Dispute Resolution Board (in short the DRB) under sub-clause 67.1 of COPA. The DRB apparently came to the same conclusion; which is how, the matter got referred to the arbitral tribunal. Pertinently, though the petitioner took a preliminary objection with regard to the arbitral tribunal not having jurisdiction in the matter as no decision was rendered by the DRB, the arbitral tribunal rejected the petitioner's preliminary objection under Section 16 of the Act. The grievance vis-à-vis the rejection of the preliminary objection has not been pressed before me, on behalf of the petitioner.

SUBMISSIONS OF COUNSELS

7. It is, therefore, the case of the petitioner before me, which was put forth by Ms. Padma Priya, that claim no.2 has been wrongly awarded in favour of the respondent for the following reasons :-

7.1. The award qua claim no.2 is contrary to the specific terms of the contract and therefore, the arbitral tribunal exceeded the remit of its jurisdiction. The variations construed had to be valued by keeping in mind the specific clauses of the contract, these being: clauses 51.1, 52.1, 52.2 and 52.3.

7.2 It was the submission of Ms. Padma Priya that the variation contemplated under clause 51.1 could take place on various accounts such as increase or decrease in the quantity of any work included in the contract or even omission of any such work. In the instant case, according to Ms. Padma Priya, the variation being in the nature of an omission, the valuation could be made either in terms of clause 52.1 or 52.2, bearing in mind though, the cap or the limitations provided in clause 52.3.

7.3. Ms. Padma Priya, though candidly conceded that the provisions of clause 52.2 of the GCC had not got triggered in the present case in view of the fact that the item omitted did not fulfil the conditions prescribed in the proviso to the said clause. The proviso, clearly, prescribed that no change in the rate or price of any item in the contract could be considered unless such item(s) account(s) for an amount, which is more than 2% of the contract price and that the actual quantity of the work executed under the item(s) exceed(s) or fall(s) short of the quantity set out in the BOQ by more than 25%.

7.4 It was Ms. Padma Priya's contention that the valuation of variation thus, under clause 52.1, would have to adhere to the restrictions or the

limiting conditions prescribed in clause 52.3 of the GCC. For this purpose, Ms. Padma Priya drew my attention to clause 52.3 of the GCC, which categorically provides that only such additions or deductions of the contract price will be made, which are in excess of 15% of the contract price.

8. As against this, Mr. George, the learned counsel for the respondent, stated that the valuation of the omitted items had to be carried out “independently” in terms of clause 52.1 of the GCC, without regard to the provisions of clauses 52.2 and 52.3 of the GCC. It was Mr. George's contention that what the respondent had sought was valuation of omitted items and not re-fixation of rates of the BOQ items. In other words, to put it simply, it was his contention that the valuation of the omitted work / varied work had to be carried out under clause 52.1. It was, also, his contention that clause 52.2 provided for re-fixation of rates and prices of BOQ items provided the conditions contained in the proviso, as indicated above, are fulfilled. This clause i.e., 52.2, according to Mr. George, was not applicable.

8.1 It was his submission that therefore, re-fixation of rates and prices of the BOQ items under clause 52.2 or valuation of variation under clause 52.1 were independent of each other, and therefore, their overall effect on the contract price could have no bearing on the valuation of varied work under sub clause 52.1.

8.2 Mr. George submitted that the BOQ item in issue i.e., Item no.3.01 (b) was not made operable even after a Taking-Over-Certificate was issued. He, therefore, denied the submissions made by the petitioner in that behalf.

8.3 In support of his submissions, the learned counsel for the respondent relied upon the judgment of this court in the case of *National Highways*

Authority of India Vs. ITD Cementation India Ltd., (2009) 3 Arb. L.R. 268 (Delhi) and that of the Supreme Court in the case of ***Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63.*** It was Mr. George's contention that the issue involved was one which related to interpretation of the contract and therefore, was not amenable to correction even if the arbitrator committed an error in that behalf.

REASONS

9. Having heard the learned counsel for the parties, what clearly emerges is as follows :-

9.1. The scope for interference by a court in a matter of this kind is limited. The judgments cited by the learned counsel for the respondent enunciate a principle which one cannot quibble with. The principle briefly summarised is as follows :-

9.2 Interpretation of provisions of the contract is within the exclusive domain of the arbitrator. Unless the interpretation is implausible or absurd, the courts will not interdict a decision of the arbitrator. In other words, if only one interpretation is possible and the arbitral tribunal chooses to ignore the same, the court is not obliged to accept the interpretation given by the arbitral tribunal. The arbitral tribunal is not to ignore the law or mis-apply the law. The arbitrator, cannot, ignore the specific terms of the contract as he is a creature of the agreement obtaining between the parties (see ***National Highways Authority of India Vs. ITD Cementation India Ltd.***).

10. The question really is : which side of the line does this case fall. Is this a case of interpretation of the terms of the contract or, is this a case of, the arbitrator, ignoring the specific terms of the contract. If I may add to

the principle enunciated above, in my view, the scope of interpretation arises only if there is ambiguity in the terms of the contract. In other words, where there is a scope for at least two, very possible, but diametrically opposite views. In such circumstances, the court would not superimpose its view on the view taken by the arbitral tribunal, just because it does not concur with the view of the arbitral tribunal even if it is a possible view. In the absence of such a situation, there is no scope for interpretation as, plain meaning of the words should enable the court to reach a conclusion, as to what would be the intent of parties at the time when they entered into a contract.

10.1 The object is to get to the true intent of the parties. However, the route of interpretation is not available, when words are plain and unambiguous. In ascertaining the true intent of the parties, the court is required to look at the words used in the contract. The word intent is often used to mean “motive”, “purpose”, “desire” or even “state of mind” and not as intention expressed by the words used in the contract. To attempt to discover intention of parties contrary to the meaning conveyed by words employed in the contract cannot be termed as interpretation but is a recipe for confusion. [See *Great Western Railway & Midland Railway vs Bristol Corporation (1918) 87 LJ Ch. 414* and *I.R.C. vs Raphael (1935) A.C. 96*]. Therefore, in my view, the judgment of the Supreme Court in *Steel Authority of India Ltd.*’s case does not lay down any different principle.

11. In the present situation, therefore, in order to get to the intent of the parties, it may be necessary to extract the relevant provisions of the

contract. For the sake of convenience, the same are extracted hereinafter to the extent relevant for the instant case :-

“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). (Emphasis supplied). - 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 <u>variation</u> shall in any way vitiate or invalidate the contract, but the effect, if any, of all such <u>variations shall be valued</u> in accordance with <u>clause 52</u>. 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. (Emphasis supplied)
Valuation of variations	52.1	<u>All variations referred to in Clause 51 and any additions to the Contract Price which</u> 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. <i>Provided further that no change in the rate or price for any item contained in the contract shall be considered unless such item accounts for an amount more than 2 percent of the Contract Price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of Quantities by more than 25 percent.</i>
Variations Exceeding 15 percent	52.3	If on the issue of the Taking-Over Certificate for the whole of the Works, it is found that as a result of: (a) all varied work valued under Sub-Clauses 52.1 and 52.2, and (b) all adjustments upon measurement of the estimated quantities set out Bill of Quantities, excluding Provisional Sums, day works and adjusted price made under Clause 70. But not form any other cause, there have been additions to or deductions Contract Price which taken together are in excess of 15 per cent of the Contract, Price (which for the purposes of this Sub-Clause shall Contract Price, excluding Provisional Sums and allowance for daywork then and in such event (subject

		to any action already taken under Sub-Clause of this Clause), after due consultation by the Engineer Employer and the Contractor, there shall be added to or deducted Contract Price such further sum as may be agreed between the Contractor, Engineer or, failing agreement, determined by the Engineer having regard Contractor's Site and general overhead costs of the Contract. The Engineer notify the Contractor of any determination made under this Sub-Clause copy to the Employer. Such sum shall be based only on the amount by additions or deductions shall be in excess of 15 per cent of the Effective Price.”
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(Emphasis is mine)

12. The counsels before me do not dispute that variations are envisaged under clause 51.1. Some variations are “instructed variations” by the engineer concerned and some relate to variations which are not instructed. (see *National Highways Authority of India Vs. ITD Cementation India Ltd.*). We are here dealing with omitted items which, both counsels agree fall within the scope of clause 51.1. What one is required to find out is the manner in which the variation is to be valued. It the submission of the counsel for the respondent that valuation can be made only under clause 52.1 and, de hors, the limitation expressed in clause 52.3. The learned counsel for the petitioner argues against this submission. Both counsels in their submissions agreed that the pre-requisites provided in clause 52.2 were not fulfilled, for it to be triggered. The conditionalities prescribed being: that the value of the varied item (omitted item in this case) did not

exceed 2% of the contract price and that the actual quantity of the varied item neither exceeded nor fell short of more than 25% of the BOQ.

12.1 The counsels, therefore, in nutshell disagreed on the application of the provisions of clause 52.3.

13. In my view, the plain reading of clause 52.3 would show that it begins with sub clause (a) which refers to both clauses 52.1 and 52.2. Therefore, any adjustment to the contract price which is made by varying the valuation either under clauses 52.1 or 52.2 would have to be governed by the limitation prescribed under clause 52.3. Clause 52.3 clearly provides that unless valuation leads to addition or deduction in the contract price in excess of 15%, it shall not be given effect to. It is not the case of the respondent that the variation was in excess of 15% of the contract value. The arbitral tribunal's decision to the contrary, is in my opinion, completely contrary to the plain wording of the clause 52.3. In these circumstances, the decision of the arbitral tribunal, on that score, will have to be set aside. The rationale of the arbitral tribunal appears to be that valuation has to be carried out "only" under clause 52.1 de hors the provisions of clause 52.3. In my view, this conclusion is contrary to the plain provisions of clause 52.3 which takes into its fold the valuation of variations made both under clauses 52.1 and 52.2. The reliance of the learned counsel for the respondent on the decision of this court in *National Highways Authority of India Vs. ITD Cementation India Ltd.* on facts, will have no applicability as that case dealt with issue of extension of rebate qua instructed variations, that is, variations carried out at the instruction of the engineer. It was NHAI's contention that the rebate ought to be available on all works executed by ITD Cementation India Ltd. (the

respondent in that case), including on variation and additional structures. The tribunal disagreed and therefore, the matter reached the High Court.

13.1 A Single Judge of this Court upheld the view taken by the arbitral tribunal, *inter alia*, on the ground that it was a matter which related to interpretation of the contract, and since, it was a plausible view, no interference was called for by the court. The court was not called upon to rule on the applicability of clause 52.3. Since there was ambiguity on the aspect of extensions of rebate to instructed variation(s), the court thought it fit not to trench upon the wisdom of the arbitral tribunal. The use of interpretative tools to ascertain the intent of parties to the contract, in the given fact situation, was thus clearly justifiable.

13.2 However, in the instant case, as indicated above, no interpretation is required. The plain language of the clauses in issue signifies the intent of the parties. The intent is this: Like every other contract parties have right to vary a contract, during the course of its execution. The variations could take several forms, such as, increase or decrease in work or even omissions and additions. However, as long as, such variations do not cross a particular bandwidth, which is, 15% of the contract price, no compensation is to be paid. To ignore this intent of parties and to grant compensation for losses apparently suffered by the respondent on account of overheads and profits, at a certain percentage point of the value of omitted item is, in my view, contrary to the plain intent of the parties.

14. As far as claim nos. 3(a), 3(b) and 3(c) are concerned, one cannot find fault with the award under these heads except to the extent that grant of interest under claim no.2 will get excluded in view of my finding hereinabove, that the award of money under claim no.2 was unwarranted.

14.1 There are two objections taken qua claim nos.3(a), 3(b) and 3(c). First, that the interest is compounded monthly at the rate of 12%, for the pre-reference period. Second, that the rate of 12% itself is excessive.

14.2 In so far as the first objection is concerned, no fault can be found as clause 60.8 (b) of COPA allows for compounding on a monthly basis. As regards the second objection, one can safely say that, interest rates have varied between 9% and 12% in the recent times. The statutory rate for the period post the date of award, if nothing is explicitly said by the arbitral tribunal, is: 18% p.a. The arbitral tribunal in fixing rate of 12% p.a., has kept in mind the yardstick of prime lending rate plus 2%. Since that worked out to a higher figure, it was scaled down to 12%.

14.3 Thus, having regard to these facts, it would be best if, I were not to interfere with discretion employed by the arbitral tribunal. Especially, in the circumstance that: it is a commercial transaction; there is no apparent impecuniosity of the petitioner revealed before the arbitral tribunal or thereafter; and the rate fixed does not seem to be unconscionably excessive, in the facts and circumstances of the instant case. The challenge qua these claims is rejected.

15. For the foregoing reasons, the impugned award is set aside to the extent it allowed claim no.2 and granted interest thereon to the respondent.

16. The petition is disposed of in the above terms. The parties, however, shall bear their own costs.

RAJIV SHAKDHER, J.

JANUARY 08, 2014

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