IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No.4993 of 2014 (O&M)
Date of decision : 29.03.2016

M/s Jaiprakash Associates Ltd.

...Appellant

Versus

NHPC Ltd. and ors.

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

1. Whether reporters of local newspapers may be allowed to see judgment ?
2. To be referred to reporters or not ?
3. Whether the judgment should be reported in the Digest ?

Present: Mr. Lovkesh Sawhney, Advocate and
Mr. Pankaj Gupta, Advocate for the appellant.

Mr. Ajit Pudussary, Advocate with
Mr. Gaurav Chopra, Advocate for the respondents.

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AMIT RAWAL, J.

The appellants are aggrieved of the order dated 26.03.2014, whereby objections filed by the respondents against the arbitration award dated 22.08.2010 has been accepted and the award passed in their favour has been set aside.

It would be apt to give brief preface of the controversy leading to the lis/dispute to the Arbitrator. As per the agreement dated 21.03.2001, a contract for construction of underground power house, surge shaft, Pressure shaft, Part Head Race Tunnel including Adit-V, Switchyard and TRT (3 nos.) for Teesta Hydroelectric Project Stage-V in with NHPC was awarded to the appellant. The stipulated date of completion of work as per the contract was 21.09.2005 whereas, work had been completed on 21.01.2008. Since dispute arose between the parties during the execution of various components of agreed work and the contract envisage resolution of dispute through arbitration and the matter was referred to the Arbitrator. The basic claim before the Arbitrator was that additional cost, occasioned to the claimant in implementing the work was increase in the minimum wages due to the notifications promulgated by Government of Sikkim, has not been taken into account while tendering and the same has also not been compensated taking into consideration the price adjustment formulae contained as per Sub Clause (i) (ii) (iii) of Clause 70 of the Contract of Conditions of Particular Application (hereinafter to be called as "Contract of COPA") thus the claim of additional expenditure is liable to be paid as per sub-clause 70.8 of COPA. Various letters in this regard were sent for such additional cost but the request was rejected firstly on 16.02.2006 and finally on 12.01.2007. The aforementioned claim was contested by the respondent as noticed from the contents of the award. During the course of arbitration deliberations, number of other documents, statements Annexures and various judgments of High Court and Supreme Court were submitted by both the parties. The parties did not object to the procedure adopted by the Arbitrator Tribunal and were given ample opportunities. It would be apt to reproduce the Clause 70 dealing with the changes in cost and legislation of COPA:-

"Clause 70 Changes in Cost and Legislation

Sub Clause 70.1 Price Adjustment

The amounts payable to the Contractor, in various currencies pursuant to Sub-Clause 60.1, shall be adjusted in respect of the rise or fall in the cost of labour, Contractor's Equipment, Plant, material and other inputs to the Works, as specified in Appendix to Bid by applying to such, amounts the formulae prescribed in Sub-Clause 70.3 hereafter.

Sub Clause 70.2 other Changes in Cost

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

Sub Clause 70.3 Adjustment Formulae

The adjustment to the Interim Payment Certificates in respect of changes in cost and legislation shall be determined from separate formulae for each of the currencies of payment and each of the types of construction work to be performed and Plant to be supplied. The formulae will be of the following general type:

Pn: A+b.Ln/Lo+C. Mn/Mo+d.En/Eo+etc

where

Pn is a price adjustment factor to be applied to the amount in each specific currency for the payment of the work carried out in the subject month, *determined in accordance with Sub-Clause 60.1 (d) & with Sub Clauses 60.1(e) and (f) where such variation and Daywork are not otherwise subject to adjustment;*

A is a constant, to be proposed by the bidder as per Appendix to Bid, representing the non-adjustment portion in contractual payments;

b, c, d, etc. are weightings or coefficients representing the estimated proportion of each cost element labour, materials, equipment usage, etc.) in the Works or sections thereof, net of Provisional Sums as specified in the Appendix to Bid;

Ln, Mn, En, etc. are the current cost indices or reference prices of the cost elements in the specific currency for month 'n', determined pursuant to Sub-Clause 70.5, applicable to each cost element; and

Lo, Mo, Eo, etc. are the base cost indices or reference prices corresponding to the above cost elements at the date specified in Sub-Clause 70.5.

If a price adjustment factor is applied to payments made in a currency other than the currency of the source of the index for a particular indexed input, a correction factor Zo/Z will be applied to the respective component factor of Pn for the formula of the relevant currency. Zo is the number of units of currency of the country of index, equivalent to one unit of the currency of payment on the date of the base index, and Z is the corresponding number of such currency units on the date of the current *index.*

Sub-Clause 70.4 Source of Indices and weightings

The sources of indices shall be those listed in the Appendix to Bid, as approved by the Engineer. Indices shall be appropriate for their purpose and shall relate to the Contractor's proposed source of supply of inputs on the basis of which his Contract Price and expected foreign currency requirements shall have been computed. As the proposed basis for price adjustment, the Contractor shall have submitted with his bid the tabulation of weightings and Sources of Indices in the Appendix to Bid, which shall be subject to approval by the Engineer.

Sub-Clause 70.5 Base, Current and Provisional Indices

The base cost indices or prices shall be those prevailing on the day 28 days prior to the latest date for submission of bids. Current indices or prices shall be those prevailing on the day 28 days prior to the last day of the period to which a particular Interim Payment Certificate is related. If at any time the current indices are not available, provisional indices as determined by the Engineer will be used, subject to subsequent correction of the amounts paid to be Contractor when the current indices become available.

Sub-Clause 70.6 Adjustment after Completion

If the Contractor fails to complete the Works within the time for completion prescribed under Clause 43, adjustment of prices thereafter *until the date of completion of the Works shall be made using either the indices or prices relating to the prescribed time for completion, or the current indices or prices, whichever is more favourable to the Employer, provided that if an extension of time is granted pursuant to Clause 44, the above provision shall apply only to adjustment made after the expiry of such extensions of time.*

Sub-Clause 70.7 Weightings

The weighing for each of the factors of cost given in the Appendix to Bid shall be adjusted if, in the opinion of the Engineer, they have been rendered unreasonable, unbalanced or inapplicable as a result of varied or additional work already executed or instructed under Clause 51 or for any other reason.

Sub-Clause 70.8 Subsequent Legislation

If, after the date 28 days prior to the latest date for submission of bids for the Contract, there occur in the country in which the works are being or are to be executed changes to any National or State Statute, Ordinance, Decree or other Law or any other regulation or by-law of any local or other duty constituted authority, or the introduction of any such State, Statue, Ordinance, Decree, Law, Regulation or by-law which causes additional or reduced cost to the Contractor, other than the preceding sub-Clauses of this clause, in the

> *execution of the Contractor, such additional or reduced cost shall, after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be added to or deducted form the Contract Price and the Engineer shall notify the Contractor accordingly, with a copy to the employer. Nothwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have taken into account in the indexing or any inputs to the Price Adjustment Formulae in accordance with the Provisions of Sub Clauses 70.1 to 70.7."*

Mr. Lovekesh Sahni, and Mr. Pankaj Gupta, learned counsel appearing on behalf of appellant-claimants submits that Clause 70.8 of COPA is not restrictive in nature rather is of wide amplitude, as it envisages the reimbursement to the Contract in respect of expenditure incurred beyond what is covered by Clause 70.3, in essence, it does not debar the charging of the cost incurred because of statutory hike in the minimum wages under the Minimum Wages Act, 1948 and in this regard, language of Sub-Clause 70.8 is clear and unambiguous on account of the fact that same has not been incorporated in the Indexing of any inputs. The claimants sought reimbursement of such rise in minimum wages over and above the percentage rise in CPI (Cost Price Index) Numbers. Both the parties submitted their respective submissions vis-a-vis the claim and non-entitling of the claim. The Arbitrator Tribunal after considering the aforementioned fact, framed five following issues:-

> *"i) Whether, under the facts and circumstances of the matter, the claim is barred by limitation as contended by the respondents.*
>
> *ii) Whether, the notifications fixing/revising the minimum wages amount to subsequent legislation attracting the provisions of Clause 70.8 of COPA.*
>
> *iii) If the answer to the issue no.ii supra is in the affirmative, whether the claimant's claim is tenable.*
>
> *iv) If the answer issue no.iii supra is in affirmative, as to what extent the claim is tenable.*
>
> *v) Other reliefs."*

He submits that order of the Objecting Court setting aside the award is lacking reasons as the objections were not falling within the realm of Section 34 of the Act. It is settled law that Objecting Court cannot sit as an Appellate Court and re-appreciate the evidence available or re-write the Contract, thus, exceeded its jurisdiction by re-incorporating the Contract and terms. The Arbitrator Tribunal construed the contract agreement as per the sub-Section 3 of Section 28 and the Award therefore cannot be said to have been suffering from the fallaciousness, much less, illegality and perversity and even, the Arbitrator Tribunal has not mis-directed in interpreting the terms and conditions of the Contract.

He further submitted that the award is fair and has been delivered after hearing the parties at length while considering all the records including pleadings, written arguments, documents and terms and conditions of the Contract, in essence, Arbitrator Tribunal did not mis-conduct or mis-interpret the provisions of the Contract. The respondents failed to prove, before the Objecting Court, that the award of the Tribunal was perverse and other view was possible because it can be only set aside once it is held to be perverse. The order of the Objecting Court tantamounts to mis-reading of Clause 70.8 read with Clause 70.2 which has resulted into great prejudice as the claim of the appellant was not for increase or escalation to be paid for labour components, but for reimbursement of the additional expenditure incurred on account of revision in the Minimum Wages for the reasons that the factors which are/were not covered by the CPI Number i.e. under indice used for formulae under Clause 70.3. Objecting Court erred in holding that wages to be paid to the labour was/is responsibility of the Contractor irrespective of the fact that the wages increased on account of change in law and Contractor shall not be paid additional expenses by the employer as such finding is against the Clause 70 itself and particularly Clause 70.8. Basically, Clause 70.8 is a safeguard against the factor which were beyond the control of the Contractor and the factum of increase in the Minimum Wages was not disputed as the said fact was reimbursed by the Labour Inspector of the Sikkim.

He submits that last date of submission of bid was 22.12.2000. As per Clause 70, 28 days prior to the said date was 24.11.2000 and this date would become the base date for indices on prices. The Contract was executed on 21.03.2001 and the date of start was given as 22.03.2001. The final bill of the Contract was submitted by the claimants in March, 2009 which was not settled. Notification date for fixing the minimum wages was of 01.05.2001 and 01.04.2004. First one pertained to increase from Rs.43/- per day to Rs.52/53 per day and second as Rs.88 per day. He further submits that as per the Section 4 of the Minimum Wages Act, it contains two components. The basic rate of wages is a fixed component and fluctuating component i.e. special allowance etc. and the Arbitrator Tribunal after noticing all the provision, the Gazette Notification, much less, provision of Sub-Clause 70.8 ibid held that the change in the minimum wages had taken into account two factors:-

i). Change in the basic rate of wages.

ii). Change in the CPI Number.

Sub-Clause 70.3 takes into account only change in the CPI Number and not basic change of rate of wages. The basic rate of wages do not take into account CPI Number into consideration and thus are based upon the other factors than the CPI Numbers. Annexure-24 submitted along with statement contained the detailed computations of the amount of adjustment on this account. The said calculations were based upon the percentage of increase in the minimum wages with reference to base date and the same was not disputed by the other side in reply. No separate evidence was required, as the Annexure-24 contained the list of employees and verified on inspection by the Labour Inspector, thus by taking into consideration the revision in minimum wages, the difference was mentioned in one of the column which formed the claim, therefore, it does not lie in the mouth of the respondent to contend that the claimants failed to discharge the onus for the purpose of substantiating its stake. Though, the Arbitrator Tribunal did not consider the factor of increase from 43 to 53 but had taken into consideration the increase of 53 to 88. The Objecting Court while accepting the objections, as already stated above, did not assign reasons, thus, order is not sustainable in the eyes of law. He has drawn the attention of this Court to the order under challenge, and submitted that from para Nos.1 to 34 is the discussion and reproduction of the Clauses, much less, submission of the counsels and the finding is only in paragraph Nos.35 to 37. It would be apt to reproduce findings rendered by the Objecting Court from para Nos.35 to para No.37:-

> *"35. This clause says if there occurs any change in law which causes additional burden (in this case hike in minimum wages) to the contractor, then it is payable by employer. But there is a rider, if it has already been taken care of while preparing indices for price adjustment formula, then nothing will be paid. As we have already seen under clause 70.3, b, c, d are weightings or coefficients representing the estimated proportion of each cost element (labour, material, equipment, usage etc.). When labour component has already been taken care of, then it can be paid or adjusted under clause 70.8. This additional cost to contractor shall not be paid by employer notwithstanding any change in law. Clause 70.2 if read conjointly with 70.8, they create a complete embargo on such claim/payment.*
>
> *36. There is another aspect also. That wages are to be paid by contractor. There is no contract between employer, contractor and labour. However, there is a provision to the effect if contractor fails to pay wages to labour, then employer is to pay it. But at the same time, it has been given a right to recover it from contractor. It shows that this amount has to be paid by contractor. Contractor cannot take shelter under notification whereby minimum wages were hiked by Sikkim Government.*
>
> *37 There is still one more proposition. If contractor*

> *pays hefty amount of labour without any change in law or if there is no labour available at the minimum wages provided in notification and contractor has to pay even more, in that situation, whether contractor is competent to recover it from employer. The answer is definitely 'no'. So, if it has been changed by notification, even if it has a force of legislation, then also, it cannot recover from employer and if employer pays, it has a right to recover it from contractor. In these circumstances, issued is decided in favour of Objector and against respondent."*

In support of his contention, he has relied upon judgment of Hon'ble Supreme Court in *National Highway Authority of India Vs. M/s ITD Cementation India Ltd. 2015(3) RAJ 1, Civil Appeal No.9799 of 2010, decided on 24.04.2015*, wherein identical clause was subject matter of the dispute before the Arbitrator and the award of the Arbitrator has been upheld by the Hon'ble Supreme Court by adopting the rationale of the formulae mentioned in the clauses and also cited judgment of Hon'ble Supreme Court in *State of Maharashtra Vs. Hindustan Construction Company Ltd. 2010(4) SCC 518,* to contend that the reasoning assigned by the Objecting Court was actually not taken in the application under Section 34 of 1996 Act.

Mr. Ajit Pudussary, Advocate along with Mr. Gaurav Chopra, learned counsel appearing on behalf of respondent submitted, that there is no error, illegality and perversity in the order under challenge. The judgments cited on behalf of appellants rather helps respondents. As per observation in para No.11 in *National Highway Authority of India Vs. M/s ITD Cementation India Ltd. (Supra),* it has been held that since Arbitrator

Tribunal did not quantify the amount as no proof of alleged loan was proved but thereafter compensation was adjusted, whereas, in the instant case the appellants failed to lead any evidence in support of their claim except by submitting their claim, much less, not quantified the claim and, therefore, claim was not maintainable and rightly so, arbitration award has been set aside. While rebutting the arguments of appellants, in this regard also referred to para No.11 of the objections to contend that said objections takes care of the objections vis-a-vis non-examination of any expert or assessment of the compensation and thus, has drawn attention of this Court to para No.11 of the objections, which reads thus:-

> *"11. It is further stated that claim of petitioner for compensation of cost incurred towards labour over and above the price adjustment clause No.70.3 of Conditions of Particular Application (COPA) is after thought unwarranted and untenable and learned arbitral tribunal has gravely erred in granting the same. The NHPC has cited judgment RJI and RJ II but learned tribunal has wrongly failed to apply & peruse the same and wrongly granted claim of petitioner in complete disregard to the provisions of contract."*

He also relied upon the provision of Clause 53.1 particularly 53.4 which deals with for the claims and to contend, that where contractor fails to comply with the provision of this clause in respect of any claim which he seeks to make his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any Arbitrator or Arbitrator appointed in pursuance to sub-Clause 67.3 assess claim, to be verified by contemporary record, where such records were brought to the Engineer notice. The objections have rightly been accepted as they were falling within the realm of Section 34 of 1996 Act. The claim is/was beyond the provision of the Contract as the Contractor attempted to deviate from the terms and conditions on which parties had agreed, for, as per the agreement between the parties, the cost indices with respect to the cost element of labour component was to be the Consumer Price Index (CPI), therefore, it does not lie in the mouth of the claimants/appellants, to claim the price adjustment taking into consideration the new cost element as such claim, not only amounted to breach of contract but was against the fundamentals of the Contract.

The Contractor had occasion of choosing the source of index as either cost indices or reference prices. Once Contractor chose Average Consumer Price Index as the source of Index for labour component in preference to minimum wages is not permitted to resile from the agreed terms and conditions of the Contract and, therefore, claim was not sustainable. Any national or State ordinance, decree or any other law, resolution or bye-laws of any local or other duly constituted authority causing any additional or adduced cost to the Contractor after due consideration with the employer is to be determined by Engineer and shall be added or deducted from the Contractor price. Clause 70.8 provides that such additional or adduced cost shall not separately be paid or credited if the same has already been taken into account of indexing or any inputs to the price adjustment formulae in accordance with the provisions of Sub-Clause 7.1 to 70.7. In fact, the increase in the cost of the labour component has already been taken into account in the agreed Consumer Price Index to the Price Adjustment Formulae which index is subject to the change or revision every month. The reliance on interpretation of the Clause 70.8 is misplaced as said clause has no application to the facts and circumstances of the present case. The Tribunal had wrongly awarded a sum of Rs.3,656.32/- lacs as amount of basic claim and Rs.1700.2 lacs as interest at the rate of 10% from the date of payment due and future interest at the rate of 12% and, therefore, majority of award was unjust, unreasonable and against the public policy. Much emphasis was relied upon Clause 70.1 to 70.3, because as per the said provision price adjustment of labour component is based upon increase or decrease in CPI and, therefore, the claimant is not entitled to increase in the matter of labour component and thus prays for dismissal of the appeal. In support of his contention, he has relied upon judgment rendered by Hon'ble Supreme Court in *State of Rajasthan and another Vs. Ferro Concrete Construction Pvt. Ltd. (2009) 12 Supreme Court Cases 1*.

I have heard learned counsel for the parties and appraised the paper book and of the view that there is force and substance in the plea of Mr. Sahni Mr. Pankaj. Both the counsels have laid a heavy emphasis on the interpretation of the Clauses referred above by observing, that exercise done by the Arbitrator Tribunal was correct, whereas as per the respondents, interpretation of the Clauses by the Objecting Court does not warrant any inference. The fact remains the scope of objections under Section 34, in my view and as per the settled law, is very limited. Objecting Court cannot decide the objections while treating it as appeal and assume a role of expert by re-appreciating the entire evidence. Even if otherwise, different opinion is to be formed other than the Tribunal the scope of objections is very limited. The respondents have failed to make out the case that their objections were falling within the provision of Section 34 of the Act.

The objection No.1 noticed above do not even takes into consideration vis-a-vis non-application of the claim and, therefore, cannot be permitted to raise for the first time in this present appeal. My view is fortified by the ratio decidendi culled out in *State of Maharashtra Vs. Hindustan Construction Company Ltd. (Supra)*. The provision of Clause 53 of the Contract would not be applicable to the facts and circumstances of the case but 70.8 would apply. The findings given by the Objecting Court as noticed above in my view leaves no manner of doubt that no reasoning has been assigned in setting aside well-reasoned award of the Arbitrator Tribunal. Till para No.13, the Objecting Court dealt with the rival contentions of the parties to the lis and in paras reproduced above rendedred the findings assuming the role of an appellate Court. Whereas on the contrary, the view expressed by the Arbitrator Tribunal in my view is correct. For the sake of brevity, relevant portion of the findings rendered by the Arbitrator Tribunal reads thus:-

> *"c) The Arbitral Tribunal has considered the rival contentions. In the contract there are two sub-clauses for adjustment of increase/decrease in the cost of works. The first provision is given in Sub-Clause 70.1 which provides that the amount payable to the Contractor in various currencies pursuant to sub-clause 60.1 shall be adjusted in respect of rise or fall in the cost of labour, equipment usage and material by applying to such amounts the formulae stipulated in sub-clause 70.3. These adjustments are linked with index value as per provision of the contract*

agreement. These adjustments in the amount payable to the Contractor are required to be done on the basis of the formulae given in sub-clause 70.3 and do not require any verification of the expenditure incurred by the Contractor. The second adjustment in the amount payable to the Contractor is provided in sub-clause 70.8 for all types of increase/decrease in cost on account of introduction of new/changes in legislation. The adjustment on account of introduction of new/changes in legislation is also required to be done as per the formulae given in sub-clause 70.3 as provided therein. The claimants' contention that the price adjustment on account of subsequent legislation is also to be calculated by the formula given in Sub-Clause 70.3 and that the word 'etc.' in this formula takes care of such situation is sustained.

After considering the material on record and contractual provision, the AT, therefore, holds that the formula given under sub-clause 70.3 has also to be applied for the calculation of Price Adjustment due to change in legislation in the same way as provided in that formula. The compensation due to revision of Minimum Wages as calculated by the formula payable shall, however, the reduced to the extent the same already stands paid considering the CPI number. The quantum of the amount payable is now required to be considered. The claimants in the Ann-24 submitted with the SOC has filed the detailed computations of the amount of adjustment on this account. In these calculations, the percentage increase in Minimum wages with reference to base date has been adjusted with the percentage variation of the CPI number. The amount of adjustment due to change in CPI number which has already been received by the claimants as per formula given in Sub-Clause 70.3 and the same has been offset in *these calculations while arriving at the amount of additional cost payable due to revision of Minimum Wages. This has been done to find out the amount, which remains unrealized by the Contractor. The claimants in Ann-24 of their statement of claim have calculated such amount till September 2007 as Rs.4142.86 lacs and the same has been claimed by them in para 5.2 of SOC. They have further stated that the amount of claim till completion of the work is also payable to them similarly.*

The amount already received by the Contractor due to change in CPI No. through price adjustment clause 70.3 of COPA has been offset from the computed expenditure incurred by the claimant due to increase in minimum wages. There is no duplicacy involved in amount payable to the Contractor. The AT, however, holds that the claimants are not entitled to reimbursement due to change in minimum wages for the day work as has been claimed by them in annexure 24 of S.O.C. The payment claimed on account of day work amounts to Rs.12.13 lacs. The AT holds that the claimants are not entitled to receive the amount from the respondents. The AT also holds that the change in minimum wages from Rs.43/- to Rs.53/- per day (as fixed by Govt. of Sikkim vide notification dt. 15.03.1995-annexure 3 & notification dt.07.05.2001- annexure 5 of SOC respectively) cannot be termed as abrupt increase in minimum wages particularly so when the yearly percentage increase in minimum wages and CPI number were almost equal and increase from Rs.43/- to Rs.53/- per day had been effected by the State Govt. after a period of almost six years and the Contractor had to pay same wages of Rs.53/- per day for almost 3 years till 31.03.2004. Thus, the AT holds that the claimants are not entitled for price adjustment due to increase in minimum *wages from Rs.43/- to Rs.53/- which as per the submitted claim amounts to Rs.474.35 lacs. Accordingly, the amount admissible to the contractor due to revision of minimum wages after off-setting the payment already received as per change in CPI number for the period from April 2004 to Sep. 2007 works out as below:*

i) On BOQ items i.e. from RA bill 35 to RA bill 76 comes as Rs.36,88,10,447.00 only

ii) On extra items from RA bill 35 to RA bill 76 comes as (-) Rs.31,77,697.00 only

iii) Thus the total amount payable to the Claimants comes as Rs.36,56,32,750.00 (say Rs.3,656.32 lacs) only.

The Arbitral Tribunal accordingly holds that the claimants are entitled to payment of Rs.3,656.32 lacs due to rise in minimum wages for the works executed up to September 2007. The Arbitral Tribunal also holds that the claimants are further entitled to the payment in the similar way for the works executed after September 2007 till completion of the work i.e. up to 21.01.2008 and the same shall be calculated accordingly.

d. The Arbitral Tribunal, therefore, holds and makes an award that the claimants are entitled to the amount of Rs.3,656.32 lacs for the works executed up to September 2007 and are further entitled to the amount computed in the same manner as in Ann-24 filed with SOC for the works executed in the period after September 2007 to the date of completion of the work i.e. 21.01.2008."

On perusal of findings rendered by the Arbitrator Tribunal, it is evident that Arbitrator has formed opinion that the cost of living index number i.e. consumer price index envisages only fluctuating of the component minimum rates of wages, thus for all intents and purposes, the basic rate of wages is not connected to CPI and resultantly increase or decrease of the basic rate of wages is not reflected or taken care of CPI number. While deciding the minimum wages, CPI is one of the various factors to be considered whereas while deciding CPI Number, the minimum wages is not considered in view of intimation received from the Deputy Director, Labour Bureau, Ministry of Labour, Government of India as referred in the claim petition which has been annexed as Annexure-2 with the statement of claim. Thus, in my view CPI number is only one of the factor out of several which contribute to increase in the minimum wages. The cumulative reading of the aforementioned provision, much less, findings rendered by the Arbitrator Tribunal leads to irresistible conclusion that rise in the minimum wages owing to the changes in the law based on the factors other than the CPI have not been taken into account in the index formulae as per Sub-Clause 70.3, thus, the Contractor is entitled to claim the as per Clause 70.8. In my view, the award of the arbitrator is in conformity with the provision of Sub-Section 5 of Section 31 of 1996 Act.

There is another aspect of the matter. An identical situation arose in the matter referred to judgment of National Highway (Supra), wherein Hon'ble Supreme court, after considering the same, very clauses gave the findings in favour of the Contractor. For the sake of brevity, the findings rendered by the Hon'ble Supreme Court in para No.21, reads thus:-

> *"21. We now turn to the reasoning given by the Arbitral Tribunal in paras 21 to 23 of the award, as quoted above. The award considers the impact of sub-clauses 70.1 to 70.7 and agrees with the contention that the provision for cost escalation based on the agreed price adjustment*

formulae falls in one compartment while the compensation for additional cost resulting from a subsequent legislation falls in a separate category. In other words, the contention that stands accepted was, that the escalation in price premised on fluctuation in market value of the inputs stands on one footing, while the additional cost resulting form the impact of any statute, decree, ordinance, law etc as referred to in sub-clause 70.8 stands on the other. Resultantly the governing clauses in the instant case were held not to be sub-clauses 70.1 to 70.7 but the substantive part of sub-clause 70.8. The award also considered whether minor minerals in question were or were not included in the basket of materials whose cost variation was taken into account as an input while arriving at WPI. It also considered that the WPI is an index applicable uniformly in all states while the increase in Seigniorage Fee would vary from state to state. It further dealt with the aspect that NHAI itself was of the opinion that the additional impact as a result of subsequent legislation was admissible separately, as signified by the letter dated 03.09.2003 to the Economic Advisor. In the backdrop of the law laid down by this court, the construction of the terms of the contract by the Arbitral Tribunal is completely consistent with the principles laid down by this court. Upon construing the terms and the material on record it concluded that the instant matter would be covered by substantive part of Sub-Clause 70.8 of COPA. It also noted that NHAI itself was of such opinion. The view so taken by the Arbitral Tribunal after considering the material on record and the terms of the contract is certainly a possible view, to say the least. We do not see any reason to interfere. The Division Bench in our considered view, was completely right and justified in dismissing the challenge."

Keeping in view the aforementioned facts and circumstances, the order passed by the Objecting Court is hereby set aside and award of the Arbitrator is hereby restored.

Accordingly, the present appeal stands allowed.

29.03.2016 **(AMIT RAWAL)**
pawan **JUDGE**