

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

% *Judgment Reserved On : March 08, 2016*
Judgment Delivered On : March 15, 2016

+ **FAO(OS) 426/2015**

M/S CHENNAI-ENNORE PORT ROAD CO LTD..... Appellant

Represented by: Mr.Arun Kumar Varma, Advocate
with Mr.Abhay Raj Varma,
Advocate

versus

M/S RDS PROJECT LTD Respondent

Represented by: Mr.Jagdeep Dhankar, Sr.Advocate
instructed by Ms.Asha Jain Madan,
Mr.Mukesh Jain, Ms.Nivedita
Grover, Ms.Priyanka Parida, and
Mr.Amit Varma, Advocates with
authorized signatory of
Mr.D.L.Vohra (Technical
Consultant)

FAO(OS) 429/2015

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CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. A groyne is a rigid hydraulic structure built from an ocean/sea shore or from a river bank that interrupts water flow and limits the movement of sediment. It is usually made out of stone.
2. The National Highways Authority of India was to develop adequate road connectivity to major ports in India requiring Sea Protection Works. To ensure construction of groynes the appellant was the Special Purpose Company in the State of Tamil Nadu. The appellant

used a stale data and this has resulted in avoidable litigation. Even a layman has knowledge of the fact that, just as sand dunes shift due to wind currents, so does the sea bed and especially at the shore. A survey conducted in the year 1999 and on the basis of the data collected a design prepared in the year 2000 by IIT Madras was used by the appellant to prepare the cross section of the groynes and based thereon a notice inviting tender was issued calling upon the prospective bidders to submit the rate to construct the groynes. Description of the items of work to be executed as also quantity was made known in the schedule to the tender documents. The bids had to be made as per the tender documents. The broad scope of the work was : (i) identification of quarries for supply of stones of required specification; (ii) arranging transportation of the stones from the quarries to the work site; and (iii) construction of groynes according to the specification, designs and standards. The drawing indicated in the notice inviting tender informed the prospective bidders that the groynes to be construed would have three layers : (i) filter, (ii) core, and (iii) armour; with the filter layer at the bottom, core in between and at the top the armour. This was obviously based upon the survey conducted in the year 1999 and the design prepared in the year 2000 by IIT Madras. The bid by the respondent being accepted a contract bond was executed on May 20, 2003. Work had to be completed in 24 months. Date of completion was May 19, 2005.

3. Environment clearance had to be obtained by the appellant. Regretfully, none was obtained after the project was conceived of and before bids were invited. None was obtained even when the contract bond was signed. What has pained us is that not even a letter was sent to the Ministry of Environment, Government of India for environmental clearance. The work obviously could not commence. The first application

sent to the Ministry of Environment by the appellant was after the contract bond was signed. Environmental clearance was obtained on June 08, 2004 i.e. after one year and nineteen days of the date of commencement of the work.

4. It not being indicated to the respondent that environmental clearance had not been obtained, and the respondent acting upon the assumption that the appellant being a Government Undertaking would be armed with the necessary clearances mobilized itself at the site and was confronted with a situation of stalemate. At the fore most was a complete change in the topology of the sea bed at the shore where the groynes had to be constructed. There was a substantial difference in the sea bed profile compared to the one provided in the tender documents. Though not a part of the work to be performed by the respondent, it engaged a consultant to conduct a Bathymetry survey and based thereon prepared a fresh design of the cross sections of the groynes. This was refined by IIT Madras and another layer called the secondary layer, between the core and the armour had to be laid. Thus, as against three layers : (i) filter, (ii) core, and (iii) armour, a fourth : secondary layer required to be laid. Rates had obviously to be revised. Parties discussed the revised rates. On March 02, 2004 the appellant wrote a letter to the respondent enclosing therewith the revised rates, indicating the quantity of work to be executed. The letter reads as under:-

*“Thiru Deepak Shah
Executive Director
RDS Projects Limited,
1-B, TCR Apartment,
22, Judge Jambulingam Street
Mylapore
Chennai-600 004*

Sir,

Sub: Chennai Ennore Port Connectivity Project – Review of Design of Groynes

Please find enclosed herewith the copy of final design review report for the Groynes along Ennore Expressway, submitted by IIT, Chennai.

The statement of substitution of items is based on final revised design review of IIT Chennai, which was already discussed in the meeting held in TNRDC in the presence of PD/NHAI and yourself on 2nd March 2004 is also enclosed for your information. It may be noted that the revised design and substituted items statement is yet to be approved by NHAI.

Yours sincerely

*V Muthukrishna
Chief Project Officer”*

5. The respondent responded to appellant's letter dated March 02, 2004 as under:-

*“To
Shri V.Muthukrishnan
Chief Project Officer
TNRDC, Chennai*

Sir,

Sub: Development of adequate Road Connectivity to Chennai and Ennore Port-Sea Protection work.

Ref: Your letter No. CEP/6477/RDG/H dt.2.3.04 – Final Design and BOQ Substitution Items – Our letter No.RDS/CH/SSP-03-127/2003-04.

Reference to above we hereby convey acceptance of substituted items and the Rates as per the Final Design Review Report for the Groynes along Ennore Expressway

submitted by IIT Madras. However all other conditions of the contract shall remain unchanged.

Thanking you.

Yours faithfully

For RDS Projects.”

6. Relevant would it be to highlight that the letter dated March 02, 2004 addressed by the appellant to the respondent clearly records that the substitution of items, and with reference thereto the rates to be paid, were based on *final design review* by IIT, Chennai and that the *design had yet to be approved by NHAI*. Meaning thereby, there was enough scope for a dispute which may arise, as it did in the instant case, with reference to the design finally approved by NHAI. Indeed, as evident from the further facts which we would be noting the design which was finally approved by NHAI substantially altered the scope of the work impacting the schedule of quantities. The rates quoted and accepted and further revised as per letter dated March 02, 2004 by the appellant and accepted by the respondent as per its letter dated March 15, 2004 were ₹305/-, ₹310/- and ₹312/- per metric ton for the filter layer, core & secondary layer and armour layer respectively.

7. In anticipation of the environmental clearance pertaining to the stretch of the sea shore where the groynes had to be constructed, possession of part stretch, referred to by the parties as Stretch-I, was handed over by the appellant to the respondent on May 07, 2004 and of Stretch-II on February 08, 2005. As noted hereinbefore environmental clearance was obtained by the appellant on June 08, 2004. Thus, as against works contemplated to be commenced immediately when the contract bond was signed i.e. May 20, 2003; with date of completion May

19, 2005, the work could commence if drawings were approved on Stretch-I only on May 08, 2004 i.e. after half of the completion period was over and on Stretch-II on February 09, 2005 i.e. when only three months and eleven days completion period remained.

8. Reverting back, after the respondent through its consultant conducted a Bathymetry survey and based thereon prepared fresh design of the cross-sections of the groynes (not a part of the contract work), and after IIT Madras approved the same were sent to NHAI, the design of the cross-section was approved by NHAI and the revised drawings were issued on May 25, 2004. Based thereon work commenced. Thus, it is apparent that a year's delay was wholly attributable to the appellant.

9. We need not note other factors held wholly attributable to the appellant resulting in further delays in completion of the work because learned counsel for the appellant very fairly conceded that being finding of a fact based on evidence the appellant has to accept the said finding returned by the Arbitral Tribunal and thus we straightaway deal with the challenge to the three awards in respect whereof the appellant filed three objections under Section 34 of the Arbitration and Conciliation Act, 1996.

10. Three references were made to the same Arbitral Tribunal comprising Major General (Retd.) W.S.Chona (Presiding Arbitrator), Major General (Retd.) S.N.Bouri and Sh.Krishan Kumar. The three awards are dated September 10, 2012, October 28, 2012 and December 12, 2012. The first award is unanimous as regards claims No.1 to 5 made by the respondent. The disagreement is to claim No.6 which has been allowed by the majority in sum of ₹1,87,00,000/- (Rupees One Crore and Eighty Seven Lacs only) with nil awarded by the minority. The second award is unanimous. The third award is unanimous as regards claim

No.1, with a disagreement pertaining to claim No.2 whereunder the majority has awarded ₹1,56,50,000/- (Rupees One Crore Fifty Six Lacs and Fifty Thousand only) and the minority Nil.

11. Highlighting as this stage that whereas there is a linkage in the first and the second award, the third award is on an entirely different facet. A duplication of the sum awarded in the second award vis-a-vis the first has been corrected by the learned Single Judge and the respondent has accepted the modification because of the apparent duplication. The third award has been set aside as regards claim No.1(i) 1(ii). There is no cross-appeal filed by the respondent and thus as regards the third award the challenge in the appeal is restricted to claim No.2. The challenge to the first award, upheld by the learned Single Judge, is to the award except claim No.3. The challenge to the second award is to the entirety thereof in spite of the correction made by the learned Single Judge. Impugned decision disposing of OMP No.23/2013, OMP No.213/2013 and OMP No.419/2013 is dated April 23, 2015.

12. The summary of the award dated September 01, 2012 showing description of the claim, amount claimed and amount awarded by the majority arbitrators and concurred thereto qua claims No.1 to 5 by the minority, with a dissent to the claim No.6 awarded by the majority, would be as under:-

Claim No.	Description of claim	Amount Claimed (₹)	Amount Awarded by AT in Rupees
1.	Quantities of Boulder payments withheld	6,77,23,85.00	16,28,700
2.	Extension of time to become eligible for incentive	NIL	NIL
3.	Removal and Re-fixing of PWD stones Extra item	2,86,440.00	1,71,000

4.	Pricing of core material @ ₹310	14,95,795.00	NIL
5.	Enhancement of Armour rates in Schedule A-1 and A-2	2,32,21,219.00	20,56,560
6.	Compensation due to Deemed suspension of work	2,71,00,000.00	1,87,00,000

13. Claim No.2 was withdrawn by the respondent and thus the Arbitral Tribunal has noted said fact, and so have we.

14. After noting the pleadings of the parties, the evidence led and the terms of the contract, the discussion on the claims in the award dated September 10, 2012 commenced from 14.01. Claim No.1 was for payment withheld as per contract rate for work executed. The dispute was as to how would the work be measured. The dispute required the learned Arbitrators to interpret clause 1(d)(iv) and note 1 and note 4 thereunder of the Special Conditions of the Contract. It would therefore be appropriate for us to note the same. It reads:-

“1(d)(iv) The stones shall be closely placed and or dumped with such interlocking as obtainable so that voids shall not exceed the specified limits for each category. However for making good of settlement of stones in core mound due to normal sinking action caused by wave action or any other causes until the completion of works including maintenance on allowance upto 10% in respect of the cross section shall be made. The correct executed quantities for different categories shall be limited for the purposes of payment of 10% excess over the theoretical quantities whatever may be actual voids specific gravity of stones or the damages due to the natural causes. This quantity will be arrived at by taking cross levels at convenient intervals. The Cross Section constructed would be verified with the drawings by taking soundings and with already recorded bathymetry bed levels. The quantity will be calculated to

ensure that the work carried out is as per design. This Parameter of theoretical quantities/weighed quantities will be compared and variation of +/- 10% will be allowed. However cross sections given in the drawing should be maintained and no variation will be allowed.

The theoretical quantity in tones will be worked out on the following basis:

- (a) For Filter stones
Theoretical volume in cubic metres multiplied by 2.56*
- (b) for Armour stones
Theoretical volume in cubic metres multiplied by 1.695*
- (c) for core stones
Theoretical volume in cubic metres multiplies by 2.15*

Mode of Measurement and Payment :

(1) The measurement of stone shall be by the actual weighment for each category subject to the condition stipulated under clause (i)(v) above. The full payment for all the stones will be made in full only after they are quarried, transported, handled and placed or dumped in position. No part payment will be made for the supply of stones alone.

However, if the contractor so desires that they may be permitted to keep stones as stock during the monsoon period or any other such times with the prior permission of the Employer at the site of work and the contractor shall be paid 60% of the rates of stones so stocked subject to adjustment after the stones are actually dumped at the revetment and subject to the following:

(a) to (c)

(2) – (3)

(4) Mode of Payment

Payment shall be made based on the actual quantity dumped as recorded in weigh bridges to be provided at site by the contractor. The allowances specified over and above the theoretical quantities shall not be applicable in this case."

15. Claim No.1 for release of payment withheld in sum of ₹67,72,387 (Rupees Sixty Seven Lacs Seventy Two Thousand Three Hundred and Eighty Seven only) was on account of work done. With reference to the cross-sections of the drawing, parties were at ad idem that clause 1(d)(iv) of the Special Conditions of Contract made allowances for plus and minus 10% of the theoretical quantity calculated and the reason was that the works were to be executed in the sea with waves constantly beating the shore and allowance to be made for sinking. The issue was as to how should the theoretical quantity be worked out. As per the clause, to make good for settlement of stones in the core mound due to normal sinking action caused by wave action or other causes allowance upto 10% in respect of the cross-sections shall be made. The correct executed quantities for different categories was to be limited for the purpose of payment of 10% excess over the theoretical quantities which had to be arrived at by taking cross levels at convenient intervals. The problem was that the clause in question was inserted in the tender documents with reference to the design of the groyne having only three layers : filter, core and the armour and with reference to the topology of the sea bed at the shore it being envisaged that sinking would only be where the core was erected. But the contract as finalized had another layer called as the secondary layer. Unfortunately this mismatch between the clauses of the Special Condition of the Contract and the actual design remained. The

learned Arbitrators noted that the mode of measurement and payment at page 178 of the agreement stipulated that the measurement shall be by actual weight for each category subject to clauses (i)-(v), correctly opined as conceded to by learned counsel for the appellant as a typographic error found by the Arbitral Tribunal because there were no clauses (i) to (v) under clause (d). The reference obviously was to clause 1(d)(iv). The learned Arbitrators noted a clarification at serial No.9 at a pre-bid meeting as per which each groyne was to be treated as a separate entity. The learned Arbitrators have recorded in para 14.12 that details of actually executed theoretical quantities derived from constructed drawings have not been made available to the Arbitral Tribunal by either party. The Arbitral Tribunal has thereafter highlighted note (4) under clause 1(d)(iv) of the Special conditions of the Contract as per which payment was to be made based on the actual quantity dumped as recorded in weigh bridges to be provided at the site by the contractor and in such situation allowances specified over and above the theoretical quantity would not be applicable. The learned Arbitrators have thereafter noted that from the submitted documents the details of volumetric content of stones in each layer of all the groynes has been recorded and this has enabled the Arbitral Tribunal to arrive at the permissible limits of the theoretical quantities from these records and for comparison of the same with the weighted quantities. The learned Arbitrators have thereafter tabulated the same as under:-

Groyne No.	Theoretical Quantity	Dumped Quantity	Permissible (Lesser of the Weighted/ Theoretical + 10%)	Paid	Withheld/due for payments
<u>Armour</u>					
2	12745	13152	13152	12745	407
4	16963	19781	18659	17606	1053

7	16449	18102	18093	17829	264
8	20493	21374	21374	20936	438
9	20680	21501	21501	21025	476
10	16565	17565	17565	17482	83
					2721
Sub-Layer					
6	10411	15419	11452	10204	1248
8	17063	17023	17023	16889	134
					1382
Core					
6	22724	31165	24996	23367	1629
8	46224	40783	40783	40764	19
					1648

16. There is an error pertaining to groyne No.2 for the reason with 10% variation on the theoretical quantity 12745 the permissible would be 14019.5 and 131.52. But that hardly matters.

17. The learned Arbitrators have interpreted the clauses to mean that the intention of the contract was to make payments based on the stones actually dumped and recorded in weigh bridges, corroborated by theoretical quantities derived from actually constructed record groynes and thus the claim has been allowed in sum of ₹16,28,700/- (Rupees Sixteen Lacs Twenty Eight Thousand and Seven Hundred only) as under:-

“(a Core	-1648Tons @ ₹305.	= 5,02,640.00
(b)Under layer	-1382 Tons @ ₹310.	= 4,28,420.00
(c)Armour	-2721 Tons @ ₹312.	= 8,48,952.00
		17,80,012.00
	Less 8.5%	= 1,51,301.00
	Total	= 16,28,711.00”

18. We do not find any infirmity in the award concerning claim No.1 and concur with the view taken by the learned Single Judge that the terms of the contract required an interpretation and the Arbitrators were fully justified in interpreting the contract. We find no perversity in the
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reasoning by the learned Arbitrators and would simply highlight once again even at the cost of repetition that the appellant proceeded with a contract with initial terms thereof as per NIT conditions with the contemplation that the groynes would have three layers and as a matter of fact the groynes constructed were with four layers. Independent thereof a meaning had to be ascribed to note (4) beneath clause 1(d)(iv) as also note (1), as per which *the measurement of stones shall be by the actual weighment for each category and payment shall be made based on the actual quantity dumped as recorded in weigh bridges.*

19. Pertaining to claim No.2, as noted above the contractor withdrew the claim and thus the learned Arbitrators have recorded the claim being made in sum Nil and awarded Nil. There is no issue on that.

20. Claim No.3 was on account of removal and re-fixing of PWD stones. As against claim in sum of ₹2,86,440/- the sum awarded is ₹1,71,000/-. We need not deal with this issue for the reason appellant has not challenged the same.

21. Claim No.4 in sum of ₹14,95,795/- has been rejected and the respondent has not challenged said finding by the Arbitral Tribunal and thus we need not deal with the same.

22. Claim No.5 in sum of ₹2,32,21,219/- has been awarded in sum of ₹20,56,560/- and the head of the claim was enhancement of armour rates in Schedule A-1 and A-2.

23. The issue concerning said claim was a simple interpretation of the price adjustment clause under the bill of quantities as per the schedules to the contract. The clause is 6.7. It reads:-

“6.7 Price Adjustment in case of Change of quantity

(i) If the final quantity of the work done differs from the quantity in the bill of quantities for the particular item by more than 25% provided the change exceeds 1% of initial contract price, the Employer's Representative shall adjust the rate to allow for the change.

(ii) The Employer's representative shall not adjust rates from changes in quantities if thereby the initial contract price is exceeded by more than 15% except with the prior approval of the Employer.

(iii) If requested by the Employer's representative, the Contractor shall provide the Employer's representative with a detailed cost breakdown of any rate in the bill of quantities."

24. Highlighting that the learned Arbitrators rejected the contention of the respondent that for purposes of calculation, the secondary layer should be clubbed with the armour, and in harmony with its reasoning pertaining to claim No.1 for determining the method by which the quantities had to be computed, the Arbitral Tribunal noted in para 28.06 that even as per the method of calculation adopted by the appellant quantity executed was 40824.74 MT and the schedule of quantity in the contract was 30000 MT. Noting that on the contract as interpreted by the learned Arbitrators the total quantity worked out would be 50290.49 MT. Recording that the issue of payment for this item with respect to work actually carried out and as found justified by the learned Arbitrators on the interpretation as to how executed quantities had to be determined was also a subject matter of claim No.2, the learned Arbitrators held that they were working out recompense under award No.1 pertaining to the quantity 40824.74 MT and would deal with the remainder under the second reference.

25. The debate was the stand taken by the appellant that only variation beyond 25% had to be at the higher rates. Meaning thereby, variation upto 25% had to be as per contract rates. The stand of the respondent was that once the variation exceeded 25% the higher rates had to be on the entire quantity executed in excess of the bill of quantities.

26. Sub-para (i) of clause 6.7, which we have reproduced hereinabove, is most inappropriately worded. It reads : *If the final quantity of the work done differs from the quantity in the bill of quantities for the particular item by more than 25% provided the change exceeds 1% of initial contract price, the Employer's Representative shall adjust the rate to allow for the change.* The error is apparent. The compound sentence has three limbs : (i) *If the final quantity of the work done differs from the quantity in the bill of quantities for the particular item by more than 25%* (ii) *provided the change exceeds 1% of initial contract price,* (iii) *the Employer's Representative shall adjust the rate to allow for the change.* The second limb ought to be at the end for the reason the first and the third are running and the second limb which is by way of a proviso makes an exception, being that the change in price must exceed 1% of the initial contract price, for extra payment to be made. Be that as it may, with the syntax error in the clause, the words '*for the change*' in the last limb would mean the change referred to in the schedule of quantities contemplated by the first limb of the clause. Simple English language tells us that the first limb of the clause contemplates the situation where the final quantity of the work done differs from the quantity in the bill of quantities for a particular item by more than 25% and its consequence is in the third limb i.e. appellant's obligation to adjust the rate to allow for the change. '*The change*' would obviously be the change contemplated by the first limb i.e. the entire 25% and above of the exceeded quantity.

Not only do we find the interpretation by the learned Arbitrators in harmony with English language, but would turn down any challenge to the award because it is not a case where under the garb of interpreting a contract the Arbitrators have reinvented the contract. The clause certainly fell for interpretation and even if the interpretation could be better, it would be no ground to challenge the same.

27. On the quantification of the amount, two contentions are urged by learned counsel for the appellant. The first is to the rate ₹190/- per MT adopted by the learned Arbitrators to recompense the respondent for the excess being beyond 25% of the bill of quantities of work executed. There are two limbs of the argument. The first that the rate has been pulled out of the hat and the second that for the same item of work, for the quantity beyond 40824.74 MT, the rate applied is ₹150/- per MT.

28. Now, the Arbitrators were experts in the field and there would be an implied understanding between the parties that based upon their experience they would have gained knowledge which they could have applied while determining the rates. Quarried stones are not freely available in the market and hence the rates at a given point of time cannot be ascertained with precision. There is element of subjectivity for the reason guidance is taken with reference to the license and royalties paid to the Government when a mine is taken on a lease. The labour cost. Cost of tools, plants and machinery deployed for breaking the rocks. Petrol and diesel price for extracting the blasted stones. Transportation cost. Consumables consumed etc. Keeping in view the contract price for the same items of work, the recompense worked out per MT cannot be said to be arbitrary or perverse. Yes, it may be true that for the same item of work under the second award recompensed has been worked out at ₹150/- per MT, and there appears to be an apparent contradiction. The

first and the second award does not reveal the basis for the contradiction. But learned senior counsel for the respondent gave the reason, being that, when arguments were advanced for the second reference made, the learned Arbitrators had observed that the principle of higher the volume of work, the lesser the input cost required recompense at the second stage to be awarded at a less amount. Learned senior counsel explained that say if, 1000 MT of stone has to be quarried and transported the per MT cost would be more vis-à-vis 2000 MT of stones, for the reason the same crane, dumper truck and other blasting equipment would be used and this would substantially lower the per MT price. We concur and hold that there is no apparent perversity in the first award even in comparison with the second keeping in view the rationale, though not expressly stated in the two awards, but as explained by learned senior counsel for the respondent.

29. Appellate challenge to claim No.5 awarded and as upheld by the learned Single Judge therefore fails.

30. Pertaining to claim No.6, on which there is a disagreement between the majority and the minority, the claim was on account of compensation due to the delay in execution of the works and we highlight that while making the claim for the contractor the lawyer used a wrong expression by labeling the claim as one on account of compensation due to deemed suspension of the work. Claim was in sum of ₹2,71,00,000/- and has been allowed by the majority in sum of ₹1,87,00,000/-.

31. The majority Arbitrators have referred to clause 10.6 and 10.7 of the General Conditions of the Contract as the foundation of the claim. The two clauses read as under;-

“10.6 Suspension of work

The Employer may at any time instruct the Contractor in writing to suspend provision of part or all of the Works. Any such instruction shall include the reasons for ordering such suspension. During suspension the Contractors shall:

(A) Protect and secure the Works against any deterioration, loss or damage.

(B) Place no further subcontracts in relation to the Works; and

(C) Use all reasonable endeavours to suspend on the most favourable terms available to the Contractor, all subcontracts and agreements for hire to the extent affected by the suspension and otherwise to minimize the Cost associated with the suspension, provided that, unless instructed otherwise by the Employer's Representative, the Contractor shall during the suspension maintain its staff and equipment on or near the Project Site, ready to proceed with the provision of the Works upon receipt of permission or instructions from the Employer to do so.

10.7 Consequences of suspension

If the Contractor suffers delay and/or incurs Cost following the Employer's instructions under Clause 10.6 of GCC and in resumption of the Works, the Contractor shall give notice to the Employer's Representative, with a copy to the Employer. Any such Cost shall be treated as a Remibursable Item and its value would be determined by t he Employer in consultation with the Contractor.

The Contractor shall not be entitled to such Cost if the suspension is due to a cause attributable to the Contractor."

32. The minority Arbitrator has held that as per the two clauses recompense had to be on the condition that the employer i.e. the appellant

suspends the work or part thereof in writing. There being no writing evidencing that the appellant suspended the work, the minority held that the claim was not even maintainable.

33. The majority noted that environment clearance was obtained on June 08, 2004 i.e. after one year and that Ex.C-7 would show that alignments and levels of reference to be provided by the appellant to the respondent had not been provided. The majority noted the delay occasioned due to revision in the groynes. The learned Arbitrators noted that the respondent had in the meanwhile begun quarrying work in the mines and had stacked 2,20,000.00 MT of stones requiring handling and re-handling of the stones. The majority has used the expression deemed suspension and for which we find that a wrong expression used has been used by learned counsel for the contractor. Referring to usage rates approved by the Ministry of Road Transport and Highways, Government of India (MoRTH) for plant and machinery the recompense awarded is @ ₹85/- per MT.

34. Challenge to the award has been repelled by the learned Single Judge holding that since delay was found attributable to the appellant and which finding had not even been challenged, consequences must flow.

35. The learned Single Judge has not noted the argument advanced by the appellant and thus we do so. The argument was that the claim was on account of deemed suspension and for which the clauses of the contract warranted a written communication by the appellant to the respondent to stop the works. Admittedly there was none. Learned counsel for the appellant fairly conceded that meaningfully read the majority Arbitrators had allowed the claim under the General Law of Contract i.e. Section 73 of the Indian Contract Act, 1872.

36. Now, if there is delay attributable to the appellant, the respondent would certainly be entitled to a recompense and highlighting that the learned Arbitrators were persons with non-legal background, two being from the Armed Forces and the other a technocrat, awards authored by them would not be weighed on the scale on which a judgment authored by a person with legal background would be weighed. At base is justness and fairness. Have the learned Arbitrators come to grips with the issue, and is the core reasoning a reasonable reasoning, would be what needs to be looked at by a Court while considering objection to an award in the context of the language used. A wrong expression used by the counsel has seeped into the award. But at base, as noted above, is the recompense to the contractor for the delay occasioned and attributable wholly to the appellant. A limb of the argument was that if the appellant was made aware that the claim was for general damages, the appellant could have pleaded mitigation of the loss. The argument is theoretical and overlooks the fact that the recompense was for handling charges of 2,20,000 MT of quarried stone. Extracted from the quarries, huge quantities of stones had to be stacked and handling charges were incurred. Where was the question of mitigation of the loss? The respondent could not have sold the stone and looked for some other quarry to extract the stone when the works commenced. It is not a case of variance between pleading and proof. It is a case where the claim was for general damages but the counsel gave it a wrong label. The claim was clearly maintainable.

37. On the sustainability of the claim learned counsel for the appellant urged that recompense in sum of ₹85/- per MT was a figure pulled out of the hat by the learned majority Arbitrators.

38. The argument overlooks that the learned Arbitrators had clearly written that they had arrived at the figure with reference to use of plant

and machinery for quarrying and earthwork from the handbook of MoRTH. It may be true that the majority Arbitrator has not extracted the relevant part from MoRTH, but we do not find a ground urged that the guidelines issued by MoRTH do not provide for expenses incurred due to operation of plant and machinery and deployment of manpower for such kinds of work.

39. Before terminating we note that, though not recorded by the learned Arbitrators, the recompense is on account of the reason that if the work at site had commenced, the quarried stones at the quarries would have been removed from inside the quarries using cranes with the quarried stone heaved out from the quarried pits in nets or a container attached to the outer arm of a crane and directly loaded on to a dumper truck and taken to the site of the work. But this could not be done because the site was not made available for work to be commenced. The quarried stone had to be removed from the pits using crane and stacked. Huge piles of stacks thus came into existence. When the work commenced at site the cranes had to redeployed and the removal of the quarried stones from the stack piles and loading the same on the dumper trucks became a tedious process because the pincer head of the arm of the crane had to pick up one stone at a time and then load the same on the body of the dumper truck.

40. We therefore find no infirmity in the view taken by the majority Arbitrators and uphold not only the award but even the view taken by the learned Single Judge that there is no infirmity in the award dated September 10, 2012.

41. That takes us to the second award dated August 28, 2012.

42. Claim No.1 has been turned down by the learned Arbitrators and there being no challenge to the award by the respondent, we do not note the facts relating thereto.

43. Claim No.2 had two sub-heads : A and B.

44. The first was for release of payments for work done within the schedule of quantities and the dispute related thereto was the same as concerning claim No.1 under the first award i.e. how to determine the quantity of work executed. For the reasoning given by the learned Arbitrators pertaining to the first award, which we have dealt with in extenso hereinabove, the undisputed position would be that the quantities for which less payment was made would be 9481.95 MT and the rate would be ₹310/- per MT less 8.5% and the sum comes to ₹26,89,555/-.

45. The argument by learned counsel for the appellant is with reference to an inadvertent error in para 17.2 of the award, wherein while extracting a portion of the clause of the contract pertaining to the mode of measurements the expression '***derived from actually executed cross-sections***' has found an insertion. As noted above, clause 1(d)(iv) under the Special Conditions of the Contract uses the expression '*the correct executed quantities for different categories shall be limited for the purposes of payment of 10% excess over the theoretical quantities whatever may be actual voids specific gravity of stones or the damages due to the natural causes*'. While reproducing said part of the clause the learned Arbitrators have added the words '***derived from actually executed cross-sections***' between the word '*quantities*' and '*whatever*'. An ingenuous argument was advanced. The argument was that this insertion lay hidden in the first award, and as truth has the uncanny habit of oozing out, this insertion, laying hidden in the first award, has oozed out in the second.

46. The reasoning of the learned Arbitrators while interpreting the terms of the contract to find out the basis on which work executed had to be determined has been already noted by us hereinabove in paras 15 to 16. The tabular chart drawn up by the learned Arbitrators to summarize the calculations has also been noted by us in paragraph 15 above. In a nut shell, the learned Arbitrators have held that the theoretical quantities worked out by them were with reference to the actually executed cross-sections.

47. It sometimes happen that a thought in the mind of the author of the thought, when reflected in the first document get reflected in the second with a slight corruption therein, but the meaning remains the same. A thing is corrupted if it becomes different than the original. We do not find any insidious corruption in the thinking process which was lying hidden when the first award was pronounced. The appellant is making a mountain out of a molehill.

48. On the second limb of the claim, the linkage of the first award is to be found. While dealing with the challenge to the first award, we have already noted hereinabove in paragraph 24, that while dealing with claim No.5 the issue before the Arbitrators was whether upon quantities exceeding by 25% as per bill of quantities, was the respondent entitled to revised rates for the entire quantity or for deviation up to 25% the price payable was as per contract rates and beyond that as per revised rates. The learned Arbitrators found that for the armour and the secondary layer total executed work was 50290.49 MT and that the executed work had been determined on the same basis as was for claim No.1. The learned Arbitrators only recompensed for excess up to 40824.74 MT because this was the quantity for which the appellant had made the payment admitting said quantity of work done as per its interpretation of the contract to

determine the work done, but had denied further payment on account of the fact that upto 25% excess work done payment had to be as per contract price. The learned Arbitrators were therefore to recompense for the remainder i.e. 9465.75. In an error which is obvious, the recompense was for the entire quantity, and as noted by us in paragraph 11 above, the learned Single Judge has already made the necessary correction. Concededly the amount paid under the first award has been adjusted by the learned Single Judge with reference to the quantity for which the earlier award was pronounced and restricted to the quantity as per the latter award.

49. The only argument advanced on this issue is that under Section 34 of the Arbitration and Conciliation Act, 1996, unlike the Arbitration Act, 1940 there is no power vested in a Court to modify an award and thus any error in an award must result in the award being set aside as a whole, leaving it to the parties to work their way forward.

50. Now, if an error in an award is of a kind which needs modification by giving reasoning which is akin to a core reasoning the argument advanced may be considered. But where the error is akin to one of computation, the correction would not be a modification strictly so called. To correct means to make something free from an error. To modify means to make partial changes to.

51. The power of correction would be inherent in a Court of record.

52. Challenge on said aspect is therefore repelled noting that the second limb of the challenge was to the recompense granted @ ₹150/- per MT by urging that the rate had been pulled out from the hat. The same was the ground of challenge concerning the rate pertaining to the first award and we find that the reference to justify the award could be the guidelines issued by MoRTH.

53. Thus, challenge to the second award, error wherein, has already been rectified by the learned Single Judge is repelled.

54. That takes us to the last limb of our journey. The third award. Two claims, with the first having two sub-heads (i) and (ii) has been interdicted by the learned Single Judge by setting aside the same and there being no challenge to said part of the impugned order by the respondent, we neither note the facts nor deal with the same, and proceed straight to claim No.2, which was in sum of ₹7,45,85,400/- (Rupees Seven Crores Forty Five Lacs Eighty Five Thousand Four Hundred only), but has been reduced to ₹1,56,50,000/- (Rupees One Crore Fifty Six Lacs Fifty Thousand only). The claim was for extra work for round head at each groyne due to increase in depth of the water by more than 2 meters at the groyne heads and the basis of the claim was the facts noted by us in paragraph 6 above, with reference to the two letters reproduced in paragraphs 4 and 5 above. The final drawing approved by NHAI warranted extra work. The majority has held the claim maintainable and has sustained it in the sum as aforementioned. The dissent records that the claim is not even maintainable.

55. As noted in paragraphs 4 and 5 above, the schedule of quantities disclosed in the NIT were found to be, and if we may with apology use the expression, horribly out of sync with the reality. The reason was an old data generated by IIT Chennai and the design of the groynes prepared with reference thereto, overlooking the fact that due to waves, the topology of the sea bed is prone to change and indeed this is what had happened. When the respondent mobilize itself at the site, it dawned that there was a substantial difference in the sea bed profile compared to the one provided in the tender documents and this led the respondent to engage a consultant for conducting a Bathymetry survey (a task not to be

performed by the respondent but performed gratuitously) and based thereon a fresh design of the cross-sections of the groynes prepared. The same had to be approved by the NHAI. What the appellant did was to obtain an approval from IIT Madras and communicate the same to the respondent i.e. that the designs as revised upon review by IIT Chennai would form the basis for a revision of the bill of quantities, and the rates, with a rider that the revised design and substituted items statement was subject to approval by NHAI. The result was a further dispute emerging concerning a claim for excess work carried out by the respondent on account of the depth of the water at the groynes heads being deeper by more than 2 meter than what was envisaged in the revised drawings prepared by IIT Madras as also a round head of 25 meter diameter at each groyne, which was not conceived of either in the tender drawings when NIT was floated nor in the approval granted by IIT Madras.

56. 10 groynes had to be constructed as per the tender documents. Admittedly the structures were designed for maximum water depth of 3.2 meters and no Round-Heads were proposed. After NHAI approved the revised drawings which were released by the appellant to the respondent under cover of its letter dated May 26, 2004, a specific provision for round head at each groyne nose was provided for at a water depth of -5.5 meters. As per the respondent this was a variation as defined under clause 8.1 of the General Conditions of the Contract and it executed the works as contemplated by Clause 8.1 of the General Conditions of the Contract. Five reasons were advanced by the respondent in support of the claim, which have been noted by the majority arbitrators in para 10.2 of the award, with justification for the same in para 10.3 of the award. The learned arbitrators had noted the stand of the appellant that no such issue was raised when the final designs were communicated under cover of

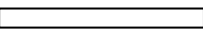
appellant's letter dated May 26, 2004. The learned arbitrators have noted that this issue was initially referred to a dispute resolution committee, but without any success. The learned majority arbitrators have noted that as per clause 6.3 of the agreement the designs prepared by the employer i.e. the appellant, were expressly stated to be based on detailed tests/surveys carried out at site and the design norms and specification given in the bid documents are the minimum to be provided and the responsibility for adequacy of the design rests with the employer. The learned arbitrators have noted that at a pre-bid meeting held on April 18, 2002, vide item No.5 of the minutes drawn up, it was confirmed by the appellant that the respondent shall review the design and engineering of the works by an experienced professional designer and suggest modifications, but the responsibility of adequacy of the design would still be that of the appellant. We may only add at this stage that though the learned arbitrators have not highlighted, it is apparent that the appellant proceeded with the notice inviting tender with reference to old worthless and useless data, overlooking that due to waves, the sea shore topology changes and the sea bed profile recorded in a particular year would not hold good for the subsequent year and thus the appellant was desperately trying to salvage its prestige, and the works, without making a candid admission of its negligence. The minutes were being recorded in a manner where one could argue that the design responsibility was that of the respondent, but the last line of the minutes were to the effect that the responsibility would always be that of the appellant. In para 11.1 of the award the learned majority arbitrators have highlighted the old data used while preparing the NIT, resulting in a bill of quantity shown which was extremely deficient. The learned majority arbitrators have also noted that in the approval letter dated March 02, 2004 the approval was expressly

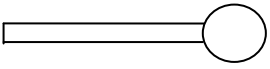
subject to final approval by NHAI. In para 11.3 of the award the learned majority arbitrators have noted that the bill of quantities which was revised and sent under cover of the letter dated March 02, 2004 by the appellant was obviously not based on the final construction drawings. The learned majority arbitrators have thereafter noted five deviations from the original contract in para 11.3 of the award, and in para 11.4, have concluded the issue as under:-

“11.4 AT is of the view that extra cost borne by the claimants in placing the stones at depths greater than (-) 3.2.M in all Groynes and particularly stones of much higher sizes i.e. 2.5 to 4.) MT at depths ranging from 3.2 to 5.5. M or even up to 7.0 M at far end of the round heads, involved substantial extra effort which was beyond the scope of original contract, and as such was reimbursable. Claimants have claimed ₹150. per MT as additional cost of handling, staking and placing of stones at depths greater than 3.M, out of which ₹50 is the cost of placing only of the stones in position. Since carriage to work site, handling and staking are common to all situations, only the cost incurred in placing the stones at greater depths is extra cost incurred by the claimants. Thus reimbursement for the extra effort put in by the claimants @ rate of ₹50/- in placing the stones at depths greater than specified in the contract is considered reasonable and payable.”

57. In paragraph 6 above we have already recorded reasons as to why there was enough scope for a dispute arising in the future and had recorded that same would be apparent from the facts which we would be further noting.

58. The time has come to note the said facts.

59. The design of the 10 groynes provided in the tender documents showed the groynes without round heads i.e. akin to a bar. The graphic representation would be :  Based thereon, the quantities for the filter, core and armour were disclosed in the NIT as 57150 MT,

328200 MT and 230770 MT for the three layers respectively. Under cover of the letter dated March 02, 2004, contents whereof we have noted in paragraph 4 above, the appellant sent the revised statement of the substituted items, but this was subject to the revised design and substituted item statements as per design which was to be finally approved by NHAI. Where was the need to do so on March 02, 2004 when NHAI had yet to approve the design? Be that as it may, by March 02, 2004 it had become apparent that another layer, called the secondary layer had to be laid. Therefore, under cover of the letter dated March 02, 2004 the substituted quantities were : 74462 MT for the filter layer. For the core and the secondary layer the substituted quantities were jointly indicated as 304985 MT for core layer, 7395 MT for secondary layer upto depth 0-1 meter where stones weighing between 50 kg to 100 kg had to be used and 125941 MT for depth 1 meter to 5.5 meter with stone weighting 100 kg to 300 kg to be used and for the armour layer 7001 MT of stones weighing between 500 kg to 1000 kg upto depth 0-1 meter, 27697 MT of stones weighing between 1000 kg to 2000 kg for depth between 1 meter to 3 meter, 92909 MT of stones weighing between 1000 kg to 3000 kg for depth between 3 meter to 5.5 meter and 34004 MT of stones weighing between 2500 kg to 4000 kg, with depth not mentioned. But when the drawings were finally approved by NHAI the shape of the groynes was changed and the graphic representation of the groynes would be 

60. When the revision in the drawings was being discussed and not knowing what the final shape of the groynes would take, on August 28, 2003 the appellant wrote a letter to the respondent, inter-alia, writing as under :-

“As far as the design for the nose portion is concerned, since only a maximum of (-) 3 m bed level is to be encountered no special designs have been envisaged. Should any need arise, the same will be considered at the appropriate time. As far as the ‘Turn around’ is concerned your attention is invited to clause 2 under mode of measurement of SCC of the Agreement (pg 179 of Agreement) which covers the subject. The exact location of the turn around can be decided for each Groyne in due course as the works proceed.”

61. Being written by persons with non-legal background, the learned Arbitrators have given further reasons in para 11.5 and 11.6, which a person with a legal background would have given before para 11.4 because the conclusion was being arrived at and therefore the entire reasoning had to be stated before the conclusion. But that does not mean that there is an error in the award which needs to be corrected, nor does it mean that the learned Arbitrators have gone by their ipse dixit. In paras 11.5 and 11.6, the learned Arbitrators have written as under :-

“11.5 The final design of IIT Madras, adopted at the execution stage indicates that approximately 60% by volume or 63% by weight of stones in the Groynes are to be placed at depths greater than (-)3 M. Relevant extract of the design details provided by IIT Madras are appended below:-

**Table 4: Design details of cross section of Groynes
0.0m – 1.0m water depth**

<i>Description</i>	<i>Material (Quarry stone in kg)</i>	<i>Volume (Cu.m)</i>	<i>Thickness(m)</i>	<i>Top Level (m)</i>
<i>Armour layer</i>	<i>500-1000</i>	<i>21</i>	<i>1.3</i>	<i>+4.2</i>
<i>Secondary Layer</i>	<i>50-100</i>	<i>20</i>	<i>0.6</i>	<i>+2.9</i>
<i>Core layer</i>	<i>1-60</i>	<i>23</i>	<i>2.5 (avg)</i>	<i>+2.3</i>
<i>Filter</i>	<i>10mm-50kg</i>	<i>9</i>	<i>0.3</i>	<i>-0.7</i>

<i>layer</i>				
<i>Toe layer</i>	<i>50-100</i>		<i>1.0</i>	<i>+0.3</i>

1.0m – 3.0m water depth

<i>Description</i>	<i>Material (Quarry stone in kg)</i>	<i>Volume (Cu.m)</i>	<i>Thickness(m)</i>	<i>Top Level (m)</i>
<i>Armour layer</i>	<i>1000-2000</i>	<i>31</i>	<i>1.4</i>	<i>+4.2</i>
<i>Secondary Layer</i>	<i>100-300</i>	<i>29</i>	<i>0.7</i>	<i>+2.8</i>
<i>Core layer</i>	<i>1-60</i>	<i>50</i>	<i>3.8 (avg)</i>	<i>+2.1</i>
<i>Filter layer</i>	<i>10mm-50kg</i>	<i>10</i>	<i>0.3</i>	<i>-2.7</i>
<i>Toe layer</i>	<i>100-300</i>		<i>1.0</i>	<i>-1.7</i>

3.0m – 5.5m water depth

<i>Description</i>	<i>Material (Quarry stone in kg)</i>	<i>Volume (Cu.m)</i>	<i>Thickness(m)</i>	<i>Top Level (m)</i>
<i>Armour layer</i>	<i>1000-3000</i>	<i>42</i>	<i>1.5</i>	<i>+4.2</i>
<i>Secondary Layer</i>	<i>100-300</i>	<i>33</i>	<i>0.7</i>	<i>+2.7</i>
<i>Core layer</i>	<i>1-60</i>	<i>81</i>	<i>5.7 (avg)</i>	<i>+2.0</i>
<i>Filter layer</i>	<i>10mm-50kg</i>	<i>12</i>	<i>0.3</i>	<i>-4.7</i>
<i>Toe layer</i>	<i>100-300</i>		<i>1.0</i>	<i>-3.7</i>

Head upto 5.5.m water depth

<i>Description</i>	<i>Material (Quarry stone in kg)</i>	<i>Volume (Cu.m)</i>	<i>Thickness(m)</i>	<i>Top Level (m)</i>
<i>Armour layer</i>	<i>2500-4000</i>	<i>36</i>	<i>1.8</i>	<i>+4.2</i>
<i>Secondary Layer</i>	<i>100-300</i>	<i>22</i>	<i>0.7</i>	<i>+2.4</i>

Core layer	1-60	60	6.4 (avg)	+1.7
Filter layer	10mm-50kg	8	0.3	-4.7
Toe layer	100-300		1.0	-3.7

11.6 Claimants have stated that a total of 4,97,236 MT of stones have been placed in the trunk portion of Groynes and Round-heads. Thus 63% of these stones i.e. approximately 3, 13,000 MT of stones have been placed at depths greater than the provisions of contract.

11.6 After careful consideration of all facts as brought in hereinbefore, AT has come to majority conclusion that Claimants are entitled to cost of placing the stones at depths greater than specified in the contract i.e. 3,13,000.MT @ ₹50.Per MT which works out to ₹1,56,50,000.(Rupees one crore fifty six lakhs and fifty thousand only) against the above claim.”

62. Concededly 6,95,879 MT of stone was used to construct the 10 groynes out of which 4,97,236 MT was used to construct the portions of the trunk and the round heads below the sea level and a finding of fact has been returned by the Arbitral Tribunal that 66% thereof i.e. approximately 3,13,000 MT stones had been placed at depths greater than what was conceived of as per the revised drawings approved by IIT Madras at the second stage and the final drawings approved by NHAI. The recompense has been worked out with reference to the data tabulated by the learned Arbitrators in para 11.5. It is common sense conclusion that if heavy stones have to be placed at deeper depths, labour cost and operating costs would rise. The learned Arbitrators have brought this out. The reasoning of the majority cannot be labeled as perverse. The reasoning of the majority proceeds as if the revision after IIT Madras accorded approval to the revised drawings was final. The reasoning that the respondent had agreed to the revision of the rates conveyed by the

appellant under its letter dated March 02, 2004 is clearly a perverse finding because it over looks, what the majority Arbitrators have noticed and so do we, that the letter dated March 02, 2004 clearly informed that what was proposed was tentative and was subject to the final approval which may be accorded by NHAI. Further, the portion of the letter dated August 28, 2003 written by the appellant which we have extracted in para 60 above itself shows that the appellant had agreed that the nose portion i.e. the head of the groynes was designed for a maximum depth of -3 meters and should need arise, the issue would be considered at an appropriate state and that the exact location of the turn around for each groyne would be decided in due course as the works proceed.

63. We simply highlight that the majority award has recompensed the respondent for the extra labour involved concerning claim No.2.

64. The three appeals are accordingly dismissed with costs, to be assessed by the Taxation Officer, to be borne by the appellant and received by the respondent.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

MARCH 15, 2016
mamta/skb