

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 23.12.2021

+ **O.M.P. (COMM.) 461/2020, I.A. NOS. 7760/2020 & 2327/2021**

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

....Petitioner

versus

KMC CONSTRUCTION LTD

....Respondent

Advocates who appeared in this case:

For National Highways :
Authority of India

Mr Arun Kumar Varma, Senior
Advocate with Mr Yamandeep Kumar
and Mr Shashank Bhansali,
Advocates.

For KMC Construction :
Ltd.

Ms Kiran Suri, Senior Advocate with
Mr Hitendra Nath Rath, Advocate.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter '**NHAI**') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an Arbitral Award dated 24.09.2019 (hereafter '**the impugned award**') rendered by an Arbitral

Tribunal constituted by three members (hereafter ‘the **Arbitral Tribunal**’).

2. NHAI challenges the impugned award to the limited extent that it allows KMC’s claims for certain extra items (E-2, E-4, E-12, E-16, R2-05, CD-02 & 03) forming part of Claim No. 1 and to the extent that it allows KMC’s Claim Nos. 12, 14 and 22.

3. Briefly stated the facts that are necessary to address the controversy are stated hereunder.

3.1 NHAI, by a Letter of Acceptance (LoA) dated 22.08.2001, awarded a contract for the work of ‘Widening to four lanes and strengthening of the existing two lane carriageway between Km 278/000 to Km 340/000 of Udaipur-Ratanpur-Gandhinagar Section of NH-8 in Rajasthan, package no. UG-1’ (hereafter ‘the **Project**’) to KMC. Subsequently, the parties entered into an agreement dated 05.10.2001 (hereafter ‘the **Agreement**’). In terms of the Agreement, KMC agreed to execute the works at a Contract Price of ₹164,75,76,353/-. The works for the Project were to commence on 30.10.2001 and completed by 30.04.2004.

3.2 It is KMC’s case that NHAI had failed to handover the site to it and had provided an incorrect Detailed Project Report (DPR). Despite this, KMC completed the project two months prior to the stipulated date of completion. The works were completed on 28.02.2004 at a Contract Price of ₹248,00,00,000/- against the original Contract Price of ₹164,75,76,353/-. KMC submitted its completion statement on

08.05.2004. It is KMC's case that the Engineer did not process the payments due to it and extended the defect liability period. Finally, the Engineer issued the Defect Liability Certificate on 24.05.2006. The Engineer issued a Statement at Completion proposing a recovery of ₹18,16,34,122/- against the Final Bill of ₹70,51,84,650/-. Further, the Engineer did not give its decision on the other sums payable to KMC.

3.3 NHAI invoked the Performance Bank Guarantee furnished by KMC in the sum of ₹16,47,57,636/-.

3.4 In view of the disputes, KMC invoked the Arbitration Agreement by a letter dated 16.09.2006 and nominated Sh. P.V. Rama Raju as an Arbitrator. NHAI nominated Sh. V.S. Dixit as its nominee Arbitrator. Both nominated Arbitrators appointed Sh. Prafulla Kumar as the Presiding Arbitrator and the Arbitral Tribunal was constituted on 12.11.2006.

3.5 In the meanwhile, KMC also filed a Writ Petition (bearing W.P. No. 18269/2006) before the High Court of Andhra Pradesh seeking interdiction of the invocation of the Bank Guarantee. By an order dated 29.11.2006, that High Court restrained NHAI from encashing the aforesaid Bank Guarantee. NHAI appealed against the aforesaid order before the Division Bench of the High Court of Andhra Pradesh and the Court ordered KMC to keep the Bank Guarantee alive during the course of the arbitration proceedings.

3.6 Before the Arbitral Tribunal, KMC raised twenty-two claims aggregating to ₹135,96,28,549/-. NHAI filed its Statement of Defence and also raised counter-claims.

3.7 By a letter dated 11.10.2013 addressed to the Arbitral Tribunal, both parties requested the Arbitral Tribunal to keep the arbitral proceedings in abeyance, to enable them to amicably resolve the disputes by Conciliation before the three CGM Committee and the Independent Settlement Advisory Committee (ISAC). However, the Conciliation was not successful and by a letter dated 23.06.2015, KMC requested the Arbitral Tribunal to resume the arbitral proceedings. Mr VS Dixit recused from the Arbitral Tribunal and Mr Ninan Koshi was appointed by NHAI in place of him. Mr Ninan Koshi and KMC's Arbitrator jointly appointed Mr SC Sharma as the Presiding Arbitrator on 19.04.2016.

4. On 24.09.2019, the Arbitral Tribunal delivered the impugned award. A tabular statement indicating the amounts awarded against the claims made by KMC is set out below:

Claim No.	Nomenclature of Claims	Amount of the Claim as per Applicant	Amount of Claims as per Award	Declaratory Claim for Interest as per Applicant	Interest on Claims as per Award
1	CLAIM No. 1 Variations ordered as per Clause 51.1 for which new rates are to be paid as per market rates in terms of Clause 52.1 and 52.2	7,62,12,757/-	3,19,51,622/-	38,81,56,355/-	5,80,24,145/-
i.	E2: Supplying and fixing of Netlon Geotextile behind	6,90,466/-	3,44,890/-	Amount included above in	

	abutments and wing walls			Claim No.1	
ii.	E3: Removal of existing tree stumps	15,87,359/-	15,87,359/-	--do--	
iii.	E4: Providing and fixing in position HYSD bars for Median Drain Chambers	1,33,85,106/-	72,42,390/-	--do--	
iv.	E5: Sand filling in open wells falling in construction area	7,52,005/-	5,22,413/-	--do--	
v.	E12: Painting of Kerbs	5,93,462/-	4,74,416/-	--do--	
vi.	E16: Pedestrian Guard Railing	6,30,840/-	5,12,188/-	--do--	
vii.	R1.02: PCC M:15 grade Cement Concrete for RCC Retaining Walls	3,13,367/-	Nil	--do--	
viii.	R1.03: PCC M:25 grade Cement Concrete for RCC Retaining Walls	16,92,228/-	Nil	--do--	
ix.	R1.04: Providing and fixing in position HYSD reinforcement bars	32,49,271/-	Nil	--do--	
x.	R2.05: Construction of Stone Masonry in CM (1:3) for Masonry Retaining Wall	2,07,99,485/-	8,64,800/-	--do--	
xi.	UD.02: Construction of RCC Urban Drains as per approved Drawing	2,91,41,234/-	1,86,85,239/-	--do--	
xii.	CD.02: Providing Encasement to Cross Ducts with M: 15 Grade Concrete	32,12,2611/-	17,17,927/-	--do--	
xvi.	CD.03: Providing 150 mm dia. PVC Pipe in Cross Ducts				
2.	CLAIM NO.2 New rates to be paid for the quantities executed more than 25% of Bill of Quantities and 2% of Contract Price as per sub-clause 52.2	27,62,38,125/-	11,24,51,315/-	1,40,99,62,986 /-	20,42,11,587/-
3.	CLAIM NO. 3 Escalation to be paid on Base Rates as per clause 70.1 (Price Adjustment) and not after discounting the base rate by the rebate	2,62,01,641/-	Nil	13,37,37,306/-	Nil

4.	CLAIM NO.4 Classification of roadway excavation materials as per clause 301.2.1 (ii) attracting payment under Item No.: 2.01(b), but payment made under item Nos. 1.02(a) and 2.01(a)	3,99,84,686/-	1,95,93,580/-	20,40,88,148/-	3,55,81,941/-
5.	CLAIM NO.5 The rebate is limited to BOQ quantity only and cannot be applied to work done beyond BOQ quantities	9,65,26,231/-	Nil	59,84,79,236/-	Nil
6.	CLAIM No.6 Rocky Sub grade is to be paid as per clause 301.6 under item No.: 2.10 of BOQ	3, 75,24,163/-	Nil	19,15,29,250/-	Nil
7.	CLAIM NO. 7 Payments not made for the diversions made as per Engineer's instructions with 200 mm thick WMM and 40 mm thick DBM	47,99,749/-	28,34,132/-	2,44,98,676/-	51,46,783/-
8.	CLAIM NO.8 Payments for routine maintenance not made. Payment to be released as per clause 3002	19,29,273/-	10,92,967/-	98,47,314/-	19,84,828/-
9.	CLAIM NO.9 Balance payment to be made under item No 12.09 for planting and maintenance of median hedges and tree sapling	7,18,183/-	7,18,183/-	36,65,719/-	13,04,220/-
10.	CLAIM NO. 10 Payment of Escalation for Bitumen content in Tack Coat and Prime Coat to be paid as per Clause 70.5(ii)a	30,18,985/-	Nil	22,65,827/-	Nil

11.	CLAIM NO. 11 Reimbursement of Seigniorage Charges recovered from the bill on account of Earthwork (minor minerals)	14,35,599/-	Nil	73,27,524/-	Nil
12.	CLAIM NO. 12 Further sums are to be paid for the variations exceeding 15% of the Effective Contract Price	22,63,81,902/-	3,93,83,321/-	72,98,79,504/-	6,66,05,072/-
13.	CLAIM NO. 13 Bonus not paid for early completion of 6 months (only paid for 2 months)	4,00,00,000/-	Nil	20,41,66,313/-	Nil
14.	CLAIM NO. 14 Costs to be paid for idling of Men and Machinery due to transporter's strike and due to Mining Department Instructions	62,57,800/-	47,35,147 I-	2,01,75,818/-	80,08,080/-
16.	CLAIM NO. 16 Cost to be paid for rectification of damages caused due to accidents	68,59,334/-	Nil	2,21,15,228/-	Nil
17.	CLAIM NO. 17 Reimbursement of amount towards cost of repairs after DLP i.e. one year after Taking Over Certificate	42,63,034/-	7,69,350/-	1,37,44,478/-	13,01,124/-
19.	CLAIM NO. 19 Losses suffered by the contractor as a consequence of failure to release the Performance Bank Guarantee on the expiry of defect liability period	55,78,89,631/-	4,07,91,985/- (Including interest)	67,69,71,248/- (Including interest)	1,73,70,736/- (Including interest)

20.	CLAIM NO. 20 Interest payable to the contractor for delay in release of Additional Performance Bank Guarantees	59,29,566/-	Nil	1,91,17,556/-	Nil
22.	CLAIM NO. 22 Interest is to be paid for unpaid executed items from the date of completion of the work	461,90,07,700 /-	38,21,67,760/-	398,27,57,23/-	Sum of as above (Excluding Claim No.19)
23.	Declare that the letter dated 29.07.2006 is illegal, void, ab initio and of no effect, being contrary to law and in violation of the terms and conditions of the contract		Nil		Nil

5. The Arbitral Tribunal rejected the counter-claims preferred by NHAI. A tabular statement setting out the counter-claims is given below:

Claim No.	Nomenclature of Counter-Claims	Amount of the Counter-Claims as per Opposite Party
Claim- A	Recoveries on various accounts (Non-Refundable)	
i.	Scrap Steel of RCC Slab & RC Pipes	1,42,005/-
ii.	Dismantled Mansory Stone	5,48,029/-
Claim –B	Recoveries in IPC's (Non-refundable)	
i.	Recoveries on account of New Rock rates and other items with interest	14,91,24,898/-
Claim- C	Amount to be withheld on account of non-submission of NOC disputes etc.	
i.	Mining Department dues (refundable)	1,70,87,188/-
ii.	EPF dues (refundable)	66,56,014/-
iii.	Labour Case (refundable)	3,00,000/-
iv.	Claims by M/s Akschat Farms refundable)	8,00,000/-
v.	Withheld amount of escalation for want of submission of invoices of material consumed (refundable)	21,70,171/-

6. KMC filed an application under Section 33 of the A&C Act dated 22.10.2019, *inter alia*, seeking modification of the impugned award in respect of reimbursement of commission paid for the Bank Guarantee. KMC claimed that there was an error in its calculation of the Commission paid to the Bank. However, the Arbitral Tribunal rejected the same by an order dated 21.11.2019.

Submissions

7. At the outset it is necessary to note that NHAI seeks that the impugned award be set aside to the limited extent that it has allowed KMC's claims for certain extra items (E-2, E-4, E-12, E-16, R2-05, CD-02 & 03) forming part of Claim No. 1 and has allowed KMC's Claim Nos. 12, 14 and 22. NHAI does not challenge the Arbitral Tribunal's decision to reject its counter-claims.

8. Mr Varma, learned senior counsel appearing for NHAI has assailed the impugned award on four fronts. First, he submitted that the decision of the Arbitral Tribunal to award Claim No.1 in respect of certain items is *ex facie* erroneous. He contended that the Arbitral Tribunal had erred in disregarding that KMC had accepted the Variation Orders in respect of the extra items in question. The said Variation Orders included the rates for the items in question. Notwithstanding the above, the Arbitral Tribunal had awarded substantial amounts after reworking the rates determined by the Engineer and as accepted by KMC.

9. Second, he submitted that the Arbitral Tribunal had erred in awarding an amount of ₹3,93,83,321/- on account of additional overheads as the total contract value had exceeded the Effective Contract Price by over 15%. However, there was no evidence or material on record to substantiate any increase in overheads. He submitted that even if it is accepted that KMC was entitled to an additional amount on account of overheads, it was nonetheless, required to prove the same. However, in this case, there was no evidence on record to show any increased overheads.

10. Third, he submitted that the Arbitral Tribunal had erred in awarding costs for idling of men and machinery due to transporters strike and instructions issued by the Mining Department. KMC contended that it was entitled to be paid costs for idling of men and machinery. Although the Arbitral Tribunal accepted the said contention, there were no pleadings or any evidence for determining the amount as awarded. He stated that KMC had not led any evidence to establish that it had paid or incurred any cost for men and machinery during the transporters strike and closure of quarry on the instructions issued by the Mining Department.

11. He also submitted that the claim raised by KMC was barred by limitation. The claims were made before the Engineer. However, the Engineer did not render any decision. Therefore, the cause of action had arisen after eighty-four days from the date of issuance of the notices, which were issued in December 2002. Although, the said contention was noted by the Arbitral Tribunal, it did not render any decision

regarding the same. He relied on the decision of the Supreme Court in the *State of Gujarat v. M/s Kothari and Associates: (2016) 14 SCC 761* in support of his contention that the claims were barred by limitation.

12. Lastly, he submitted that the award of interest at the rate of 16% per annum was excessive and the rate of interest was liable to be reduced. He referred to the decision of the Supreme Court in *Vedanta Limited v. Shenzhen Shandong Nuclear Power Construction Company Limited: (2019) 11 SCC 465* in support of his contention.

13. Ms Suri, learned counsel appearing for KMC countered the aforesaid contentions. She submitted that KMC's claim for idling of men and machinery was awarded on the basis of the rates as published by Ministry of Road Transport and Highways in MoRTH Data Book for the year 2001. The relevant pages from the said book were placed on record. She also handed over a copy of those pages during the course of submissions.

Reasons and Conclusion

14. The first question to be examined is whether the decision of the Arbitral Tribunal in allowing KMC's Claim no. 1 for additional amounts in respect of certain items of work directed to be executed by the Engineer in addition to the Bill of Quantity (BOQ) items, is patently illegal.

15. During the course of the execution of the works, certain new items were directed to be executed by the Engineer. Undisputedly, the Engineer was required to fix rates for the said items. KMC claimed that

the rates were required to be fixed with reference to the market rates, nature of the item, variation in the cost of materials, variation in operation cost etc. In terms of the Agreement, KMC submitted analysis of rates in respect of each item in question. However, the Engineer had finalised the rate arbitrarily and without considering the actual cost. Accordingly, KMC claimed additional amount based on the difference in the value of work at the rates as claimed by KMC and as fixed by the Engineer.

16. NHAI is aggrieved on account of the amounts awarded by the Arbitral Tribunal in respect of seven items (E-2, E-4, E-12, E-16, R2-05, CD-02 & 03). A tabular statement setting out the relevant items, the amount claimed by KMC and the amount awarded against such claims is set out below:

“S. No.	Claim no. and description of claim	Amount claimed (Rs.)	Amount awarded (Rs.)
1.	<u>Claim No.1</u> • Supplying and fixing of Netlon Geo-Textile behind abutments and wing walls • Providing and fixing in position HYSD bars for Median Drain Chambers • Painting of Kerbs • Pedestrian Guard Railing • Construction of Stone Masonry in CM (1:3) for Masonry Retaining Wall	6,90,466/- 1,33,85,106/- 5,93,462/- 6,30,840/- 2,07,99,485/-	3,44,890/- 72,42,390/- 4,74,416/- 5,12,188/- 8,640,800/-

	• Providing Encasement to Cross Ducts with M:15 Grade Concrete & CD-03: Providing 150 mm dia. PVC Pipe in Cross Duct	32,12,261/-	17,17,927/-
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17. NHAI's contention that the impugned award is vitiated by patent illegality is premised on the assumption that the Arbitral Tribunal was precluded from awarding any amount as KMC had accepted the rates as fixed by the Engineer and had signed the Variation Orders in acceptance thereof.

18. KMC had contended that it was not precluded from raising its claim as the rates fixed by the Engineer were *ex facie* arbitrary. KMC had submitted the analysis of rates for each of the items. Although the Engineer had fixed the rates, it had overlooked certain cost components that were available on record.

19. The Arbitral Tribunal examined the analysis of rates and found that there were apparent errors. Accordingly, the Arbitral Tribunal determined the rates for certain items as set out above. The Arbitral Tribunal rejected NHAI's contention that KMC was precluded from challenging the said rates. And, accepted KMC's contention that it had signed the Variation Orders as there was an inordinate delay in determining the rates and it had to sign the same for its payments to be processed. KMC had submitted its rates at the time of executing the items. The Arbitral Tribunal noted that no objections were raised at the material time and KMC was allowed to proceed with and complete the items of work. There was an inordinate delay on the part of the

Engineer in determining the rates. It did so, much after the work had been completed. KMC contended that NHAI was estopped from challenging the rates. The Arbitral Tribunal accepted KMC's contention that the rates submitted by it were accepted without objection by the Engineer at the material time and it had permitted KMC to proceed with the work on that basis.

20. KMC had pleaded that it had signed the Variation Orders as the delay was affecting its cash flow. The Arbitral Tribunal had found that KMC had taken up the matter with the Engineer but had signed the Variation Orders as the payments had already been unreasonably delayed. However, KMC had treated the same as provisional.

21. The issue whether KMC was bound by the Variation Orders as accepted by it, in the given facts and circumstances, is a contentious one. The Arbitral Tribunal had evaluated the circumstances and material before it and had rejected NHAI's contention that KMC was bound by the Variation Orders. Merely because KMC had signed the Variation Orders it is not dispositive of KMC's claims. KMC's contentions in this regard were evaluated and considered by the Arbitral Tribunal. The decision of the Arbitral Tribunal is not amenable to a re-evaluation on merits. It is trite law that the arbitral award cannot be interfered with except where it is found to be patently illegal or in conflict with the public policy of India.

22. In *M/s PCL-Suncon (JV) v. National Highways Authority of India: 2015 SCC OnLine Del. 13192*, the Division Bench of this Court

had observed that “*Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review*”. Clearly, the view of the Arbitral Tribunal is a plausible one and it is not permissible for this Court to interfere with the same.

23. The second question to be considered is whether the impugned award is vitiated by patent illegality to the extent that the Arbitral Tribunal had awarded a sum of ₹3,93,83,321/- against KMC’s claim for a sum of ₹22,63,81,902/-, on account of variation in the contract value exceeding 15% of the Effective Contract Price (Claim No.12).

24. KMC had claimed that it was entitled to additional expenditure on account of overheads and profit resulting from increase in the value of the Contract as it had exceeded 15% of the Effective Contract Price. The original contract price was ₹164,75,76,653/-. However, KMC had executed additional work for a sum of ₹90,35,23,147/- which exceeded 15% of the Effective Contract Price. Thus, the Arbitral Tribunal found that the additional value of the work above 15% of the contract price was ₹65,63,88,694/- and in terms of Clause 52.3 of the General Conditions of Contract (GCC), the Engineer was required to determine additional overheads. Clause 52.3 of the GCC is set out below:

“52.3. 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 percent of the "Effective Contract Price" (Which for the purposes of this Sub-clause shall mean the Contract Price, excluding Provisional Sums and allowances 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-deductions shall be in excess of 15 percent of the Effective Contract Price."

25. KMC claimed that the variation amounted to ₹115,26,64,060.44/-. The value of additional items beyond the permissible 15% of the Effective Contract Price amounted to ₹90,55,27,607.49/-. KMC claimed that it was entitled to additional overheads of ₹13,58,29,141.12/- calculated at the rate of 15% of the said amount and further 10% of the said amount as profits, quantified at ₹9,05,52,760.75/-. KMC, thus, claimed that it was entitled to ₹22,63,81,901.87/-.

26. NHAI disputed the aforesaid claim. According to NHAI, no amount was payable as the overheads were included in the rates fixed by the Engineer under Sub-Clauses 52.1 and 52.2 of the GCC. NHAI also stated that KMC was not entitled to any amount as it had failed to produce any evidence to prove the site and general overheads costs. KMC had relied on certain letters. However, NHAI stated that the said letters were not sufficient evidence for substantiating the claims. NHAI also disputed the manner of computing the variation above the threshold of 15% of the Effective Contract Price.

27. The Arbitral Tribunal had interpreted Clause 52.3 of the GCC and held that KMC was entitled to additional overheads on account of increase in the value of the Contract beyond the threshold limit of 15%. It relied upon the decision of the Division Bench of this Court in *M/s PCL-Suncon (JV) v. National Highways Authority of India: 2015 SCC OnLine Del. 13192*. Paragraph no. 18 of the said decision is relevant and is set out below:

“18. The Arbitral Tribunal held that valuation of the omitted items was to be made under Clause 52.1, independent of Clause 52.3. This Court is in agreement with this view. A look at the terms of the contract would show that Clause 52.1 and 52.2 on the one hand and 52.3 on the other contemplate two different points of time in the execution of the contract. Under 52.1, the Engineer is entitled to affect any variation by way of addition or deletion of items from the BOQ. Clause 52.1 mandates that such variations made during the execution of the work must be valued at the same time, i.e. during the subsistence of the contract, at the time of the variation itself. Clause 52.3 operates at a later point in time, i.e. at

the time when the Taking Over Certificate is issued, which necessarily contemplates the completion of the work and the end of the Contract. It is at this time, that all previously valued variations must be taken into account to ascertain whether the cumulative valuation has either exceeded or fallen below 15 percent of the price of the effective contract price. In other words, the valuation under Clause 52.1 precedes the estimation of the valuation vis-a-vis the effective contract price under Clause 52.3. Clause 52.3 therefore does not function as a restriction against the initial mandatory valuation of any variation made in the BOQ. It operates independently of it. Clause 52 can be said to be in three steps,

- (i) Clause 52.1 being the sub clause determining initial valuations of the varied work,
- (ii) Clause 52.2 being the sub clause where when the valuation under 51.1 is of such nature as to effect the price of other items of the BOQ, prices of such affected must be re-negotiated;
- (iii) Clause 52.3, which leads to the aggregate estimation of all variations at the time the work, is completed and the contract realized.

Clearly then, 52.3 does not in any manner limit the individual valuations made during the subsistence of the contract. In fact, the wording of Clause 52.3 could not have made the situation clearer; it begins with the words “if on the issue of the Taking-Over Certificate” expressly signifying the time at which the threshold of 15% becomes important. If this were not reason enough, Clause 52.3 itself clearly refers to the valuation of the variation having already been carried out under Clause 52.1 and 52.2 by employing the words “all varied work valued under Sub-Clauses 52.1 and 52.2”.

28. In view of the above, NHAI's contention that the impugned award is patently illegal as the Arbitral Tribunal erred in interpreting Clause 52.3 of GCC, is unsustainable. As noted above, it is not necessary for this Court to re-adjudicate the disputes. The Arbitral Tribunal's interpretation of Clause 52.3 of the GCC is clearly a plausible interpretation. It is well settled that the Arbitral Tribunal is the final adjudicator regarding interpretation of the contract [See: *McDermott International Inc. v. Burn Standard Co. Ltd and Ors.: (2006) 11 SCC 181*].

29. In view of the above, no interference with the impugned award is warranted on account of the Arbitral Tribunal's interpretation of Clause 52.3 of the GCC. The contention that no amount is payable to KMC as it had not substantiated its claim by producing any evidence regarding incurring additional overheads, is unpersuasive. A plain reading of Clause 52.3 of the GCC indicates that the Engineer was required to determine the additional overheads, having regard to the contractor's site and general overhead costs of the Contract. This indicates that the Engineer was required to play a pro-active role and determine the additional cost in consultation with the employer (NHAI). The Arbitral Tribunal found that the Engineer had not done this exercise and therefore, it was apposite for the Arbitral Tribunal to determine reasonable overheads. The Arbitral Tribunal held that general overheads charges at the rate of 6% of the additional work done would be reasonable, bearing in mind that the initial establishment of KMC would require augmentation above the BOQ rates. It is material to note

that the KMC's claim for additional overheads was not one of damages but of additional contract price and it was entitled to receive the same on account of additional works executed by it. Ms Suri had referred to certain documents including the analysis of rates issued by Ministry of Road Transport and Highways (MoRTH) and pointed out that MoRTH had accepted overhead cost at 10%. She had also referred to the Delhi Schedule of Rates where overheads at the rate of 10% of the item rates have been accepted. The decision of the Arbitral Tribunal to determine a reasonable compensation for the same warrants no interference in these proceedings.

30. It is also necessary to point out at this stage that NHAI has not contested that 6% of the overhead charges are unreasonable. In view of the above, this Court finds no reason to set aside the impugned award.

31. The next question to be examined is whether the impugned award to the extent that KMC's claim for idling of men and machinery due to transporters' strike and due to instructions issued by the Mining Department (Claim No.14), is patently erroneous.

32. KMC had claimed a sum of ₹62,57,800/- as cost for idling of men and machinery. The claim as articulated by KMC in its Statement of Claim is set out below:

“3.14 CLAIM NO.14 - Rs.62,57,800: Costs to be paid for Idling of Men and Machinery due to Transporters strike and due to Mining department instructions.

The Claimant states it is also entitled to idling charges for the period 14-4-2003 to 23-4-2003 in view of the transporters strike, in the sum of **Rs.38,06,632/-**, and due to idling of machinery because of stoppage of work by the Mining Department from 10-12-2002 to 13-12-2002, in the sum of **Rs.24,51,168/-**, as per the statement appended herewith and marked as **Annexure - XIV.**”

33. KMC had included an Annexure (Annexure - XIV) to its Statement of Claim setting out its list of machinery, which according to KMC, was kept idle on account of stoppage of work due to transporters’ strike during the period 14.04.2003 to 23.04.2003 and on account of stoppage of work from 10.12.2002 to 13.12.2002 on account of instructions issued by the Mining Department.

34. NHAI had contested the aforesaid claim, essentially, on three grounds. First, it had submitted that KMC’s claims were barred by limitation. Second, it had submitted that events such as transporters’ strike and stoppage of work on instructions of the Mining Department did not fall within the purview of employer’s risk under Clause 20.4 of the Conditions of Particular Application (COPA). And third, it submitted that KMC had failed to produce any documentary evidence regarding idling of men and machinery.

35. The Arbitral Tribunal referred to Clause 20.4 of COPA and rejected NHAI’s contention that events such as transporters’ strike and Mining Department’s instructions to stop work were not covered under Clause 20.4 of COPA.

36. Clause 20.4 of COPA reads as under:

“Sub-clause 20.4 Employer’s Risks

Amend sub-clause 20.4 to read as follows:

The Employer’s risks are

- (a) Insofar as they directly affect the execution of the Works in the country where the permanent Works are to be executed:
 - (i) War and hostilities (whether was be declared or not), invasion, act of foreign enemies;
 - (ii) rebellion, revolution, insurrection or military or usurped power, or civil war,
 - (iii) ionizing radiations, or contamination by radioactivity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
 - (iv) pressure waves caused by aircrafts or other aerial devices traveling at sonic or supersonic speeds;
 - (v) riot, commotion or disorder, unless solely restricted to the employees of the Contractor or of his Sub contractors and arising from the conduct of the Works;
- (b) loss or damage due to the use or occupation by the Employer of any Section or part of the Permanent Works, except as may be provided for in the Contract.
- (c) Loss or damage to the extent that it is due to the design of the Works, other than any part of the design provided by the Contractor or for which the contractor is responsible, and

(d) Any operation of the forces of nature (insofar as it occurs on the Site) which in experienced contractor:

- (i) could not have reasonably foreseen, or
- (ii) could reasonably have foreseen, but against which he could not reasonably have taken at least one of the following measures:
 - (A) prevent loss or damage to physical property from occurring by taking appropriate measures, or
 - (B) insure against such loss or damage.”

37. The Arbitral Tribunal also referred to Clause 12.2 of the GCC and held that events in question – transporters’ strike and stopping of quarrying by the Mining Department – constituted obstructions, which could not have been foreseen by KMC. Thus, in terms of Clause 12.2 of the GCC, KMC was entitled to extension of time as well as cost that may have been incurred on account of such obstructions. KMC was required to give a notice in terms of the said clause and the Engineer was required to determine the cost as well as extension of time, in consultation with NHAI. Admittedly, the said notices were issued by KMC on 12.12.2002. Ms Suri had also handed over a copy of the letters dated 12.12.2002 and 13.12.2002 informing the Team Leader regarding stoppage of the mining activities by the Mining Department. The Engineer had after a detailed analysis found that the works had been disrupted for a period of six days on account of instructions issued by the Mining Department. Similarly, the Engineer had determined the delay on account of transporters’ strike and had recommended extension of time for a period of six days. Accordingly, the Arbitral

Tribunal held that KMC was entitled to idling charges for men and machinery for a period of four days in respect of the instructions issued by the Mining Department and for a period of six days on account of transporters' strike.

38. The decision of the Arbitral Tribunal that events such as transporters' strike and instructions issued by the Mining Department fall within the scope of Clause 20.4 of COPA warrants no interference as the said view is a plausible one and construction of the contract is within the jurisdiction of the Arbitral Tribunal.

39. The Arbitral Tribunal's view that KMC was entitled to compensation for idling of men and machinery warrants no interference.

40. The contention that KMC's claim is barred by limitation has not been considered by the Arbitral Tribunal. KMC has contested the contention. According to KMC, its claim was not barred by limitation. The defect liability period had expired in 2006. NHAI had rejected its claims finally in June 2007. KMC had countered NHAI's submissions that its claims were barred by limitation. However, the said issue was not decided.

41. Although Mr Varma is correct that the Arbitral Tribunal has not specifically dealt with NHAI's defence that KMC's Claim No. 14 was barred by limitation. However, it is apparent that the Arbitral Tribunal had rejected the same. This Court is of the view that NHAI's contention that the petitioner's claims were barred by limitation is not sustainable.

The contract in question was a running contract and the claims made by the petitioner were well within the period of limitation after its claims were rejected after completion of the Project. The reliance placed by the petitioner in the case of *State of Gujarat v. M/s Kothari and Associates* (*supra*) is not persuasive. In that case, the Court had considered a case relating to a contract that spanned several seasons and breach of obligations to provide site in one season crystallised the cause of action. This is not so in this case. Indisputably, the contractor could raise its claims if the same were not considered at the time of the Final Bill.

42. The only question that remains to be examined is whether the said claim is substantiated in any manner. Mr Varma contended that the Arbitral Tribunal has simply accepted the claim without considering that the amounts as claimed were not quantified.

43. The aforesaid contention is not merited. The Arbitral Tribunal had examined the claim and was persuaded to accept the claim. It reasoned that the Engineer was required to determine the cost of idling, which was not done. KMC has informed the Engineer regarding the events that had resulted in stoppage of work. The Engineer had recommended extension of time for completion of the works but had not determined the costs to be paid. KMC had relied upon the MoRTH Data Book for the year 2001, which indicated the usage charges in respect of machinery. The Arbitral Tribunal had proceeded to determine the charges on the said basis. Mr Varma contended that the usage charges would also include costs for operating the machinery and thus, was not an appropriate measure of idling costs. However, it does not

appear that any such contention was advanced before the Arbitral Tribunal. It is also well settled that there is some element of estimation involved in assessing costs. If the measure is based on relevant material, the arbitral award cannot be called into question. This is so because the decision of the Arbitral Tribunal is final and this Court is not required to carry out an exercise of re-adjudicating the disputes. An arbitral award may be impeached on the ground of patent illegality but as explained by the Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd. v Delhi Metro Rail Corporation Ltd.: 2021 SCC OnLine SC 695*** “*patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression ‘patent illegality’..*”. And, it is impermissible for the courts to reappreciate evidence to determine whether an arbitral award suffers from patent illegality on the face of the record.

44. Insofar as the claim for interest is concerned, KMC has also challenged the same *albeit* on a different ground. According to NHAI, the award of interest at the rate of 16% per annum is unreasonable. KMC claims that the interest was required to be paid as agreed in terms of the Contract. This Court finds no ground to interfere with the award of interest on the ground that the rate of interest is unreasonable. The Arbitral Tribunal has wide discretion in awarding interest under Section 31(7) of the A&C Act. Interestingly, this is also NHAI’s contention, advanced to contest KMC’s contention that the Arbitral Tribunal has erred in not awarding interest at the rate as agreed under the Agreement.

The rate of interest under Section 37(1)(b) of the A&C Act prior to 23.10.2015 was specified as 18% per annum. The award of interest at the rate of 2% above State Bank of India's Prime Lending Rate cannot be held to be unreasonable. In view of the above, the Court finds that the impugned award cannot be set aside on the grounds as urged by NHAI.

45. The petition is, accordingly, dismissed. The pending applications are also disposed of.

DECEMBER 23, 2021
RK/v

VIBHU BAKHRU, J



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