

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.03.2017

DELIVERED ON : 14.06.2017

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

**Original Petition No.325 of 2009**

Chennai Metroplitan Water Supply  
and Sewerage Board,  
1, Pumping Station Road,  
Chennai - 600 002.  
through the Managing Director

.... Petitioner

Vs

1. M/s.Subhash Projects and Marketing Ltd.,  
8/2, Ulsoor road, Bangalore - 560 042  
through Sh.anil Sethi, Chairman.
2. Dr.T.S.Sethurathnam  
Presiding Arbitrator
3. Capt.S.Raja Rao  
Arbitrator
4. Mr.K.Ramalingam  
Arbitrator

... Respondents

\* \* \*

**Prayer :** Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 against the award dated 15.12.2007 passed by the Arbitral Tribunal.

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For Petitioner : Mr.D.Balaraman

For Respondents : Mr.R.Venkatavaradan - R1

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**ORDER**

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'the 1996 Act'), whereby, challenge is laid to the majority award dated 15.12.2007. Notably, the minority award is prior in point of time and is dated 30.09.2007.

1.1. The petitioner before me, as is obvious from the cause title, is, Chennai Metropolitan Water Supply and Sewerage Board (hereafter referred to as 'the Board'). The 1st respondent, which is, the contesting respondent, in these proceeding, is the contractor. The contractor is a company by the name, Subhash Projects and Marketing Ltd. (hereafter referred to as 'SPML').

1.2. SPML was the claimant before the Arbitral Tribunal (in short "Tribunal") comprising of three experts. The Board, which is the petitioner herein, was arrayed as the respondent before the Tribunal.

1.3. For the sake of convenience, the Board and SPML will collectively be referred to as parties.

2. The record, in the contract obtaining between them shows that the parties in had provided for settlement of disputes via Dispute Resolution Board (in short "DRB") prior to their reference to arbitration.

2.1. It appears that the DRB could not function effectively, in

view of the absence of the Consultant Engineer, appointed by the Board. The Board, evidently, vide written agreement dated 26.11.1998, had appointed a Consultant Engineer of international repute, namely, Camp Dresser and McKee Inc. (hereafter referred to as 'Consultant Engineer'). Apparently, the Consultant Engineer was relieved of its obligations.

3. Be that as it may. In so far as the constitution of the Tribunal is concerned, it was brought about upon SPML invoking clause 76 of the contract obtaining between the parties. Resultantly, the SPML appointed, one, Mr.S.Rajaroo, (retired) Secretary to the Government of Karnataka, Minor Irrigation Department, as their nominee, while the Board appointed, one, Mr.S.Sankaran, (retired) Additional Director General, CPWD as their nominee for conducting arbitration, as required under Clause 76.10 of the contract and in accordance with the provisions of the Act. The two Arbitrators agreed to the appointment of Dr.T.S.Sethurathnam (retired) Chairman, MPSEB/BSES, as the Presiding Arbitrator.

3.1. It appears that there was delay in the initial stages in completion of pleadings, as the Board's records had been seized by Central Bureau of Investigation (in short 'CBI'). In the meanwhile and during the course of Arbitral proceedings Mr.S.Sankaran, the Board's

nominee, fell ill and, subsequently, passed away on 14.03.2006.

3.2. This resulted in the Arbitral Tribunal being re-constituted. Consequently, Mr.K.Ramalingam, (retired) Chief Engineer, PWD, Government of Tamil Nadu was appointed by the Board as its nominee. On account of the change in the constitution of the Arbitral Tribunal, the proceedings, as it appears, were conducted anew.

3.3. Pertinently, Mr.K.Ramalingam, has delivered the minority award, to which, I have made a reference above.

4. Before I proceed further, it may be useful to advert to the broad facts, which have led to the passing of the impugned award.

4.1. The Board, evidently, in October, 1997, floated a tender inviting bids for construction of Permeate Conveyance Pipeline.

4.2. It appears, that the work sought to be executed by the Board was part of Chennai Sewerage Renovation and Functional Improvement Project, which was to be funded by Overseas Economic Co-operation Fund (OECF), Japan.

4.3. Pertinently, this fund, subsequently, was renamed as Japan Bank for Industrial Cooperation (in short, JBIC).

4.4. The Board, as it appears, conducted pre-tender meetings on 25.03.1998 with the respective bidders to seek clarifications qua the subject contract. In February, 1998, the Board invited bids. SPML

submitted its bid, on 11.07.1998. Thereupon, SPML's bid, after post tender negotiations, was accepted, on 17.11.1998.

4.5. A formal contract was executed between the Board and SPML, on 26.11.1998. The contract so executed between them comprised of both rupee as well as Japanese Yen component. The value of the contract in Indian Rupees (in short, INR) was: INR 18,05,30,000/-, while in Japanese Yen (in short, JPY), the value was fixed at JPY 51,90,42,904/-.

4.6. The contract obliged SPML to supply and lay 28767 metres (Mtrs) of pipeline of varying diameters, ranging between 200 Mtrs to 2000 Mtrs, within a time frame of 17 months. Thus, the contract, in the ordinary course, was required to be completed on 16.04.2000. The contractual period was extended twice by the Board, albeit, without levying liquidated damages. The first time, the Board, extended the contract, was on 10.03.2000. The period of contract was extended by nearly five months, i.e., till 16.10.2000. Thereafter, the contract was extended on 21.2.2001. The extension, this time around, was granted by the Board till 31.07.2001. Both times, the initiative for extension of time was taken by SPML vide letters dated 29.03.2000 and 20.01.2001.

5. A perusal of the record would show that at the heart of the

dispute between the parties is the post-contractual changes, brought about in the alignment of the pipeline, which SPML was obliged to lay down in terms of the contract.

5.1. The scope of the contract entered into between the parties, broadly, obliged SPML, to do the following:

- i) Construction of pumping station and emergency generator station at Koyambedu
- ii) To supply and install electro mechanical and instrumentation equipment
- iii) To supply and lay down 1700 m of ductile iron pipeline with all accessories of the requisite diameter.

5.2. Pertinently, the contract between the parties envisaged that only part of the pipeline within the range of 10-15% would be laid underground, and that, a major part of the pipeline would have to be laid down by SPML overground. However, as it transpired, due to post contractual changes, not only the actual length of the pipeline, which had to be laid got altered, but also, the length of the pipeline, which had to be laid underground increased.

5.3. In sum, while the actual length of the pipeline which had to be laid got changed from 17,945 Mtrs to 11887.2 Mtrs, the portion, which had to be laid underground increased from 1759 Mtrs to 5637

Mtrs.

5.4. Therefore, the increase in that part of the pipeline which had to be laid below the road surface, in percentage terms, increased, apparently, from 10-15% to 47.42%.

5.5. Besides this, the mean average depth of excavation, evidently, increased from 2.68 Mtrs to 3.16 Mtrs. The increase in real terms was approximately 0.5 Mtrs, while in percentage terms, the average depth of excavation increased by 18.65%.

5.6. It is these post contractual changes, which propelled SPML to lodge its claim for recovery of monies under various heads.

6. A perusal of the majority award would show that SPML lodged 16 claims, which included a claim for interest, while, the Board lodged a counter claim, for the purported delay committed by SPML in execution of the contract.

6.1. The counter claim was in the form of a claim for liquidated damages. The Board, thus, sought liquidated damages at the rate of 10% of the contract price.

6.2. Furthermore, a perusal of majority award, which is under challenge, contained 22 sub-heads under claim I. Out of the 22 sub-heads, 2 sub-heads, i.e., 1.10 and 1.11.5 were rejected. Besides these, claim Nos.4B, 5, 7 and 8 were also rejected.

6.3. Though, in the summary of the claims provided by the Arbitrators, who are signatories to the majority award, claim No.13 has been shown as having been rejected, in the body of the award, in paragraph 8.13, it has been stated that the said claim, according to them, stands covered by their award in respect of Claim Nos.11 and 12, and, therefore, no separate award was being passed qua the said claim.

6.4. In all, the majority award directs payment of a sum of Rs.13,72,38,571/- to SPML with interest at the rate of 12% p.a. from 01.09.2003, till the date of payment. A caveat has been appended to this direction, which is, if moneys, as awarded to SPML, are not paid within three months from the date of receipt of the award, it would be entitled to a further interest at the rate of 15% per annum till the date of actual payment of the amount so awarded. Furthermore, the majority award directs parties to bear their own costs.

7. In so far as the minority award is concerned, SPML has been awarded a sum of Rs.1,54,57,574/- towards claim Nos.1,5,7A,7B,8B and 10. In addition, interest at the rate of 8% for the period, spanning between, August, 2003 and December, 2007 has been awarded to SPML. This interest has been quantified and pegged at Rs.54,61,676/- The minority award, also, directs payment of further interest at the

rate of 6%, if, payment, as ordered, is not made on or before December, 2007. The said interest will run till the date of actual payment. Furthermore, parties have been directed to bear their own costs.

8. In so far as the Board's counter claim in the form of liquidated damages is concerned, the same has been rejected. To that extent, there is an unanimity amongst the Arbitrators.

9. I must only point out that the minority award, erroneously, adverts to the fact that liquidated damages was sought for by the Board at the rate of 15% of the basic cost of the Scheme. The counter claim, as correctly pointed out in the majority award, demanded liquidated damages at the rate of 10% of the basic contract price, though, in real terms, it may not have much impact, in view of what is noted above, which is that, both the majority and minority awards have rejected the counter claim preferred by the Board.

10. Before I proceed further, I may also advert to the major findings of fact returned in the majority award:

(i) That the enormous prolongation of work, which SPML was required to execute under the contract, was attributable to the Board and/or the Consultant Engineer, and/or on account of the reasons beyond the control of SPML.

(ii) The execution of the work was delayed due to no fault of SPML and, therefore, the Board was liable for the resultant consequences.

(iii) That to the format General Conditions of Contract (in short GCC), which included, Clause 61, three new sub-clauses were added, with the consent of both parties. These being, 61.4, 61.5 and 61.6.

(iv) In terms of clause 61.6, the Consultant Engineer could give instructions for carrying out additional work either on account of safety or other reasons.

(v) SPML's claim for extra works would have to be granted, in terms of clause 61.6 of the GCC. The other reasons being that the said clause was subordinate to the old clause 8.1 and 20.1 of the GCC.

(vi) The fact that SPML had carried out extra works had not been disputed by the respondent. In this behalf, reference was made to the Consultant Engineer's letters, marked as R9, R11, R12 and R13.

(vii) The contract was not a turnkey contract or a lumpsum contract as contended by the Board. The billing schedule appended to the contract adverts to numerous works. The unit rate in respect of various items have quoted collected in lump sum or on metre basis.

(viii) There is a difference between Schedule of Price (in short, "SOP") (billing schedule) and Schedule of Rates (in short, "SOR").

(ix). SOP and SOR are different documents and are not identical. SOP is part of the contract document. It is a billing schedule or SOP, which forms part of the contract, while SOR is a schedule of rates of various items of work, normally undertaken during construction. SOR sets out rates qua various items of work ordinarily involved in a works contract; SOR is, generally, updated every year, by factoring in rising prices.

(x) In this particular case, SOR was not made part of the contract. Accordingly, the price put on extra items by the Board, as per SOR, was not in consonance with, what is provided in the contract obtaining between the parties.

(xi) Furthermore, when, extra works were carried out, the SOR for the year 2000-01 was in operation and not SOR for 1999-2000. Since, even according to the Board, the rates offered by SPML, which were accepted, were higher than the SOR. Therefore, if, SOR for 1999-2000 was to be applied for extra works, suitable proportional adjustment would have to be made, bearing in mind the difference in percentage terms, between the tendered rate and SOR, at the time, when, contract was awarded to SPML.

(xii). Accordingly, SPML's contention that the difference in rates, as provided in the SOR for 1999-2000 and the tendered rates, which

had been pegged at 106.4%, had to be accepted, was not objected to by the Board.

(xiii) Extra works, which were to be carried out by SPML, would have to be paid at the rates provided in the SOR for 1999-2000, after an upward revision of 106.44%.

(xiv) Post-contractual changes in the alignment of the pipeline had to be made, interalia, due to severe opposition from Jaya Nagar Resident's Association, illegal encroachment by hutment dwellers, interference due to over ground structures, and underground utilities.

(xv) That having regard to the provisions of the contract, approval of post-contractual drawings by the Consultant Engineer and post-contractual changes in the alignment, SPML was entitled to payment for the work done in executing the extra items.

(xv)(a) In this behalf, the objections raised by the Board, based on the provisions of Clauses 8.1 and 20.1 and the contents of a format letter executed by SPML, which was appended to appendix IV of the tender were discussed.

(xv)(b) The Board's contention based on clauses 8.1 and 20.1, was that, no extra payment was required to be made on account of the underground impediments. It was, further contended that SPML was not entitled to any payment on account of the site variation.

In this behalf, notice was taken note of clause 21 of the GCC, which require the Board to make every effort to provide information (drawings), which was complete and accurate on the basis of data and information procured by the Consultant Engineer.

(xv)(c). Therefore, based on the aforesaid, the following observations were made and findings of fact were returned in the majority award.

" The pre-tender site investigation was made by the Claimant on the basis of alignment indicated in the tender drawings and also on the basis of information indicated in the tender drawings. From the evidence of (sic) record, it is clearly established that there is post-contract changes in the original alignment of pipeline and the work was not carried out as per the alignment originally indicated in the tender drawing. The argument on behalf of the claimant that when there is post contract changes in the alignment stipulation regarding pre-tender inspection of site on the basis or original alignment ceases to be applicable. The Claimant contractor could not visualize any post contract changes in the alignment at the time of submission of tender. Further there was an amendment of the condition of the tender under which there was significant modification in the original tender stipulation. One such amendment to the tender was indicated in the additional amended Clause 61.6 which provided for payment of compensation to the contractor under certain

contingencies. The claimant submitted its tender under the circumstances of the aforesaid provision along with other provisions and the tender of the claimant was accepted accordingly. Clause 61.6(3) provides compensation payable to the contractor in case of execution of any additional work required for safety or other reasons. The amplitude of the aforesaid clause is extremely wide and includes execution of any additional work required for safety or other reasons. In our view any work which had not been shown in the tender drawings or in the contract document will qualify as additional work. In the premises, the defence of the Respondent against the claims of the claimant based on Clause 8.1, 20.1 clause 28 or any other clause is not tenable.

In view of the expressed stipulation in the contract by way of amendment of the existing General Conditions of Contract i.e. Clause 61, the old/existing Clause 8.1 or 20.1 will be subordinate to amended Clause 61.6 and cannot and/or will not prevent the compensation payable under the amended Clause 61.6 and sub-clauses thereunder. The Respondent's further contention that for execution of extra works instructed by the Engineer is necessary and in this case no such instructions were issued by the Engineer and as such the Claimant is not entitled to any claim for extra work. The aforesaid contentions of the Respondent are incorrect in fact and untenable in law.

With regard to the Respondent's contentions that no

instructions for part variation orders were issued by the Engineer with respect to extra items of works claimed by the claimant under 12 heads (except Item No.5), is not correct. There are various contemporaneous correspondences between the parties - for instance with regard to Extra Item No.I, the Claimant have disclosed in the Statement of Claims, eleven contemporaneous correspondences. The Claimant, in fact, submitted drawings and designs calculation for saddle support and the same were also approved by the Engineer. It is the fact that the Respondent/Engineer repudiated the claim for extra works and accordingly, the question of issuing variation order by the Engineer under Clause 28 of the General Conditions of Contract, did not arise. But that will not prevent payment to the Claimant if the works in question are additional/extra works."

(Emphasis is mine)

(xvi) There is no evidence on record, which would suggest that alignment of a pipeline was changed for the convenience of SPML. The contention advanced by the Board that reduction in the length of the pipeline due to re-alignment was advantageous to SPML, as it afforded extra time, was without substance. Therefore, the stand of the Board that reduction in the quantum of work was beneficial to the contractor, was untenable, as that would amount to saying that more the deduction in the work, more the benefit to the contractor. This,

according to the majority award, was a contention, which was absurd.

(xvii) The Board has neither denied nor disputed that SPML had to negotiate culverts due to change in the alignment of the pipeline. There were written orders on record issued by the Consultant Engineer to take up the work of laying the pipe as per the revised alignment. Furthermore, the details of pipe laying works indicating the depth of excavation, width of excavation, thickness of concrete, invert level of pipeline were jointly recorded in job cards and signed by both parties, which indicated the execution of work by the claimant was under day-to-day supervision, inspection and approval of the Board.

(xviii) Even as per the Board, there was a difference in the depth for each chainage; the variation spanned between 0.070 Mtrs. and 2.906 Mtrs. Because of the post-contractual changes in the alignment, a major part of the pipeline had to be laid below the surface; an exercise, which exorbitantly enhanced costs. The cost of laying pipelines also increased, with the increase in the depth of additional excavation, inter alia, due to additional shoring, dewatering and lift etc.

(xix) SPML had satisfactorily completed its work of laying the pipe till it reached the Villivakkam Railway crossing. Trial run was conducted on 04.10.2001, the result of which was reflected in Ex.C.-

10/3 under the joint signatures of the representatives of the parties. SPML, was, therefore, required to lay the pipeline of only 144 Mtrs, which could not be laid down, as Railways did not complete its work till May, 2004.

(xix)(a) In other words, between 7th October, 2001 and May, 2003, SPML had no other work. SPML had made a request for foreclosing the contract and for release of 15% of the contractual amount retained against preliminary, provisional and final acceptances. This request was made by SPML vide their letter dated 31.12.2001. The Board did not foreclose the contract. The Board, however, released 5% of the amount against preliminary acceptance on 15.4.2002 and another 5% against provisional acceptance on 15.10.2002, that too against a bank guarantee.

(xix)(b) After the Railways had completed their part of the work, in May, 2003, SPML completed the final leg of the work awarded, in October, 2003. After a 60 days trial run, the work was finally completed on 26.09.2004.

(xx) That the contracted system became operational from September, 2004 and continues to perform satisfactorily, though SPML, till such time Arbitration proceeding were on, had not, carried out hydro testing qua the last 144 Mtrs of the pipeline. However, given

the fact that the contracted system was working properly, only a deduction in the sum of Rs.50,000/- could be made in that behalf towards the amount payable to SPML. Accordingly, since work had been satisfactorily completed by SPML, it was entitled to release of even the final 5% of the contractual amount retained towards final acceptance and to secure release of the bank guarantee furnished against payment of 5% provisional acceptance amount. The delay in the execution of the contracted work was caused by public authorities, Utilities and the Board.

(xx)(a) In this behalf, the letter of the Consultant Engineer dated 24.08.2008 was noted, wherein, the following reasons were set out as to why SPML could not complete the laying of pipeline within the stipulated period:

".... (i) Public objection for trench cutting and laying pipes.

(ii) Change of pipelines alignment in certain Reaches.

(iii) Delay in obtaining permission for laying pipes from railways, Highways, PWD etc.

(iv) Difficulty in laying pipelines in congested area.

(v) Problem faced in allowing pipe laying along / across various existing underground service lines especially in Tondiarpet area, which was not anticipated earlier."

(xx)(b) Furthermore, in the course of the discussion, the majority award also notes the letter of the Consultant Engineer dated 07.12.2000, wherein, interalia, the following is stated:

"....In our view SPML had done all that they were expected to do under the contract to elicit approval for the railways crossing and since those beyond their control SPML's claim for EOT is valid. Therefore, the contract period should be extended to one month after the expected completion of installation of the pipe casting at the Villivakkam Railway Crossing which will be about July, 2001".

(Emphasis is mine)

(xx)(c) Thus, the Arbitrators concluded that while the clearances or permissions from public authorities and Railways had been obtained by SPML under Clause 88 of the contract, SPML had done whatever it could do to obtain such clearances, including the clearance from Railways.

11. Based on the aforesaid findings, the majority award, as indicated above, was passed in favour of SPML for a sum of Rs.13,72,38,571/- along with interest at the rates indicated above.

12. A perusal of the petition, filed under Section 34 of the 1996 Act, would show that a very broad grounds have been articulated to assail the award.

12.1. The Board appears to be aggrieved by the fact that claims had been awarded in favour of SPML, principally, for the reason that it did not have knowledge of the impediments, it would have to face, while executing the contracted works.

12.2. The other grievance which appears to have been articulated is that rates qua additional items of work had been uniformly enhanced by 106%. According to the Board, there was no basis for the same and, therefore, the approach adopted in the majority award was contrary to Clause 28 of the contract.

12.3. It is averred that the non-compliance of the conditions stipulated in Clause 28 of the contract disentitled SPML from claiming payment on account of extra items.

12.4. I must indicate herein that there is also an averment to the effect that the contract in issue, according to the Board, is a lump sum contract and there was no scope for entertaining a claim for price variation.

12.5. Furthermore, the grievance has also been raised with regard to payment of interest at the rate of 12% p.a. for the pendente

lite period and qua future interest.

13. As alluded to above, apart from these broad assertions, nothing specifically, has been articulated in the petition, filed under Section 34 of the 1996 Act.

14. Arguments were advanced in the matter by counsels for both parties. Mr.Balaraman, who appeared for the Board, advanced his arguments, which were confined to challenge laid qua claim Nos.2, 11 and 12. This aspect of the matter is reflected in the proceedings of 02.12.2016 and 01.03.2017.

14.1. As a matter of fact, after arguments had been heard in the matter, at some length, counsel for both sides agreed on 02.12.2016 that majority award, vis-a-vis claim Nos.11 and 12 could not be sustained and that these claims could be remanded for fresh adjudication. In fact, counsel for the parties agreed in the proceedings held on 01.03.2017, that adjudication qua claim Nos.11 and 12 could be carried out by Hon'ble Mr.Justice K.Govindaraj, a former Judge of this Court.

14.2. In the very same proceedings, Mr.Balaraman has also indicated to the Court that this Court should also examine the tenability of the rate of interest granted in the majority award.

14.3. It is on that date, orders were reserved in the matter.

15. Notwithstanding the aforesaid, I have examined the basic grievance articulated in the Section 34 Petition as to whether consideration for additional items of work, which, had been executed, could be paid at an enhanced rates as per the formula put in place by the learned Arbitrators, who had authored the majority award.

15.1. The narration of facts herein above would show that the Arbitrators have returned a finding of fact that additional works were, in fact, carried out by SPML, and that, there was in fact a post contractual realignment of the pipeline. There is also a finding of fact that this realignment, while reducing the length, resulted in approximately 42.47% of the pipeline being layed below the road surface, as against 10-15%, which was envisaged in the contract. In real and absolute terms, the total length of the pipeline, as found in the majority award was reduced from 17945 Mtrs to 11887.02 Mtrs. Pertinently, though under the contract, SPML was to lay only 1759 Mtrs of the total length of the pipeline below the road surface after the post-contractual changes had been put in place, it ended up laying 5637 Mtrs. of pipeline underground.

15.2. Besides this, the mean depth of excavation was also required to be varied, even according to the calculation furnished by the Board. The difference in depth of excavation varied from 0.070

Mtrs. to 2.906 Mtrs. There is also a finding of fact returned by the Tribunal, that the post-contractual re-alignment of the pipeline, required SPML to negotiate culverts etc.

16. Taking into account all those changes what the Arbitrators were required to consider was, at what rates, SPML was to be paid for the extra items.

16.1. In this behalf, as indicated herein above, the majority award has discussed at length the fine difference between SOP/Billing Schedule and SOR. The majority award has also noted that at the point in time, additional works were being executed, SOR for 2000-01 was in force, and not, SOR for 1999-2000, which, the Board insisted should be taken into account.

17. Furthermore, the objection raised by the Board that payments for extra works could only be made after variation of the contract was ordered by the Consultant Engineer, in terms of Clause 28, was noticed and dealt with in the majority award.

17.1. The discussion and the conclusion reached by the Arbitrators in this behalf are, interalia, contained in the following extract of the award:

*" (g) The Claimant also contended that provisions for fixation of rates for additional works have been given in Clause 28.4 of the General Conditions of Contract. The*

said clause provided for fixation of rates where possible as per schedule of prices (billing schedule) and as per current market rate where fixation of rate as per schedule of prices is not possible. There is no scope for fixing the rates for extra works on the basis of CMWSSB Schedule of Rates. The Respondent are suffering from confusion by failing to distinguish the difference between the schedule of prices (billing schedule) and the schedule of rates. Same are not identical but different documents. Schedule of prices is a part of contract document as expressly mentioned under Vol-II B, page IT-9 of the Contract document. It is actually the billing schedule of prices forming the part of the Contract. Schedule of Rates (SOR) of the Respondent is a schedule of various items of works normally required for construction works. Schedule of rates contains several hundreds of items of works and the rates for each such item is indicated in the SOR. SOR is general updated each year inter alia due to rise in prices. SOR has not been made part of this contract. Accordingly, the pricing of extra items by the Respondent on the basis of CMWSSB Schedule of Rates was not as per the provisions of contract.

Further, the works were carried out when the CMWSSB Schedule of rates for the year 2000-01 was in force and not 1999-2000 Schedule of Rates. The Schedule of Prices mentioned in Clause No.28.4 is a part of the tender document under volume 2B page IT-9 of C-1.

*The Claimant have argued that the work in question being a very specialized work, involving deployment of plants and equipments and skilled personnel, cannot be done at the normal departmental schedule of rates. The Respondent themselves in their additional statement of defence (RV-4, at page 13) have stated that the Claimant quoted high rates when comparing, with the Board's rate for executing the work under the contract. According to the Claimant that when compared with the Respondent's Schedule of Rates for the year 1999-2000, accepted rates of the instant contract should be higher by 106.44%. Accordingly, if the Schedule of Rates for the year 1999-2000 is at all made applicable then to the same must go an upward adjustment of 106.44% to make the rates at par with the accepted contractual rates. In CV-17, the Claimant has pointed out various errors and omissions in the analysis of rates submitted by the Respondent in RV-7. When the works were executed CMWSSB Schedule of Rates for the year 2000-2001 was in force and not old Schedule of 1999-2000. Admittedly, the rates quoted by the Claimant and accepted by the Respondent in their tender were high rates. In the Additional Statement of Defence (RV-4) at page 13, the Respondent have stated as under :*

*"taking into all these factors only the claimant has quoted high rates when compared to the Board's rates for executing the work under this contract".*

*In CV-17 the Claimant have indicated that accepted*

contract rate of the Claimant were 106.44% above the Schedule of Rates for the year 1999-2000. The Respondent has not raised any objection with regard to the same. The Respondent has admitted that the accepted contract rates were high rates compared to the schedule of rates of the Respondent.

(h) During the arbitration hearing, the respondent as per direction of the Arbitral Tribunal submitted the analysis of rates for Claim No.1 (Sub-claims 1 to 12) based on CMWSSB Schedule of Rates for the year 1999-2000 vide documents dated 10<sup>th</sup> August, 2005 (Marked RV-7). The Respondent have submitted such analysis of rates without prejudice to their contentions that the Claim No.1 is not payable to the Claimant.

The Claimant have not agreed to the said analysis of rates of the Respondent and have given detailed documents against each of the analysis of rates vide Claimant's documents marked CV-17.

(i) The Respondent contended that except Item No.5 (providing extract C.I. Tees) all other items of works are part of the works and the cost for the same were included in the contract price. The Respondent further contended that for any extra and additional work in terms of the variation contract Clause 28, fresh variation order has to be issued by the Engineer. In the instant case, since the alleged extra items of works claimed by the Claimant are not extra works, no variation order was issued under Clause 28 of the Conditions of Contract. Hence, the

claims for alleged extra works are not maintainable in terms of the contract.

(j) The Respondent also contended that the instant contract is on turnkey basis and further contended that the contract is a lumpsum contract and, accordingly, there is no scope for any extra works in the turnkey contract and/or lumpsum contract.

(k) Conclusion

We have carefully considered the rival submissions. From the contract documents itself, we find that the instant contract is not at all a turnkey contract. Various activities under contract were to be done by the Respondent and/or their Consultant. It is also not a lumpsum contract. Major drawings were prepared by the Respondent and/or its consultant. The work was executed under the supervision, direction and approval of the Engineer of the Respondent. The Billing Schedule indicates numerous items of works. The unit rate for various items have been quoted lumpsum or even per meter basis. Further, Clause 28 of the General Conditions of Contract provided for execution of additional works. Accordingly, the defence against the Claim No.1 by the Respondent based on turnkey contract or lumpsum contract is not tenable and is unacceptable.

Soon after execution of the contract agreement, the Claimant conducted survey during the months of February – March, 1999 and prepared and submitted the detailed working drawings for pipe-laying, The said detailed

working drawings prepared post-contract, were duly approved by the Engineer (CDM). During the execution of the work, several changes were made in the alignment from what was shown in the tender drawings and/or even what was indicated in the post contract drawings. The post contract changes in the alignment were made, inter alia, due to severe opposition from Jayanagar Residents Association, illegal encroachment from hutment dwellers, interference due to over-ground structures, under-ground utilities etc.

In Clause 20.1 of the General Conditions of Contract it was, inter alia, stated that "every effort has been made to make the information (drawing) complete and accurate on the basis of all data and information which could be procured by the Engineer". The submissions of the Claimant that when the drawings have been prepared by Engineer of international repute with sufficient time resources and with every effort, the same can be reasonably expected to be correct, is not without substance. It is hardly possible for a tenderer within the limited time and without trial pit to improve upon the drawings prepared by an internationally reputed Engineer with every care. Further, the post contract drawings prepared by the Claimant after topographical survey was approved by the Respondent/Engineer. All the extra items of works claimed by the claimant were beyond the scope of works indicated in the post contract approved drawings. Further changes in the alignment of pipeline

after the agreement was executed, will make the stipulation regarding pretender inspection of original site, inapplicable.

Further, Clause 61 of the General Conditions of Contract was amended. The additional amended clause 61.6 provided for compensation event, unless they were caused by the contractor. The amended clause, inter alia, provided for a changed work required for safety or other reasons. In other words, provisions for additional works were made for two contingencies. First, the additional works required for safety and secondly, the additional work require for other reasons. The amplitude of the expression execution of additional works for other reasons, is very wide and not limited to any particular circumstance. The General Conditions of Contract are made specifically with standard clauses applicable to all contracts in general and the amendment to the said General Conditions of Contract are made specifically for the instant contract and, as such, such amendment are to be considered on that background while dealing with the clauses of the General Conditions of Contract.

In the facts and circumstances of the case, having regard to the clauses of the contract, approval of post contract drawings by the Engineer and post contract changes in the alignment find that the claimant is entitled to payment for extra items as indicated hereinafter.”

(Emphasis is mine)

18. A careful perusal of the aforesaid extract along with relevant terms of the contract, does bring to fore the fact that this is a possible view in the given facts and circumstances of the case. Once the Arbitrators returned the finding that the additional work had been carried out, which was a post contractual change, the basis on which payment had to be made qua such works could possibly have been pivoted on the method adopted by the learned Arbitrators.

18.1. In so far as this part is concerned, this Court would have very limited jurisdiction as it related to the interpretation of the terms incorporated in the contract and experience gained over the years by expert arbitrators. To my mind, even if, the interpretation of the terms, obtaining in the contract, gives rise to a question of law, that, by itself, cannot form the basis for interference.

19. A somewhat similar situation arose in the matter of ***Associated Builders V. Delhi Development Authority, (2015) 3 SCC 49***. In the said case, the contractor, who was the appellant before the Supreme Court had some of its claims scaled down by the Division Bench of the Delhi High Court, on the ground, that the Arbitral Tribunal had applied the Hudson's formula mechanically. The Supreme

Court, after culling out a whole host of case law on the subject, *inter alia*, made the following observations:

*"..... This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.*

*In McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, this Court held as under:*

*"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to*

determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC* [(2003) 8 SCC 593] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325]).

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

*In MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, (2011) 10 SCC 573, the Court held:

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See *Gobardhan Das v. Lachhmi Ram* [AIR 1954 SC 689], *Thawardas*

*Pherumal v. Union of India [AIR 1955 SC 468], Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362], Alop Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588], Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156] ).”*

*In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306, the Court held:*

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63: (2009) 4 SCC (Civ) 16]* and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296: (2010) 4 SCC (Civ) 459]* to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in

this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

"43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwalitiy Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the 34 Page 35 agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

13. Applying the tests laid down by this Court, we have to examine whether the Division Bench has exceeded

*its jurisdiction in setting aside the arbitral award impugned before it. "*

(Emphasis is mine)

20. Applying the aforesaid test, the Supreme Court reversed the view of the Division Bench and consequently, sustained the view of the single Judge. In doing so, it approved the dicta articulated in its own judgment in **McDermott Inc. V. Burn Standards Limited (2006) 11 SCC 181**. It adopted the following observations made in **McDermott**.

*" 15. The Division Bench while considering claims 9, 10, 11 and 15 found fault with the application of Hudson's formula which was set out by the learned Arbitrator in order to arrive at the claim made under these heads. The Division Bench said that it was not possible for an Arbitrator to mechanically apply a certain formula however well understood in the trade. This itself is going outside the jurisdiction to set aside an award under Section 34 in as much as in McDermott's case (supra), it was held: ..... 106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator."*

16. Obviously, the Division Bench has exceeded its jurisdiction in interfering with a possible view of the Arbitrator on facts. "

(Emphasis is mine)

21. In my opinion, therefore, this Court would have very little leeway to interfere with the award on this score.

22. In so far as the other aspects are concerned, Mr.Balaraman, as indicated above, laid a challenge to claim Nos.2, 11 and 12.

22.1. As alluded to above, Mr.Balaraman, also articulated his grievance with regard to rate of interest granted via the majority award, an aspect, which I will deal hereafter.

23. Insofar as claim Nos.11 and 12 are concerned, they relate to the following:

**Claim 11:** Extra Expenditure due to delayed taking over the plant (Rs.2,77,15,200/-)

**Claim 12:** Compensation for loss of overheads and profit due to prolongation of contract (Rs.11,54,80,040/- and JPY 27,61,258/- (Rs.1,10,45,007/-)

23.1. Claim 11 relates to extra expenditure incurred by SPML on account of delayed taking over of the contracted work, while under Claim No.12, SPML seeks compensation for loss of overheads and

profits due to prolongation of the contract.

23.2. These claims, Mr.Venkatavaradan accepts, would have to be re-examined by way of a fresh adjudication to reach a conclusion as whether claim for loss of profit could be sustained in the given facts and circumstances alongside compensation for delay in taking over of the contracted works in respect of overheads and extra expenditure. (See ***Bharat Coking Coal Ltd. V. L.K.Ahuja, 2004 (5) SCC 109 and Delhi Jal Board V. Subhash Pipes Ltd., 2005 (2) ARBLR 213 Delhi***).

23.3. Accordingly, the amounts awarded under the said claims are set aside and as agreed by the counsel for parties the same are referred for fresh adjudication to Hon'ble Mr.Justice K.Govindaraj, a former Judge of this Court.

24. Which brings me to claim No.2. This claim pertains to the payment sought by SPML on account of additional work carried out due increase in the depth of excavation and length of the pipeline, which had to be laid below the road surface due to its re-alignment.

24.1. The discussion that has been undertaken herein above with regard to the justification provided for the rates at which payment for additional items of work had to be made will also be applicable qua this claim as well.

24.2. The majority award, has discussed this claim at length. In doing so, it has made the following observations:

"Conclusion

*In view of the major post contract changes in the alignment of pipeline, the Respondent's reference to the printed offer letter in the tender document or reference to pre-tender site inspection by the tenderer or various other clauses of the contract have become irrelevant.*

*It is also not a lumpsum contract as stated earlier. The unit rate for various item have been quoted lumpsum or even per metre basis. The entire work was executed under the supervision, direction and approval of the Engineers of the Respondent. There were series of contemporary correspondence in this regard. Further Clause 28 of GCC provided for execution of additional work.*

*Both the parties have cited various laws in support of their respective contention. These have been discussed in detail hereinbefore. In the case of State of Maharashtra Vs. Nav Bharat Builders (AIR 1991 SC 11), the Hon'ble Supreme Court held that the Arbitrator is entitled to interpret any clause of the contract reading the contract as a whole, keeping in mind the intention of the parties. The Claimant have submitted the case of M.L.Damlia & Co. Vs. Union of India (AIR 1997 Cal 266). These cases have been discussed under Claim No.1. The Claimant also relied upon FIDIC condition of contract which states that unforeseen constraints permit compensation to Contractor who encounters an exceptional physical constraints not*

*foreseen at the time of contract. The Respondent cited the case laws of Rajasthan State Mines & Minerals Vs. Eastern Engineering Enterprises (AIR 1999 SC 3627), Ramachandra Reddy Vs. State of Andhra Pradesh 2001 (4) SCC 241 and C.H.Ramalinga Reddy Vs. Superintending Engineer 1999 (9) SCC 610. These cases have been discussed earlier and also under Claim No.1. None of the case laws cited by the Respondent prohibits the claim. The Claimant is entitled to payment due to major post changes in the alignment.*

*There was difference between the parties as to whether the work is an extra work or not. The absence of written order will not be towards payment, if the works in question are indeed extra works. However, in this case, there were written orders from the Engineer to take up the pipe laying work as per the revised alignment of the pipeline. Further in the instant case, details of pipe laying works indicating the depth of excavation, width of excavation, thickness of concrete, inert level of the pipe line were jointly recorded in job cards and signed by both the parties which indicated the execution of works by the Claimant under day-to-day supervision, inspection and approval by the Respondent. In this case, we hold that the works under the Claim No.2 are extra/additional work for reasons as stated earlier and the Claimant is entitled to payment for the same.*

*In the instant case, due to post contract changes in the alignment, the agreed fact situation ceased to exist. It*

cannot be denied that laying of pipeline under the road which involved cutting off road hard crust taking additional safety measures during excavation of trenches and laying of pipeline, obtaining permission from the authorities etc., etc. is more expensive than laying of pipeline beyond the road portion. Similarly, the cost of laying pipeline is also increased with the increase in depth of excavation, inter alia, due to additional shoring, additional de-watering, additional lift etc. The Respondent have furnished exhaustive details indicating the chainnages where the pipes were laid, the Respondent also indicated the depth of excavation as per the original drawing and also the depth of excavation as per the actual work. The Respondent have also indicated difference in depth for each chainnages. The difference in depth of excavation varied from 0.070 to 2.906 M. The Respondent have worked out as per depth analysis of CMWSSB procedure and the rates as per schedule of rates which works out Rs.4,79,15,214.71 (pages 181 of RV-6A). This amount for the reasons stated earlier is to be increased by 106% that is to say, the amount is Rs.9,87,05,340/-. The Respondent have already paid a sum of Rs.4,67,47,483/- leaving a balance of Rs.5,19,57,857/- and we make an award of the said amount in favour of the Claimant against Claim No.2."

(Emphasis is mine)

25. As would be evident, this extract should be read with the earlier extract, which has been set out herein above by me, whereby,

a logical reasoning has been given as to why SOR of 1999-2000, provided by the Board had to be adjusted by 106%. As would be evident from the above, the Board itself has liquidated a vast majority of the claimed amount, i.e., Rs.4,67,47,483/-, albeit, based on the agreed rates, as against adjusted rates. In so far as adjustment in rates is concerned, the rationale provided by Arbitrators, as noted above, is a possible one, which, while sitting in jurisdiction under Section 34 of the 1996 Act, cannot be interfered with by me.

25.1. Therefore, the challenge raised to Claim No.2 would have to be rejected. It is ordered accordingly.

26. In so far as the award of interest is concerned, it is noticed, that Mr.Balaraman, is aggrieved by the fact that interest at the rate of 12% has been awarded to SPML via the majority award.

26.1. As indicated right at the outset, according to the majority award, the rate of interest would increase to 15% on the awarded amount, if the money is not paid, as directed, within a period of 3 months.

26.2. As against this, in the minority award, rate of interest has been granted at the rate of 8% on the amount awarded, and, if, the money, as directed, is not paid by December, 2007, (as it has not

been in this case), future interest at the lower rate of 6%, will be payable till the date of payment.

26.3. To be noted, in both the majority and minority award, it is indicated that interest would commence from September, 2003, that is, from the month succeeding the date when, the statement of claim was filed by SPML. The record shows that the statement of claims was filed by SPML, on 11.08.2003.

26.4. A perusal of both awards, that is, award passed by the majority as well as the minority would show that no reasons have been given as to why a particular rate of interest has been granted in favour of SPML. Ordinarily, while exercising jurisdiction under Section 34 of the 1996 Act, one would refrain from interfering with the discretion employed by the Arbitrators with regard to interest. However, this proposition cannot hold good, where no reasons are furnished for granting interest at one or the other rate. The events, as they have transpired after the publication of the awards, would show that a great span of time has elapsed since the time when the awards were first published. Over all, nearly 14 years have elapsed. To my mind, this aspect, would have to be factored in while arriving at the rate, at which, interest should be awarded to SPML.

26.5. In addition to this aspect of matter, one would also have to bear in mind that we are presently in the regime of falling rate of interest on deposits. Interest on deposits, as of today, ranges between 6% and 7.25%, subject to the period of deposit. As against this, minority award has awarded interest at the rate of 8% till December, 2007 and, thereafter, at the rate of 6% till the date of actual payment.

26.6. Therefore, in my view, keeping in mind the aforesaid circumstances, interest of justice will be served, if interest is paid for the relevant period, i.e., period commencing from 01.09.2003 till the date of payment, at a simple rate of interest, pegged at 8% per annum. (See ***Krishna Bhagya Jala Nigam Ltd. V. G.Harischandra Reddy and another, (2007) 2 SCC 720; Government of NCT of Delhi V. M/s.Nav Nirman Construction Co., ILR (2014) 3 Delhi 2074 and Flex Engineering V. Antartica Construction Co., (2007) 2 ARBLR 287 (Delhi).***)

26.7. However, the total amount of interest, which would become due, would depend upon the decision that the learned Arbitrator would arrive at, vis-a-vis claim Nos.11 and 12.

27. Therefore, subject to what is stated above, the majority award is sustained. The petition, filed under Section 34 of the 1996 Act is, thus, partly allowed, in terms of the directions contained hereinabove. There shall, however, be no order as to costs.

Speaking order  
Index : Yes / No  
Internet: Yes  
sl

14.06.2017

**RAJIV SHAKDHER,J.**

sl

Pre-Delivery Order in  
**Original Petition No.325 of 2009**

Dated: 14.06.2017

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