

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

+ *Reserved on: March 28, 2019*
Pronounced on 16th April, 2019

O.M.P.(COMM) 128/2019

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Dr. Maurya Vijay Chandra, Advocate
with Ms. Somya Pandey, Advocate.
versus

M/S GAYATRI- ECI (JOINT VENTURE), HYDERABAD..... Respondent

Through: Mr. Jayant Mehta, Advocate with Mr.
Angad Mehta and Ms. Bani Brar,
Advocate.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. National Highways Authority of India (hereinafter referred to as 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act'), assailing the award dated 22nd November 2018 passed by the Arbitral Tribunal comprising of three Arbitrators (hereinafter referred to as 'the AT').

2. The impugned award has been rendered in respect of the disputes raised between Gayatri-ECI (Joint Venture) (hereinafter referred to as GEJV, a Joint Venture association between M/s Gayatri Projects Limited and Engineering and Construction Limited Company (ECI)) in relation to Contract Agreement dated 7th April 2006 (hereinafter referred to as 'the

Agreement') for the works of four-laning of National Highway from Km 40.000 to Km 60.00 of Maibong to Lumding Section of NH-54 in Assam. Contract No: EW-II (AS-27) on the East West Corridor under Phase-II programme of NHDP. (hereinafter "the works").

BRIEF FACTS

3. NHAI invited tenders for the works and GEJV participated in the tender process and its bid was accepted by the Respondent. Petitioner issued the Letter of Acceptance dated 31st January 2006 and in pursuance thereto the Agreement was executed between the parties.

4. The Agreement stipulated a Contract term of 30 months. Date of commencement was notified as 15th October 2006 and the scheduled date of completion was fixed as 14th April 2009. Disputes arose between the parties, *inter alia* relating to: a) Reimbursement of enhanced Value Added Tax (hereinafter referred to as VAT) under Sub-Clause 70.6 of Conditions of Particular Application (hereinafter referred to as 'COPA') of the Agreement on account of increase in the rate of Value Added Tax. [The rate of VAT under the Composition Scheme- Assam VAT Act in the State of Assam was increased from 4% to 5% by virtue of Assam Gazette Notification (hereinafter 'the Notification') dated 31.03.2012]; and b) Price Adjustments on components such as Cements, Steel, Plant and Machinery and other materials based on indices as per new series 2004-05 = 100 published by Government of India.

5. GEJV referred the claims to Dispute Resolution Board (DRB) in

accordance with procedures prescribed under Clause 63.7 of the Agreement. After considering the pleadings, documents and submissions, DRB gave its recommendations on 9th June 2014. It recommended claims for reimbursement of enhanced VAT in favour of the Petitioner. However, as regards the claim for price adjustment, the recommendations of the DRB were against the Petitioner. Petitioner communicated its dissatisfaction against the recommendations on the claim for price adjustments and likewise Respondent expressed dissatisfaction vis-a-vis the claim for reimbursement of enhanced VAT. Both parties invoked Arbitration Clause 67 of the Agreement with intention to refer the disputes to Arbitration.

6. GEJV submitted the following claims before the AT :-

Claim No.1: Claim for Reimbursement of enhanced VAT under Subsequent Legislation Clause No. 70.6 of the Agreement:

Rs.2,86,58,050/- [Rs 1,94,65,294/-(Principle)+ Rs 91,92,756 (Interest)] along with interest @ 18% p.a. from date of recovery till the actual date of payment; declaration for reimbursement of additional 1 % of gross bill amount deducted towards VAT from future bills.

Claim No.2: Claim for price adjustment on components such as Cement, Steel, Plant and Machinery and Other Materials using the indices as per new series 2004-05=100 published by Govt. of India.

Rs.4,56,07,893/- [Rs 1,96,88,103 (Principle) + Rs 2,59,19,789/- (Interest)] for the period from October, 2006 to September, 2010 and Rs. 12,45,24,96/- [Rs.7,87,39,536/- (Principle) + Rs 4,57,85,433/- (Interest)] for the period

from October, 2010 till date with interest @ 18% from due date of payment till date of payment.

7. After examining the relevant facts and circumstances and considering the contentions raised by the parties, the AT allowed both the claims as under:

Claim No. 1: Rs. 1,94,65,294/- was awarded towards Claim No. 1 along with interest @ 10%p.a. from the date of recovery till the actual date of award. It was further directed that any future recovery on account of increase in VAT shall also be reimbursed along with interest @ 10% p.a. from the date of recovery till the date of payment. On account of reduced rate of interest as awarded by the AT, the interest amount claimed was reworked. Rs. 51,07,087/- was awarded as interest up to 31st December 2016. Further interest from 1st January 2017 to the date of award was awarded as Rs. 87,86,027/-. Future interest on the total amount of award (Rs. 1,94,65,294/- + Rs. 87,86,027 = Rs. 2,82,51,321/-) was directed to be paid @ 10% p.a. from the date of award till the date of actual payment. In the event payment is made within 90 days of the award, no future interest is payable.

Claim No. 2: Claim of price adjustments on the basis of new series was rejected and awarded on the basis that the average linking factor determined to be 1.5689 for Cement, 2.3343 for Steel, 1.7866 for Machinery and 1.8592 for other materials. The price adjustment as admissible for the four disputed items was calculated by the AT to be Rs. 532,46,673 for Cement, 650,74,663 for Steel, 507,02,468 for Plant and Machinery and 1842,27,494 for other Local Materials.

The AT held that since the parties had not furnished the amount of price adjustment actually paid by the Respondent to the Claimant, it was not able to quantify as to how much further amount is payable to the Claimant in respect of any of the four disputed elements on the basis of calculations made by the AT. Thus, it was held that the figures worked out by the AT are the amounts which should be justifiably payable to the Claimant for the price adjustment against each of the four disputed elements. In case actual payment made by the Respondent to the Claimant for any element is short of this amount, the Respondent was directed to pay the difference and in case the amount paid by the Respondent to the Claimant was more than the amount worked out by the AT, no adjustment was required to be done.

Further, interest @10% was awarded on the amount awarded from 25th November 2016, the date of constitution of AT to the date of Award. Future interest was awarded @10% p.a. on the total amount of award from the date of award till the date of payment.

Additional Award: An amount of Rs. 36,26,606 was awarded to the Claimant as payment of expenses and fees of the AT, paid by the Claimant on behalf of the Respondent, along with interest @10% p.a. from the date of Award till the date of payment.

ANALYSIS AND CONCLUSION

8. The court has heard the Learned Counsels for the parties.

Claim no. 1

9. In order to decide the objection to the findings of the AT on Claim No. 1,

it is essential to understand the contractual stipulations dealing with reimbursement of additional expenditure. The relevant clauses on this aspect being Clause 14.3, 70.3 and 70.6 read as under:

Clause 14.3 of Instructions to Bidders:

“14.3. all duties taxes and other levies payable by the Claimant under the contract, or for any other cause as of the date of 28 days prior to the dead line for submission of the bids, shall be included in the rates and the prices and the total bid price submitted by the bidder and the evaluation and comparison of bids by the Respondent shall be made accordingly.”

Clause 70.3 :

"70.3. Contract Price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures as per formula given below. The amount certified in each payment certificate is adjusted by applying the respective price adjustment factor to the payment amounts due:

a) Price adjustment shall apply only for work carried out within the stipulated time or extensions granted by the Respondent and shall not apply to work carried out beyond the stipulated time; price adjustment for extensions for reasons attributable to the Claimant shall be paid in accordance with Sub-Clause 70.5:

Price adjustment shall be calculated as per the formula given below.

b) Following expressions and meanings are assigned to the value of the work done during each month:

R= Total value of work done during the month. It would include the value of materials on which secured advance has been granted, if any during the month less the value of materials in respect of which the secured advance has been recovered, if any during the month. This will exclude cost of work on items for which rates were fixed under variations Clause 51 and 52 for which the escalation will be regulated as

mutually agreed at the time of fixation of rate.

I) Adjustment for Labour Component:

Price adjustment for increase or decrease in the cost due to labour shall be paid in accordance with the following formula:

$$V_L = 0.85 \times P_l / 100 \times R \times (L_i - L_o) / L_o$$

V_L = increase or decrease in the cost of work during the month under consideration due to changes in rates for local labour.

L_o = the average consumer price index for industrial workers for the place as defined in the Appendix to Bid, in the previous month prior to the closing date of submission of bids as published by Labour Bureau, Ministry of Labour*Government of India.

L_i = The average consumer price index for industrial workers for the place as defined in the Appendix to Bid, in the previous month prior to the last day of the period to which a particular Interim Payment Certificate is related as published by Labour Bureau, Ministry of Labour*, Government of India.

P_l = Percentage of labour component of the work.

Note: For the application of this Clause, index of Industrial Workers has been chosen to represent the labour component.

ii) Adjustment for Cement Component

Price adjustment for increase or decrease in the cost of cement procured by the Claimant shall be paid in accordance with the following formula.

$$V_c = 0.85 \times P_c / 100 \times R \times (C_1 - C_o) / C_o$$

V_c = Increase or decrease in the cost of work during the month under consideration due to changes in the rates for cement

C_o = The all India average wholesale price index for cement in the previous month prior to the closing date of submission of bids as published by the Ministry of Commerce & Industry, Government of India.

C_1 = The all India average wholesale price index for cement in the previous month prior to the last day of the period to which a particular Interim Payment Certificate is related as published by Ministry of Commerce & Industry, Government of India.

P_c = Percentage of cement component of the work

(iii) Adjustment for steel component

Price adjustment for increase or decrease in the cost of steel procured by the Claimant shall be paid in accordance with the following formula:

$$V_s = 0.85 \times P_s / 100 \times R \times (S_t - S_0) / S_0$$

V_s = Increase or decrease in the cost of work during the month under consideration due to changes in the rates for steel.

S_0 = The all India average wholesale price index for steel (Bars and Rods) in the previous month prior to the closing date of submission of bids as published by the Ministry of Commerce & Industry, Government of India.

S_1 = The all India average wholesale price index for steel (Bars and Rods) in the previous month prior to the last day of the period to which a particular Interim Payment Certificate is related as published by the Ministry of Commerce & Industry, Government of India.

P_s = Percentage of steel component of the work

Note: For the application of this Clause, index of Bars and Rods has been chosen to represent steel component.

(iv) Adjustment for Plant and machinery and spares component

Price adjustment for increase or decrease in the cost of Plant and machinery spares procured by the Claimant shall be paid in accordance with the following formula:

$$V_p = 0.85 \times P_p / 100 \times R \times (P_1 - P_0) / P_0$$

V_p = Increase or decrease in the cost of work during the month under consideration due to changes in the rates related for Plant and Machinery spares.

P_0 = The all India average wholesale price index for heavy machinery and parts in the previous month prior to the closing date of submission of bids as published by the Ministry of Commerce & Industry Government of India.

P_1 = The all India average wholesale price index for heavy machinery and parts in the previous month prior to the last day of the period to which a particular Interim Payment Certificate is related as published by the Ministry of Commerce & Industry, Government of India.

P_p = Percentage of Plant and machinery spares component of the work.

Note - For the application of this Clause, index of heavymachinery and parts have been chosen to represent thePlant and Machinery and spares components.

(v) Adjustment for Bitumen Component

Price adjustment for increase or decrease in the cost of bitumenshall be paid in accordance with the following formula:

$$V_b = 0.85 \times P_b / 100 \times R \times (B_1 - B_0) / B_0$$

V_b = Increase or decrease in the cost of work during the monthunder consideration due to changes in the rates for bitumen

B_0 = the average official retail price of bitumen at the nearestrefinery for the place as defined in Appendix to Bid, in theprevious month prior to the date of submission of Bids.

B_1 = the average official retail price of bitumen at nearest refineryfor the place as defined in Appendix to Bid. in the previousmonth prior to the last date of the period to which a particular Interim Payment Certificate is related.

P_b = Percentage of bitumen component of the work.

(vi) Adjustment for Fuel and Lubricants (POL)

Price adjustment for increase or decrease in the cost of POL (fuel andlubricant) shall be paid in accordance with the following formula:

$$V_1 = 0.85 \times P_1 / 100 \times R \times (F_1 - F_0) / F_0$$

V_1 = Increase or decrease in the cost of work during the monthunder consideration due to changes in rate for fuel andlubricants.

F_0 = The average official retail price of High Speed Diesel(HSD) oil at the existing consumer pumps IOC for theplace defined in the Appendix to Bid in the previous monthprior to date of submission bids.

F_1 = The average official retail price of HSD at the existingconsumer pumps of 'IOC for the price defined in theAppendix to Bid in the previous month prior to thelast dayof the period to which particular Interim PaymentCertificate is related

P_1 = Percentage of fuel and lubricants component of the work.

Note: For the application of this clause, the price of High

Speed Diesel oil at the IOC pumps has been chosen to represent fuel and lubricants component.

(vii) Adjustment for Other Local Materials

Price adjustment for increase or decrease in the cost of local materials other than cement, steel, bitumen, plant spares and POL procured by the Claimant shall be paid in accordance

$$V_m = 0.85 \times P_m / 100 \times R \times (M_1 - M_0) / M_0$$

V_m = Increase or decrease in the cost of work during the month under consideration due to changes in rates for local materials other than cement, steel, bitumen, plant spares and POL

M_0 = The all India average wholesale price index (all commodities) in the previous month prior to date of submission of bids as published by the Ministry of Commerce & Industry, Government of India

M_1 = The all India average wholesale price index (all commodities) in the previous month prior to last day of the period to which a particular Interim Payment Certificate is related as published by the Ministry of Commerce & Industry, Government of India.

P_m = Percentage of local material component (other than cement steel, bitumen, plant spares and POL) of the work.

(viii) The following percentages will govern the price adjustment of the Contract:

1. Labour- P_1	20%
2. Plant and Machinery and Spares - P_p	20 %
3. POL- P_1	10%
4. Bitumen - P_b	x %
5. Cement- P_c	y%
6. Steel- P_s	z%
7. Other materials- P_m	50-(x-y+z)%
Total	100%

(Note: x. y. z are the actual percentages of material of bitumen, cement and steel respectively used for execution of work as per the Interim Payment Certificate for the months)"

Sub-clause 70.6 of the CoPA Agreement:

"if, after the 28 days prior to the latest of submission of tenders of the contract, there occur changes to any National or State statute, ordinance, decree or other duly constituted authority or the introduction of any such State statute, ordinance, Decree, Law, regulation or byelaw which causes additional or reduced cost to the Claimant other than under preceding Sub clauses of this clause, in the execution of the contract, such additional or reduced cost shall, after due consultation with Engineer and shall be added to or deducted from the Contract Price and Engineer shall be added to or deducted from the Contract Price and Engineer shall notify the contractor accordingly with a copy to the Respondent.

Notwithstanding the foregoing, such additional cost or reduced cost, shall be not be separately paid or credited if the same shall already have taken into account in the indexing of any inputs to the Price adjustment Formulae in accordance with the provisions of sub Clause (1) to (5) of this clause".

10. A reading of Clause 14.3 of the Instructions to bidders, makes it clear that the bid price is inclusive of "*all duties taxes and other levies payable by the Claimant under the Contract, or for any other cause as of the date of 28 days prior to the deadline submission of the bids*". The rate of VAT under the Composition Scheme applicable on Works Contract as on the cut-off date i.e 1st November 2005 was 4%. This was subsequently enhanced to 5% by way of a gazette notification. Respondent claims "additional expenditure" on account of increase composition levy in lieu of VAT from 4% to 5% during the currency of the Contract i.e. post 1st November 2005.

11. The principal ground of challenge to the finding of the AT is that there is no change in the "law" relating to VAT liability on Works Contract within the meaning of Clause 70.6 of CoPA. Petitioner argues that as on 1st

November 2005, the applicable VAT was 12.5% as per entry 2 of schedule V to the Assam VAT Act, 2003. This remained the same throughout the contract period. The statutory provisions relating to the Composition Scheme for Works Contract viz. Section 20 (2) of the Assam VAT Act, 2003 allows the Government of Assam to fix the levy up to 5 % of the value of the works contract in lieu of the VAT liability. This provision also remained unchanged and the Respondent was aware of the aforesaid provision. The liability to pay tax under the composition scheme is compounding of the VAT liability by accepting specified percentage of the value of the Works Contract. The amount deducted or paid under the composition is not a tax itself, but an approximation of the tax liability, calculated for the convenience of the Claimant. It is not an independent tax liability under Section 10 of the Assam VAT Act 2003. GEJV had the option to opt out of the composition Scheme as soon as the rate of calculating the composition liability was increased in March 2012. Had it done so, there would have been no additional liability on NHAI for change in legislation, since the VAT rate remained constant throughout the contract and the said rate was included in the contract price as per Clause 12.1 of the contract agreement. It is further argued that GEJV cannot be permitted to increase NHAI's liability on account of its own decision of opting in for the composition scheme.

12. There is no dispute that by a notification issued by Government of Assam, VAT levy under the Scheme was increased from 4% to 5%. Clause 10 of the Scheme dated 31st March 2012 permits contractors to compound the VAT that is otherwise payable by them on inputs, by paying

VAT on the aggregate value of the works contract. The said clause reads as under:

“Every dealer who has been granted permission by the Prescribed Authority under this Scheme shall be liable to make payment of tax under this Scheme monthly calculated at five percent of the payments receivable by him during the month for execution of the contract”.

13. It is therefore clear that eligible dealers can opt under the scheme as per their discretion. This however does not mean that the payment under the scheme loses the character and nature of “VAT”. The argument of the Petitioner that the increase of the liability under the scheme from 4 % to 5 % is not of VAT, but of composition fee in lieu of VAT is therefore misconceived. Earlier, Petitioner was deducting VAT @ 4% on gross work done from the Running Account (RA) Bills and remitting the said amount to the concerned department. Subsequent to increase in VAT, the deductions were made @ 5% of the gross work done. This additional recovery did not form part of the bid price in terms of Clause 14.3 of the Agreement. Change in law which causes an additional cost to the contractor, is provided for in Clause 70.6 of Conditions of Particular Application (CoPA). In terms thereof, the Respondent is entitled to reimbursement of additional tax being a change brought in after the crucial date of *28 days prior to the deadline submission of the bids*. The Gazette Notification dated 31st March 2000 was issued by the Government of Assam in its executive capacity in pursuance to Section 20(2) of the Assam VAT Act 2003. On account of this increase, the deductions made by the Petitioner financially impacted the Respondent and the same is therefore within the scope and ambit of Sub Clause 70.6. The

contention of the Petitioner that there is no change in legislation is without any merit, as the wording of the Sub Clause 70.6 to the effect *“there occur changes to any National or State statute, ordinance, decree or other duly constituted authority or the introduction of any such state statute, ordinance, Decree, Law, regulation or byelaw which causes additional or reduced cost to the Claimant other than under preceding Sub clauses of this clause....”* is wide and is not restricted to laws passed by the Union or the State Legislatures.

14. NHAI's contention that the GEJV cannot be permitted to claim increase in expenditure as the overall limit of 5% is provided for under Section 20(2) of the Assam VAT Act is also untenable. No contractual stipulation is pointed out to the Court that requires the contractor to have included in the bid price the maximum possible levy of taxes/levies. In terms of Clause 14.3 of the instructions to the Bidders, Respondent was required to include the taxes applicable 28 days prior to the deadline. Concededly as on the said date i.e. 1st November 2005, the rate of tax under the scheme was 4%. The Respondent factored the said tax in the bid price and not the maximum rate stipulated and is therefore entitled to additional expenditure on account of subsequent enhancement.

15. The Petitioner has additionally argued that the enhancement of VAT is included in price adjustment provided under Clause 70.3 of the CoPA. Clause 70.3 deals with Contract Price adjustment relating to rates and price of inputs, such as labour, materials, fuels and lubricants. GEJV has claimed 1% of the gross value on work done as additional cost on account of increase

in the levy of VAT on the aggregate value of the work done. This additional expenditure is not relating to any increase in the cost of inputs but purely on account of levy of VAT. As noted above, this claim is not captured in the indexing of any inputs to the price adjustment formula provided in Sub-clause 70.3 and was not subsumed in the price indexing mechanism. Therefore, the AT has rightly rejected the contention of the Petitioner that the price adjustment sub-clause 70.3 includes the element of VAT enhancement. This court finds the reasoning to be correct and acceptable in view of the contractual provisions.

Claim No. 2

16. This claim emanates from the price adjustment calculated for cement; steel; bars and rod; heavy machinery and parts; and other local materials. Claimant relies upon Sub-Clause 70.1 and 70.3 of CoPA which provides for price adjustment for the rise or fall in the indexed cost for labour, equipment, plant, materials and other inputs to the works by the addition or the subtraction of the amounts determined by the formula described therein.

17. The increase or decrease in rates or price is to be calculated on the basis of the indices of the All India Average Wholesale Price Index (WPI). The WPI series used in the initial period of the Contract was the 1993-94, WPI series (as published by Ministry of Commerce and Industry, Government of India). Till September 2010, Respondent paid price adjustment on components referred to the above noted series using the 'base' and 'current' indices of 1993-94, WPI series. The said series were old and were not adequately capturing the market fluctuations. In September 2010, Ministry

of Commerce and Industry (GOI) updated the price index base series to 2004 -05 = 100 and released the indices effective from April 2005 and discontinued the base series 1993-94 = 100. In the said series, indices with base year 2004-05 were determined.

18. Ministry of Commerce and Industry has provided for a method to work out equivalent indices under the old base year of 1993-94 from the value of indices under the new base year of 2004-05 by applying a linking factor. The Petitioner relying on the said guidelines had worked out the linking factor on item basis, taking the values of indices under the two series available for the year 2009-10. Respondent refused to accept the linking factors proposed by NHAI for payment of price adjustment and filed claims on the new WPI series for the period from October 2006 till the date of filing of the claim petition. The AT rejected the claim of the Respondent that it should be paid price adjustments on the basis of new series. The AT instead agreed with the solution of “applying linking factors” worked out by the Petitioner to resolve the issue. This is evident from the observations made in para 5.3.18 of the order which reads as under:

“The claim of the Claimant that they should be paid price adjustments on the basis of new series which is more reflecting of the trade situation etc is not acceptable as the Contract conditions are sacred and have to be followed. Modifications can be used with the consent of two parties which has not taken place. The Respondent has worked out a solution to resolve the issues. The AT agrees and decides accordingly.”

19. The above observation shows that the AT was conscious of the fact that

contract conditions are sacrosanct and cannot be modified except by consent between the parties. The AT then analyzed the workability of the linking factors suggested by Ministry of Commerce and Industries which were for broad group of commodities and not individual components. The AT held that the same *"cannot be used as the same is trade based and not item based"*. Thus, while accepting Petitioner's claim that linking factor was required, the AT determined the method of deriving the same and concluded as under:

“The Ministry of Commerce and Industries had anticipated this problem and had provided for a method to work out equivalent indices under the old base of 1993-1994 from the values of indices under the new base of 2004-2005 by applying a linking factor. The guidelines also indicate that the linking factor can be worked out by each authority in particular circumstances separately. Under the circumstances, thus available and the guidelines given by the Ministry for the adoption of new series, the only option available is to make use of linking factor. However, the linking factor as worked out by the Ministry cannot be used as the same is trade based and not item based. The Respondent has worked out the linking factor on item basis taking the values of the indices under the two series available: for the year 2009-2010 and has used the values accordingly. The AT considers that it will be fair to work out the values of linking factors for the total period during which the values of indices under the old series and values of indices under the new series are available. Thus the linking factor has been worked out for the years 2004-05, 2005-06, 2006-07, 2007-2008, 2008-2009 and 2009-10. The average of the same gives a more rational and more reasonable linking factor.”

20. The Petitioner's contention that AT has travelled beyond his jurisdiction is misconceived. To determine the values of the linking factor was within

the domain of the AT. The basic feature of price updation is to capture the structure which is consistent with prevailing prices, references and consumption patterns. The linking factor is used to maintain arithmetic continuity. This was the precise question to be determined while deciding Claim No. 2. Concededly, Petitioner unilaterally determined and adopted 'linking factors' instead of using direct indices. Respondents, instead claimed price adjustment on the basis of 2004-05 series without applying linking factors. In view of rival stand of the parties, the AT was required to determine the range of data for calculating linking factor. Since Petitioner itself used linking factor to bridge 1993-94 and 2004-05 series, the approach of AT, by using a more rational and more reasonable linking factor cannot be faulted with. This certainly is not a finding that which can be called to be perverse so as to warrant interference under Section 34 of the Act. Accordingly, this objection of the Petitioner is also rejected. The Respondent has rightly placed reliance on the judgment of this Court in ***Ssangyong Engineering & Construction Co. Ltd. V N.H.A.I., 2017 SCC OnLine Del 7864***, where the Arbitral Tribunal had taken the minority view that the New Series was applicable to the transactions therein. It was held by the Court that if a contractual provision can be interpreted in two ways, it is not open to the Court to interfere with an arbitral award, just because the Court prefers the other view. In the present case, the Arbitral Tribunal has unanimously adopted the linking factors after due deliberation.

Objection under Section 16 of the Act

21. The objections under Section 16 of the Act were decided by the AT vide order dated 9th February 2018. The Objection of the Petitioner is that the

claim Nos. 1 and 2 could not have been examined by the AT as the same involve complicated questions of law of public importance and interpretation of the terms of the contract. Petitioner has also relied upon the judgment of the SC in ***Booz Allen and Hamilton Ltd v SBI Home Finance Ltd., (2011) 5 SCC 532***. The learned counsel for the Petitioner has objected to the findings of the AT on the ground that the award has led to a situation where a judgment *in rem* will come into existence, not by way of full adjudication by a public Court, but by way of "non perversity" test applied to a decision of a private forum. The dispute relating to interpretation of statutory provision would lead to litigation between PSUs and Multiple private parties. Such disputes by their very nature and necessary implication should be excluded from the scope of arbitrability. This objection is *ex facie* untenable. Firstly, Claim No. 1 does not raise a question of law in the manner the Petitioner is trying to canvas. The Claim No. 1 is only in respect of additional expenditure arising out of a contractual provision. Claim No. 2 no doubt involves interpretation and reasonableness of an action of the Respondent, however such an action has been adjudicated by the AT upon the rights inter se the parties and is not a dispute *in rem*. Thus, the judgment of the Apex Court in ***Booz Allen (supra)*** is not applicable to the present case. Petitioner also has no convincing argument in support of the contention that the dispute is not arbitrable on the ground of public policy. The term "public policy" has been explained in multiple decisions of the Supreme Court, such as ***Renu Sagar Power Company Ltd. v General Electric Company, AIR 1994 SC 860, ONGC v. Saw Pipes, 2003 5 SCC 705, ONGC v. Western Geco, AIR 2015 SC 363*** and ***Associate Builders v. DDA, AIR 2015 SC 620***. The Respondent's claims in respect of the price

adjustment is the subject matter of individual contract with the Petitioner and it does not fall into the category of the cases which can be determined exclusively by public courts.

Fee of Arbitral Tribunal

22. The AT has not awarded any costs to the parties. However an amount of Rs. 36,26,606/- has been awarded to the Respondent as payment of expenses and fees of the AT. This amount was paid by the Respondent on behalf of the Tribunal. The Petitioner assails the award of the aforesaid expenses and fees on the ground that the Arbitrator has wrongly fixed the remuneration. The Petitioner came up with its own fee structure, stating that the reasonableness of the fee fixed by the arbitrators will depend on the complexity of the cases, the time that may be consumed in hearing the matters and the expertise and stature of the Arbitrators. It was thus submitted that in the instant case, since there were only two claims and the entire arbitration consumed 10 hearings and the AT comprised of retired Chief Engineer level persons, a fee of Rs. 40,000 per day would be a fair remuneration, assuming the gross salary of the officers of such rank (Chief Engineer) to be Rs. 3,00,000 per month including all perquisites and 300 working days in a year.

23. The AT constituted of three learned Arbitrators who have charged fees as per schedule IV of the Act and therefore the objection of the Petitioner is misconceived and untenable and the same is rejected.

24. Furthermore, the law relating to the scope of interference by this Court

in an arbitral award is no longer *res integra*. In fact, there are several judgments of the Supreme Court and of this Court which have defined that the Courts would interfere in the arbitral awards only in a situation covered under Section 34(2) of the Arbitration and Conciliation Act such as *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49, *WishwaMitter Bajaj v Shipra Estate Ltd.* (2019) 256 DLT 42 (DB), *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181, *P.C.L Suncon (JV) v N.H.A.I.*, 2015 SCC Online Del 13192, *P.R. Shah Shares and Stock Brokers Pvt. Ltd. v B.H.H. Securities Pvt Ltd.*, 2012 (1) SCC 594, *Navodaya Mass Entertainment Limited v J.M. Combines* (2015) 5 SCC 698.

25. In *McDermott (supra)*, it was observed:

“35. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

26. In *Associate Builders (supra)*, the Apex Court, on the aspect of scope of interference by Courts in a section 34 petition, held as under:

“This Section in conjunction with Section 5 makes it clear that

an arbitration award that is governed by part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned Under Section 34(2) and (3), and not otherwise. Section 5 reads as follows:

5. Extent of judicial intervention.--Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process.

It will be seen that none of the grounds contained in Sub-clause 2(a) deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.”

27. In view of the above discussion, there is no merit in the present petition and the same is dismissed. No order as to costs.

SANJEEV NARULA, J.

APRIL 16, 2019

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