

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 28.08.2018
Judgment pronounced on: 31.10.2018

+ O.M.P. 622/2014

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Ms. Gunjan Sinha Jain with Ms.
Soumya Priyadarshnee, Advs.

versus

M/S ITD-SDB(JV)

..... Respondent

Through: Ms. Kiran Suri, Senior Advocate with
Ms. Anusuya Salwan, Ms. Aishwarya
Kumar and Ms. Nikita Salwan, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short "1996 Act"). Via this petition, challenge is laid to the award dated 28.01.2014, passed by the Arbitral Tribunal comprising technical Members. The petitioner i.e. National Highways Authority of India (hereafter referred to as "NHAI") was the claimant before the Arbitral Tribunal.

2. The record shows that prior to the disputes being referred to the Arbitral Tribunal, the respondent (hereafter referred to as "Contractor") had in accordance with Clause 67 the Conditions of Particular Application (in short "COPA") appended to the Contract Agreement dated 07.02.2001, (in short "C.A.") entered into between the parties herein, referred its claim to the Dispute Review Board ("DRB"). The claims of the Contractor upon which the DRB gave its recommendations were as follows: -

- “Dispute no.1 - Refund of liquidated damages wrongfully recovered in respect of Section-1.
- Dispute no.2 - Payment for initial pile load test on pile foundations.
- Dispute no.3 - Payment of balance 25% amount of certified amount wrongly withheld by the Employer of IPC-73.

3. The record shows that the DRB unanimously ruled in favour of the Contractor qua the disputes referred to it. It may, however, be relevant to note that two opinions were given by DRB which comprised three Members. One opinion comprised the majority recommendation while other opinion which concurred with the opinions of the majority set forth its separate reasons. These recommendations were made on 05.10.2010. Since NHAI was aggrieved by the recommendations made by the DRB, it issued a notice of dissatisfaction and expressed its intention to invoke the arbitration on 23.10.2010, in accordance with the provisions of the C.A.

4. It is in this background that once the Arbitral Tribunal was constituted and pleadings were completed that the impugned award was rendered.

5. As would be evident from what is indicated hereinabove, NHAI was aggrieved on three counts: first, the recommendation made by the DRB for refund of liquidated damages retained by it qua Section 1 of the work in issue; second, the recommendation made by the DRB with regard to payment of monies towards installation of 7 test piles and the initial load test carried out on these piles by Contractor; and lastly the recommendation made for payment of balance 25% of the certified amount against IPC 73 by NHAI.

6. Besides this, since the Arbitral Tribunal has also granted pre-award as well as post award interest at the rate of 12% per annum in respect of amounts awarded under dispute No.1 and 3 and *vis-à-vis* the period for which amounts were not paid in respect of dispute No.2, the same is also challenged by NHAI. In addition thereto, since price adjustment has also been ordered in favour of the Contractor as per paragraph 3.3.11 of the impugned award, interest is awarded at the same rate and that is assailed as well by NHAI.

6.1 Briefly, in paragraph 3.3.11 of the impugned award the Arbitral Tribunal has held that price adjustment would be calculated keeping in mind the indices prevailing on the date 28 days prior to the last day of the period to which a particular Interim Payment Certificate(IPC) is related. Therefore, keeping this in mind, the Arbitral Tribunal directed NHAI to rework the price adjustment in respect of payment to be made in respect of claim lodged by the contractor under dispute No.2.

7. Having regard to the broad contours of the challenge made by NHAI referred to above, to my mind, the following brief facts need to be noticed: -

8. As alluded to above, the C.A. was executed between NHAI and the Contractor on 07.02.2001. The C.A. required the Contractor to execute the works described as follows: -

“Four Laning and Strengthening of existing two lane highway section from 393 km to 470 km on NH-2 via Sikandara (Construction Package II-A) in the State of U.P.” (hereafter referred to as the subject works).

8.1 The value fixed for execution of the subject works was pegged at Rs.2,89,30,49,814/-. As indicated above, because disputes erupted between

the parties, the contractor placed its grievances before the DRB. The DRB, with respect to the three disputes, to which reference has been made hereinabove, gave its recommendation on 05.10.2010.

9. Since, NHAI was dissatisfied with the recommendations of the DRB, it issued a notice to that effect and expressed its intention to invoke the arbitration mechanism. This notice was issued on 23.10.2010.

10. It is in this background that claims were lodged before the Arbitral Tribunal.

11. Thus, having regard to the aforesaid I would be adverting to the claims lodged by NHAI dispute-wise: -

Dispute No.1

12. In so far as this dispute is concerned, the Contractor is aggrieved by the fact that the Arbitral Tribunal has directed refund of a sum of Rs.1,16,59,430/- which was recovered by it in the form of liquidated damages.

13. The reason that NHAI retained the money was on account of its stand that Section 1 of the subject works was not completed within the approved extended time frame stipulated by it. The record shows that there is no dispute that the subject works was divided into three sections for the purposes of handing over the site after its completion. In so far as Section 1 was concerned, the distance to be covered lay between 393/0 km and 20/0 km. This section was required to be completed in 17 months with the caveat that the site would be handed over immediately.

13.1 However, though the Scheduled Date of Completion was 22.07.2002, NHAI had granted extension till 08.08.2003. It is NHAI's case that the Contractor completed a substantial part of Section 1 only on 25.07.2007. The Contractor though, argued to the contrary. It was the Contractor's submission that a substantial portion of Section 1 was completed on 03.07.2003. In this behalf, it relied upon the Team Leader's letter dated 31.03.2005. Furthermore, the Contractor also relied upon the successive IPCs issued by the Engineer appointed under the C.A. wherein it was stated that Section 1 Equivalent was substantially completed on 03.07.2003. For this purpose, reliance was placed on following IPCs: -

“IPC No.50 dated 21.10.2005; IPC No.51 dated 09.12.2005; IPC No.52 dated 29.12.2005; and lastly IPC No.53 dated 07.02.2006.”

14. Since an issue had been raised on behalf of NHAI, while assailing this claim before the Tribunal that the Team Leader could not have taken into account Sectional Milestones and converted that into equivalent road length, reliance was placed by the Contractor on a policy decision taken by the Chairperson of NHAI and other Members at a meeting held on 11.06.2003 and also on the direction issued by the Chairperson of the NHAI on 12.04.2006, whereby, the Engineer was required to look into the recovery of liquidated damages under Section 1. The argument raised by the Contractor was that the Engineer was required to resolve the issue, keeping in mind, the policy decision taken on 11.06.2003. The Arbitral Tribunal accepted the stand taken by the Contractor and returned, *inter alia*, the following facts:

- i) That the Team Leader vide his letter dated 31.03.2005 had indicated that Section 1 was substantially completed on 03.07.2003,

which was in point of fact, a date prior to the date up to which time had been extended by NHAI i.e. 08.08.2003.

ii) The Engineer, who, himself, had delegated his power to the Team Leader vide communication dated 17.03.2003, for issuing a Taking Over Certificate, had via IPC's 50 to 53, to which I have made a reference above, indicated that no liquidated damages were recoverable qua Section No.1.

iii) The Engineer, after issuing IPCs 50 to 53 had done a U-turn. This U-turn was reflected in the Engineer's communication dated 11.3.2006, while forwarding IPC 54. In this communication, it was indicated by the Engineer (contrary to the earlier position taken by the Team Leader, which, he had backed via IPCs 50 to 53) that a stretch of only 26.454 kilometers of Section 1 was substantially completed as on 3.7.2003. Therefore, by this communication, the Engineer recommended retention of liquidated damages amounting to Rs.73,08,333/-. According to the Arbitral Tribunal though, this was an afterthought as the Taking Over Certificate for road length equivalent to Section 1 had been issued nearly an year ago, that is, on 31.3.2005.

iv) The Taking Over Certificate reflected that Section 1 Equivalent of road length consisted of road measuring 35 kilometers out of which, 27.388 kilometers comprised new carriageway, while the balance 7.729 kilometers covered existing carriageway. The sum total of the two though, matched the approved Equivalent length of Section 1.

v) The Resident Engineer had vide his letter dated 13.5.2005 reiterated the issuance of Substantial Completion Certificate. The Taking Over Certificate dated 31.3.2005 and the Resident Engineer's communication dated 13.5.2005 were endorsed to the Project Director, NHAI, Kanpur, despite which, NHAI had raised no objection qua these communications.

vi) The argument advanced on behalf of the Contractor that the claim under Dispute No.1 was time-barred was repelled and the order dated 19.9.2012 passed by it on an application filed under Section 17 of the 1996 Act qua the very same ground was reiterated.

vii) NHAI by its conduct, on many occasions, had indicated that no liquidated damages were imposable *vis-à-vis* Section 1.

15. On behalf of NHAI, Ms. Gunjan Sinha submitted that the claim had to be allowed as the learned Arbitral Tribunal had applied the principle of Equivalent Completion of Sections qua which, there was no provision in the C.A. It was further stated that if this principle were to be applied, then the entire timeline would change. According to the learned counsel, the composition of Sections could not have been unilaterally altered to suit the convenience of the Contractor.

16. On the other hand, Ms. Suri, learned Senior Advocate, reiterated the findings returned by the Arbitral Tribunal and highlighted the fact that since NHAI was unable to provide land on certain stretches on Section 1 *vis-à-vis* new carriageway, it took a policy decision on 11.6.2003 that if quantities planned to be executed in a Sectional Milestone had been attained in other Sections or parts of the projects, then liquidated damages need not be levied.

Reference, in this behalf, was made to the Taking Over Certificate dated 31.3.2005, the Resident Engineer's letter dated 13.5.2005 and Engineer's letter dated 2.9.2003.

Reason & Analysis:

17. In my view, retention of money on account of liquidated damages would necessarily require NHAI to show that it had suffered injury on account of delay. As indicated above, there is no dispute between the parties that the dates for commencement in completion were fixed for each of the three sections, which form part of the project. Liquidated damages in this case, were sought to be levied and thus, recovered *vis-à-vis* Section 1. NHAI has not been able to demonstrate that the finding returned by the Arbitral Tribunal that a policy decision had been taken by NHAI at a level no less than of its Chairman along with other Members of the concerned committee that wherever Equivalent length anywhere else in the project had been achieved, liquidated damages could not be levied, was a finding which had no basis. Clearly, this policy decision was taken by NHAI as it was unable to provide land qua certain Sections and remove utilities and bring down trees to enable the Contractor to carry on the work.

18. Furthermore, as rightly argued on behalf of the Contactor, in this case, a directive was issued on 12.4.2006 by the Chairman in the presence of Member (Technical) and Chief General Manager to resolve the issue of retention of an amount towards liquidated damages. Therefore, the Taking Over Certificate dated 31.03.2005, issued by the Team Leader who was part of the Engineer's team and the Resident Engineer's letter dated 13.5.2005 cannot be faulted with, as both the communications were made in the background of the policy decision taken by NHAI via the Chairperson in a

meeting attended by Member (Administrative), Member (Finance) and Member (Technical), in view of the inability by NHAI, as indicated above, to give complete right of way to the Contractor. The project, as indicated above, required Four-Laning and Strengthening of carriageway on NH-2 which required the contractor to strengthen existing lanes and to provide for two new lanes.

19. Having regard to the aforesaid, in my view, no fault can be found with the reasoning or conclusion reached by the Arbitral Tribunal qua Dispute No.1.

Dispute No.2:

20. This claim essentially pertains to demand of payments by the Contractor with regard to the installation of 7 test piles and the initial load test carried on them. Being additional items, which were, according to the Contractor, not specified in the tender drawings, payment qua the same had to be made by NHAI.

21. NHAI, however, resisted the payment in respect of the said additional item on the ground that Bill of Quantity (BOQ), item No.5.05¹, included this item as well. The contention of NHAI was that construction of test piles and initial load tests carried out on them was governed by BOQ item No.5.05, which, clearly provided that quoted rates would include provision for all tests.

21.1 Furthermore, reliance was also placed by NHAI, to support this contention, on the following clauses in the Technical Specification (TS):

¹Providing and Casting In place Bored RCC piles including all tests complete as per drawing and technical Specification Clause no. 1100, 1600 & 1700.

(a) Clause 1100; Sub-clauses 1101.3; and 1105.1².

21.2 In addition thereto, reliance was also placed on Clauses 1113³, 1118 and 1119. Besides this, reference was also made to TS sub-clause 114.2(xi).

22. The argument advanced was that a conjoint reading of BOQ item No.5.05 and the TS clause referred to above, would show that initial pile loading test was covered in the quoted rate and that the quoted rate would include costs incurred towards labour, material, equipment and other incidental expenses involved for conducting routine and initial pile load tests, which would include costs for installation of piles on which tests were carried out. It was also contended that since TS Clause 1105 referred to test piles which were shown on the drawings or specified in the contract, it demonstrated the fact that drawings were not only source of information as regards test piles and initial load tests which were carried out on such piles. The fact that the location and number of initial load tests carried out were dependent on sub-soil strata conditions would provide the reasons as to why

²1105 TEST PILES

1105.1. Test piles which are shown on the drawings or specified in the Contract or installed by the Contractor on his own to determine the lengths, of piles to be furnished shall conform to the requirements for piling as indicated in these specifications, if they are to be incorporated in the completed structure. Test piles that are to become a part of the completed structure shall be installed with the same type of equipment that is proposed to be used for piling in the actual structure. Test piles which are not to be incorporated in the completed structure shall be removed to at least 600 mm below the proposed soffit level of pile cap and the remaining hole shall be back filled with earth or other suitable material. The piles shall be load tested in accordance with provisions laid down in this section.

³ 1113.1. General

The bearing capacity of a single pile may be determined from test loading a pile. The load test on a concrete pile may not be carried out earlier than 28 days from the time of casting of the pile. There shall be two categories of test on piles, namely, initial tests and routine tests. Initial tests should be carried out on test piles which are not be incorporated in the work. Routine tests shall be carried out as a check on working piles. The number of initial and routine tests on piles shall be as determined by the Engineer depending upon the number of foundations, span length, type of superstructure and uncertainties of founding strata. In any case, the initial load tests shall not be less than 2 in number, while the routine load tests shall not be less than 2 percent of the total number of piles in the structure nor less than 2 in number. The above stipulations hold good for both vertical as well as lateral load tests on pile foundations. However, both initial and routine tests may be suitably increased for important structures or cases with large variation in the sub-surface strata. The methodology of carrying out load tests and of arriving at safe load on piles shall conform to IS: 2911 (Part IV). In case of any doubt of workmanship or load carrying capacity of working piles not subjected to routine tests, or when ordered by the Engineer, or when provided in the contract, load tests on working piles may be supplemented by non-destructive testing. Such tests may include "Integrity Testing" of concrete in the installed pile and utilisation of "Pile Driving Analyser" which gives an indication of pile capacity in end bearing and side friction.

the location of initial load tests could not be indicated in the tender drawings.

22.1 This apart, the claim was barred by time as it had not been raised within a prescribed period of 28 days from the date of cause of action as required under Sub-Clause 53.1 of the General Conditions of Contract ("GCC"). Furthermore, no notice of intention to claim extra payment under this head was given by the Contractor to NHAI as required under Sub-Clause 52.2⁴ of the GCC. In support of this objection, NHAI adverted to the fact that the initial pile loading test was conducted as early as in October, 2001 and the claim qua the same was raised in February, 2005. Thus, according to NHAI, the claim was barred both under the provisions of the Limitation Act, 1963 (in short "Limitation Act") and sub-clause 53.1 of the GCC. Pertinently, these very objections were reiterated on behalf of NHAI by Ms. Sinha before me.

23. On the other hand, on behalf of the Contractor, it was submitted by Ms. Suri that the initial pile load tests were carried out in accordance with the instructions conveyed by the Engineer. The contention advanced was that in terms of TS Sub-Clause 1105.1, the test piles had to be shown either in the drawings or specified in the Contract. According to the learned Senior Counsel, the tender drawings only provided for routine load test of working

⁴ **52.2 Power of Engineer to Fix Rates, G.C.C.**

Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the Works or to any part thereof, is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item of the Works is, by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate or price as is in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance-with Clause 60. Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub-Clause 52.1 or under this Sub-Clause unless, within 14 days of the date of such instruction and, other than in the case of omitted work, before the commencement of the varied work, notice shall have been given either:

(a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price, or
(b) by the Engineer to the Contractor of his intention to vary a rate or price.

piles and that they did not indicate initial load test piles that had to be installed and qua which Section load tests were required to be carried out. The contention was that BOQ Item No.5.05 had to be read with TS 1105.1 and the tender drawings. The contention advanced by Ms. Suri was that installation of initial load test piles and their corresponding load tests continued upto September, 2005. The claim was submitted in February 2005, followed by updation in January, 2006 along with rate analysis, which is something that is not contested by the Engineer or NHAI.

24. According to the learned Senior Advocate, the Engineer was empowered to approve rate variations upto 1% of the contract price. Furthermore, it was submitted that the failure to comply with the procedural requirements under sub-clauses 53.1⁵, 53.2 and 53.3⁶ of the GCC cannot bar either the Engineer or the Arbitral Tribunal to decide whether or not payment had to be made qua this claim as well as it was based on “contemporary record”. In this behalf, reliance was placed on Guide to Use FIDIC condition of contract. The other contention raised in support of this claim on behalf of the contractor by Ms. Suri was that the C.A. permitted

⁵ **Notice of Claims, 53.1, G.C.C.**

Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.

⁶ **Substantiation of Claims, 53.3, G.C.C.**

Within 28 days, or such other reasonable time as may be agreed by the Engineer, of giving notice under Sub-Clause 53.1, the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the grounds upon which the claim is based. Where the event giving rise to the claim has a continuing effect, such account shall be considered to be an interim account and the Contractor shall, at such intervals as the Engineer may reasonably require, send further interim accounts giving the accumulated amount of the claim and any further grounds upon which it is based. In cases where interim accounts are sent to the Engineer, the Contractor shall send a final account within 28 days of the end of the effects resulting from the event. The Contractor shall, if required by the Engineer so to do, copy to the Employer all accounts sent to the Engineer pursuant to this Sub-Clause. If the circumstances giving rise to the claim are not continuing the Contractor has the Obligation, but also the benefit, of submitting his claim to the Engineer for agreement or discussion while the event is still sufficiently recent for Site personnel to have the facts at their fingertips and the records readily available. If the circumstances are continuing the Engineer will inspect the records at reasonable intervals and should raise any points with which he disagrees or on which he wishes to have further information when he inspects the records.

raising of claims even at the stage of submission of draft final statement. In this behalf, reference was made to sub-clause 60.11 and 60.14 of the GCC.

Reasons & Analysis:

25. Under this claim, the contractor had sought payment of a sum of Rs.45,37,847. The claim, as indicated above, involved payments for installation of seven test piles and conducting initial load test on them. The Arbitral Tribunal, however, noted that the sum of Rs.45,37,847/- included a sum of RS.11,95,944/- towards price adjustment. The amount towards price adjustment had been calculated, according to the learned Arbitral Tribunal, by taking into account the price indices as on 28 days prior to taking over of the subject works, that is, as on 25.7.2007. As per the reasoning employed by the Arbitral Tribunal the methodology adopted by the Contactor on this count was not correct. The Arbitral Tribunal was of the view that the Contractor should have taken into account the price indices, which were relevant when the work was carried out and not when the subject works were taken over. Therefore, it concluded that since test piles were completed on different dates between October, 2001 and September, 2005, the price adjustment component had to be reworked.

26. On merits, the Arbitral Tribunal returned, *inter alia*, with the following findings of fact: (i) that the tender drawings did not specify initial pile load test; (ii) the tender drawings only specified the routine tests; and (iii) that tenders had been invited without carrying out sub-soil investigations.

26.1 In other words, because sub-soil investigations were not carried out, details with regard to the initial load tests were not provided.

27. In view of the above, the Arbitral Tribunal concluded that it was illogical on the part of NHAI to contend that the Contractor ought to have included in its bid costs of an item, the details of which were not known to it prior to the bid being preferred.

28. Having regard to the findings returned by the Arbitral Tribunal and the rationale, I am of the view that the conclusions reached on this score are unimpeachable. The failure on the part of NHAI to carry out sub-soil investigations prior to floating of tender cannot lead to a situation that the Contractor is denied moneys expended by it on installation of test piles and carrying out load test on them at the behest of the Engineer.

29. Thus, the contention advanced on behalf of NHAI to the contrary cannot be accepted.

30. As regards submissions advanced on behalf of NHAI that the claim under this head was barred in view of failure to comply with the provisions of sub-clauses 53.1, 53.2 and 53.3 of the GCC, I am inclined to accept the interpretation put by the Arbitral Tribunal on sub-clause 53.4⁷ of the GCC, which is that the preceding sub-clauses are procedural in nature and that they do not emasculate the right of a contractor to lodge a claim; the only caveat being that the Contractor's claim could get restricted to the amounts as quantified by either the Engineer or the Arbitral Tribunal appointed in consonance with sub-clause 67.3. This aspect is mentioned in sub-clause 53.4, which reads as follows:

⁷ **Failure to Comply, 53.4**

If the Contractor fails to comply with any of the provisions 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 arbitrators appointed pursuant to Sub- Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clauses 53.2 and 53.3).

"...53.4 If the Contractor fails to comply with any of the provisions 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 arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clauses 53.2 and 53.3)..."

(emphasis is mine)

30.1 Furthermore in the context of what is stated above, observations made in ***National Highways Authority of India vs. OSE-GIL J.V.***, 2014 SCC OnLine, Del 7051 being relevant are extracted hereafter:

"...3. Ms. Gupta, therefore, argues that Section 28 of the Contract Act would have no application, in view of the fact that, clause 53.1 of the contract obtaining between the parties only prescribes a procedure, by which, claim for additional payments, if any, can be triggered by the contractor (i.e., the respondent in this case). Ms. Gupta says that clause 53.1 of the contract does not, as held by arbitral tribunal, firstly, prescribe a period of limitation; and secondly, a period shorter than that prescribed under law, rendering it liable to run afoul of Section 28 of the Contract Act.

4. In the context of what Ms. Gupta has submitted it would be necessary to extract relevant portion of not only clause 53.1, but also, an attendant clause, i.e., clause 53.4; which was also relied upon by the arbitral tribunal. The same read as follows:

"Clause 53.1: Notwithstanding any other provisions of the contract, if the contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the Claim has first arisen...."

.....Clause 53.4: If the Contractor fails to comply with any of these provisions 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 arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under sub-clauses 53.2 and 53.3)....”

5. In my view, a plain reading of clause 53.1 would show that, while it is a non-obstante clause, it provides that where a contractor intends to claim additional payment, he is required to give notice of his intention to the engineer, with a copy to the employer (i.e., the NHAI in this case), within 28 days after the event, giving rise to the claim, has arisen.

5.1 On the other hand, clause 53.4, provides for an anticipated situation, which is, where a contractor fails to comply with any provisions of the clause in issue (i.e., clause 53), in respect of any of his claims, for which, he seeks entitlement to payment, and thus, the manner in which it is to be assessed by the engineer or an arbitrator, as the case may be.

5.2 Clause 53.4, therefore requires that, in such a situation, the engineer or, the arbitrator(s) so appointed to adjudicate upon the dispute in this behalf, shall assess the claim for additional payment by verifying the same with reference to the “contemporary records”.

5.3 A conjoint reading of clause 53.1 and 53.4, persuades me to accept the submission of Mr. Airi, learned counsel for the respondent, that the provisions of clause 53.1, which required issuance of notice before a claim can be lodged for additional payment, is not mandatory, and that, it is only a directory provision. Failure, to issue notice, does not envisage a situation that the contractor, i.e., the respondent in this case, would lose his right to agitate his claim for additional payment. If notice is not issued, as contemplated under clause 53.1, then, the engineer or the arbitrator(s) appointed to adjudicate upon the claim lodged, can assess its tenability and value with reference to contemporary record.

5.4 It is not disputed before me, by the counsel for the petitioner, that the, claim has been verified by the arbitral tribunal with reference to contemporary record. It is also not in

dispute that there is, today, no grievance vis-a-vis the quantum of the claim, so ascertained by the arbitral tribunal.

6. Having regard to the above, in my opinion, the discussion on Section 28 of the Contract Act by the arbitral tribunal was, in a sense, made in addition, to its view on the interpretation of clauses 53.1 and 53.4..."

(emphasis is mine)

31. Before I conclude on this aspect of the matter, I must also advert to a contention advanced, based on the provisions of Section 227⁸ and 228⁹ of the Indian Contract Act, 1872 (in short 'Contract Act'). Based on the said provisions, it is argued that NHAI cannot be called upon to pay for installation of test piles and initial load test which were not authorized and since the two components of the claims cannot be separated, it was not bound to recognize the claim.

31.1 Section 227 provides that the principal is not bound by the acts done by an agent beyond the authority conferred on him. Section 228 adverts to a situation that where an agent acts outside the scope of his authority and the unauthorized acts cannot be separated from those which are authorized, the principal is not bound to recognise the transaction. To my mind, both sections have no application for the reason the Engineer, as noted above, acted within the bounds of his authority. The value of the variation item was within the range of the limit prescribed in Clause 2.1 (d)(ii) of the G.C.C. Therefore, the NHAI was, to my mind, required to make payment for the

⁸ Section 227, INDIAN CONTRACT ACT, 1872 - Principal how far bound, when agent exceeds authority- When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

⁹ Section 227, INDIAN CONTRACT ACT, 1872 - Principal not bound when excess of agent's authority is not separable - Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

additional item based on the principle analogous to quantum meruit, which was what the Arbitral Tribunal, in effect, has directed.

32. Thus, in my view, the Arbitral Tribunal has rightly awarded the said claim in favour of the Contractor for a sum of Rs.33,41,903/- with additional right to claim price adjustment as indicated in the award.

Dispute No.3:

33. This claim was rendered academic in view of the fact that NHAI has admittedly released payment against the balance 25% of the certified amount in respect of IPC 73. The record shows that the Engineer had certified IPC 73 for an amount equivalent of Rs.12,40,97,985/- against which, NHAI had released an amount equivalent to Rs.8,96,81,425/-. Thus, in effect, NHAI had withheld 25% of the total sum in respect of IPC 73 – amounting to Rs.3,44,16,560/-. The ground put forth by NHAI for withholding the said amount was that further action had to be taken *vis-à-vis* IPC 73. In other words, IPC 73 had not been finalized as the certified amount included provisional rates for "variation items". According to NHAI, fixation of rate for variation items had not been completed and that its approval qua the same was still awaited.

34. The Arbitral Tribunal, *inter alia*, noted the provisions of sub-clause 2.1(b) of G.C.C.¹⁰ and sub-clause 2.1(d)(ii)¹¹ contained in Appendix to bid, which permitted the Engineer to approve a variation if it did not exceed 1%

¹⁰ 2.1 Engineer's Duties and Authority:

(a) The Engineer shall carry out the duties specified in the Contract.

(b) The Engineer may exercise the authority specified in or necessarily to be implied from the Contract, provided, however, that if the Engineer is required, under the terms of his appointment by the Employer, to obtain the specific approval of the Employer before exercising any such authority, particulars of such requirements shall be set out in Part II of these Conditions. Provided, further that any requisite approval shall be deemed to have been given by the Employer for any such authority exercised by the Engineer.

¹¹ **Engineer's Authority to Issue Variations, 2.1 (d)(ii), Appendix to bid**

One percent of the contract price at a time subject to a maximum of 10 (Ten) percent of the contract price in aggregate.

of the Contract Price at a time subject to a maximum of 10% of the contract price in aggregate.

35. The Arbitral Tribunal, thus, came to a conclusion that the Engineer was empowered to approve the variations, contrary to what had been the stand of NHAI.

35.1 To be noted, before the Arbitral Tribunal, one other argument was raised by NHAI, which was that excess payment of Rs.67,28,252/- had been made to the Contractor. The Arbitral Tribunal rejected the said contention, as there was no such claim raised before it. Pertinently, as correctly advised, no such ground of objection has been taken in the petition filed under Section 34 of the 1996 Act, though, there is a passing reference to this fact in paragraph 21.2 of the body of the petition.

35.2 Importantly, this aspect was also not pressed before me by Ms. Sinha.

36. It is also relevant to note that pursuant to the decision of the DRB in respect of this claim, which was also in favour of the Contractor, a bank guarantee was furnished by the Contractor, which expired during the pendency of the proceedings before the Arbitral Tribunal. The Arbitral Tribunal noticed that the bank guarantee in the sum of Rs.3,44,16,560/- expired on 14.1.2012.

36.1 The Arbitral Tribunal has, however, returned a finding of fact that the dispute before the DRB with regard to this claim was raised on 19.4.2010 and that NHAI released the retained payment under this claim to the Contractor on 15.1.2011.

36.2 Therefore, while no payment was required to be awarded by the Arbitral Tribunal qua the said claim, what it was required to examine was as to whether interest had to be paid or not. This aspect is discussed in the latter paragraph of the judgment.

Interest Claim (Pre-Award): Discussion

37. The Arbitral Tribunal has awarded in respect of the claim lodged under Dispute No.1 and 2 qua interest, sums calculated at 12% (simple) per annum) from the date of cause of action, that is, 11.12.2007 till the date of the award, that is, 28.1.2014.

37.1 However, as noticed above, in respect of the claim lodged under Dispute No.3, the period for which interest, *albeit*, at the same rate has been awarded commences from 19.4.2010 when the dispute was referred to the DRB and 15.1.2011 when the payment was released by the NHAI.

38. Pertinently, despite sub-clause 60.8¹² of the C.A. providing that interest is to be paid at the rate of 12% compounded monthly, the Arbitral Tribunal has rejected the contention of the Contractor on the ground that no demand for interest was made by the Contractor. Thus, taking into account the provisions of sub-clause 60.8 of the C.A., Section 3¹³ of the Interest Act,

¹² **Final Payment Certificate, 60.8:** Within 28 days after receipt of the Final Statement, and the written discharge, the Engineer shall issue to the Employer (with a copy to the Contractor) a Final Payment Certificate stating:

(a) the amount which, in the opinion of the Engineer, is finally due under the Contract or otherwise, and
(b) after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled other than under Clause 47, the balance, if any, due from the Employer to the Contractor or from the Contractor to the Employer as the case may be.

¹³ **Section 3, Interest Act, 1978** - Power of court to allow interest

(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,--

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings;

1978, and Section ¹⁴31(7)(a) and (b) of the 1996 Act, the Arbitral Tribunal has proceeded to award at simple interest at the rate of 12% per annum.

39. In my view, the approach of the Arbitral Tribunal is in accordance with law and therefore, the same is required to be sustained. NHAI did not portray before me that a demand for interest was made.

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings interest shall not be allowed under this section for the period after such repayment.

(2) Where, in any such proceedings as are mentioned in sub-section (1),--

(a) judgment, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and

(b) the sum represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death,

then, the power conferred by that sub-section shall be exercised so as to include in that sum interest on those damages or on such part of them as the court considers appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) Nothing in this section,--

(a) shall apply in relation to--

(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or

(ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement;

(b) shall affect--

(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or

(ii) the provisions of rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);

(c) shall empower the court to award interest upon interest.

¹⁴ **Section 31** - Form and contents of arbitral award

(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless--

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

1[(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent. higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.-- The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).]

2[(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.]

Future Interest (Post-Award): Discussion

40. The Arbitral Tribunal has, under this head, awarded once again, simple interest at the rate of 12% per annum on the amounts, which include the amounts awarded under Dispute No.1 and 2 inclusive of interest. In other words, post award interest has been awarded on the total sum reflected in paragraph 7.1, that is, a sum of Rs.2,90,91,620/-. Here again, in my view, no error is found in the approach adopted by the Arbitral Tribunal.

41. Besides this, the Arbitral Tribunal has also awarded simple interest at the rate of 12% from the date of cause of action, that is, 11.12.2007 till 28.1.2014 on the amount of price adjustment which is squarely to be worked out, *vis-à-vis*, claim lodged in respect of Dispute No.2. To my mind, no error can be found in respect of the same as well.

42. I may only indicate that in respect of Post-award interest awarded by the Arbitral Tribunal, the only objection taken is that since it is granted on the awarded sum, that is, sum inclusive of interest till the date of the award, it tantamounts to awarding interest at a compounded rate.

42.1 In this regard, I may only advert to the following extract from the judgement of the Supreme Court in *Hyder Consulting (UK) Ltd. v. State of Orissa*, (2015) 2 SCC 189, which is in sync with the approach of the Arbitral Tribunal:

"...10. In this view of the matter, it is clear that the interest, the sum directed to be paid by the arbitral award under clause (b) of sub-section (7) of Section 31 of the Act is inclusive of interest pendente lite.

11. At this juncture, it may be useful to refer to Section 34 CPC, also enacted by Parliament and conferring the same power upon a court to award interest on an award i.e. post-award interest. While enacting Section 34 CPC Parliament conferred power on a court to order interest "on the principal sum adjudged" and not on merely the "sum" as provided in the Arbitration Act. The departure from the language of Section 34 CPC in Section 31(7) of the 1996 Act is significant and shows the intention of Parliament.

12. It is settled law that where different language is used by Parliament, it is intended to have a different effect. In the Arbitration Act, the word "sum" has deliberately not been qualified by using the word "principal" before it. If it had been so used, there would have been no scope for the contention that the word "sum" may include "interest." In Section 31(7) of the Act, Parliament has deliberately used the word "sum" to refer to the aggregate of the amounts that may be directed to be paid by the Arbitral Tribunal and not merely the "principal" sum without interest..."

(emphasis is mine)

43. Accordingly, for the foregoing reasons, in my view, no interference is called for with the impugned award. The captioned petition is, accordingly, dismissed. Costs will follow the result.

RAJIV SHAKDHER
(JUDGE)

OCTOBER 31, 2018/pmc