

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.546 OF 2015

Chenab Bridge Project Undertaking ... Petitioner
Versus
Konkan Railway Corporation Ltd. ... Respondent

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Mr. Anirudh Krishnan a/w Ms. Chaitra Srinivas and Ms. Manasi Kalvit I/b
Mahernosh Humranwala for the Petitioner.

Ms. Kiran Bhagalia a/w Ms. Asha Bhambwani for the Respondent.

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CORAM : S.C. GUPTE, J.

DATE : 17 JANUARY 2019

(ORAL JUDGEMENT)

. This arbitration petition challenges an award passed by an arbitral tribunal of three arbitrators. The disputes between the parties arise out of a construction contract. The contract was for construction of a special bridge across river Chenab. The Petitioner, who was the contractor, raised several claims arising out of this construction contract against the Respondent, who was the employer and respondent before the arbitral forum. These claims were broadly grouped into twelve heads of disputes. Out of these twelve disputes, three were rejected by a partial award. The partial award is the subject matter of challenge in the present petition.

2 The Petitioner was entrusted the work of construction of a special bridge across river Chenab at KM 50/800 on Katra-Laole section of the Udhampur-Srinagar-Baramulla Rail Link Project undertaken by the

Respondent-employer. The Petitioner is a joint venture of three companies and was awarded the work under a contract dated 24 November 2004. The contract value had two components : (i) fixed cost of about Rs.451,61,09,885/- for the portion of the bridge above foundation level and (ii) variable cost of about Rs.61,13,34,287/- for foundation and soil stabilization works. The contractor's claims consist of various items such as price variation, soil investigation tests, entry tax, increase in toll tax, excavation, extra items-slope stabilization, change in alignment of viaduct, compensation for change in design, compensation relating to *pend* period, compensation for loss of productivity, additional expenses, compensation for extended stay and de-mobilisation of equipment, etc. These claims were grouped into two groups and sub-grouped into twelve disputes denoted as 'Dispute I' to 'Dispute XII'. At the hearing of the reference, the parties requested the arbitrators to decide four disputes covering claim Nos.7, 9,12, 13, 22, 23, 28 and 29, i.e. Disputes I, II, III and IV, to be heard and decided in the first instance. On other claims, the parties had proposed to lead oral evidence and therefore, requested the arbitral tribunal to consider them separately and subsequently. After consideration of submissions of the parties, in regard to Dispute II (Claim No.7), the tribunal was of the view that Dispute II required proper consideration and it would be more appropriate to decide the same along with the other claims in Group-I, which were to be argued and considered subsequently as noted above.

3 Accordingly, the arbitrators considered three disputes, Disputes I, III and IV, comprising in all of seven claims. The arbitrators considered the rival cases in the light of pleadings, evidence and submissions of the parties

and rejected each of these three disputes. The awards on these disputes are considered separately as follows.

Dispute I (Claim No.9) (Price Variation) :

4 Dispute I pertained to application of the price variation clause contained in Clause 7.2.0 of the contract for variation of price of steel (Claim No.9). The Petitioner had claimed a sum of Rs.68,13,559/- towards such price variation. The case of the Petitioner before the arbitral tribunal was that the contract had provided a general price variation scheme in clause 7.1 (comprising of ten sub-clauses, numbered as Clauses 7.1.1 to 7.1.10) and a separate and special price variation scheme for structural steel in clause 7.2 (comprising of two sub-clauses, namely, Clauses 7.2.1 and 7.2.2). As for the general price variation scheme, the relevant sub-clause (clause 7.1.9) allowed price variation only in excess of 5 % to the contractor. In other words, the general price variation scheme contained in clause 7.1 excluded the initial price variation of upto 5 % of the amount payable to the contractor for the purpose of reimbursement for all items of deliverables except structural steel items. These latter items were covered under a separate price variation scheme (clause 7.2). Since Clause 7.2 did not contain any restrictive provision, i.e. provision similar to 7.1.9, it was submitted by the Petitioner that the entire price variation was payable for structural steel items. The argument of the Petitioner was that the particular clause, namely, clause 7.2.0, had originally provided for exclusion of price variation upto 15 % of the gross amount of steel supplied. It was submitted that this clause was dropped altogether, when Clause 7.2 was amended by Corrigendum No.3. It was submitted that

consequently, the reimbursement payable was for the entire price variation in case of structural steel, that is to say, without excluding any percentage of such variation. The grievance of the Petitioner was that inspite of this contractual provision, the Respondent had excluded 5 % worth of variation while reimbursing the price variation in case of structural steel and as a consequence, a sum of Rs.68,13,559 had been wrongly withheld from the bills (Escalation Bills 1, 2 and 5) relating to structural steel for three particular periods (i.e. June 2005 to May 2006, June 2006 to November 2006, and June 2007 to August 2007).

5 The Arbitrators construed the provisions of price variation in Chapter 7 of the tender document which formed part of Special Conditions of Contract. Clauses 7.1.1 to 7.1.10 related, as noted above, to price variation in general, whereas clause 7.2 contained special provisions relating to price variation for structural steel. The arbitrators considered clause 7.2, both before and after its amendment by Corrigendum No.3. The arbitrators noted that there was a difference between the two formulas for determination of price variation of two different items, i.e. (i) structural steel and (ii) all other items, though their structure was the same; the difference was only in the description of factors 'Ws' and 'Wso' in the formula, as explained by the arbitrators in the award. The arbitrators held that clause 7.2 was not a complete and independent self contained code for price variation in respect of structural steel; on the other hand, clauses 7.1.3 to 7.1.10 constituted a complete code for all price variations and clause 7.2 merely made a change in regard to two inputs/variable factors in the formula in clause 7.1.6 so as to arrive at price variation for structural steel. The arbitrators held that on this reason, clause 7.1.9,

which provided for exclusion of price variation upto a certain limit, would very well apply even in respect of structural steel. The arbitrators held that clauses 7.2.1 and 7.2.2 gave the reason for making a special provision in regard to price variation in the case of structural steel; these clauses provided for a formula based on wholesale price index only for iron and steel as opposed to general wholesale price index (for all commodities by groups and sub-groups). The arbitrators held that neither of the clauses (i.e. 7.2.1 or 7.2.2) made any provision for other factors, which were covered by various sub-causes of clause 7.1 making computation provisions concerning methodology and machinery for applying such variation, namely, the intervals at which price adjustments should be made, whether during the period of contract originally fixed or also during the extended period, whether the price adjustment was available even when the extension was subject to levy of penalty, whether there should be any exclusions/deductions from the gross value with reference to which price variation was payable, and the extent of such variation. The learned arbitrators held that clause 7.2 did not contain any provision for any of these factors. The learned arbitrators held that it was, accordingly, evident that price variation in structural steel was also subject to the various computation provisions relating to methodology and machinery contained in clauses 7.1.3 to 7.1.10, which, as the arbitrators noted, included clause 7.1.9. The arbitrators also noted the wording of clause 7.2.2 in this behalf. The wording required that for price variation in structural steel the average index number of whole sale price shall be “replaced” by the index only for the group of iron and steel. The arbitrators held that the use of the word 'replaced' clearly showed that only a part of clause 7.1.6 was altered and the other provisions, namely, clauses 7.1.3, 7.1.4, 7.1.5, 7.1.7, 7.1.8, 7.1.9

and 7.1.10, were to apply for price variation in structural steel. The arbitrators observed that the formula given in clause 7.2.2 would become ineffectual and meaningless without the help of the various sub-clauses of clause 7.1. After considering these circumstances and analyzing the relevant provisions in their light, the arbitrators arrived at their conclusion that the provisions of clauses 7.1.3 to 7.1.10 governing price variation generally in regard to all other material (i.e. material other than structural steel) were applicable even in regard to price variation for structural steel, the only change in case of the latter being a change in the factors 'W' by 'Ws' and 'Wo' by 'Wso' in the formula. In short, the arbitrators' conclusion was that the wholesale price index of iron and steel alone was to be applied in case of structural steel items as opposed to the wholesale price index for all other commodities.

6 The analysis of the learned arbitrators and their conclusions referred to above, are clearly possible views. The arbitrators have reasonably construed the relevant clauses of the contract and have come to a conclusion, which any fair or judiciously minded person could well have arrived at. There is nothing shocking or unreasonable about such conclusion. As the Supreme Court held in the case of **Associate Builders Vs. Delhi Development Authority**¹, an arbitral tribunal must decide in accordance with the terms of contract, but if an arbitrator construes a term of the contract in a reasonable manner, it does not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide and unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do,

1 (2015) 3 Supreme Court Cases 49

the award cannot be faulted.

7 Learned Counsel for the Petitioner submits that for arriving at their conclusions, the arbitrators have not considered the real or actual submissions of the Petitioner. Learned Counsel submits that the arbitrators appear to have construed the submissions wrongly and accordingly reached wrong conclusions. For example, it is submitted that it was not the submission of the Petitioner that Clause 7.2 was a complete or independent code for price variation in structural steel; the Petitioner's contention was that the provision of exclusion of 15 per cent variation earlier to be found in Clause 7.2.2 was dropped altogether in the amendment (Corrigendum No.3) and this deliberate dropping of exclusion was to make for nil exclusion. In short, the argument is that the submissions of the Petitioner were not considered at all and therefore, the award was bad under the law discussed in **Oil and Natural Gas Corporation Limited Vs. Western Geco International Limited**².

8 No doubt, the arbitrators have considered whether or not Clause 7.2 was a complete and independent self-contained code for price variation in respect of structural steel as the claimant's contention. But, even otherwise, the consideration by itself is clearly relevant and has a vital bearing on the construction of clause 7.2 in contrast with clause 7.1. Besides, the whole point of the Petitioner's real contention, namely, the provision of exclusion of variation in the case of structural steel contained in the earlier (i.e. pre-amendment) clause 7.2.2 being deliberately dropped, is clearly subsumed within the analysis of the relevant clauses by the

2 (2014) 9 Supreme Court Cases 263

learned arbitrators noted above. After all, the question before the arbitrators was: whether or not there was a provision for exclusion of price variation in the case of structural steel. The argument to be considered was whether, by reason of deletion of the particular clause providing for exclusion (i.e. exclusion of 15%) from the original contract by way of Corrigendum No.3, the exclusion was altogether dropped for application of price variation in the case of structural steel or whether, as a result, the general provision contained in clause 7.1, namely, clause 7.1.9, which dealt with the other items, was to be made applicable to price variation of structural steel. As we have noted above, the arbitrators' analysis precisely considers this question upon relevant considerations. There is, thus, no infirmity in the analysis of the learned arbitrators or the conclusion arrived at by them for not considering the particular submission of the Petitioners based on the amendment of clause 7.2 by Corrigendum No.3. Any argument of the Petitioner in that behalf is clearly inconsistent with the analysis of the arbitrators. If that is so and if the analysis of the arbitrators and the conclusions arrived at by them are found to be reasonable and possible conclusions, there is no fault to be found with the same within the parameters of Section 34 of the Act as explained by the Supreme Court in **Associate Builders'** case (supra).

Dispute III (Claims 12, 22 and 28) (Entry Tax on earth moving equipment) :

9 This dispute involved consideration as to whether a particular clause in Chapter 5, namely, Clause 5.1.2 of Special Conditions of Contract, required the Petitioner to be compensated on account of change of pattern

of taxation pertaining entry tax during execution of the works and in particular, whether the Petitioner was entitled to reimbursement of Rs.1,32,28,910 paid as entry tax on earth-moving equipment. Clause 5.1.2 is quoted below :-

“Clause 5.1.2 : Sales Tax including turn over tax on works contract, octroi, royalty, toll tax, Duties/Levies as well as services and any other tax levied by central govt., state govt. or local bodies, as applicable 15 days prior to the date of opening of tender shall be considered to be included in the percentage rates quoted by tenderer/s in the Schedule of Items, Rates & Quantities. In case of any increase/decrease in the taxes during the period from 15 days prior to the date of opening of tender to the completion of the work, the net increase/decrease for the balance portion of the work shall be borne/recovered by the Corporation. xxxxxx”

10 The Petitioner's contention in the reference was that entry tax became leviable by the State Government after the opening of tenders and this additional expenditure on account of entry tax for moving in equipment required for the contract work would have to be borne by the Respondent. The Respondent, on the other hand, contended that no claim for any compensation or additional payment by reason of imposition of entry tax on earth moving equipment was tenable, having regard to the bar contained in clause 11.7 of Bill of Quantity ('BoQ'), and clauses 7.1.1 and 7.1.2 of Special Conditions of Contract and clause 2.11.2 of ITB. These clauses are extracted below :-

Clause 11.7 of BoQ (Vol.-I/VI: page 77): “The rates and prices tendered in the priced Bill of Quantities, shall except in so far as it is otherwise provided under the Contract, include all construction, plant, labour, supervision, materials, all temporary works, false works, all leads and lifts, erection, specified finishes, maintenance, establishment and overhead charges, insurance, profits, foreign taxation and levies, taxes, royalties and duties together with all general risks, liabilities and obligations set out or implied in the Contract and including remedy of any defects during the Defects Liability Period.”

Clause 7.1.1 of Special Conditions (Vol.-I/VI: page 54): “The rates quoted by tenderer and accepted by the Corporation shall hold good till the completion of the work and no additional, individual claim shall be admissible on account of fluctuation in market rates, increase in taxes/any other levies/tolls etc. except the payment/recovery for overall market situation shall be made as per price variation clause.”

Clause 7.1.2 of Special Conditions (Vol.-I/VI: page 54): “No cognizance shall be given for any sort of fluctuations in taxes and other market conditions etc. for any individual item for the purpose of making adjustments in payments. The-Contract shall, however, be governed by the general price-variation clause.”

Clause 2.11.2 of ITB (Vol.-I/VI: page 26): “No variation in prices of materials or wages escalation on any account whatsoever or compensation for 'Force Majeure' etc. shall be

payable under this Contract except price escalation clause payable as per price variation clause, if any provided separately in the tender documents.”

11 The learned arbitrators held that a careful reading of these relevant provisions of contract showed that the Petitioner would not be entitled to reimbursement of any entry tax paid by it. The Arbitrators' reasons for this conclusion were as follows. Clause 5.1.2 of Special Conditions provided for differential sales tax or turnover tax or works contract or other tax being borne by the respondent on **the amount billed to the respondent** and not in regard to **items forming components of the rates quoted by the Petitioner**. The arbitrators explained this by giving an example. The arbitrators held that Clause 5.1.2 dealt with taxes “chargeable” by the contractor on the bills raised on the respondent; it did not deal with or provide for reimbursement of increase in taxes which might indirectly be a component of the price or rate quoted. The arbitrators held that it was clear from the contract that in regard to such components of rates, the Petitioner was not entitled to seek reimbursement of any increase in price or taxes and all that it would be entitled to would be the increase which was permitted in accordance with the formula provided in the price variation clause. The price variation clause only provided for variation in general price in accordance with a standardized price variation formula, and not reimbursement of actual increases in taxes. The arbitrators held that this was the rationale of (i) clause 11.7 of BoQ which provided that rates/prices would include all taxes and (ii) clauses 7.1.1 and 7.1.2 which provided that rates quoted by the tenderer and accepted by the employer would hold good till the completion of the work and no additional

individual claim would be admissible on account of increases in taxes or other levies except for the provision made by way of price variation clause. The arbitrators held that there was nothing in the contract to suggest, as claimed by the Petitioner, that clause 5.1.2 of Technical Special Conditions would prevail over clauses 7.1.1 and 7.1.2. In the light of the argument of the Petitioner in this behalf, the arbitrators also independently analyzed clause 5.1.2 on the one hand and clauses 7.1.1 and 7.1.2 on the other. The analysis of the arbitrators and the findings based on such analysis clearly exhibit reasonable and possible approach and view.

10 Learned Counsel for the Petitioner relies on a host of cases including the case of **Delhi Development Authority Vs. R.S. Sharma**³, to contend that an arbitrator cannot go beyond the terms of a contract whilst interpreting them. Learned Counsel submits that if a term of the contract is clear and unambiguous, the arbitrator cannot ignore it. Learned Counsel submits that if the particular clause, namely, clause 5.1.2 of special conditions of contract makes a provision for entry tax payable by the contractor, such tax would be clearly covered in the expression “any other taxes levied by the Central Government, State Government or Local Body.” Learned Counsel submits that the only reason for providing sub-clauses, such as clauses 7.1.1 and 7.1.2, in the price variation clause was to exclude taxes whilst calculating price variation payable under it so as to avoid duplication, considering the provision of clause 5.1.2. Learned Counsel submits that clause 5.1.2 is clear and unambiguous and could not have been disregarded by the arbitrators. The ambiguity does not come from clause 5.1.1, but from the fact that there are other clauses in the

3 (2008) 13 Supreme Court Cases 80

contract, such as clauses 7.1.1 and 7.1.2. One way to look at the co-existence of these clauses is to treat clauses 7.1.1 and 7.1.2 merely as an exclusion for working out price variation, since it is specifically provided for in clause 5.1.2. Equally, there is another way of looking at these three clauses, and that is : clauses 7.1.1 and 7.1.2 make it clear that no increase in tax in the case of any component forming part of BoQ rates, which was considered by the contractor for quoting his rates for any particular item, should be allowed to the contractor; it is only when particular taxes were actually to be paid on the deliveries of the contractor, these would be included for reimbursement by the employer under clause 5.1.2. The arbitrator adopted the latter view. It cannot be said either that it is an unreasonable view or a view which is either impossible or which no fair and judiciously minded person would have taken. The award on this dispute, thus, does not merit any interference under Section 34 of the Act, having regard to the law stated by the Supreme Court in the case of **Associate Builders** (supra).

Dispute IV (Claims 13, 23 and 29) (Increase in Toll Tax) :

11 This dispute involves a claim for compensation of the Petitioner on account of change in the pattern of taxation pertaining to toll tax during the execution of the work and for reimbursement of Rs.5,23,279 towards such change. The provision, under which this claim was made and the objections to the claim and the respective contentions of the parties in respect of it, were identical to those relating to the claim on account of entry tax, which was separately dealt with by the learned arbitrators and which is discussed above. The learned arbitrators adopted the same

reasoning to hold that the Petitioner was not entitled to any reimbursement on account of increase in toll tax under clause 5.1.2 of special conditions of contract. Learned Counsel for the Petitioner submits that toll tax is expressly referred to in clause 5.1.2 and thus, a special provision is made in respect of toll tax. Learned Counsel submits that in the premises, the arbitrators could not have had recourse to the general provisions concerning tax in clauses 7.1.1 and 7.1.2. There is no distinction to be drawn between toll tax and entry tax for the purpose of clause 5.1.2 and in particular, concerning its interpretation in the face of the other clauses, namely, clauses 7.1.1 and 7.1.2. The interpretation of the arbitrators in so far as Dispute III is concerned holds good even if the tax (entry tax under Dispute III) was included within the expression 'tax' provided under clause 5.1.2. If that is so, the fact that toll tax was particularly referred to and therefore included in clause 5.1.2, makes no real difference. If any increase in any of the taxes (referred to in clause 5.1.2) levied on the components which make up or go into the rates quoted by the contractor, is not to be reimbursed under the contract, having regard to combined reading of clauses 7.1.1, 7.1.2 and 5.1.2, the toll tax must also meet the same fate. Accordingly, there is no merit even in this particular challenge.

12 There is, accordingly, no merit in the petition. The Arbitration Petition is dismissed.

(S.C. GUPTE, J.)