

\$~35

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 143/2018 and IA Nos. 4682-4683/2018**

GOVT. OF NCT OF DELHI

..... Petitioner

Through: Mr Ramesh Singh, Standing
Counsel for GNCTD with Mr
Sanjay Dewan, ASC for
GNCTD with Mr Chirayu Jain,
Advocate.

versus

CONTINENTAL ENGINEERING
CORPORATION

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

10.04.2018

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the arbitral award dated 30.11.2017 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted of a sole arbitrator, Sh K.K. Varma (Retired), Additional Director General, CPWD (hereafter 'the Arbitral Tribunal').

2. The impugned award was rendered in the context of disputes that had arisen between the parties in respect of contract for execution of the works relating to the "Comprehensive Development of Corridor

(Outer Ring Road) between Wazirabad to Mukarba Chowk”. The controversy involved in the present petition relates to the price variation in contract price on account of increase / decrease in prices of materials specified in Schedule F in terms of Clause 10CA of the General Conditions of Contract-2010 (GCC-2010) that forms a part of the contract between the parties.

3. By the impugned award, the Arbitral Tribunal has accepted the respondent’s claims that the base Price Index (referred to as ‘Clo’) for computing the price variation as per Clause 10CA of GCC-2010 would be the base Price Index for the month of March 2013, that is, as applicable on the last date for submission of the tender. The petitioner disputes the same; it claims that in terms of Correction Slip No. 5 dated 27.02.2012, the base Price Index would be as applicable in March 2012, which corresponds to the base prices as set out in Schedule ‘F’ of GCC-2010.

4. There is no dispute between the parties that the petitioner would be entitled to payment due to variation of prices of materials after receipt of the tender in terms of Clause 10CA of the General Conditions of Contract-2010 (GCC-2010). In terms of the said Clause, the price variation is required to be calculated as per the following formula:-

$$V = P \times Q \times \frac{C_1 - C_0}{C_0}$$

5. The principal dispute between the parties relates to the determination of the variable, referred to as 'Clo'. The petitioner's claims that Clo would be the Price Index for the specified material as corresponding to the base price of respective materials indicated in Schedule 'F' of the GCC-2010, whereas the respondent, on the other hand, contends that Clo is the Price Index as prevailing on the last stipulated date of receipt of tenders.

6. The above controversy arises on account of conflicting clauses in documents constituting the contract between the parties.

Brief facts

7. The petitioner issued a Notice Inviting Tender (NIT) on 06.03.2013 for "*Comprehensive Development of Corridor (Outer Ring Road) between Wazirabad to Mukarba Chowk*" (hereafter 'the Project'). The length of the aforesaid corridor is about 7.6 kms and the Project involved civil and electrical works with respect to the said stretch. The cumulative estimated cost of the Project was ₹500,54,21,665/- [₹495,34,28,156/- (for civil works) + ₹5,19,93,509/- (for electrical works)] and the Project was to be completed within a period of 24 months.

8. Pursuant to the aforesaid NIT, the respondent submitted its bid for ₹442,95,68,517/- which was below the estimated cost. The said bid was accepted and, on 29.04.2013, the petitioner issued a Letter of Acceptance (LOA) stipulating the date of commencement of work as 21.05.2013. The Project was to be completed within 24 months and,

therefore, the stipulated date of completion of the project was fixed as 20.05.2015.

9. Thereafter, the parties entered into the Contract Agreement No. 01/EE/F-133/PWD/2013-14 (hereafter 'the Agreement'). In terms of the Contract Agreement, the following documents also constituted an integral part of the contract: (i) NIT including schedules A-F, additional conditions, specifications and drawings, if any, forming part of the tender; (ii) standard CPWD Form – 8; (iii) GCC-2010 as modified and corrected up to the last date of submission of the tender; (iv) Special conditions of the Contract; (v) Integrity Pact; (vi) negotiation letter dated 16.04.2013; (vii) LOA dated 29.04.2013, (viii) letter of commencement of work dated 14.05.2013; and (ix) pre-bid clarification.

10. Completion of the Project has been inordinately delayed. The respondent alleges that the same is for reasons attributable to the petitioner including delay in handing over the site. The petitioner has also extended the time for completion of the Project from time to time. By a letter dated 27.12.2014, the petitioner extended the time for completion of the Project to 31.12.2015. Thereafter, the petitioner extended the time for completion of the project up to 31.12.2016, which was further extended till 31.05.2017.

11. The respondent has been submitting its running account bills (RA Bills) from time to time, which were processed by the petitioner. The said bills included amounts due to price variation in terms of

Clause 10CA of the GCC-2010. The petitioner processed the first 30 RA Bills without any protest or objection. However, the petitioner raised a controversy while processing the payment of the 31st RA Bill. According to the petitioner, the price variation for materials was to be calculated considering the base price indices as existing in October 2012.

12. The petitioner, by a letter dated 26.04.2016, called upon the respondent to submit the revised price escalation statement by using the base Price Indices as in October 2012. According to the petitioner, those indices were applicable by virtue of Correction Slip No. 5 dated 27.02.2012 (hereafter 'the Correction Slip'). According to the petitioner, Clause 10CA of GCC-2010 stood modified by the Correction Slip.

13. The respondent disputed the same as, according to the respondent, the Correction Slip modified the GCC-2010 as existing on that date, that is, as on 27.02.2012. However, Clause 10CA of the GCC-2010 was amended after the issuance of the Correction Slip and an Annexure 1B was introduced in Schedule 'F' of the GCC-2010. The said amendment provided for calculation of the price variation by using the Price Index as valid on the last stipulated date as receipt of the tender. Thus, according to the respondent, the price index as prevailing on 22.03.2013 was applicable for determining the price variation. This was reiterated by the respondent by a letter dated 20.05.2016 and the petitioner was requested not to withhold any amount from the RA Bills.

14. The petitioner rejected the aforesaid claim by a letter dated 11.06.2016 and withheld a sum of ₹7.63 crores from RA Bill No. 31. This led the respondent to issue a letter dated 14.06.2016 raising a dispute and requesting for the necessary instructions in terms of Clause 25(i) of GCC. The same was rejected by the Chief Project Manager by his letter dated 15.06.2016. In terms of the Dispute Resolution Clause, the respondent preferred an appeal before the Chief Engineer (Projects)/Chief Engineer by a letter dated 23.06.2016. This was also rejected by the Principal Chief Engineer by a letter dated 22.08.2016.

15. Thereafter, by a letter dated 26.09.2016, the petitioner informed the respondent that a Dispute Redressal Committee (DRC) had been constituted. The petitioner filed a representation before the DRC; however, the same was also rejected. This led the petitioner to invoke the arbitration clause.

16. Thereafter, the disputes were referred to the Arbitral Tribunal, which entered upon reference on 10.02.2017. The arbitral proceedings culminated in the Arbitral Tribunal delivering the impugned award.

Impugned award

17. The Arbitral Tribunal accepted the claims made by the respondent. The Arbitral Tribunal held that the GCC-2010 was amended as it was apparent by addition of Chapter I, which included the amended, clauses of the GCC-2010, including Annexure 1B. The said annexure included the amended Clause 10CA. Further, Schedule

F also referred to Annexure IB. On the basis of the above, the Arbitral Tribunal concluded that the Correction Slip stood superseded by the amended Clause 10CA. Accordingly, the Arbitral Tribunal held that the price variation was to be computed as per Clause 10CA as amended under Annexure 1B of the GCC-2010.

18. In view of the said conclusion, the Arbitral Tribunal awarded a sum of ₹7,31,10,320/- (which was recovered by the petitioner) in favour of the respondent. The Arbitral Tribunal also awarded simple interest at the rate of 10% on the sum of ₹7,31,10,320/- from the date of invocation of the arbitration – that is from 27.12.2016 – till the date of the award (30.11.2017) which was computed at ₹67,62,705/-. The other claims raised by the respondent and the counter claim preferred by the petitioner were rejected. However, since the respondent had also paid the petitioner's share of fee to the extent of ₹6,25,375/-, the Arbitral Tribunal awarded the said sum in favour of the respondent. Thus, in aggregate, the Arbitral Tribunal awarded a sum of ₹8,11,98,400/- in favour of the respondent. It also awarded future interest at the rate of 8.5% on the said sum till the date of payment.

Submissions

19. Mr Ramesh Singh, the learned counsel appearing for the petitioner assailed the impugned award on two fronts. First, he submitted that the Arbitral Tribunal had grossly erred in not appreciating that the Correction Slip was an integral part of the contract and had been issued to modify the GCC-2010. He submitted

that in the circumstances, the Correction Slip would override the clauses of GCC-2010. He contended that the Arbitral Tribunal had grossly erred in proceeding on the basis that since the GCC-2010 itself was amended after the issuance of the Correction Slip, the amended GCC-2010 would prevail.

20. He submitted that the Arbitral Tribunal erred in following the principle that in case of repugnancy or conflict between two clauses of an agreement, the clause introduced later would prevail over the earlier clause. He submitted that this principle was applicable in interpreting testamentary instruments and not agreements. He contended that it was well established that in case of an agreement, the earlier clause would prevail over a later clause. He referred to the decision of the Supreme Court in case of *Uma Devi Nambiar & Ors. v. T.C. Sidhan: (2004) 2 SCC 321* in support of this contention.

21. Next, he contended that even if it was accepted that the amended Clause 10CA was applicable, the same could not be applied in case of other materials as 'Clo' was defined as Price Index for cement, steel reinforcement and structural steel as issued by DG, CPWD but did not include any other material.

Reasons and conclusion

22. It is apparent from the above that the controversy involved in the present petition relates to interpretation of a contract between the parties. And, it is well settled that construction of a contract lies within the jurisdiction of the arbitrator (See: *Mcdermott International*

Inc. v. Burn Standard Corporation Ltd.: (2006) 11 SCC 181).

23. In ***Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.: (2009) 10 SCC 63***, the Supreme Court had observed that “.... *an error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.*”

24. It is also trite law that if the view accepted by the Arbitral Tribunal is a plausible view, the Courts would not interfere even if it favours another view. In ***Steel Authority of India Ltd. (supra)***, the Court had held that “*if the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.*” This view was also reiterated by the Supreme Court in a later decision in ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran: (2012) 5 SCC 306***. In that decision the Supreme Court held as under:-

“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.”

25. In view of the above, the only question that falls for consideration of this Court is whether the interpretation of the

documents as accepted by the Arbitral Tribunal is perverse or is so unreasonable so as to fail the *Wednesbury* test; that is, to say that no sensible person would arrive at such a conclusion.

26. At this stage, it would be relevant to refer to the relevant clauses of the documents forming a contract between the parties. Clause 10CA of the GCC, as it existed in 2010, reads as under:-

“Clause 10CA

If after submission of the tender, the price of materials specified in Schedule F increases/ decreases beyond the price(s) prevailing at the time of the last stipulated date for receipt of tenders (including extensions, if any) for the work, then the amount of the contract shall accordingly be varied and provided further that any such variations shall be effected for stipulated period of Contract including the justified period extended under the provisions of Clause 5 of the Contract without any action under Clause 2.

However for work done/ during the justified period extended as above, it will be limited to indices prevailing at the time of stipulated date of completion or as prevailing for the period under consideration, whichever is less.

The increase/ decrease in prices of cement, steel reinforcement and structural steel shall be determined by the Price indices issued by the Director General (Works), CPWD. For other items provided in the Schedule ‘F’, this shall be determined by the All India Wholesale Price Indices of materials as published by Economic Advisor to

Government of India, Ministry of Commerce and Industry and base price for cement, steel reinforcement and structural steel as issued under the authority of Director General (Works) CPWD applicable for Delhi including Noida, Gurgaon, Faridabad & Ghaziabad and for other places as issued under the authority of Zonal Chief Engineer, CPWD and base price of other materials issued by concerned Zonal Chief Engineer as indicated in Schedule 'F' as valid on the last stipulated date of receipt of tender, including extension if any and for the period under consideration. In case, price index of a particular material is not issued by Ministry of Commerce and Industry, then the price index of nearest similar material as indicated in Schedule 'F' shall be followed.”

The amount of the contract shall accordingly be varied for all such materials and will be worked out as per the formula given below for individual material:-

Adjustment for component of individual material

$$V = P \times Q \times (CI - C_{lo}) / C_{lo}$$

Where,

V = Variation in material cost i.e. increase or decrease in the amount of rupees to be paid or recovered.

P = Base Price of material as issued under authority of DG(W), CPWD or concerned zonal chief Engineer as indicated in Schedule 'F' valid at the time of the last stipulated date of receipt of tender including extensions, if any.

Q = Quantity of material brought at site for bonafide use in the works since previous bill.

Clo = Price index for cement, steel reinforcement bars and structural steel as issued by the DG{W}, CPWD as valid on the last stipulated date of receipt of tenders including extensions, if any. For other items, if any provided in Schedule 'F', All India Wholesale Price Index for the material as published by the Economic Advisor to Government of India, Ministry of Industry and Commerce as valid on the last stipulated date of receipt of tenders including extensions, if any.

CI = Price index for cement, steel reinforcement bars and structural steel as issued under the authority of DG(W), CPWD for period under consideration. For other items, if any, provided in Schedule 'F', All India Wholesale Price Index for the material for period under consideration as published by Economic Advisor to Government of India, Ministry of Industry and Commerce,

Note: (i) In respect of the justified period extended under the provisions of clause 5 of the contract without any action under clause 2, the index prevailing at the time of stipulated date of completion or the prevailing index of the period under consideration, whichever is less, shall be considered.

Provided always that provisions of the preceding Clause 10C shall not be applicable in respect of Materials covered in this Clause.

(ii) If during progress of work or at tJ,, time of completion of work, it is noticed that any material brought at site is in excess of requirement, then amount of escalation if paid earlier on such excess quantity of material shall be recovered on the basis of cost indices as applied at the time of payment of escalation or as

prevailing at the time of effecting recovery, whichever is high.”

27. The Correction Slip (Correction Slip No. 5 dated 27.02.2012) has not been produced in record. However, Mr Singh referred to the relevant extract of the said Correction Slip, which is quoted in the Statement of Claim and is set out below:-

“Clo = Price index for cement, steel reinforcement bars and structural steel as issued by the DG, CPWD and corresponding to the time of base price of respective material indicated in Schedule ‘F’. For other items, if any, provided in Schedule ‘F’, All India Wholesale Price Index for the material as published by the Economic Advisor to Government of India, Ministry of Industry and Commerce and corresponding to the time of base price of respective material indicates in Schedule ‘F’.”

28. Schedule ‘F’, as included in GCC-2010, is set out below:-

Clause 10 C Component of labour expressed as percent of value of work		No Applicable
Clause 10CA		Applicable
Materials covered under this clause	Nearest Materials (other than cement, reinforcement bars and structural steel) for which All India Wholesale Price	Base Price of all materials covered under clause 10 CA

	Index to be followed	
1. Cement (Port Slag cement)	----	Rs 6700/- Per MT
2. Cement (OPC)	----	Rs 5600/- Per MT
3. Reinforcement Bars TMT -500(Primary Manufacturer)	----	Rs 53314/- Per MT
4. Structural Steel (E410)	----	Rs. 53314/- Per MT
5. All other Structural Steel	----	Rs 49056/- Per MT
6. H.T. Strand	----	Rs 65,000/- Per Mt
Clause 10CC Clause 10CC to be applicable in contracts with stipulated period of completion exceeding the period shown in next column. (Also refer Annexure-1C)		18 Months
Schedule of component of Other materials, labour & POL for price escalation		
Components of 'Civil component of other construction materials' (except cement, reinforcement bars, structural steel, HT Strand covered under clause 10CA		40%

29. The Agreement also included amended clauses of GCC-2010.

It is not in dispute that the said amended clauses were introduced much after the date of the Correction Slip, that is, much after the date 27.02.2012. Annexure 1B of the GCC -2010 includes the amended Clause 10CA, which is set out below:-

“ANNEXURE-1B

CLAUSE 10 CA - PAYMENT DUE TO
VARIATION IN PRICES OF MATERIALS
AFTER RECEIPT OF TENDER.

If after submission of the tender, the price of materials specified in Schedule F increases/decreases beyond the price(s) prevailing at the time of the last stipulated date for receipt of tenders (including extensions, if any) for the work, then the amount of the contract shall accordingly be varied and provided further that any such variations shall be effected for stipulated period of Contract including the justified period extended under the provisions of Clause 5 of the Contract without any action under clause 2.

However for work done/during the justified period extended as above, it will be limited to indices prevailing at the time of stipulated date of completion or as prevailing for the period under consideration, whoever is less.

The increase/decrease in prices of cement, steel reinforcement and structural steel etc. shall be determined by the Price indices issued by the

Director General (Works), CPWD as detailed below:

The amount of the contract shall accordingly be varied for all such materials and will be worked out as per the formula given below for individual material:

$$V = P \times Q \times \frac{Cl - Clo}{Clo}$$

Where,

V = Variation in material cost i.e. increase or decrease in the amount of rupees to be paid or recovered.

P = Base price of material as issued under authority of DG(W), CPWD or concerned Zonal Chief Engineer as indicated in Schedule 'F' valid at the time of the last stipulated date of receipt of tender including extension of time, if any.

Q = Quantity of material brought at site for bonafide use in the works since previous bill.

Clo = Price index for cement steel, reinforcement bars and structural steel as issued by the DG(W), CPWD as valid on the last stipulated date of receipt of tenders including extension, if any.[Emphasis supplied]

Cl = Price index for cement, steel reinforcement bars and structural steel as issued under the authority of DG(W), CPWD for period under consideration.

Note :(i) In respect of the justified period extended under the provisions of clause 5 of the contract without any action under clause 2, the index prevailing at the time of stipulated date of completion or the prevailing index of the period under consideration, whichever is less, shall be considered.

- (ii) For Port slag cement and ordinary Portland cement, CI & Clo will be the All India Price Index for “Cement (OPC)” issued by Director General, CPWD for the period under consideration and as valid on the last stipulated date of receipt of tender including extension, if any, respectively.
- (iii) For Reinforcement Bars TMT -500 (Primary Manufacturer), CI & Clo will be the All India Price Index for “Reinforcement Bars TMT-500 (Primary Manufacturer)” issued by Director General, CPWD for the period under consideration and as valid on the last stipulated date of receipt of tender including extension, if any, respectively .
- (iv) For H.T. Strand, CI & Clo will be the All India Price Index issued by Director General, CPWD for the period under consideration and as valid on the last .stipulated date of receipt of tender including extension, if any, respectively.
- (v) For Structural Steel (E410) and All other Structural Steel, CI & Clo will be the All India Price Index for “Structural Steel” issued by Director General, CPWD for the period under consideration and as valid on the last stipulated date of receipt of tender including extension, if any, respectively.

- (vi) For Bitumen, CI& Clo are the All India Wholesale Price Index for 'Bitumen' as published by the Economic Advisor to Govt. of India, for the period under consideration and as valid on the last stipulated date of receipt of tender including extension if any, respectively.

Provided always that provisions of the proceedings Clause 10C shall not be applicable in respect of Materials covered in this clause.

If during progress of work or at the time of completion of work, it is noted that any material brought at site is in excess of requirement, then amount of escalation if paid earlier on such excess quantity of material shall be recovered on the basis of cost indices as applied at the time of payment of escalation or as prevailing at the time of effecting recovery, whichever is higher.”

30. It is clear from the above that there is a conflict between the terms of Clause 10CA of the GCC-2010 and the Correction Slip. The formula provided in Clause 10CA in the GCC-2010 has to be computed on the basis of escalation in the price index of cement, steel reinforcement bars and structural steel as indicated on the last stipulated date of receipt of tender including extension, if any. This was, subsequently, sought to be amended by the Correction Slip, which expressly provided that the price index would correspond to the base price of respected material as indicated in Schedule 'F'.

31. However, after the Correction Slip had been issued, Clause 10CA of GCC-2010 was again amended. Schedule F was amended

and included a reference to Annexure 1B which included an amended Clause 10CA. The base Price Indices for the purposes of calculating escalation (referred to as 'Clo') was now to be reckoned as on the last stipulated date of receipt of tenders. The Arbitral Tribunal noticed the above repugnancy and concluded that since Clause 10CA was amended after the Correction Slip had been issued, the said amended clause would be applicable.

32. This Court finds no infirmity with the aforesaid view. The contention that rules of interpretation of agreements required the earlier clause to prevail over a later clause is unmerited. The Agreement must be read as a whole. In order to ascertain the intention of the parties, an attempt must be made to read all clauses of an agreement in a harmonious manner. The reliance placed on behalf of the petitioner on the decision in the case of *Uma Devi Nambiar* (*supra*) is misplaced. The said decision is rendered in the context of the interpretation of the Will. The Court sought to draw a distinction between interpreting a Will and interpreting other documents such as sale deed, gift deed or a mortgage deed. Clearly, the rules of interpretation as referred to by the Supreme Court in regard to documents such as sale deed, gift deed or a mortgage deed are wholly inapplicable while interpreting a commercial agreement. In cases where the property is sought to be transferred by way of a sale deed, gift deed or a mortgage deed, the earlier agreement would prevail. This is for the simple reason that once the property has been conveyed, the transferor would have no right to deal with the same.

This principle does not apply to a Will as explained by the Supreme Court in *Uma Devi Nambiar* (*supra*). The relevant extract of the said decision – which was also relied upon by Mr Singh – is set out below:-

“12. This rule of interpretation can be invoked if different clauses cannot be reconciled. (See *Rameshwar Bakhsh Singh v. Balraj Kuar* [AIR 1935 PC 187 : 40 CWN 8] .) It is to be noted that rules of interpretation of Will are different from rules which govern interpretation of other documents like sale deed, or a gift deed, or a mortgage deed, or for that matter, any other instrument by which interest in immovable property is created. While in these documents, if there is any inconsistency between the earlier or the subsequent part or specific clauses, inter se contained therein, the earlier part will prevail over the latter as against the rule of interpretation applicable to a Will under which the subsequent part, clause or portion prevails over the earlier part on the principle that in the matter of Will the testator can always change his mind and create another interest in place of the bequest already made in the earlier part or on an earlier occasion. Undoubtedly, it is the last Will which prevails.”

33. As is apparent from the above, the court was seeking to draw a distinction between a Will and other instruments that convey a property. The said decision is not an authority for the proposition that in case of repugnancy between two clauses of a commercial document, the clause as included earlier would supersede the later. This proposition is fundamentally flawed.

34. The contention that the amended Clause 10CA of GCC-2010

would apply only to cement, steel reinforcement and structural steel was not canvassed before the Arbitral Tribunal. The written submissions filed by the petitioner before the Arbitral Tribunal also do not include any such contention. This Court also does not consider it apposite to permit the petitioner to raise the same at this stage.

35. Since the interpretation of the Agreement as accepted in the impugned award is clearly a plausible view, this Court does not find any reason to interfere with the impugned award. The petition is, accordingly, dismissed. All the pending applications are also disposed of.

APRIL 10, 2018
RK

VIBHU BAKHRU, J