

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on:10.01.2014

+ **FAO(OS) 508/2013**

M/s JSC CENTRODOSTROY

.....Appellant

versus

**M/s NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

.....Respondent

Advocates who appeared in this case:

For the Appellant : Mr C. U. Singh, Sr. Advocate with
Mr Vikas Sharma and Mr Amit Chaudhary.

For the Respondent : Ms Padma Priya.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present appeal has been filed under section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') impugning the order dated 05.09.2013 passed by a learned Single Judge of this Court in OMP no.855/2013. The said order dated 05.09.2013 is hereinafter referred to as the 'impugned order'. By the impugned order, the learned Single Judge has dismissed the application filed by the appellant, under section 34 of the Act, challenging the arbitral award dated 01.06.2013 whereby the claims of the appellant with regard to the compensation on account of loss of overheads and profit and price adjustment were rejected.

2. Briefly stated, the respondent awarded a contract for the construction of four laning and strengthening of existing two lane sections between Km 245 to Km 317 on NH-2 in Uttar Pradesh (Package III C), for a contract price of ₹265.38 crores, to the appellant on 12.01.2001. The Contract Agreement was signed by the two parties on 12.03.2001. The contract document includes General Conditions of Contract (GCC), Conditions of Particular Application (COPA) and Bill of Quantities (BOQ). The BOQ listed different items of work, the quantities, the accepted rate and price of each item, the total price of contract etc. M/s Meinhardt (Singapore) Pvt. Ltd. was appointed as the Supervision Consultant and Engineer by the respondent.

3. During the course of execution of the work contracted to the appellant, on 18.02.2006, the Engineer issued a Variation Order in terms of Clause 51 of GCC (Variation Order No.10) reducing the quantities provided under item 8.02 (a) of the BOQ from 1,08,347 to 61,430 Sqm (43.3% reduction in the original quantity) and totally omitting the work under item 8.02 (c) of the BOQ (100% reduction in the original quantity). On completion of the work in 2011, it was noted that the actual reduction was somewhat higher i.e. 54.54% in respect of item 8.02(a). The details of the original quantity as provided under BOQ and the variation in quantities as instructed by the Variation Order dated 18.02.2006 is stated as under:-

BOQ Item No	Item of Work	Unit	BOQ Original Qty	Accepted Unit Rate (₹) per Sqm	Revised Qty actually executed	%reduction in final quantity	% Impact of the item on Contract Price
8.02	Pavement marking with hot applied Thermoplastic						

	Compound, complete as per TS Clause 8.03						
(a)	Lane/Centre Line/edge marking/transverse marking etc.	Sqm	1,08,347	590.23	49,249.900	54.54%	2.41%
(c)	Kerb Stone	Sqm	1,02,342	590.23	0	100%	2.28%

4. The claims which were subject matter of disputes before the Arbitral Tribunal and concern the present proceedings relate to loss on account of overheads and profits. The appellant has claimed that the items of work specified in clauses 8.02(a) and 8.02(c) of the BOQ (Bill of Quantities) which pertain to applying hot thermo plastic compound to mark lane/centre line/edge marking and kerb stone were to be paid for at the rate of ₹590.23 per sq. meter. It is claimed by the appellant that these items of work were outsourced by the claimant to another specialised agency at the rate of ₹270 per sq. meter and as a result, the claimant had a margin of ₹320.23 per sq. meter which the appellant would have gained in the event these works were executed as per the contract. However, since the quantities of item 8.02(a) were reduced to the extent of 54.54% and instead of the original quantity of 1,08,347/- per sq. meter, the actual quantity of work executed was only 49,249.900 sq. meters, the appellant had lost out on the margin on 59,079.10 sq. meters of work under item 8.02(a) which the appellant would have made had the work not been reduced. Similarly, as the item of work under clause 8.02(c) had been completely deleted from the contract, the appellant claimed that it had been deprived of the margin that the appellant would have gained on 1,02,342 sq. meters of work under item 8.02(c). In aggregate, a total area of 1,61,439.10 sq. meters of work had been reduced

from the bill of quantities in respect of markings with hot applied thermo plastic compound and the appellant claimed that this work would have resulted in a margin of ₹5,16,97,643/- (calculated at the rate of ₹320.23 per sq. meter). The appellant thus claimed this amount as compensation. In addition, the claimant also demanded a sum of ₹1,98,26,046/- towards price adjustment which would have been payable on execution of the work. According to the claimant, if the quantum of work would not have been reduced then this amount would have been payable by virtue of the price adjustment clause. This amount was computed by the appellant at the average rate of 38.35% on the basis of the price adjustment which was actually paid by the respondent on the works executed under the contract.

5. The appellant made a claim for loss of overheads and profit for the first time on 13.03.2006, which was responded to by the Engineer, on 20.03.2006. The appellant preferred a claim with the Engineer on 22.10.2011. However, no response was received from the Engineer in respect of the claim made by the appellant. On 12.12.2011, the appellant issued a Notice of Dispute to the respondent in terms of the contract, however, this too did not evoke any response from the respondent. Thereafter, on 12.01.2012, the appellant approached Dispute Review Board (DRB) for their recommendations, however, their recommendations could not be received, apparently, on account of resignation of one of the members of the DRB, whose replacement was not found, within the period prescribed.

6. Thereafter, the appellant invoked the arbitration clause and filed a Statement of Claims claiming a sum of ₹7,15,83,689/- (subsequently

modified to ₹7,16,77,759/-) along with interest as compensation for overheads and loss of profit on account of the aforementioned reduction in quantity of work and also compensation on account of the price adjustment that would be applicable if the quantum of work had not been reduced.

7. The appellant sought to sustain its claims on the basis of clause 52.2 of GCC read with COPA. In order to consider the submissions, it would be necessary to refer to clauses 51.2, 52.1, 52.2 and 52.3 of GCC as well as sub-clause 52.2 of COPA which are extracted below:-

“Clause 51.2 of GCC - Instructions for Variations

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.”

“Clause 52.1 of GCC - Valuation of Variations

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.”

“Clause 52.2 of GCC - Power of Engineer to Fix Rates

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.”

“Sub-Clause 52.2 of COPA - Power of Engineer to Fix Rates

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.”

“Clause 52.3 of GCC - Variations Exceeding 15 percent

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 in the Bill of Quantities excluding Provisional Sums, day works and adjustments of price made under Clause 70.

but not from any other cause, there have been additions to or deductions from the Contract Price which taken together are in excess of 15 per cent of the “Effective Contract Price” (which for the purposes of this Sub-Clause shall mean the Contract Price, excluding Provisional Sums and allowance for day works, if any) then and in such event (subject to any action already taken under any other Sub-Clause of this Clause), after due consultation by the Engineer with the Employer and the Contractor, there shall be added to or deducted from the Contract Price such further sum as may be agreed between the Contractor and the Engineer or, failing agreement, determined by the Engineer having regard to the Contractor’s Site and general overhead costs of the Contract. The Engineer shall notify the Contractor of any determination made under this Sub-Clause, with a copy to the Employer. Such sum shall be based only on the amount by which such additions or deductions shall be in excess of 15 per cent of the Effective Contract Price.”

8. The appellant submitted that the provisions of clause 52.2 of GCC read with COPA were applicable as the necessary conditions specified therein were satisfied. The said conditions being:-

- a) That there was a reduction in quantities in items 8.02(a) and 8.02(c) to the extent of 54.54% and 100% respectively. The reduction of quantity in percentage term exceeded 25% which was a condition specified in sub clause 52.2 of COPA.
- b) The amount in the BOQ of each of the two items namely 8.02(a) and 8.02(c) exceeded 2% of the contract price (being 2.41% in case of item 8.02(a) and 2.287% in case of item 8.02(c)).

The appellant claimed that each of the two items would result in a margin of ₹320 per sq. meter and to that extent reduction of quantities resulted in a loss of overheads and profits to the appellant. It is claimed that on account of the reduction in the quantities, the price indicated in the BOQ had become inappropriate, inasmuch as, the appellant has been deprived of the profits that the appellant would have gained or the contribution that the appellant would have received on account of executing the work that had been removed from the scope of the contract. This, according to the appellant, had rendered the rate/price as specified in the BOQ, inappropriate and the Engineer was thus obliged to fix/determine new rates/price.

9. The Arbitral Tribunal examined the contentions of appellant and the findings of the Tribunal are as under:-

“5.4 The AT finds that :

(a) As stipulated in sub clause 51.1 of GCC all variations instructed by the Engineer are to be valued in term of clause 52 of the conditions of contract.

(b) According to sub clause 52.1 of GCC, all variations instructed by the engineer and any addition to the Contract price which are required to be determined in accordance with clause 52 (for the purpose of this clause referred to as “varied works”) shall be valued at rates and prices as set out in the contract, if they shall be applicable.

(c) Work included in variation is to be valued in accordance with sub clause 52.2. The impact of variation which deals with exclusion of work from the BOQ, is to be considered under sub clause 52.3.

(d) Valuation of “varied works”, according to sub clause 52.2 is to be considered by review and determination of new rates/prices, if required, and on the basis of rates and prices in the contract.

(e) Valuation of reductions in quantities cannot be in terms of rates or prices as they do not involve actual work done. It has to be in the form of addition to the Contract Price considering loss, if any, on account of fixed costs, overheads etc. Such valuation is outside the scope of sub clause 52.2 and the appropriate contractual clause for it sub clause 52.3.”

10. The Tribunal rejected the claim of compensation, under clause 52.2 of GCC read with COPA, for loss of overhead and profits and held that the word ‘price’ appearing in clause 52.2 had been used in the same sense as the word ‘rate’ and any contrary view would be inconsistent with the contractual terms. The Tribunal held that the expression ‘rate’ used in the said clause 52.2 applies to general items of the BOQ, while the word ‘price’ applies to lump sum items and rejected the contention that the word ‘price’

appearing in the said clause, i.e., clause 52.2, referred to the product of rate and quantity. The Arbitral Tribunal did not find that rates or prices as set out in the contract were rendered inappropriate and/or inapplicable on account of reduction in the quantities as contended by the appellant.

11. The Arbitral Tribunal also noted that the nature of claim preferred by the appellant was for compensation on account of loss of profits/margin and loss of overheads. This according to the Arbitral Tribunal was not a claim that could be entertained under clause 52.2 of GCC. The Arbitral Tribunal noted that the appellant itself had not approached the Engineer for a review of the accepted rate/price of work in the context of seeking payment of varied work under that clause. The Arbitral Tribunal further held as under:-

“5.6 The claimant would have been justified in invoking sub clause 52.2 if he had asked the Engineer for review of the accepted rate for item 8.02(a), in the context of payment to him for the ‘varied work’ under the item i.e the work actually executed under the item. The AT concludes that the Claimant has no case for the claimed compensation of ₹5,15,97,643/- under the provision of sub clause 52.2 of the contract condition.”

12. The Arbitral Tribunal was of the view that the claims made by the appellant could be examined under clause 52.3 of GCC. Accordingly, the Arbitral Tribunal proceeded to examine whether clause 52.3 could be applied on the facts of the case considering that recourse to clause 52.3 was only available if the difference between the value of work executed excluding price adjustment, day work and provisional sum and the Effective Contract Price was more than 15 per cent of the Effective Contract Price. The Arbitral Tribunal found that the difference in the value

of work performed and the Effective Contract Price constituted only 7.84% of the Effective Contract Price which was less than the agreed threshold (15% of the Effective Contract Price) for price variation mechanism under clause 52.3 of GCC to be applicable.

13. With respect to the claim of price adjustment, it was held by the Tribunal that the said claim was not tenable as sub clause 70.3(a) of COPA stipulated that the price adjustment shall apply only for the works executed.

14. Aggrieved by the rejection of the claims, the appellant preferred a petition under section 34 of the Act (OMP No.855/2013) before a learned Single Judge of this Court. The learned Single Judge examined the Arbitral Award and observed that the result of the Arbitral Tribunal's deliberation was that no rate or price had become inappropriate or inapplicable due to variation in quantities and consequently clause 52.2 of the GCC was not applicable to the case. The relevant extract of the impugned order is as under:-

“10. A reading of the aforesaid observations of the arbitral tribunal would show that the arbitral tribunal came to the conclusion that expression ‘rate’ used in clause 52.2 of the COPA applies to general items of the BOQ, while the word ‘price’ applies to lump sum items. The arbitral tribunal rejected the contention of the petitioner that the word ‘price’ appearing in the said clause, i.e., clause 52.2 of the COPA, would mean total price of the BOQ, which could only be arrived by multiplication of quantity with rate. The arbitral tribunal clearly returned a finding that such a submission was inconsistent with the contractual terms. It is the arbitral tribunal's view that the word ‘price’ used in clause 52.2 of the COPA had been used in the same sense as the word ‘rate’. Price related to lump sum items of BOQ, while the rate was

relatable to other items of the BOQ. The net result of the arbitral tribunal's deliberation appears to be that since no rate or price became inappropriate or inapplicable due to variation in quantities, as indicated above, clause 52.2 of the COPA was not applicable to the case in issue."

15. The learned Single Judge, by the impugned order, dismissed the said petition and held that there was no flaw in the rationale provided in the award and an interpretation of clause 52.2 of the GCC could not be made a subject matter of challenge under Section 34 of the Act. The relevant extract of the impugned order is as under:-

"After hearing the counsels for the parties and perused the record, I find that there is no flaw whatsoever in the rationale provided in the award. The interpretation of clause 52.2 of the COPA cannot be made a subject matter of challenge under Section 34 of the Act. It cannot be said that the arbitral tribunal has gone beyond the terms of its reference. See observations of the Supreme Court in *Steel Authority of India Ltd. vs Gupta Brothers Steel Tubes Ltd. (2009) 10 SCC 63* at page 79 in paragraph 18(ii):

"....(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by courts as such error is not an error on the face of the award...."

Also see *Numaligarh Refinery Ltd. vs Daelim Industrial Co. Ltd. (2007) 8 SCC 466.*"

Aggrieved by the impugned order, the appellant has preferred the present appeal.

16. It has been contended by the appellant before us that the interpretation given by the Arbitral Tribunal as well as the learned Single

Judge with respect to the clause 52.2 of GCC is completely erroneous. It is contended that the Tribunal grossly erred in interpreting clause 52 of GCC in the manner that it did. First of all, it is contended that the Arbitral Tribunal erred in proceeding on the basis that expressions ‘rate’ or ‘price’ are used in the same sense and that the word “rate” is used for items for which a rate is specified in the BOQ and the word “price” is used in respect of the items where lump sum price has been provided. According to the appellant, the price is a multiple of the agreed rate and the specified quantity and if the quantity is decreased or increased, the price as provided would become inappropriate as a variation in the quantity would automatically result in a change in price. The Arbitral Tribunal rejected this contention and, essentially, held that any variation in quantity would not necessarily result in the specified rate or price being rendered inappropriate or inapplicable so as to attract the provisions of clause 52.2 of GCC. It is contended by the appellant that the findings of the Arbitral Tribunal are perverse and militate against the plain reading of the contract.

17. Secondly, the appellant has contended that the finding of the Arbitral Tribunal that work included in the variation is to be valued in accordance with clause 52.2 while the work that is excluded can be considered only under sub-clause 52.3, is erroneous and contrary to the express language of the said clause 52.2. It is stoutly contended that the varied work includes both addition (inclusion) in work as well as reduction (exclusion of work). It is pointed out by the appellant that clause 52.2 refers to varied work, which, by definition (contained in clause 52.1), includes variations as per

clause 51 and, as per clause 51.1(a), includes “*increase or decrease the quantity of any work included in the Contract.*”.

18. Thirdly, the appellant has also impugned the finding of the Arbitral Tribunal that, “*Valuation of reductions in quantities cannot be in terms of rates or prices as they do not involve actual work done. It has to be in the form of addition to the Contract Price considering loss, if any, on account of fixed costs, overheads etc. Such valuation is outside the scope of sub clause 52.2 and the appropriate contractual clause for it sub clause 52.3.*” as also being erroneous. It is contended that a variation as contemplated under clause 51 of GCC encompasses not only increase but also reduction in work and such variation in work may render the contractual rates/price inappropriate or inapplicable. Such variations are required to be valued in terms of clause 52.2 of GCC as the language of clause 52.2 does not exclude variation on account of reduction in quantity of work. The learned senior counsel for the appellant submitted that in terms of the clause 52.2 of the GCC, an appropriate price for the quantum of work that was reduced was required to be fixed and the appellant was entitled to receive the same.

19. Fourthly, it is contended that the Arbitral Tribunal erred in holding that clause 52.3 of GCC would not be applicable as the difference between the work executed (excluding price adjustment, day work and provisional sum) and the Effective Contract Price only constituted 7.84 percent of the Effective Contract Price. It is contended that the value of “varied works” which was computed as ₹8,88,78,766/- by the Arbitral tribunal was erroneous as the same was the arithmetical result of all variations in the value of work i.e., the value of works that were increased were added and

the value of works that were reduced were deducted. According to the appellant, the value of all variations had to aggregated irrespective of whether the variation were on account of increase or decrease in the value of works executed.

20. The learned counsel for the appellant has relied upon the decision of a Division Bench of this Court **National Highway Authority of India v. Som Datt Builders**: 2010 (1) Arb. LR 185 (Delhi) (DB) in support of his contention that the Arbitral Tribunal's interpretation of clause 52.2 of the GCC is contrary to the plain meaning of its language.

21. It is trite law that an arbitral award will not be interfered with, under section 34 of the Act, on the ground of any alleged controversy relating to interpretation of a contract. Even if it is assumed that the Arbitral Tribunal has erred in interpreting a contract, the same is within the jurisdiction of the Tribunal and unless it is established that the Tribunals view is not plausible, the Courts would not entertain a plea to interfere with the same. In the case of **National Highway Authority of India v. Som Datt Builders** (*supra*), a Division Bench of this Court held as under:-

“21. We are conscious of the fact that primarily it was for the Arbitral Tribunal to interpret the contractual terms and that if the interpretation adopted by the Arbitral Tribunal is a plausible interpretation i.e. if it is one of the various interpretations that could reasonably be given to the contract, then the Court would not interfere with the award merely because, according to the Court's understanding, another interpretation is preferable. However, it is equally well settled that if the interpretation adopted by the Arbitral Tribunal in respect of the contractual terms is so unreasonable that no reasonable person would adopt, which is so unfair and

unreasonable as to shock the conscience of the Court, the illegality is one which goes to the root of the matter and is not merely a trivial illegality and the interpretation of the contractual terms goes contrary to the contractual terms themselves and is patently incorrect, the court while hearing the objections to such an award, would be justified in interfering with such an award and setting aside the same (See ONGC Ltd. (supra) paragraphs 55 and 56).”

It is, thus, necessary to examine the terms of the contract between the parties for the limited purpose of determining whether the findings of the Arbitral Tribunal are perverse or are contrary to the plain reading of the contract.

22. In terms of clause 51.1 of the GCC, the Engineer is entitled to make any necessary or appropriate variation in the “form, quality or quantity of the works or any part thereof”. And, in terms of clause 51.1 of GCC, the contractor is obliged to follow the instructions of the Engineer with respect to:-

“(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.”

Clause 51.1 of GCC further specifies that any such variation would not vitiate the contract.

23. Clause 52 of the GCC provides for valuation of the variations and in terms of clause 52.1, all variations which are referred to in clause 51 and any addition to the contract price which are required to be determined under clause 52, are to be valued at the rates and prices set out in the contract, if the same are applicable in the opinion of the Engineer. In absence of the contract containing any rates/prices for the varied work, the same has to be determined on the basis of the rates/prices provided in the contract as far as the same may be reasonable failing which the rates/prices have to be agreed between the Engineer and the contractor and in absence of any agreement, the Engineer is authorised to fix the rates/prices.

24. Clause 52.2 carves out an exception to clause 52.1 as indicated by the opening sentence of clause 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,..”* Thus, on a plain reading of the said clause, the precondition for application of clause 51.2 is that rates and prices of any varied work should have been rendered inappropriate or inapplicable by the variation in the nature or quantum of work in relation to the whole works. If this precondition is satisfied then a “suitable rate or price” for the varied work has to be fixed as may be agreed between the Engineer and the Contractor. In case of disagreement between the Engineer and the Contractor, the

Engineer would notify the Employer of such rate/price as it may consider appropriate. Clause 51.2 further provides that till such time the rates/prices are agreed to or fixed, the Engineer shall determine provisional rates/on account payment to be included in certificates issued for payment to the Contractor.

25. Clause 51.2 of the GCC is not restricted only to variations as a result of increase or decrease in the quantities of work but also encompasses situations resulting from other variations, as are indicated in Clause 51.1 of GCC, which may be required to be carried out in execution of the works. In all such cases, clause 51.2 would be applicable provided that variation of work has rendered the rates/prices as indicated in the contract as inappropriate or inapplicable and the volume of the variation is more than the threshold specified, in this regard, under COPA.

26. Any variation in the agreed quantity of any item would affect the amount payable to the contractor (the amount payable being the quantity of work done, multiplied by the rate accepted in the contract), however, in our view, this would not necessarily imply that the rate/price as agreed under the contract would be rendered inappropriate or inapplicable. In cases where there is a variation in the quantity as provided in the BOQ, the claimant (subject to the other pre-conditions of sub clause 52.2 of COPA been made) can claim, under clause 52.2, that a suitable rate or price be determined provided that in the opinion of the Engineer, the rate or price contained in the contract has been “rendered inappropriate or inapplicable” on account of the variation in the quantum of work. However, every change in the quantity beyond the specified limit does not necessarily result in

clause 52.2 being applicable. And, the same would become applicable only if in the opinion of the Engineer, the rates or the price had been rendered inappropriate on account of the variation in quantities. The appellant has contended that since price is only a mathematical product of quantity and rate, every change in quantity would result in a change in price as contemplated under clause 52.2 of GCC. The Arbitral Tribunal rejected this contention and held that the word “price” used in clause 52.2 of GCC had been used in the same sense as the word “rate” and any contrary view would be inconsistent with the contractual terms. We are unable to accept that the Arbitral Tribunal’s view, in this regard, is erroneous and in any view of the matter the same cannot be considered to be implausible.

27. In respect of the appellant’s second contention that the Arbitral Tribunal has erred in finding that payment under clause 52.2 of GCC could only be made in respect of work which was included in the contract (i.e., the actual work done) and in cases where the work has been reduced, the impact could only be determined under Section 52.3, it is necessary to read the said finding in the context of the claim made by the appellant. In order to consider the nature of the claims made by the appellant, it is necessary to refer to a letter dated 13.03.2006 sent by the appellant to the Engineer, whereby the appellant had made the claim for the first time, with reference to clause 52.2 of the GCC. The said letter reads as under:-

“Team Leader
Meinhardt (Singapore) Pte. Ltd.
Project Site Office
16C, Ashok Nagar
Allahabad 211 002

Sub: Package IIIC – Request for compensation under clause 52 for the reduction in quantity of Thermo plastic painting work – BOQ item 8.02

Ref: (1) Your letter -205C/1200/0882/3969 dated 18.02.2006

Dear Sir

- As per the original BOQ, following were the quantities of thermo plastic painting under BOQ 8.02

BOQ No	Item of work	Unit	Quantity	Unit Rate (Rs)
8.02	Pavement marking with hot applied thermoplastic compound complete as per Technical Specification Clause 803			
8.02 – a)	Lane/centre line/edge marking / transverse marking etc	SqM	108347	Rs.710.13(without rebate) Rs 590.23 (with rebate)
8.02 – b)	Broken line, Directional arrows, lettering etc	No	1168	Rs.1450.15 (without rebate) Rs 1205.30 (with rebate)
8.02 – c)	Kerb Stone	SqM	102342	Rs.710.13 (without rebate) Rs 590.23 (with rebate)

- As per the revised quantities of BOQ as indicated in your letter 205C / 1200 / 0882 / 3969 dated 18.02.2006, the thermo plastic painting quantity under 8.02(a) has been reduced substantially and the quantity under BOQ 8.02(c) has been reduced to zero.
- Following table shows the extent of reduction in the quantity as well as the impact of this BOQ item on the Contract Price.

BOQ No	Item of work	Unit	Unit rate (Rs)	Original Qty	Revised Qty	% Change in qty	% Impact of the item on Contract Price
8.02	Pavement marking with hot applied thermo plastic compound complete as						

	per Technical Specification Clause 803 -						
a)	Lane/ centre line /edge marking/ transverse marking etc	SqM	590.23	108347	53000 (#1)	51%	2.41%
b)	Broken line, Directional arrows, lettering etc	No	1205.30	1168	1168	0%	0%
c)	Kerb Stone	SqM	590.23	102342	0	100%	2.28%

(Note #1- The quantity indicated in the table enclosed with your letter 205C/1200/0882/3969 dated 18.02.2006 is 61430 SqM for item 8.02 (a). However, as per our estimate, the maximum quantity under this item is likely to be only 53000 SqM, which we have considered in the above table)

4. Thus, BOQ item 8.02(a) and 8.02(c) both qualify for the revision in the rate/price under Clause 52.2 in view of the change in quantity being more than 25% and impact of this item of work on the Contract Price being more than 2%
5. Due to the above stated reduction of the work under BOQ item 8.02, the Contract Price under this BOQ item will become reduced as follows

BOQ No	Item of work	Unit	Unit rate (Rs)	Original Qty	Revised Qty	Original Contract Price a/c BOQ item (Rs. Million)	Contract Price a/c BOQ item in view of revised Qty (Rs.Million)
8.02	Pavement marking with hot applied thermo plastic compound complete as per Technical Specification Clause 803 -						
a)	Lane / centre line /edge marking/ transverse marking etc.	SqM	590.23	108347	53000 (#1)	63.95	31.28
b)	Broken line, Directional arrows, lettering	No	1205.30	1168	1168	1.41	1.41

	etc						
c)	Kerb Stone	SqM	590.23	102342	0	60.41	0
	Total					125.77	32.69

6. As per the above table, the net reduction in the Contract Price due to the above mentioned reduction in the quantity work under BOQ item 8.02 is Rs 93,072,779. Due to such substantial reduction in the Contract Price, we will not be able to realise our cost of overheads and profit under this item of work.
7. We therefore request you to compensate us, under Clause 52 and 53, a minimum amount of Rs 16,753,100, towards loss of contribution towards overheads and profit calculated at 18% in view of the above stated reduction in the quantities of BOQ item 8.02.

Thanking you
Yours faithfully
Sd/-
M Malyutin
Project Manager”

28. The Engineer sent a letter dated 04.05.2006 in response to the aforesaid letter *inter alia* pointing out that a claim for loss on account of overheads could be compensated as per the procedure set out in clause 52.3, once the final taking over certificate was issued.

29. In response to the rejection letter dated 04.05.2006 sent by the Engineer, the appellant once again reiterated its claim vide a letter dated 04.05.2006, the relevant extract of which is reproduced below:-

“2.3 If it is still decided to insist on omission/reduction in quantity of thermo plastic pavement marking work under BOQ item 8.02, the relevant points/provisions of the Contract necessarily to be focused are:

- (i) We have already reported to you through our letter ref.4124/IIIC dated 13.03.2006, that BOQ items 8.02(a) and 8.02(c) respectively account for 2.41% and 2.28% of the Contract Price and that the instructions for omission/reduction in quantity of thermo plastic pavement marking work under these BOQ items 8.02(a) and (c) will respectively amount to a change of 51% & 100% in quantity. The total contract price under BOQ items 8.02(a), (b) and (c) will reduce from INR 125.77 Million to INR 32.69 Million – a reduction of about 74% as brought out below

BOQ Item No	Item Of Work	Unit	Unit Rate (Rs.)	Original BOQ Quantity	Revised Quantity	Original Contract Price a/c BOQ item (Rs. Million)	Reduced Contract Price a/c BOQ item in view of revised Quantity (Rs.Million)
8.02	Pavement marking with hot applied thermo plastic compound Complete as per technical specification clause 803						
a)	Lane center line /edge marking/ transverse marking etc.	SqM	590.23	108347	53000	63.95	31.28
b)	Broken line, Direction arrows, lettering etc	No.	1205.3	1168	1168	1.41	1.41
c)	Kerb Stone	SqM	590.23	102342	0	60.41	0
	Total					125.77	32.69

- (ii) Third paragraph added in Clause 52.2 of Conditions of Particular Application (COPA) is reproduced for ready reference.

“Provided further that no change in the rates or price of any item contained in the contract shall be considered unless such item accounts for an amount more than 2% 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%”

(iii) All the criteria setout in Clause 52.2 of conditions of particular application (COPA) are met in full as detailed in paragraph 2.3 (i).

(iv) We are therefore entitled for an extra payment under clause 52.2 (a) as detailed below

a) Reduction in quantities of BOQ item 8.02 (53000 SqM) on account of instructions communicated for omission /reduction in quantity of BOQ item 8.02 over that provided in the Contract (108347 + 102342 = 210689 SqM) is 157689 SqM (210689 – 53000 = 157689)

b) As you are aware, the work specified under BOQ item 8.02 is being executed by us through a specialist agency. The compensation available to us under this item of work w.r.t BOQ rate is tabulated below

BOQ Item No.	Item Of Work	Unit	Unit BOQ Rate (Rs.)	Unit rate payable to the specialist agency (Rs)	Compensation available to us w.r.t BOQ rate (Rs)
8.02	Pavement marking with hot applied thermo plastic compound Complete as per technical specification clause 803				
a)	Lane center line/ edge marking/ transverse marking etc.	SqM	590.23	270	320.23
c)	Kerb Stone	SqM	590.23	270	320.23

c) Thus the compensation of Rs 5,04,96,748 (Rs 320.23 x 157689) along with corresponding impact of price variation available to us under this item of work is being denied on account of reduction of 157,689 SqM in the quantity of BOQ item 8.02 as detailed above.

2.4 In view of aforesaid, we request you to pay us an additional amount of Rs. 5,04,96,748/- along with corresponding impact of price variation as an extra payment under Clause 52.2 of General Condition of Contract.”

30. It is apparent from the above that the claim made by the appellant was not that the rate specified in the contract for the items of work in 8.02(a) and 8.02(c) of the BOQ had been rendered inappropriate or inapplicable but the claim was only for compensation on account of loss of margin which the appellant is stated to have suffered on account of reduction in work. The findings of the Arbitral Tribunal have to be read in context of the nature of this claim made by the appellant.

31. As discussed earlier, clause 52.2 triggers only when the nature or amount of any varied work is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item of the works is rendered inappropriate or inapplicable on account of the variation. If this condition is satisfied then clause 52.2 provides for fixation/determination of an agreed/appropriate rate/price of the item of work. Even if we assume that the condition for triggering clause 52.2, as stated above, has occurred then it follows that the rate/price for the item of work has to be fixed/determined. If we consider the applicability of clause of 52.2 in respect of work under item 8.02(a), which was not completely omitted but merely reduced in terms of quantities, and assume that all the preconditions for triggering clause 52.2, including the Engineer forming an opinion that the rate/price provided has become inappropriate on account of reduction of the quantity of work, have been met, then an agreed/appropriate rate would have to be fixed for that item of work. The rate/price so agreed/determined

would have to substitute the existing rate/price as provided under the contract (in this case the BOQ) as the same have been rendered inappropriate or inapplicable. These new rates/price would obviously apply to the revised quantum of work under item 8.02(a) and not to the quantum of work that is not to be executed and stands removed from the BOQ. However, as indicated above this was not the claim made by the appellant, the appellant did not seek enhancement of the rates for the residuary quantity of work under item 8.02(a) but applied for compensation for loss of contribution (margin) that the appellant would have earned from the work that was reduced from the scope of works. It is in this context that the Arbitral Tribunal found that, *“Work included in variation is to be valued in accordance with sub clause 52.2. The impact of variation which deals with exclusion of work from the BOQ, is to be considered under sub clause 52.3.”* This finding must be read in conjunction with the observation of the Arbitral tribunal that *“The claimant would have been justified in invoking sub clause 52.2 if he had asked the Engineer for review of the accepted rate for item 8.02(a), in the context of payment to him for the ‘varied work’ under the item i.e. the work actually executed under the item.”* It would be erroneous to read the arbitral award to mean that in all cases of reduction of work the rates/prices of the residuary work cannot be fixed or determined under clause 52.2 of the GCC.

32. The rationale for the conclusion that the claims made by the appellant did not fall within clause 52.2 also becomes apparent when the said clause is applied to item 8.02(c). The work under 8.02(c) was completely omitted. A revision in rate/price by itself is of no assistance to

the appellant in so far as item no. 8.02(c) is concerned because even if a rate/price is fixed the same would not be payable as no work of that item is executed. In order to fit the claim of the appellant in respect of item 8.02(c), within clause 52.2 of the GCC, the said clause would have to be read as providing for determination or fixation of compensation on account of variation of the work and not for determination/fixation of a rate or a price. This, in our view, is clearly not tenable. A rate/price that may be agreed/determined under clause 52.2 is for making payment for the work done. The expression 'rate' or 'price' fixed under BOQ is for the purposes of making payment to the contractor for work executed by him and not as a measure of compensation payable if the said item is reduced from the scope of work.

33. The third contention canvassed by the appellant that since the reduction of quantum of work is also a variation contemplated under clause 52.2, an appropriate price ought to be fixed for the quantity of work which has been removed from the scope of work and paid to the appellant, is in our view, also devoid of any merit. As explained earlier, the price/rate which is to be determined under clause 52.2 of GCC is in respect of quantities of work executed and/or to be executed and not the work which has been removed from the scope of the contract. The expression rate/price cannot be equated with compensation for loss suffered on account of reduction in the quantum of work. It may even be possible to interpret that clause 52.2 provides that a rate/price is determined/fixed for arriving at a value of the work which is reduced/omitted. However, clause 52.2 of GCC

cannot be read as providing a mechanism of fixing a rate/price for the purposes of making a payment for work not executed.

34. The decision in *National Highway Authority of India v. Som Datt Builders* (*supra*) also does not assist the appellant in any manner. In that case, relevant item of work was geogrid/geotextile reinforcement fabric. The estimated quantity of the said work as mentioned in the bill of quantities was 6,80,000 sq. mtrs. However, on the execution of the work, the same was increased to 19,58,105 sq. mtrs. The National Highway Authority of India invoked the arbitration clause and in the arbitral proceedings it was claimed that on the interpretation of clauses 51 and 52 of GCC read with COPA all variations of quantity beyond the tolerable limits would constitute variation entitling the Engineer to renegotiate the rates and prices of the concerned items irrespective of whether the variations were as a result of issuance of instructions by the Engineer or not. The respondent refuted the said claim on the ground that the variations were not due to the instructions issued by the Engineer and therefore sub-clause 52.2 was not applicable. The Arbitral Tribunal and the learned Single Judge accepted this contention and rejected the claim of NHAI. On appeal, a Division Bench of this Court after interpreting clauses 51 and 52 of the contract held that all variations, whether they are the result of issuance of instructions or not, would be open to re-negotiation of rates and prices if the other conditions set out in the contract are fulfilled. It is material to note that the claim of NHAI was for re-negotiation /determination of rates for the work that was executed on account of variation in the quantity of work which had increased by 300%. The claim

made was not regarding compensation for work not executed by the contractor. Therefore, this decision is not relevant to the controversy involved in the present case.

35. We do not find the view of the Arbitral Tribunal, that under clause 52.2 payments are effected only of the work which is done by a contractor and any compensation on account of the work which has been removed from the scope of work must be considered in clause 52.3, to be perverse or not supported by the language of the relevant clauses. Indisputably, the contentions raised by the appellant relate to the interpretation of clause 52.2 and 52.3. The learned Single Judge has held that the question as to interpretation of the terms of the contract are within the jurisdiction of an arbitrator and thus, cannot be subject matter of challenge under Section 34 of the Act. The learned Single Judge has also referred to the decisions of the Supreme Court in **Steel Authority of India Ltd. v. Gupta Brothers Steel Tubes Ltd.:** (2009) 10 SCC 63 and **Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.:** (2007) 8 SCC 466, wherein it has been held that an error relatable to interpretation of the contract is an error within the jurisdiction of the arbitrator and is not amenable to correction by the courts as such errors are not errors on the face of the award.

36. We concur with the view of the learned Single Judge. The learned Single Judge has rightly refrained from examining the question as to the interpretation of clause 52.2 and 52.3 of the contract. In our view also the interpretation provided by the Arbitral Tribunal to the terms of the contract is not perverse or implausible and, therefore, there is no ground to interfere with the same.

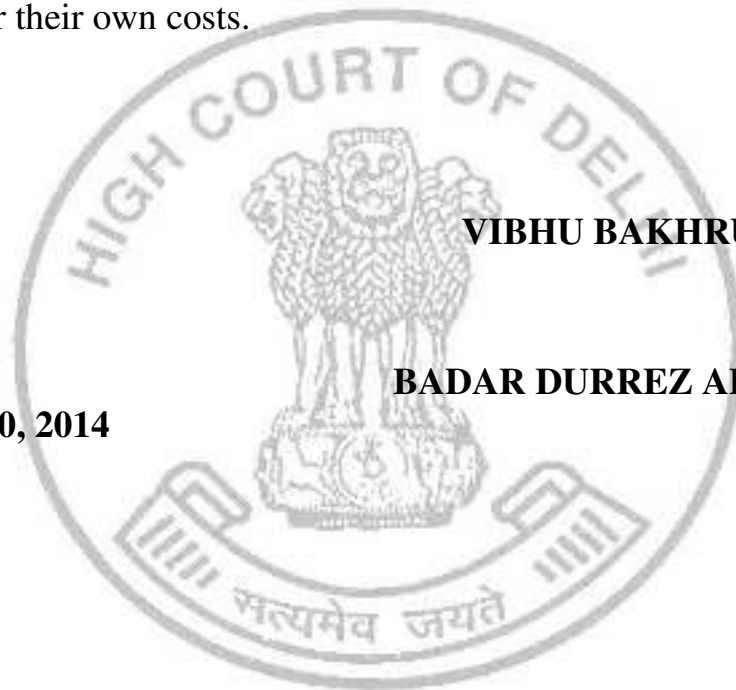
37. Before concluding, it is also necessary to consider the contention that the Arbitral Tribunal erred in arriving at the conclusion that clause 52.3 of GCC would not be applicable on the facts of the present case, as the difference between the value of works actually executed and the Effective Contract Price constituted only 7.84% of the Effective Contract Price. The Arbitral held that since, this variation was less than 15% of the Effective Contract Price, clause 52.3 would not be applicable and the claim for compensation made by the appellant could also not be considered in terms of the said clause. It is contended on behalf of the appellant that the method of computing the variance by the Arbitral Tribunal was completely erroneous. It is contended that the Arbitral Tribunal made an arithmetical sum of the variations in items of work instead of aggregating all the variations. The value of “varied works” was computed by the Arbitral Tribunal as ₹ 8,88,78,766/-. This according to the appellant was contrary to the express language of clause 52.3 which provides that clause 52.3 would be applicable in cases where “*additions to or deductions from the contract price which taken together are in excess of 15% of the ‘Effective Contract Price’*”. It is submitted by the appellant that the correct method would be to aggregate all variations ignoring whether the variations resulted increase or decrease in the contract value. In support of its contention, the appellant also relied on the decision of Supreme Court of India in **National Fertilizers v. Puran Chand Nangia: 2000 (3) Arb. LR 461 (SC)**.

38. We are not inclined to entertain this contention for two reasons. First of all, the appellant had not made any claim under clause 52.3 of the GCC, before the Arbitral Tribunal. Secondly, the appellant had not raised any

objection in this regard in its application under section 34 of the Act. On the contrary, it had been contended before the learned Single Judge that the Arbitral Tribunal had erred in holding that the nature of claim made by the appellant falls within the scope of clause 52.3 of the GCC. The appellant cannot be permitted to raise new contentions or grounds to challenge the Arbitral Award at this stage.

39. We find no merit in the appeal and the same is rejected. The parties are left to bear their own costs.

JANUARY 10, 2014
RK



VIBHU BAKHRU, J

BADAR DURREZ AHMED, J