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

Reserved on: 16th May, 2019
Pronounced on: 23rd July, 2019

+ **O.M.P. (COMM) 200/2019**

CHENNAI - ENNORE PORT ROAD COMPANY LTD. Petitioner
Through: Ms. Neetika Sharma, Advocate with
Mr. Mukesh Kumar and Ms. Padma
Priya, Advocates.

versus

M/S COASTAL - SPL (JV) Respondent
Through: Mr. R. Jawahar Lal, Advocate with
Mr. Siddharth Bawa and Mr. Shyamal
Aanand, Advocate.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. Petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), against the award dated 16th December 2018 (hereinafter 'the impugned award') passed by the Arbitral Tribunal (AT) comprising of three Arbitrators. The Petitioner and the Respondent nominated one arbitrator each and the third arbitrator was nominated by the said Arbitrators as the presiding arbitrator. The AT in the impugned award has partly allowed the claims of the Respondent and rejected the counter claims of the Petitioner.

Brief Factual Background:

2. The Petitioner (Chennai - Ennore Port Road Company Ltd.), is a special purpose vehicle of National Highways Authority of India. The Respondent (Coastal - SPL (JV)) is an unincorporated Joint Venture between M/s. SPL Infrastructure Pvt. Ltd., and Coastal Project Ltd.

3. Petitioner invited bids for the widening of four lanes with service roads on both sides and strengthening of the Thiruvottiyur - Ponneri - Panchetti (TPP) Road from Km 4/500 to 13/500 (Balance Work); Improvement and strengthening of Manali Oil Refinery Road and Northern Segment of Inner Ring Road; improvement and widening to four lane of 1.6 Km stretch at start of Ennore Expressway from Chennai Port Gate No.1, construction of three groynes and repair of existing groynes along Ennore Expressway; improvement and widening to four lane with service roads on both sides of Ennore Expressway from Km 1/600 to 7/538, hereinafter referred to as 'the Works'.

4. On 25th November 2010, the Respondent submitted its bid for the execution and completion of the works and remedying of any defects therein for a sum of Rs. 2,58,77,74,756.10/-. Respondent offered a rebate of 2% on its quoted offer as mentioned in the tender, which was accepted by the Petitioner and accordingly on 7th February 2011, parties entered into an Agreement for the execution and completion of works at the contract price of Rs. 2,53,47,18,997/-(hereinafter, "the Contract"). It was a term of the contract that, price adjustment was to be done for the value of work done as per BOQ rates in accordance with the formulae specified in the contract.

Disputes arose between the parties regarding the applicability and interpretation of the said formulae in terms of Sub Clause 67.1 of Condition of Particular Application (COPA), Respondent referred the disputes to Dispute Resolution Board (DRB) for adjudication and recommendations. The DRB adjudicated and passed recommendations for one of the disputes and was unable to adjudicate the others, due to efflux of time. The recommendation on the first dispute was rejected by the parties. As the recommendations of DRB had not become final in terms of Sub Clause 67.3 of COPA, all the disputes were referred to Arbitration by following the procedure contemplated under the Contract.

5. Respondent raised the following Claims for adjudication:

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| Claim No.1: | Reckoning percentage of Bitumen, Steel and Cement consumed for price adjustment. |
| Claim No.2: | Erroneous application of rebate in calculation of Price Adjustment. |
| Claim No.3: | Payment for dismantling of old structure in EEW, Phase-I. |
| Claim No.4: | Revised rates for additional works in Thiruvottiyur - Ponneri – Panchetty Road. |
| Claim No.5: | Application of rebate in variation items. |
| Claim No.6: | Revised rates for all BOQ items of work carried out beyond the original intended date of completion. |

6. The Petitioner, raised counter-claims before the Arbitral Tribunal as follows:-

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| Counter Claim No. 1: | Liquidated Damages |
| Counter Claim No. 2: | Damages for loss of revenue |
| Counter Claim No. 3: | Additional expenditure on supervision consultancy |

services
Counter Claim No. 4: Additional expenditure for payment of price adjustment during extended period

7. The parties led their evidence before the AT and on consideration of the evidence and facts of the case, the AT unanimously passed the impugned award whereby Claim No. 1 of the Respondent was rejected and the amount claimed in respect of the remaining six claims, was reduced and a final amount of Rs. 47,64,14,899/- with simple interest @ 10 percent per annum w.e.f. 15th June 2018 till the date of realization was awarded. The counter claims of the Petitioner were rejected. Petitioner assails the impugned award on several grounds which are dealt separately under the heading of the respective claims.

Claim No. 2: Erroneous Application of Rebate in Calculation of Price Adjustment

8. The arbitrator has allowed the aforesaid claim and awarded a sum of Rs. 73,43,858/- in favour of the Respondent. Learned counsel for the Petitioner submits that the impugning Arbitral Award is opposed to public policy, is unreasoned and non-speaking; therefore, it needs to be set-aside. He submits that the AT ignored clause 70.3 as per which the contract price was to be adjusted for increase or decrease in rates and prices of labour, materials, fuel and lubricants in accordance with the procedure and formula prescribed therein. The amount certified in each Payment Certificate was to be adjusted by applying the respective price adjustment factor to the amounts due. Further, in terms of the contract, 'Price' has been defined under clause 1.1.(e) (I) of the General Conditions of Contract (GCC), which

means the sum stated in the Letter of Acceptance (LOA) for the execution and completion of the work and remedying of any defects therein as per the contract. It is further submitted that, as per the letter of acceptance, the contract price of Rs. 253,47,18,997/- i.e., the sum arrived at after deducting a rebate of 2% was offered by the Respondent/contractor. The price adjustment formula as given in sub-clause 70.3 was to be applied by taking account of the aforesaid contract price while issuing the interim payment certificates. He submits that on a conjoint reading of sub-clause 70.1 and 70.3 of COPA, it becomes clear that the amount payable to the contractor in each Interim Payment Certificate (IPC) is nothing but the contract price which shall be adjusted for the rise or fall of the index cost of labour, plant and machinery and other inputs to the work as per the price adjustment formula mentioned in clause 70.3. IPC-3 reflects that price adjustment was to be arrived at by taking into consideration the contract price as per clause 70.3 and not the individual quoted rates as claimed by the Respondent. The Tribunal ignored the fact that the Engineer had rightly interpreted the contract provisions while rejecting the claim of price adjustment raised by the Respondent. The Tribunal also ignored all the contentions of the Petitioner and has wrongly held that the rebate on quoted offer of the Respondent cannot be applied on individual rates for deriving the amount payable towards price adjustment. Also, the arbitrator has given no basis for the awarded amount.

9. In support of the award learned counsel for the Respondent contends that the Petitioner while calculating the price adjustment has erroneously applied the rebate of two percent, which was offered at the time of signing the

contract. Respondent relied upon clause 14.4 of the Instructions to Bidders, clause 60.1, 60.2, 60.7 and 70.1 of the COPA, to contend that the base rates were quoted by the Respondent against Bill of Quantities (hereinafter 'BOQ') as an individual item and the rebate of 2 percent offered by the Respondent was applicable only on the total contract price. The individual rates in the BOQ were neither revised nor reduced by the Respondent pursuant to the offer of rebate. The Respondent thus contends that the lump sum rebate of 2 % cannot be taken into account while calculating the price adjustment payable to the Respondent in terms of the Contract. Hence, the award must be upheld.

10. The court has given its thoughtful consideration to the contentions raised by the learned counsel for the Petitioner. Clause 14.4 of the Instructions to Bidders (ITB) evidently stipulates that the rates and prices quoted by the bidder are subject to adjustment during performance of contract in terms of Clause 70 of COPA. The said clause read as under:-

“The rates and prices quoted by the bidder are subject to adjustment during the performance of the Contract in accordance with the provisions of Clause 70 of the conditions of Particular Application.”

11. Petitioner while considering the variation in price/ BOQ has applied a discount rebate of 2%. The learned Arbitrator, has held that the said rebate cannot be applied on individual rates for determining the amounts payable towards price adjustment. The reason given by the arbitrator on this issue is as under :

“The moot issue to be answered by the Tribunal is whether for the valuation of the work done during any period should be based on the rates quoted by the Claimant or the rates derived after deducting the rebate offered by the Claimant on its quoted offer. Claimant being a part of the tender submitted on 25.11.2010 that the Claimant specifically mentioned that the Claimant had offered - 'a rebate of 2% (Two Percent Only) on amount of quoted offer of the above -subjected tender'. **The quoted offer is distinguishable from quoted rate for the individual items.** To explore the intention of the Claimant for ,offering such rebate, the Tribunal refers to page 411 of the Agreement showing the extract of Bill of Quantities for all the three parts of the tender and it is recorded under the column 'Rebate if any' - 'NIL'. In other words amount originally quoted remains the same under column 'Amount after rebate'. **Thus harmonious reading of both these documents at pages 387 & 411 of the agreement unequivocally suggest that rebate of 2% as offered cannot be on individual rates; but, of quoted total amount of tender. At any event the word 'rebate' means 'paying back some amount by the recipient' and distinguishable from the word 'discount' which is applicable on rate of each item of works.**

...Careful examination of Sub-Clause 70.1 reveals that the works to be valued at base rates and Irrefutably the Claimant had not offered any rebate on individual base rates of the tender...

...In terms of Sub-Clause 70.3 the parties agreed that the variable component of the value of work done subjected to escalation should be 85% of such value of work and not 85% minus 2% of 85% i.e. 83.3% and 87% of the value of work in any particular duration of time. The methodology adopted by the Respondent is therefore incongruous to the agreed provision of contract and not tenable.”

12. From a plain reading of the aforesaid reasoning it emerges that the learned Arbitrator has carefully analyzed the clauses of the COPA.

13. Clause 70.1 of COPA deals with "price adjustment" and stipulates that, *the amounts payable to the Contractor and valued at base rates and prices in the Interim Payment Certificates issued by the Engineer, pursuant to Sub-Clause 60.1, shall be adjusted in respect of the rise or fall in the index cost for labour, Contractor's Equipment, Plant, materials, and other inputs to the Works, by the addition or subtraction of the amounts determined by the formulae prescribed in this Clause.* Clause 70.3 of COPA provides that the variable component of the value of work done subject to escalation should be 85 % of such value of work. Thus, on a co-joint reading of clauses 70.1 and 70.3, it emanates that the works had to be valued at the base rates. Respondent's offer of rebate of 2 % was against the lump sum amount of the contract price and not the individual rates and prices quoted by the Respondent. Concededly, the Respondent had not offered rebate on the individual rates quoted under the tender. Moreover clause 14.4 of the ITB quoted above also stipulates that the rates and prices quoted by the Respondent are subject to the adjustment in accordance with clause 70 of COPA. Thus there was apparent illegality in the Petitioners' action of deducting 2% rebate while calculating the amount of price adjustment and the findings of the Arbitrator are in accordance with the terms of the contract without any infirmity. The deduction made by the Petitioner is without any basis and is incorrect. Therefore the arbitrator is justified in allowing the claim and there is no merit in the challenge on this issue and the same is rejected. Moreover, the Supreme Court in ***Navodaya Mass Entertainment Ltd. v. J.M. Combines*, (2015) 5 SCC 698** has held that, the scope of interference of the court is very limited. The court would not be justified in reappraising the material on record and substituting its own view in place of

the arbitrator's view. Where there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the arbitrator. Once the arbitrator has applied his mind to the matter before him, the court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. [See *Bharat Coking Coal Ltd. v. L.K. Ahuja*[(2004) 5 SCC 109] , *Ravindra & Associates v. Union of India* [(2010) 1 SCC 80 : (2010) 1 SCC (Civ) 20] , *Madnani Construction Corpn. (P) Ltd. v. Union of India*[(2010) 1 SCC 549 : (2010) 1 SCC (Civ) 168] , *Associated Construction v. Pawanhans Helicopters Ltd.* [(2008) 16 SCC 128] and *Satna Stone & Lime Co. Ltd. v. Union of India* [(2008) 14 SCC 785] .]

CLAIM NO.3: FOR DISMANTLING OF OLD STRUCTURES EEW
PHASE-I

14. The learned Arbitrator awarded a sum of Rs. 18,02,054/- in favour of the Respondent against the aforesaid claim. The background of this claim is that before the Arbitral Tribunal, the Respondent submitted that during execution of improvement works to Ennore Express Road (Kilometer 0/0 - 1 /6) an existing random rubble masonry 3 meters below a concrete retaining wall was encountered between chainages 820 and 910. Respondent contended that this hindrance could not be visualized at the time of submission of the tender as there was no indication about the existence of the aforesaid underground hindrance in the tender document. The Respondent relied upon Clause 12.2 of GCC to contend that such obstruction was not foreseeable

and when the same was noticed, Respondent's Engineer gave a notice to the Petitioner for dismantling of the underground structures. Thus, for this reason, the Respondent prayed for grant of extension of time under Clause 44 and incurred additional cost for dismantling the same. Petitioner refuted the claim by contending that provisions of Clause 12.1 and 12.2 of GCC mandate that an experienced Contractor like the Respondent should have foreseen the obstruction at the time of submission of tender. Petitioner also relied upon Clause 8.1 to contend that Respondent was under an obligation to visit and examine the site of works and its surroundings that were necessary for preparation of bid and entering into the contract. Further reliance was placed on Clause 11.1 of GCC which stipulates that the intending tenderer should be deemed to have inspected and examined the site and its surroundings and the information available in connection thereto including nature of subsurface conditions before submission of the tender. It was thus argued that invocation of clause 12.2 of GCC was incorrect and the claim should have been rejected by the AT.

15. Learned counsel for the Petitioner also submits that the Tribunal ignored that the dismantling of the structure and work directed by the Engineer in his letter dated 10th October 2012 were duly covered in the scope of work and bill of quantities as per clause 301.1 and 304 and were not non-BOQ items as stated by the Respondent. The Tribunal also ignored that the rates quoted by the Respondent for dismantling the whole structure as provided in item 1.02a (ii) is Rs. 100/CuM. In its letter dated 19th December 2010, the Respondent had furnished the break-up details at the rates of Rs.100/CuM as accepted in the tender. However, later it furnished an exaggerated rate of Rs.

2282/- per CuM, which was in complete violation of the terms and conditions stipulated in the contract. Tribunal also ignored that clause 304.2 of the M.O.R.T. & H, which clearly provides that all materials involved in excavation shall be classified in accordance with clause 301.2. The rates for such dismantled masonry and concrete having been provided in item 1.02 (a) (i & ii), cannot be treated as a variation item and the Respondent is not entitled to the revised rates as claimed. The Tribunal ignored all these submissions of Petitioner and without any cogent reason awarded the sum of Rs. 18,02,054/- in favour of the Respondent.

16. It is noticed that the Arbitral Tribunal considered it prudent to inspect the site and to critically examine the nature and the extent of hindrance/physical obstruction to the execution of the work and with regard to the surroundings and site conditions. After such inspection, the Tribunal held that since the existence of underground obstructions was below the existing ground level/structures, the nature of hindrance encountered by the Respondent is such that it could not have been anticipated at the time of submission of the bid. The findings of the Arbitral Tribunal on this issue are as under:-

“After such site inspection, the Tribunal had no hesitation to construe that the nature of hindrance encountered by the Claimant was such that no experienced contractor could have anticipated existence of such underground obstructions as it was below the existing ground level / structures. The Tribunal took the burden of examination of the tender document and on such examination had observed that the tender document do not specify any such underground obstructions likely to be

encountered during execution of the work. In view of the aforesaid irrefutable factual positions, the claim of the Claimant should come within the pail of the provision of clause 12.2 of GCC. Based on the aforesaid finding, the Tribunal proceeds to quantify hereinafter the amount due and payable to the Claimant on this account.”

17. Further, Clause 12.2 of GCC reads as under:-

“If, however, during the execution of the works, the Contractor encounters physical obstructions or physical conditions other than climatic conditions on the site, which obstructions or conditions were, in his opinion, not foreseeable by an experienced contractor, the Contractor shall forthwith give notice thereof to the Engineer, with a copy to the Employer. On receipt of such notice, the Engineer shall, if in his opinion such obstructions or conditions could not have been reasonably foreseen by an experienced contractor, after due consultation with the Employer and the Contractor, determine:

(a) any extension of time to which the Contractor is entitled under Clause 44, and

(b) the amount of any costs/ which may have been incurred by the Contractor by reason of such obstructions or conditions having been encountered, which shall be added to the Contract Price, and shall notify the Contractor accordingly, with a copy to the Employer. Such determination shall take account of any instruction which the Engineer may issue to the Contractor in connection therewith, and any proper and reasonable measures acceptable to the Engineer which the Contractor may take in the absence of specific instructions from the Engineer.”

18. On reading of the aforesaid observations of the Arbitral Tribunal, it can be seen that the Petitioner did not dispute the quantum of charges Rs.2282/- per cubic meter as claimed by the Respondent. The Arbitral Tribunal held *“The Respondent did not deal with the analysis of the Claimant claiming Rs.2282/- per cubic meter for dismantling”*. The relevant paras of the

contract dealing with the hindrances encountered during the execution of the contract are provided in clause 12.2 as reproduced hereinbefore. The finding of the learned Arbitrator on the aforesaid Claim is a pure finding of fact which is based on the appreciation of evidence. This Court under Section 34 of the Act cannot sit in appeal over the award of the aforesaid Claim by re-assessing or re-appreciating the evidence, as has been held by the Supreme Court in *Steel Authority of India Ltd vs. Gupta Brother Steel Tubes Ltd., [JT 2009 (12) SC 135]* (Para 26) and *Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Commission of India, (2010) 11 SCC 296* (Para 36). Thus, having regard to the aforesaid provision of the tender and the finding of fact determined by the Arbitral Tribunal, the Court finds no reason to interfere with the amount awarded by the Arbitral Tribunal against the aforesaid claim. Hence the objection of the Petitioner is rejected.

**CLAIM NO. 4: REVISED RATES FOR ADDITIONAL QUANTITIES
IN THIRUVOTTIYUR - PONNERI - PANCHETTI ROAD**

19. The Respondent sought revision of rates due to increase in quantity and rates for certain items. Before the Arbitral Tribunal, the Respondent sought revision of the following four BOQ for the items:-

B.O.Q. item 2.02	Construction of Embankment
B.O.Q. item 4.04	Providing and laying Dense Bituminous macadam (D.B.M.)
B.O.Q. item No.7.02	Cement concrete M.15 Grade in

	drain foundation
Variation Order	Providing and Laying Bituminous
(Item No.6)	Macadam (8. M.) (quantities increased by 125% of BOQ items and contract price exceeded 15% of the total value of the Contract.)

20. With respect to Item No. 4, the Respondent during the arbitration proceedings withdrew the Claim and the same has not been considered. The Arbitral Tribunal, after analyzing the Claims item wise, partially allowed the Claim and determined the rates applicable against each item.

21. Learned counsel for the Petitioner submits that the Tribunal did not take into consideration the findings of the Engineer rejecting the claim of the Respondent. Although the award captures the submissions made by the Petitioner/CEPRCL before the AT in Para 11.02, yet the same were not dealt with by the Tribunal in its findings, which renders the award unreasoned and liable to be set aside on this ground itself.

22. The contention of the Petitioner is not correct. The Arbitral Tribunal has considered the contentions raised by the Petitioner against each item. In so far as Item No. 2.02 of BOQ is concerned, the Arbitral Tribunal rejected the Claim of the Respondent of Rs. 458/- per CuM and accepted the rate certified by the Petitioner of Rs. 333/- per CuM. Therefore, there cannot be any grievance on this account. With respect to item No. 4.04 of BOQ, the

Petitioner had paid a sum of Rs. 252,371,28/-. Although, Respondent had claimed Rs. 8161/- as per its analysis and the Tribunal did not find any absurdity/incorrectness in the same, the Tribunal held that the Respondent should be paid as per the agreed rate of Rs. 8018/- per CuM. Further, noting that the Petitioner had already paid Rs. 252,371,28/-, the Tribunal directed that the balance amount of Rs. 1807586/- be paid to the Respondent for the work done. Thus, for this Item as well, the Petitioner cannot have any grievance. With respect to BOQ Item No. 7.02, the Tribunal noted that the Respondent had submitted detailed analysis for arriving at the rate of Rs. 4604/- per CuM and there was no infirmity or incorrectness in the analysis, however, since the Respondent had reduced the rate to Rs. 4409.79/- per CuM, the Tribunal accepted the reduced rate and directed that the balance amount be paid at that basis. Here again, no infirmity is discernible. The findings of the Arbitral Tribunal are based purely on data and detailed analysis. The Petitioner is unable to point out any perversity in the same except for contending that its submissions have not been considered by the AT. In fact, the Tribunal has applied the rates that the Petitioner had accepted. Therefore, there is no ground to interfere with the findings of the Tribunal in respect of Claim No. 4 and hence the objection is rejected.

CLAIM NO. 5: APPLICATION OF REBATE ON VARIATION ITEMS

23. The Respondent raised a claim for refund of rebate amount recovered by the Petitioner from the payment of variation items. During the course of arguments before Arbitral Tribunal, the Respondent restricted its claim to

Variation Order No. 1. (TPP Road) only and contended that the rebate was not realized by the Petitioner in other Variation Orders / items. Thus the Claim for other four items covered in Variation Order No. 03 & 07 was not pressed by the Respondent.

24. In respect of Variation Order No. 01, the Petitioner deducted 2% of the said amount, on the assumption that it is entitled to rebate. The Tribunal allowed the claim, on the basis of the interpretation and findings given in respect of Claim No. 2 wherein the Tribunal held that the rebate of 2% was applicable on the lump sum contract amount only.

25. Learned counsel for the Petitioner submits that the Tribunal ignored the fact that the rebate of 2% offered by the Respondent/Contractor was in respect of all the items of work. It was not restricted only to BOQ items but is applicable to other works carried out as a result of a need and hence the conclusion of the Tribunal that, *“rebate of 2% on variation items cannot be realized by the Applicant and is required to be refunded to the Respondent”*, is incorrect and award of Rs. 4,50,517/-, is contrary to the terms of the Agreement.

26. The findings and the interpretation given by the AT with respect to the rebate of 2% has been found to be in consonance with the terms of the Contract. Accordingly, the same was upheld. The award against the aforesaid Claim is also in accordance with the terms of the Contract as the rebate of 2% cannot be applied on variation items and therefore the deductions made by the Petitioner are liable to be refunded. The contention

of the Petitioner that the rebate of 2% offered by the Respondent were in respect of all the Items of Works is misconceived. The reasons given while discussing the challenge to Claim No. 2 are also applicable in respect of Claim No. 5 and hence the same have not been reiterated. The objections of the Petitioner are rejected on this issue.

CLAIM NO. 6: REVISION OF RATES OF ALL BOQ ITEMS OF WORKS CARRIED OUT BEYOND THE STIPULATED DATE OF COMPLETION IN THE CONTRACT

28. The aforesaid Claim relates to revision in rates of all BOQ items of work due to delay in handing over of the site by the Petitioner and price adjustment as per extended date of Contract. Before the Arbitral Tribunal, the Respondent sub-divided the said Claim into two parts viz. a) claim towards revision of rates being the amount of difference between the amounts certified and the amount payable as per revised rate; and b) claim towards price adjustment with effect from the extended date of contract. After analyzing computations, the AT awarded a sum of Rs. 45,68,04,214/- and Rs. 96,80,034/- against the sub-head claims (a) and (b) noted above respectively.

29. Learned counsel for the Petitioner submitted that this claim was not part of the term of reference as per the Notice dated 23rd February 2015, seeking appointment of Arbitrator. Hence, the Arbitrators had no jurisdiction to entertain this claim. The Tribunal ignored that by virtue of the First Supplementary Agreement dated 31st July 2015, the Respondent had agreed

to complete all the balance works at the agreed rate. Therefore, when there was a solemn agreement to abide by the agreed rates with price adjustments as per the Contract, there was no scope for seeking revision of rates. It is further argued that as a result of the First Supplementary Agreement, Respondent waived their right to seek revision of rates and is thereby estopped from making the claim. It was agreed between the parties that the Contractor will abide by the agreed rates. The Hon'ble Supreme Court has in ***Sudarsan Trading Co. v. Govt. of Kerala, AIR 1989 SC 890*** held that "*But an Award which ignores express terms of the contract is bad.*" He submits that the Tribunal also ignored that at the initial stage itself 94.5% of work front was made available to the Respondent. The Tribunal has failed to consider that the delay of 667 days was brought about by the failure of the Joint venture partner Coastal Projects Ltd. to bring in finance. The Tribunal ignored the fact that Respondent did not have a Project Engineer for a long period of time. The Hot Mix Plant was located at a considerable distance and requisite plant and machinery were not mobilized. It is further contended that the Tribunal while ignoring the contentions of the Petitioner, has wrongly held that the execution of work had continued inordinately beyond the stipulated date of completion, the delays and defaults on the part of the Respondent. The Tribunal without any reasoning stated that it has arrived at the modified amount of Rs. 96,80,034/- and awarded sums of Rs. 45,68,04,214/- and Rs. 96,80,034/- as per claim no. 6 (a) & 6 (b) respectively after multiplying the numerator with the factor 0.85. The award is mainly based on the submissions of the Respondent, and the AT completely ignored all the submissions/contentions of the Petitioner despite the same being recorded in the award under the caption

"Respondent's/CEPRCL submissions".

30. The Petitioner has primarily relied upon the supplementary agreement No. 2 executed on 12th January 2018 to contend that the extension of time was granted on the request of the Respondent and it was not entitled to claim any damages including revision of rates for the extended period of Contract. Petitioner has also argued that Respondent itself had delayed the construction and as such is not entitled to claim compensation for the delay arising on account of the defaults on its part. The Contract Clauses did not require entire 100% of the site to be given in the beginning itself and the Respondent failed to commence/ carry out the construction work as per the Contract resulting in the extension of the period of Contract. The reasons for delay were on account of lack of proper planning and non-submission of project programme; insufficient mobilization of machineries; lack of deployment of Site Engineers; failure to plan traffic diversion as per the terms of contract. The Petitioner also relied upon on the correspondence to contend that there was slow progress of work for reasons attributable to the Respondent for which the extension of time was being sought.

31. As per the Contract, the Respondent was to commence work on 3rd June 2011 and complete the same by 2nd June 2013. Admittedly, the site was handed over on 31st March 2015 with a delay of 677 days. The Respondent has contended that a delay occurred on account of reasons attributable to the Petitioner as the land acquisition could not be completed by the Petitioner and the encroachments at site also could not be removed on account of pending litigation in Court between the encroachers and the Petitioner.

32. The Arbitral Tribunal has observed that the Petitioner had not site was handed over the site as per the agreement. The finding on this aspect is noted as under:-

“The Tribunal has already observed from the specific declaration of the Respondent during the course of pre-bid queries that the Respondent had confirmed the position of land acquisition of all the stretches and handing over of each of the stretches for construction to the Claimant as per the dates of handing over of each stage of work should be as per agreement, 'at that time of award of work'. **The aforesaid agreed fact situation was utterly frustrated by the marked failure of the Respondent to deliver the site in terms of the agreement following a logical sequence inasmuch as the stretches of sites were delivered in piece meal basis.**”

33. The Respondent quoted the rate of individual items in BOQ based on the prevalent rates in 2010/2011 (the commencement date being 3rd June 2011). The site was handed over on 31st May 2015. Respondent claimed increase in rates of the items mentioned in the BOQ that had occurred in the interregnum period. For claiming revision, Respondent relied upon the rates published by PWD/Highways Department, Tamil Nadu as on 3rd June 2013. The Respondent has contended that though it was entitled to the rates applicable as on the date of handing over of the site in terms of the supplementary agreement executed between the parties, however, such claim was not raised before the Arbitral Tribunal.

34. The Arbitral Tribunal, after examining the contemporaneous correspondence exchanged between the parties, has concluded that the execution of the work continued beyond the stipulated date of completion on account of defaults on the part of the Petitioner, which were beyond the effective control of the Respondent. Further, the Arbitral Tribunal has also relied upon the relevant clause of the Supplementary Agreement No. 2 which notes the reasons for extension of time. The relevant portion of the award on this issue reads as under:-

“The Tribunal while dealing with claim No.6 of the Claimant after critically examining the contemporaneous correspondence exchanged between the parties and the arguments of both the parties held that notwithstanding the position that the Claimant was otherwise ready, agreeable and competent to complete the work within the stipulated period of 24 months, the execution of work had continued inordinately beyond the stipulated date of completion grossly for the following delays and defaults on the part of the Respondent which were beyond all effective controls of the Claimant:-

- a) failure to provide work site free from obstructions conducive for continuance of the work unhindered;
- b) failure to determine meticulously the details / working details /working decisions at the time of inducing the Claimant to enter into the contract warranting issuance of a number of variation orders during execution of the work.

The aforesaid irrefutable factual positions regarding the reasons culminating to the delayed completion of the work are further buttressed from the admission of the Respondent in Paragraph G of Supplementary Agreement No.2, which is reproduced hereunder:-

"EOT for the contract has been worked out by the Engineer for total period of 667 days (including concurrent delay) i.e. upto

31.03.2015. The competent authority vide letter dated 30.06.2017 has concurred in-principle approval of the SPV Board for extension of time for a period of 667 days over and above the contract period without liquidated damages subject to conditions that a supplementary agreement needs to be signed by both the parties for waiving of mutual claims occurred as on date on account of Extension of Time. Further, save and except the extension of the period for fulfillment of the condition, all the terms and conditions remain unchanged".

35. In the supplementary agreement, the Petitioner agreed not to claim liquidated damages despite there being a contractual stipulation to the contrary in the Agreement. The Petitioner has also not disputed that the rates claimed by the Respondent as per Tamil Nadu PWD rates were applicable to the Contract. The Arbitral Tribunal has also referred to several letters exchanged between the parties including the Minutes Of Meeting dated 31st March 2015 and concluded that the delay in handing over was attributable to the Petitioner. In this regard, the findings of the AT are as under:-

“The admissions of the Respondent in this regard are noted by the Tribunal from the following documents :-

a) Minutes of Meeting (in short 'MOM') held on 31.03.2005 between the Claimant and the Respondent records at paragraph no. 3 that despite the issues affecting the progress of work at all levels of Government of Tamil Nadu, there was no possibility of resolving the pending issues. In view of the same the Respondent decided to submit a detailed proposal to the competent authority of the Respondent for obtaining approval so that the stretches of work not free from obstructions as specified in paragraph no. 5 of the MOM should be de-linked from the scope of present contract.

b) In the supplementary agreement entered on 31.07.2015 between the parties, it was recorded under clause D (2nd page of the agreement) that "there is no time frame when these encumbrances will be cleared, as the same are pending since last 4 years and no serious initiation from the Tamil Nadu State Government / Chennai Port Trust to clear this encumbrances/ encroachments. Hence it is mutually agreed by both the parties that substantial completion shall be given for the completed length of 27.933 Km as on 31.03.2015 and the defect liability period shall commence with effect from 01.04.2015 for the completed length of 27.933 km."

c) In the said supplementary agreement the Respondent had admitted in a compilation marked Table-1, a number of stretches were main carriage way, service road, drain work could not be taken up owing to land acquisition problem, court case etc.

d) There was one more meeting held on 29.09.2017 amongst the officers of the Respondent and from the copy of minutes of said meeting which was disclosed by the Respondent in the arbitration sitting held on 24.03.2018, the Tribunal observed that the Executive Committee of the Respondent approved to sign the supplementary agreement no. 2 and the said supplementary agreement was executed on 12.01.2018. The supplementary agreement no. 2 witnessed in paragraph no. 1 the stretches of site where encroachment was still not evicted. In this regard, it can be recalled that the date stipulated for completion expired on 02.06.2013.

e) The Tribunal also taken a note of the irrefutable factual position that there were as many as 12 numbers of variation orders/proposals commencing from 25.08.2011 to 12.06.2014 and the aforesaid admitted position also demonstrates the Respondent's failure to determine the working details considering all the contingencies in a pragmatic manner."

36. The Arbitral Tribunal has given a finding of fact determining the party responsible and liable for the delay caused. It has been held that since there

was a delay in handing over of the site, Respondent could not have commenced the work. The findings are based on evidence adduced before the Tribunal and cannot be interfered with as held by the Supreme Court in ***Associated Construction v. Pawanhans Helicopters Ltd.*, (2008) 16 SCC 128**. The AT has also taken into consideration that the Respondent in its letter dated 13th August 2012 had set out in detail the reasons for delay in handing over of the site and put the Petitioner on notice in terms of Clause 53 of GCC, claiming damages. However, in view of the supplementary agreement, the Respondent withdrew the portion of Claim No. 6 relating to liquidated damages. The Supreme Court in several decisions has held that in the event one of the parties to the contract is unable to fulfill its obligations under the contract which has a direct bearing on the work to be executed by the other parties, the Arbitrator would be within its authority to compensate the second party for the extra cost incurred by him as a result of failure of the first party to fulfill its obligations. [See: ***K.N. Sathyapalan v. State of Kerala and Ors.*** 2007 (13) SCC 43. ***Associated Construction vs. Pawanhans Helicopters Pvt. Ltd.*, (2008) 16 SCC 128** and ***Assam State Electricity Board and Ors. vs. Buildworth Pvt. Ltd.*, (2017) 8 SCC 146.**] On quantification, the Respondent submitted written analysis of the revised rates based on schedule of rates of Tamil Nadu Highways Department 2013-14 effective from 1st June 2013. The Tribunal found the reliance on the said schedule to be inappropriate, in as much as the date stipulated for completion expired on 2nd June 2013, subsequent to the finalization of the bill on 15th March 2018. The Petitioner was given an opportunity to examine the said analysis. It submitted the points of disagreement with the analysis and quantification done by the Respondent. Thereafter, the

Respondent submitted a modified compilation for revision of rates for quantification of price adjustment and deleted the quantities which were not eligible for revision of rate as per supplementary agreement. On the revised analysis and quantification, the Petitioner did not point out any incorrectness. The Arbitral Tribunal, after examining the computation, observed that the escalation on revised rates was required to be modified and the AT applied the numerator with the factor of 0.85 to arrive at the modified amount which was awarded by the Tribunal. The factor of 0.85 is provided in Sub Clause 70.3 of COPA which provides for adjustment of the contract price for the valuation of the work done as per BOQ rates to account for rise and fall in the index cost of inputs like labour, land and machinery, cement, steel, bitumen, fuel and lubricants and other local materials. The relevant extract of the Sub Clause provides as under:

“ $V = 0.85 \times p/100 \times R \times (M_i - M_o) / M_o$ where P is the percentage of the component.”

37. The formula for price adjustment of various components of work provides for a factor of 0.85 to arrive at the cost of various inputs. This factor is uniformly applicable to all the seven components. Accordingly, the Arbitrator has multiplied the numerator with the factor of 0.85 and the same is thus in accordance with the terms of the agreement and does not call for any interference. In this regard, the Supreme Court in ***Associate Builders v. DDA, (2015) 3 SCC 49*** held that different formulae can be applied in different circumstances and whether damages should be computed by taking recourse to one or another formula, having regard to

facts and circumstances of a particular case, would fall within the domain of the arbitrator.

Claim of Interest

38. The Petitioner has also challenged the impugned award on the ground that the same is solely based on the submissions of the Respondent and although the contentions of the Petitioner, have been noted, however the same have been ignored and not dealt in the impugned award. This ground of challenge is also misconceived as the Tribunal has not just noted the contentions but also elaborately dealt with and taken into consideration the documentary evidence on record. The AT did not find any merit in the same and therefore the objection is contrary to the record. The Petitioner is perhaps only looking into the paras which gives the conclusion for the final awarded amount and has not noticed that the evaluation of the rival contentions is under the heading “Findings”. Such findings may have been noted and discussed under a specific head of claim, but it does not mean that the same are not applicable to other heads of claims. Therefore this objection is also rejected being bereft of merit.

Counter Claim

39. The AT has rejected all the counter claims of the Petitioner. The challenge is on the ground that the AT has not given any reasons or justifications for rejecting the counter claims. The first counter claim of the

Petitioner is in respect of liquidated damages for the loss due to delay in completion of the project. The AT under the heading para 15.01.03 has held that in the Supplementary Agreement No. 02, the Petitioner had agreed to grant extension of time without levy of liquidated damages and therefore in view of the provisions of the said contract, no amount was due and payable to the Petitioner by way of liquidated damages on account of delay in completion of the work. A perusal of the terms and conditions of the supplementary agreement leaves no doubt that the Petitioner had agreed for extension without levy of liquidated damages and thus the findings of the Tribunal rejecting the Counter Claim No. 1 is completely in consonance with the terms of the supplementary agreement and there is no fault in decision of the Tribunal. The Counter Claim No. 2 was in respect of damages on account of loss of revenue. On the said counter claim, the AT has held that no proper evidence was brought before the Tribunal which could substantiate the claim and the same was purely presumptive and devoid of merit. Petitioner is unable to point out any mistake in the findings of the AT and hence the objection in respect of the said counter claim is rejected. Counter Claim No. 3 deals with damages on account of additional expenditure incurred for extended duration of the supervision/consultancy services. The Respondent contended that it had appointed T&DRC as Consultant/Engineer to carry out the duties specified in the contract and the Petitioner is liable to pay for the monthly expenses incurred on supervision by the engineer during the extended period. The Tribunal has held that the counter claim was based on delays that were not attributable to the Respondent. The extension of time had been duly approved by the Petitioner and therefore the Tribunal has rightly declined

to award any claim against Counter Claim No. 3. Counter Claim No. 4 is in respect of damages/interest on account of additional expenditure incurred in the form of price adjustment during the extended period. The Petitioner claimed additional expenditure from 2nd June 2013 to 31st March 2015 and contended that the Respondent is liable to pay the same. Since the counter claims were found to be bereft of merit and were rejected, obviously there would not have been any question for award of interest thereon.

40. In view of the afore-going discussion, there is no merit in the petition and accordingly the same is dismissed with no orders as to costs.

July 23, 2019

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SANJEEV NARULA, J.