

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

+ **OMP (COMM) NO.164/2017**

Reserved on: 29th November, 2017
Date of decision: 21st December, 2017

AIRPORTS AUTHORITY OF INDIA Petitioner

Through: Mr. K.K. Rai, Senior
Advocate with Mr. Digvijay
Rai, Ms. Chetna Rai, Mr.
Anshul Rai and Mr. Pulkit
Tyagi, Advocates.

versus

SIKKA ASSOCIATES Respondent

Through: Mr. Arun Kathpalia, Senior
Advocate with Mr. Angad
Mehta and Mr. Samaksh
Goyal, Advocates.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the arbitral award dated 23rd March, 2015 passed by the Sole Arbitrator.

2. The petitioner had invited global design competition for comprehensive architectural and engineering services for the proposed new Domestic Terminal Building at NSCBI Airport at

Kolkata (West Bengal). The competitive design submitted by the respondent was approved by the Assessment Committee of the petitioner and the respondent was appointed as consultant on 1st June, 2007 for air side of the project. Since the proposed integrated Passenger Terminal Building was to cater to 20 million passengers annually, the petitioner also appointed another Architectural Consultant for city side works of the Airport.

3. On 21st August, 2008, an agreement was entered into between the petitioner and the respondent for execution of 'Architectural/Engineering Consultancy Services' for the proposed new integrated passenger terminal building at NSCBI airport, Kolkata. Some of the terms of this agreement are relevant for the purposes of adjudication of the present petition and are quoted herein below:-

2.0 PROFESSIONAL FEE

2.1 Professional fee shall be paid only for the items of works for which professional services have been rendered by the Consultant.

2.2 In consideration of the professional services rendered by the Consultant, he shall be paid a professional fee of 5% of the actual cost of the work or the awarded cost whichever is lower of the subhead of the works for which consultant has rendered Professional services. In addition to the professional fee, service tax will be paid as per the Act in vogue at the time of the payment of the bill. The initial payment shall be made on approved preliminary estimated cost. The cost of the work shall not include costs of aerobridges, in-line Baggage handling Conveyor system, Baggage claim Belts, telephone exchange equipment,

Specialized hand/Baggage security scanning items, DG Sets, FIDs, CCTV, Surveillance CCTV, check-in counters, custom and immigration counters and dust bins. For effecting stage wise payments the cost of works shall be as specified in clause 4.1. Nothing extra shall be paid to the Consultant on account of Soil investigation, site survey, vetting from IIT, presentations, model, computer simulation, presentation drawings etc.

Items like travellers, escalators, elevators, counters, concourse and security hold chairs and furniture would be included towards payment till stage 4.

The payment to State Electricity Board for dedicated power supply may be included in the cost estimate of the project but not to be included for payment to Consultant.

3.0 SCHEDULE OF PAYMENT

3.1 Details of services to be rendered at various stages shall be as mentioned in Annexure 'A'.

3.2 The Consultant shall be paid professional fee in the following stages consistent with the work done plus other charges and reimbursable expenses as agreed upon. On submitting the bill the consultant shall certify completion of stage work.

4.0 EFFECTING PAYMENT TO THE CONSULTANT

4.1 The fee payable to the Consultant shall be computed on the actual cost of works or the awarded cost whichever is lower. The payment due to the Consultant at different stages shall be computed on the following basis:

- (i) At Stage 1 : On rough estimate of cost*
- (ii) At Stage 2,3&4 : On preliminary estimate of cost*
- (iii) At Stage 5 : On preliminary estimate of*

cost excluding the estimated cost of works /items specified in clause 4.4

(iv) At Stage 6 & 7 : On Awarded cost or actual cost whichever is lower of the packages specified in para 2.20 of Annexure A

(emphasis supplied)

4. The estimated cost of work put to tender for the entire project was Rs.1123.418 crores (civil+E&M works). The share of estimated cost amongst two consultants i.e. the respondent and M/s Varinder Khanna and Associates (hereinafter referred to as M/s VKA) was 72.98% and 27.02%.

5. The petitioner vide its letter dated 24th January, 2011 addressed to the respondent, stated that the Airport Authority of India Board had approved the professional services rendered by the consultant on being paid a professional fee @5% of the estimated cost of the work or the awarded cost whichever is lower. It was stated that the inadvertence clause 2.2 of the agreement had wrongly recorded that the consultant shall be paid a professional fee @5% of the actual cost of the work or the awarded cost, whichever is lower. The petitioner, by the above letter, called upon the respondent to forward its acceptance to the change in the agreement so as to move in affirmative to the Board approval and to read that

the consultancy services shall be paid @ 5% of the estimated cost of the work or the awarded cost whichever is lower.

6. The respondent vide its letter dated 14th March, 2011 refused to give its consent to such modification. The respondent stated that commensurate with the work completed by it, 70% of the fee has already been paid. It was further submitted that as the respondent was performing the work in joint collaboration with an international firm of architects namely RMJM-Hong Kong and there are other financial commitments which are based on the fee receivable by the respondent under the agreement so executed, change suggested by the petitioner was unworkable and no such unilateral change in the terms was acceptable to the respondent.

7. The petitioner did not take any further action on its letter dated 24th January, 2011, on the other hand, further work was awarded to the respondent by the petitioner.

8. The respondent continued to provide service under the agreement till completion of building in March, 2013 whereafter it raised its final bill for payment by the petitioner. In the meantime, as the petitioner has stopped making payments on the Running Account Bills, the Sole Arbitrator was appointed by this Court vide its order dated 8th October, 2012 in Arbitration Petition no.363/2012.

9. The respondent raised the following claims in its statement of claim:-

“a) Claim No.1- Payment of Rs. 21,31,40,955/- being the balance fee amount withheld from each bill illegally by the Respondent.

b) Claim No. 2- Payment of interest @ 18% per annum from the date of each running account bill till the date of reference.

c) Claim No. 3 - Payment of interest pendent lite and interest till the date of realization of the said amount @ 18%.

d) Claim No. 4- Claim for an amount of Rs. 5 Crores as damages for loss of reputation and goodwill.

e) Claim No. 5 - Payment of cost of Arbitration proceedings.”

10. The petitioner, on the other hand, raised the following counter claims before the Sole Arbitrator:-

“a) Counter Claim 1 -Refund of an amount of Rs. 3.79 Crores being excess payment of Professional fee.

b) Counter Claim 2 - Cost of Arbitration Proceedings/ litigation Rs. 2,00,000/-.

c) Counter Claim 3 - Interest @ 18% p.a. from date of Arbitration till realization on the counter claim amounts.”

11. The Sole Arbitrator vide its impugned award has awarded a sum of Rs.19,02,47,938/- in favour of the respondent under Claim no.1 along with interest.

12. Learned senior counsel for the petitioner submits that the Arbitrator has committed a grave error in ignoring the minutes of 96th Board Meeting of the petitioner held on 16th March, 2006, wherein the following resolution had been passed:-

RESOLVED-that the approval of the Board be and hereby is accorded for inviting EOI for the New Domestic Passenger Technical at NSCBI Airport, Kolkata for short-listing and then holding global design competition as per the guidelines of the Council of Architecture for architectural and engineering services for the New Domestic passenger Terminal at NSCBI Airport, Kolkata. The firm appointed for providing architectural and engineering services shall be paid fee at the rate of 5% of the estimated cost or awarded cost whichever is lower. Reimbursable charges shall be in accordance to the provisions of Council of Architecture.”

(emphasis supplied)

13. He further submits that in the 110th Board Meeting of the petitioner held on 17th May, 2007 again the following Board Resolutions were passed:-

“RESOLVED FURTHER that the approval of the Board be and is hereby accorded for AAI to appoint the winning architectural firm i.e. M/s. Sikka and Associates, New Delhi with consortium M/s RMJM Hong Kong Ltd., Hong Kong and to prepare the detailed architectural design proposals, engineering services and estimates for the Domestic building of the Integrated terminal with enhanced scope of work (from 43200 sq.m. to 129624 sq.m) to meet the requirement of 16 million annual handling capacity at consultancy fee of 5% of the estimated cost or awarded cost whichever is lower.”

(emphasis supplied)

14. He submits that as the Board had accorded its approval only on the fee being 5% of the estimated cost or the awarded cost whichever is lower, the agreement by mistake records that such fee would be paid at 5% of actual cost or the awarded cost whichever is

lower, and the petitioner could not have been held liable under the same. He further submits that this mistake in the agreement was known to the respondent as in a meeting held between the respondent and the Member(Planning) of the petitioner on 13th July, 2007, the respondent had been informed that the latest agreement signed between the petitioner and the consultant for the Integrated Passenger Terminal Building at Madurai Airport in Tamil Nadu was to be followed and in the said agreement, there was a term correctly recording the fact that the consultant was to be paid 5% of the estimated cost or the awarded work whichever is lower. He, however, concedes that this agreement was not placed before the Arbitrator and, therefore, in my opinion, no reliance can be placed on the same and the submission of the learned senior counsel for the petitioner based on Madurai Agreement cannot be accepted.

15. Learned senior counsel for the petitioner then submitted that as the agreement between the parties was not in terms of the Board Resolution, the same shall be deemed to have been executed without authority and, therefore, not binding on the petitioner. He further submits that as the agreement was executed due to a mistake, the petitioner cannot be held bound by the same. He relied upon the judgment of the Supreme Court in *Sales Tax Officer, Banaras & Ors vs. Kanhiya Lal Mukund Lal*. 1959 SCR 1350 to contend that under Section 72 of the Indian Contract Act, the respondent cannot retain the benefit of a contract entered into by mistake of the petitioner. Lastly, he contends that the Arbitrator in

his impugned award refused to place reliance on the above mentioned Board Resolution only because extracts of the same had been produced before him and not the full text. He further submits that only the relevant portion of the Board Resolution were produced before the Sole Arbitrator and as these were not denied by the respondent, therefore, they should have been relied upon by the Sole Arbitrator. Relying upon the judgment of the Supreme Court in *K.P.Poulose vs. State of Kerala & Anr.* 1975 (2) SCC 236, he submits that as these documents were relevant for the purposes of adjudication of the disputes, it was the duty of the Arbitrator to have called for the same and as he has not done so, the award suffers from the manifest error apparent on the face of the award.

16. On the other hand, the learned senior counsel for the respondent submits that the agreement is unambiguous in nature and, therefore, has to be interpreted on its own terms. He submits that the plea of the petitioner that there was an error in the contract cannot be accepted as this term was repeated not only in clause 2.2 but also in clause 4.1 to the same effect. He further submits that for the first time, a grievance recording the alleged mistake in the agreement was raised only after about 3 ½ years of the execution of the agreement. In unequivocal terms, this plea was not accepted by the respondent. The petitioner thereafter took no action to terminate the agreement but instead, not only continued to take work from the respondent, but also awarded further works to the respondent on the same terms. He further submits that the respondent cannot now

turn around and claim some mistake in the execution of the agreement. He further submits that before the execution of the agreement, the Board Resolutions were never brought to the notice of the respondent and are, therefore, not binding on the respondent; they, in any case, are matters of indoor management of the petitioner. He submits that even before the Arbitrator no relief of declaration was sought by the petitioner that it is not bound by the terms of agreement executed between the parties. Relying upon the judgment of the *Associate Builders vs. DDA* (2015) 3 SCC 49, it was submitted that the test to judge an award under Section 30 of the Arbitration Act, 1940 is no longer applicable under 1996 Act and this Court cannot act as a Court of appeal while examining the validity of the arbitral award under Section 34 of the Act.

17. I have considered the submissions made by the learned senior counsels for the parties. Before proceeding further, I may only quote the relevant extracts from the impugned arbitral award where this issue of a purported mistake in the agreement has been considered by the Arbitrator:-

(vi) After carefully going through all the documents and records produced by the parties and hearing at length both the parties, I have come to the following conclusion. It is undisputed that clause 2.2 of the agreement between the parties clearly stipulates that "In consideration of the professional services rendered by the consultant, he shall be paid a professional fee of 5% of the actual cost of the work or the awarded cost whichever is lower of the sub head of the works for which consultant has rendered professional services." This

contract was entered into on 21st August, 2007 whereas the board meeting of AAI is stated to have been held on 17th May, 2007 i.e. nearly three months prior to the signing of the agreement. Since the decision of the board was well known to the respondents as on the date of signing of this agreement, the respondents could not explain or place before me any documents or circumstances explaining as to how this clause got written differently in the contract document in the first place.

Further, a careful study of the contract document reveals that similar provisions (as at clause 2.2) are repeated at least at two more places in the contract. At clause 4.1, the contract states that “the fee payable to the consultant shall be computed on the actual cost of the works or the awarded cost whichever is lower”. Again at sub clause 4.1 (vi) relating to the payment at stage 6 and 7 it states “on awarded cost or actual cost whichever is lower of the packages specified in para 2.20 of Annexure A”. It therefore appears that the contract document was framed with the clear intent and understanding that the fee is to be paid on the basis of lower of the awarded cost or the actual cost since this aspect is reflected at least at three different clauses in the contract document. This therefore cannot be accepted as an inadvertent error or a typing mistake as argued by the Respondents.

The argument of the respondents that upto stage 5 payment was to be made on rough cost estimate and therefore this omission escaped their attention also does not appear to be plausible. Clause 4.1 of the agreement clearly states that payment at stage 1 only shall be made on rough estimated cost. Payment at stage 2,3 and 4 is to be made on preliminary estimate of cost. Similarly, payment at stage 5 is to be made on the preliminary estimate of the cost excluding the items specified in clause 4.4. Payment at stage 6 and 7 is to be made on awarded cost or the actual cost whichever is lower. It is undisputed that when the matter was raised by the

respondent in January 2011, the consultancy works had reached stage 6b(ii) which means 70% of the total fees was payable at that stage and some payments had already been made on the awarded costs (which is now proposed to be replaced by estimated cost by the Respondent). One cannot fault the field units of AAI on this, as the payments released were as per the contract.”

18. The Arbitrator has further held that:-

“In the face of large number of judgments of the apex court and High Courts cited above, and the fact that for nearly four years parties continued to act as per the provisions of the clause 2.2 of the agreement, the principle of estoppel also comes into play. Considering all the factors mentioned above, I hold that the modifications proposed to be carried out in clause 2.2 of the agreement cannot be sustained in view of the objections raised by the Claimant and a large number of citations of the Apex court barring such unilateral actions. Therefore, the letter of the respondents dated 24th January, 2011 proposing changes in clause 2.2 of the contract is struck down. The respondent has to finalize the final bill based on the terms and conditions of clause 2.2 as it existed in the original agreement entered into between the two parties.”

19. I have extracted the award of the Sole Arbitrator in extenso only to show that the Arbitrator has considered the documents placed before him and the submissions of the parties. I do not even find any error of law in the impugned award. The argument based on Article 299 of the Constitution of India was not raised before me, in fact, learned senior counsel appearing for the petitioner

conceded that the said Article would have no relevance to the facts of the present case.

20. Reliance of the learned senior counsel for the petitioner on the Letter dated 24.01.2011 addressed by the petitioner to the respondent is unfounded. The proposal to amend the contract not having being accepted by the Respondent, the Petitioner cannot claim to be discharged of its obligations under the contract. Section 62 of the Indian Contract Act, 1874 provides as under:-

“62. Effect of novation, rescission, and alteration of contract- If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed”.

21. Reading of the above provision would show that only if the parties to a contract agree to alter the same, the original contract need not be performed. An alteration in the contract can be made only where the parties are *ad idem* to the same. A party to the contract cannot unilaterally alter or modify the terms of the agreement. In ***Bharat Sanchar Nigam Limited And Another Vs. BPL Mobile Cellular Limited And Others*** (2008) 13 SCC 597, Supreme Court held that:-

“44. If the parties were ad idem as regards terms of the contract, any change in the tariff could not have been made unilaterally. Any novation in the contract was required to be done on the same terms as are required for entering into a valid and concluded contract. Such an exercise having not been resorted to,

we are of the opinion that no interference with the impugned judgment is called for”.

22. Similarly, in ***Delhi Development Authority And Another Vs. Joint Action Committee, Allottee Of SFS Flats And Others*** (2008) 2 SCC 672 Supreme Court reiterated the above position of law as under :-

“62. It is well-known principle of law that a person would be bound by the terms of the contract subject of course to its validity. A contract in certain situations may also be avoided. With a view to make novation of a contract binding and in particular some of the terms and conditions thereof, the offeree must be made known thereabout. A party to the contract cannot at a later stage, while the contract was being performed, impose terms and conditions which were not part of the offer and which were based upon unilateral issuance of office orders, but not communicated to the other party to the contract and which were not even the subject-matter of a public notice. Apart from the fact that the parties rightly or wrongly proceeded on the basis that the demand by way of fifth installment was a part of the original Scheme, DDA in its counter-affidavit either before the High Court or before us did not raise any contra plea. Submissions of Mr. Jaitely in this behalf could have been taken into consideration only if they were pleaded in the counter-affidavit filed by DDA before the High Court.

Xxxxxx xxxxxx

66. The stand taken by DDA itself is that the relationship between the parties arises out of the contract. The terms and conditions therefor were, therefore, required to be complied with by both the

parties. Terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law. Novation of contract in terms of Section 60 of the Contract Act must precede the contract-making process. The parties thereto must be ad idem so far as the terms and conditions are concerned. If DDA, a contracting party, intended to alter or modify the terms of contract, it was obligatory on its part to bring the same to the notice of the allottee. Having not done so, it, relying on or on the basis of the purported office orders which are not backed by any statute, new terms of contract could (sic not be) thrust upon the other party to the contract. The said purported policy is, therefore, not beyond the pale of judicial review. In fact, in the realm of contract, it cannot be stated to be a policy decision as such.

Xxxxxx xxxxxx

80. A definite price is an essential element of binding agreement. A definite price although need not be stated in the contract but it must be worked out on some premise as was laid down in the contract. A contract cannot be uncertain. It must not be vague. Section 29 of the Contract Act reads as under:

“29. Agreements void for uncertainty- Agreements, the meaning of which is not certain, or capable of being made certain, are void.”

A contract, therefore, must be construed so as to lead to a conclusion that the parties understood the meaning thereof. The terms of agreement cannot be vague or indefinite. No mechanism has been provided for interpretation of the terms of the contract. When a contract has been worked out, a fresh liability cannot be thrust upon a contracting party.

81. It is well settled that a definite price is an essential element of a binding agreement. Although a definite price need not be stated in the contract, but assertion thereof either expressly or impliedly is imperative”.

23. The submissions of the learned senior counsel for the petitioner that there was a mistake in the contract and therefore, the respondent cannot be paid more than what was agreed to be paid under the Board Resolution, is also ill-founded. Section 22 of the Indian Contract Act provides that a Contract caused by one of the parties to it being under mistake as to a matter of fact, does not make the contract voidable. In the present case, even otherwise, the petitioner on realising the alleged mistake in the contract, never resented the same and on the other hand not only continued with the same but also gave additional work to the respondent. The judgment of Supreme Court in **Kanhiya Lal Mukund Lal** (Supra) relied upon by the learned senior counsel for the petitioner would have no application to the facts of the present case as it was a case where the respondent claimed to have paid certain tax due to a mistake of law and it was held that “Mistake” in Section 72 of the Contract Act comprised within its scope mistake of law as well as a mistake of fact. In the present case, there is neither a mistake of fact nor a mistake of law. The parties agreed to a particular consideration in the agreement and are bound by the same. As observed above, a party cannot seek unilateral modification of such consideration alleging that it has been agreed by it due to some

mistake, especially where more than 70% of the work had already been completed by the other party.

24. With respect to reliance of the Petitioner on the Board Resolution passed in the 110th Meeting, the Arbitrator holds as under:

It is further noted that complete papers relating to the tenth meeting of AAI Board held on 17th May, 2007 were not filed before the arbitrator by the respondent. Only an extract of the board resolution in a typed version has been filed before this arbitrator. The respondents did not file a true copy of the original board resolution which was signed by the board members. Therefore, it is also not known what proposal was put up before the AAI Board, which officer chaired the board meeting as also the designations of other members involved in decision making. Also whether at any stage the claimant was made privy to the decision of the AAI board. This information is vital to understand the sequence of events which lead to formulation of clause 2.2 being different from what was approved by the board. Is it possible that the board resolution itself was improperly drafted by the officers of the respondents without realizing its implications when they knew all along that the current market practice is lower of the tendered cost or the actual cost for calculating the fee? The respondent could not convincingly explain as to how the words tendered cost or the actual cost came to be written in the agreement when this was never their intention. Further why the respondents did not cancel or suspend further work as the contract as per their own argument was void or voidable being signed by parties not competent to contract? The reference to the constitution of India has surfaced for the first time during oral arguments only. According to the arguments put forth by the learned counsel of the respondents, the contract was voidable but the Respondent took no action in that direction had that been their intention. Therefore, clearly this argument is an afterthought. No

judgment of the Apex court or any high court was cited in support of their contention. It is patently unfair to obtain full consultancy work & thereafter turnaround and modify the rates payable on some pretext. In absence of answers to these questions the arguments of the respondents are not at all convincing.”

25. The Arbitrator has rightly concluded that in absence of all material facts leading to the execution of the agreement being placed on record by the petitioner, it was not proper to rely only upon the extracts of the Minutes of Meeting. It is the duty of the party to lead the best evidence in its possession, which could throw light on the issue in controversy. It is not for the Arbitrator to go searching for the evidence which a party possess but fails to produce before him. Reliance of the learned senior counsel for the petitioner on the judgment of Supreme Court in **KP Poulouse** (Supra) is to no avail as the same was a judgment under the Arbitration Act, 1940 and as held by the Supreme Court in **Sundaram Finance Limited Vs. NEPC India Ltd.** (1999) 2 SCC 479, the 1996 Act is very different from the Arbitration Act, 1940 and therefore, the provisions thereof are to be interpreted and construed independently uninfluenced by the principle underlined the 1940 Act. Supreme Court in **Associates Builders (Supra)** has given broad parameters within the confines of which, Court exercising its jurisdiction under Section 34 of the Act, can set-aside an Arbitral Award. I do not find any such ground being made out in the present case. Even otherwise, in **KP Poulouse** (Supra) the Court was dealing with the situation where the documents had not been produced by the

department though the same were relevant to arrive at a just and fair decision in favour of contractor. I cannot read the said judgment to mean that even where a document is in possession of the party who seeks to rely upon the same, but does not produce the same, there should be an obligation on the Arbitrator to call for the said document, failing which the Award can be set aside on the ground of it being in conflict with the Public Policy of India. In any case, the agreement has to be interpreted on its own terms. The terms of the agreement being unambiguous in nature, the correspondence or the conduct of the parties prior to the execution of such agreement cannot be looked into for modifying the same.

26. As held in *Associate Builders* (supra), this Court applying the 'public policy' test to an Arbitral award, cannot sit as a Court of appeal and even errors of fact cannot be corrected. The Arbitrator is the ultimate master of the quantity and quality of evidence led before him. Court cannot reassess or re-appreciate such evidence to arrive at a different conclusion.

27. It is lastly submitted by the learned senior counsel for the petitioner that the final award in favour of the respondent is also incorrect as the actual cost of the work was Rs.15,60,52,16,015/- and not Rs.2491.47/- crores as determined by the Arbitrator. It is submitted that the completion cost of the project was not Rs.2491.47 crores as it includes escalation and overheads.

28. I am unable to accept the said submission of the learned senior counsel for the petitioner. Once the contract provides for the

‘actual cost’, the cost on account of escalation and other project over heads would necessarily form part of the actual cost. The Arbitrator has also worked out cost based on the documents that were produced before him and has held as under:-

In the 8th hearing held on 31st January, 2014 the respondents had sought time till 21st February 2014 to finalise EOT and the final bill. The respondents sought further extension till 31st March, 2014 which was also granted vide orders of the arbitrator dated 05.03.2014. Even by this date, the details were not submitted. Finally the respondents vide their mail dated 29th May 2014 forwarded a final bill figure of the contract as worked out by their Engineering (project) division for the total work done including all deviations but excluding price escalation as Rs. 15,60,14,17,818/-. This figure was further modified by the respondents (G M F&A of AAI) vide their mail dated 20.10.2014 where a final completion cost of Rs. 2491.47 Crores is mentioned. After the final hearing held on 2nd December 2014, the respondents submitted final bill of the claimant vide their letter dated 22.12.2014. The Claimant vide their document dated 31.12.2014 has finally revised his bill as document C-VIII.

As per clause 2.2 of the agreement between the parties the fee is payable on “actual cost of work or the awarded cost whichever is lower”. The completion cost intimated by the respondents as above is Rs. 2491.47 Crore which is higher than the tendered amount of Rs. 1602.61 Crores. Thus, the amount of fee shall have to be worked out on the tendered amount as laid down in clause 2.2 of the contract. The fee has to be worked out on share of the work of the claimant i.e. on Rs. 1169.58 Crores (Share of the claimant in total tendered amount of Rs. 1602.61 Crores @ 72.98%) as claimed in his document C-V plus the service tax as admissible. Further consultancy fees at the same rates are also payable for additional works done by the claimant as brought out in this document. The claimant in document C-

VII has further submitted that a sum of Rs. 2,42,130/- (actual fee Rs. 2,36,549 + Service Tax) has been remitted through RTGS to his account by the Respondent on 8th of December, 2014. This amount has also been considered while working out detailed calculations of fee payable in Annexure-I at the end of the award.

29. As the actual cost of the work was more than the awarded costs, the Arbitrator has rightly granted the fee payable to the respondent on the basis of the awarded costs as it was lower of the two. I find no reason to disagree with the said Award.

30. No contention was raised before me with respect to the rate of interest awarded by the Arbitrator.

31. In view of the above, I do not find any ground to interfere with the above finding of the Arbitrator and I find no merit in the present petition. The same is accordingly dismissed with no order as to costs.

DECEMBER 21, 2017
RN

NAVIN CHAWLA, J