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

Reserved On 11.03.2019

Pronounced On 17.07.2019

+ **O.M.P. (COMM) 82/2017 & I.A. No. 6306/2018**

IRCON INTERNATIONAL LIMITED Petitioner
Through: Mr. Chandan Kumar, Advocate.
versus

M/S PCL-BRAHMAPUTRA CONSORTIUM LTD (JV) & ANR
..... Respondents
Through: Mr. Anil Seth, Advocate.

+ **O.M.P. (COMM) 83/2017 & I.A. No. 6023/2018**

IRCON INTERNATIONAL LTD Petitioner
Through: Mr. Chandan Kumar, Advocate.
versus

M/S PCL -BRAHMAPUTRA CONSORTIUM LTD (JV)..... Respondent
Through: Mr. Anil Seth, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

O.M.P. (COMM.) 82-83/2017

1. The captioned petitions assail two separate awards passed by a common arbitrator in respect of disputes erupting between IRCON International Ltd. (hereafter referred to as 'IRCON') and PCL-Brahmaputra Consortium Ltd. (JV) (hereafter referred to as 'PCL'). The award dated 28.5.2010 is the subject matter of O.M.P.(COMM) 82/2017 while the award dated 29.4.2011 stands challenged in O.M.P.(COMM) 83/2017. The reason that I propose to dispose of both the petitions by way of a common judgment is primarily on account of the

fact that the nature of the contracts and the issues which arise in the captioned petitions are similar. Furthermore, besides the fact that the awards have been passed by a common arbitrator, the claims raised by PCL before him were similar (except for variation in amounts) and therefore, the result reached was also identical.

1.1. I must also add that not only did the counsel for parties not address arguments separately in captioned petitions but also called upon me to dispose of the petitions by way of a common judgment.

2. Before I proceed further, let me sketch out the broad contours of facts *qua* each of the two petitions to the extent they would be necessary for reaching a conclusion in the matters.

2.1. I may also indicate that collectively IRCON and PCL will be referred to as parties unless the context requires them to be referred separately.

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3. On 18.5.2002, IRCON called upon PCL to execute the “balance-work” *qua* work described as: “*Road works till WMM Stage (excluding Asphalt works) for the expressway between Noida and Greater Noida Package VI B (Km 12+500 to 15+000) - Balance works from Km 13+250 to 14+500.*” (hereafter referred to as ‘Package VI B’).

4. The reason the work assigned to PCL is termed as balance work is that Package VI B was earlier awarded to an entity by the name Gangotri Enterprises Ltd.

5 It appears that on 25.5.2002 PCL gave its consent to IRCON’s proposal to award Package VI B to it on the same rates, terms and conditions as obtained in the Contract Agreement dated 31.5.2001 executed between Gangotri Enterprises Ltd. and IRCON. The only caveat that PCL entered was as follows:

“....However, we shall be entitled for [sic:to] price escalation from the commencement of the work with [the] base month as mentioned in

the contract agreement of M/S Gangotri Enterprises Ltd. since the rates quoted by M/S Gangotri Enterprises were based on the prevailing rates at that time in the market.

In view of the Hon'ble Supreme Court latest order for banning all mining operations within 5 km periphery of the NCR. We will have to bring the material from different source involving on addition lead of around 80 km and Government of Haryana/Lease Holder has also increased the royalty. In view of this, the increased rates for GSB and WMM is to be paid accordingly....”

6. The reason PCL appears to have made a counteroffer, so to speak, (as is evident from the aforesaid extract of its letter dated 25.5.2002) for increased rates *vis-a-vis* GSB and WMM was that the Supreme Court had banned mining within a radius of 5 km of the National Capital Territory of Delhi (NCTD).

6.1 It is pertinent to note, at this stage, that the ban by the Supreme Court on mining was extended further, that is, to the entire Aravali range with effect from 29.10.2002. Consequently, raw material required for executing work connected with Package VI B had to be sourced from locations beyond Rajasthan.

7. Continuing with the narrative, PCL's letter of 25.5.2002 was followed by a letter dated 28.5.2002. This communication of PCL was accompanied by Earnest Money Deposit (EMD) of Rs.5 lakhs which was given in the form of a Fixed Deposit Receipt dated 28.5.2002 (FDR), issued by Oriental Bank of Commerce.

7.1 Importantly, in this letter, PCL had indicated that it will carry out road work till WMM stage excluding asphalt works in Package VI B i.e. balance work from Km 13+250 to 14+500.

7.2 IRCON unreservedly accepted PCL's counteroffer vide communication dated 26.6.2002. Notably, IRCON in its letter dated 26.02.2002, *inter alia*, stated the following:

“...IRCON International Limited is pleased to accept your offer referred at (ii) and (iii) above, for a total value of Rs.7,46,76,313.73 (Rupees seven crores forty six lakhs seventy six thousand three

hundred and thirteen and paise seventy three only) at the BOQ rates, terms and conditions of contract entered between IRCON and Gangotri enterprises with the following conditions accepted.

i) You shall be paid price adjustment from [the] commencement of your contract for balance works between Km 13+250 to Km 14+500 treating [the] base date as January 2001.

ii) You will be paid the price difference if any for the extra lead involved in the procurement of material due to Supreme court's restrictions based on the method adopted for similar works in other contracts on this Project...

(emphasis is mine)

8. Consequent thereto, IRCON and PCL executed a formal Contract Agreement on 7.9.2002 (hereafter referred to as '2002 CA').

9. Concededly, PCL on 26.2.2003 sought and was granted an extension of time for execution of Package VI B till 31.3.2003.

9.1 The record shows that PCL submitted its final bill after satisfactory execution of Package VI B on 12.1.2004.

10. On account of disputes arising between IRCON and PCL, the CEO of New Okhla Industrial Development Authority (NOIDA), on 11.9.2007, appointed an arbitrator not only *vis-a-vis* disputes arising between them in respect of the 2002 CA but also in respect of disputes which had arisen between them in respect of Contract Agreement dated 31.5.2001 (hereafter referred to as '2001 CA').

11. Insofar as the captioned petition is concerned, as indicated hereinabove, an award was passed on 28.5.2010 (hereafter referred to as '1st Award').

12. Under the 1st Award, three out of the seven claims preferred by PCL were rejected. Claim nos. 1, 2 and 5 were partially allowed. Against claim no.7, which was a claim for interest, a sum of Rs.50 lakhs was awarded. This amount included interest on amounts awarded *vis-a-vis* Claim nos.1 and 2 at the rate of 15 percent per annum as against the claimed rate of 18 percent per annum for

the period commencing from 1.5.2004 i.e. the date when PCL furnished a No Claim Certificate ('NCC') to IRCON, up until the date of the award. Interest at the same rate was awarded *vis-a-vis* amount allowed under Claim no.5, *albeit*, with effect from 31.3.2005.

13. Besides this, the learned arbitrator also indicated that if the awarded amount was not paid by IRCON within a period of one month from the date of the pronouncement of the award, it would carry interest at the rate of 15 percent per annum which will run from the date of the award till the date of the payment.

14. The summary given concerning the aforesaid, in the award, reads as follows:

Claim no.	Description of the Claims	Amount claimed	Amount Awarded
1.	Price Difference due to [the] extra cost incurred for procurement of material involving extra lead on account of [the] ban imposed by [the] Supreme Court.	1,21,80,944.00	76,81,461.00
2.	Extra compaction cost due to increase in the number of layers for compaction of embankment fill.	29,02,000.00	24,62,992.00
3.	Payment of excavation in [the] drain not paid.	1,30,000.00	NIL
4.	Compensation due to delay in payment of escalation/not paid correctly.	1,15,500.00	NIL
5.	Compensation due to delay in payment of security deposit.	4,50,000.00	3,64,286.00
6.	Compensation due to delay in payment of [the] final bill.	10,00,000.00	NIL
7.	Interest due to non-payment of the above items.	50,00,000.00	Interest @ 15% p.a. as per Claim No.7.

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15. The record shows that PCL had made an offer on 22.12.2000 about the work described as: “*Road works till WMM stage (excluding Asphalt works) for the Expressway between Noida & Greater Noida package – VIA (Km 10+000 to Km 12+500).*” (hereafter referred to as “Package VI A”).

16. After exchange of correspondence between the parties, a Letter of Award dated 17.1.2001 (LOA) was issued by IRCON *vis-a-vis* Package VI A. The LOA, *inter alia*, indicated that PCL was being awarded work under Package VI A in two parts i.e. Part A and B, and that the value of the work awarded under these parts was 19.1 percent and 20.1 percent below the estimated cost. Thus, the total value of the work awarded to PCL under Part A and B was a sum of Rs.9,52,70,876/- as against the total estimated cost of Rs.11,77,79,180.53. Furthermore, this very letter indicated that the timeframe for the execution of Package VI A would be 16 months commencing from the date of issuance of the LOA. It was made clear that the period of 16 months, would include the monsoon period.

17. As a result of the aforementioned development, parties went on to execute, formally, the 2001 CA to which I have referred hereinabove.

18. As a consequence of the order dated 6.5.2002 being passed by the Supreme Court in a Public Interest Petition, whereby, as indicated, above the mining activity within the radius of 5 km of NCTD was banned, PCL on 1.6.2002 wrote to IRCON that certain material required for execution of work was not available close to the site where work was being carried out, resulting in abnormal increase in the cost of the raw material required for execution of the work at hand. Pertinently, PCL put IRCON to notice that it should consider increasing rates to enable it to complete the balance work. PCL promised to submit an analysis of enhancement of rates to buttress its case for increase in rates.

19. There is no dispute that on 12.6.2002 PCL did submit its analysis of enhancement of rates on account of the ban put in place by the Supreme Court concerning the mining of material in and around NCTD. Pertinently, by this letter, PCL put IRCON to notice that on account of change in circumstances it needed to be compensated due to increase in rates of raw materials and that this increase should take effect from 8.5.2002.

19.1 IRCON vide its communication dated 13.12.2002 rejected PCL's request for revision of rates on account of the ban on mining imposed by the Supreme Court along the Delhi-Haryana borders.

20. This led to the eruption of disputes between the parties in respect of the 2001 CA. Consequent thereto, an arbitrator was appointed by the CEO, NOIDA. The arbitrator passed an award on 29.4.2011 (hereafter referred to as '2nd Award').

21. Vide the 2nd Award the learned arbitrator rejected PCL's three claims and partially allowed Claim nos.1, 2 and 5. Insofar as Claim no.7 was concerned, which related to interest, a sum of Rs.39 lakhs was awarded. The rate of interest was pegged at 15 percent per annum and it was awarded qua amounts allowed *vis-a-vis* Claim nos.1, 2 and 5 from 1.5.2004 i.e. when PCL issued a No Claim Certificate (NCC) to IRCON, till the date of the award. Besides this, the learned arbitrator also indicated that in case the awarded amount was not paid within one month from the date of the award, it shall carry interest at the rate of 15 percent per annum from the date of the award till the date of payment.

21.1 For the sake of convenience, the summary given in the award with regard to what is stated hereinabove is set forth hereafter.

Claim No.	Description of the Claims	Amount Claimed	Awarded
1.	Price Difference due to [the] extra cost incurred for procurement of material involving extra lead on account of [the] ban imposed by [the] Supreme Court.	81,17,355.65	67,86,655.00

2.	Extra compaction cost due to increase in [the] number of layers for compaction of embankment fill.	43,32,410.00	36,61,376.00
3.	Payment of excavation in [the] drain not paid.	6,20,600.00	NIL
4.	Compensation due to delay in payment of escalation/not paid correctly.	3,62,850.00	NIL
5.	Compensation due to delay in payment of security deposit.	7,39,350.00	6,16,122.00
6.	Compensation due to delay in payment of [the] final bill.	2,80,800.00	NIL
7.	Interest due to non-payment of the above items.	39,00,000.00	Interest @ 15% p.a. w.e.f. 1.5.2004 on Claims No.1, 2 & 5.

Submissions of the counsel

22. Mr. Chandan Kumar, who appeared on behalf of IRCON, has assailed both the 1st and the 2nd Award on the following grounds *qua* Claim nos. 1, 2 and 5:

(i) That no proof *qua* extra lead was placed on record. The bills placed on record only show the cost of the material. Besides this, it was emphasized that the bills of the following suppliers carried dates which were before the date of the ban order i.e. 06.05.2002, passed by the Supreme Court.

Name of Supplier	Date of Bill	Number of Bill
Hari Ram Building Material Supplier	1-15.4.2002*	493, 494, 495, 496 & 497
AV Building Material Supplier	7.4.2002*	025
S.K. Enterprise	30.4.2002*	127
Nagarjuna Construction	3.6.2002 & 16.1.2003	NIL

Shailesh Courier	28.2.2003	NIL
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[Note : * These bills in fact bear a date prior to 06.05.2002]

(ii) Secondly, the arbitrator could not have awarded enhanced compaction cost given the provisions of Clause 9.3(ii) of the SCC. The fact that though no specific reference was made to this Clause while denying the claim before the learned arbitrator it would not disable IRCON from taking an objection in the instant petition as the aforementioned Clause was available on record. Since strict rules of pleadings do not apply to arbitration proceedings, IRCON should be able to get a pass-through.

(iii) Thirdly, the learned arbitrator could not have granted interest on the late release of 50 percent of the security amount given the NCC furnished by PCL. PCL having furnished an NCC, it waived its right to claim interest. The NCC resulted in the novation of the contract as envisaged under Section 62 of the Contract Act, 1872 (in short “the Contract Act”). The learned arbitrator could not have ignored the NCC.

(iv). In support of his submissions, learned counsel has placed reliance on the following judgments:

- (i) *Ram Sarup Gupta (Dead) by Lrs. vs. Bishnu Narain Inter College and Ors.*, (1987) 2 SCC 555.
- (ii) *Union of India v Mecano Export Import S.A.*,
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23. On the other hand, Mr. Anil Seth, who appeared on behalf of PCL, relied upon the impugned awards in support of his submissions.

24. In particular, Mr. Seth submitted that none of the objections taken on behalf of IRCON fell within the realm of Section 34 of the Arbitration and Conciliation Act, 1996 (in short ‘1996 Act’). It was submitted that this Court

cannot and ought not to reassess and re-appreciate the material placed on record before the learned arbitrator.

24.1 More particularly, it was submitted by the learned counsel that even though in the 2001 CA there was no specific clause such as Article 4.1(ii) which finds mention in the 2002 CA (allowing for payment of price difference on account of extra lead involved in procurement of raw material due to the ban imposed by the Supreme Court) the same principle would be applicable *qua* the instant contract. In this behalf, my attention was drawn to PCL's letters dated 1.6.2002 and 12.6.2002. It was submitted that notwithstanding IRCON's letter dated 31.12.2002 whereby its request for compensation on account of increase in rates of raw material due to ban imposed on mining by the Supreme Court in the Aravali range was rejected, the same would have to be given as this circumstance was not anticipated by PCL when it filed its bid or by the parties when they entered into 2001 CA. There is no prohibition in the 2001 CA against the grant of compensation and, therefore, the learned arbitrator has correctly assessed the situation and partially allowed Claim no.1 in favour of PCL.

24.2 As regards the issue concerning discrepant dates on the suppliers' bills, Mr. Seth said that in the Statement of Defence (in short 'SOD'), no such objection was taken. The only objection taken was that PCL had not adverted to the provision in the contract which entitled it to claim compensation for the extra lead. Mr. Seth emphasized the fact that despite giving IRCON notice of the increase in rates, the work executed by PCL was accepted without demur. It was further contended that the delay in the execution of the work was attributable to IRCON.

25. As regards the 2002 CA, Mr. Seth argued that the Court need not look beyond Article 4.1(ii) of the 2002 CA.

26. Insofar as the objections with regard to compensation for compaction carried out by PCL in layers of 200 mm. instead of 300 mm., as provided in the

two CAs, was concerned, Mr. Seth submitted that since the work was executed by PCL without intending to do so gratuitously it was entitled to payment *qua* the same as per Section 70 of the Contract Act. It was stressed that the rate analysis submitted by PCL in that behalf was not contested by IRCON.

27. As regards grant of interest, Mr. Seth drew my attention to Clause 7.2 of the SCC. Based on the same, it was contended by the learned counsel that IRCON was obliged to return 50 percent of the security deposit on satisfactory completion of work while the balance 50 percent was to be repaid to PCL after the defect liability period was over. The dates of completion of work *qua* both CAs and the defect liability period provided therein, not being in dispute, the claims made *qua* interest in both awards were rightly granted by the learned arbitrator. Insofar as the rate of interest was concerned, the learned counsel drew my attention to Clause 11.2 of the SCC which, *inter alia*, provides that mobilisation advance released by IRCON shall bear interest at the rate of 15 percent per annum. Thus, according to Mr. Seth, all that the learned arbitrator had done in awarding interest was to apply the same measure.

Reasons

28. I have heard the learned counsel for the parties and perused the record.

29. What has emerged is that the dates and events concerning the commencement and completion of the work under the two packages i.e. Package nos.VI A and VI B, are not in dispute. Pertinently, there is no dispute about events such as the issuance of the ban order by the Supreme Court on 6.5.2002 which resulted in the prohibition of mining in the Aravali range.

30. Insofar as the 2002 CA is concerned, to my mind, it presents no difficulty in sustaining the award of compensation with regard to extra lead. The reason being that not only did PCL while giving its counteroffer vide letter dated 25.5.2002 make it clear that it would be seeking increased rates for GSB and WMM given the mining ban put in place by the Supreme Court but also the

very same intendment got explicitly reflected in Article 4.1 of 2002 CA. For the sake of convenience, Article 4.1 is reproduced hereafter:

“ARTICLE-4 CONTRACT AMOUNT AND PAYMENT

4.1 All payments for the works executed by the Contractor shall be made in Indian Rupees. The offer of the contractor vide letter PCL-BCL/IRCON/NGNEWV/VIB/135 dated 25/05/2002 accepted by IRCON to execute the work at the BoQ rates terms and conditions of contract entered between IRCON and Gangotri Enterprises for Package VI B, shall form the basis of all payments under this Contract in addition to the following accepted conditions.

(i) Price adjustment shall be paid from the commencement of the contract for balance works between Km 13+250 to km 14+500 treating [the] base date as January 2001.

(ii) Price difference if any shall be paid for extra lead involved in [the] procurement of material due to Supreme Court’s restriction based on [the] method adopted for similar works in other contracts on this project.

Value of the cost of the works accepted by IRCON shall be Rs.7,46,76,313.73 (Rupees Seven Crores Forty Six Lakhs Seventy Six Thousand Three Hundred and Thirteen and paise Seventy Three only.)”

(emphasis is mine)

31. The learned arbitrator after noting these very aspects, in paragraphs (III)(c) and (d) of the 1st Award has, thereafter, proceeded to rule in favour of PCL given the specific provision incorporated in the contract for enhancement of rates on account of extra lead. I find nothing wrong with the conclusion reached in this behalf by the learned arbitrator.

32. Insofar as the 2001 CA is concerned, the learned arbitrator noticed that IRCON had raised two objections to the claim made for increased rates on account of extra lead. First, that PCL had not adverted to a specific provision in the contract which entitled it to claim such compensation. Second, the Contract Price had already been adjusted for market-rate fluctuation as per Clause 4 of the SCC. The learned arbitrator also noticed that though no objection was taken

in the SOD but an argument was advanced during hearing before him that PCL was not entitled to compensation under Claim no.1 as it had delayed execution of Package VI A which, in a sense, led to the intercession of the ban order passed by the Supreme Court, on mining, in May 2002.

32.1. The learned arbitrator repelled, in my view, correctly, the objections raised by IRCON after considering the stand of PCL that execution of work beyond the scheduled date of completion was accepted without levy of liquidated damages and without making time the essence of the contract on the ground that the ban imposed by the Supreme Court on mining led to an abnormal increase in prices of raw materials which was not envisaged by the parties and, consequently, led to PCL having to bear the burden of procuring the raw material from locations which were much beyond the subject area where the work was being executed. The argument that the rates agreed to between the parties factored in price escalation in terms of Clause 4 of the SCC was also rejected and, once again, in my view, quite correctly, as Clause 4 of SCC did not envisage the increase in price due to extra lead.

32.2. The findings to that effect are recorded in the following paragraphs of the award which, for the sake of convenience, are extracted hereafter.

“n) In my view above the objection of Respondent of delay in execution of the work by the Claimant is not correct nor the same can be the basis for deciding the claim, which is on account of abnormal situation of ban on mining by the Supreme Court during the course of execution of the work and on account of which the prices increased abnormally due to extra lead and the material was admittedly procured from huge distance beyond the ban area. I do not agree with the objection of the Respondent that the Claimant is not entitled for [sic: to] the claim as the Claimant has been paid escalation in terms of clause 4 of the SCC. The escalation claim is neither dealing with abnormal increase in price nor with the issue of extra lead, which was not envisaged at the time of the submission of the Bid nor the same could be envisaged.

o) I have gone through the judgment referred by the claimant and in my view the principle stated therein is fully applicable to the issue

involved in this case. It is relevant to note that the parties had entered into a commercial contract and the abnormal situation could not be envisaged at the time of acceptance of the contract, which situation had arisen during the course of execution of the work viz. non-availability of material from the source of material near the site and abnormal increase in price of material. The rates quoted by the Claimant were not based on the abnormal situation which had arisen much after the award of the work. The Claimant immediately after the abnormal increase in prices pursuant to ban had informed the Respondent and requested it to revise the rates. At no stage the Respondent had denied the request of the Claimant of abnormal increase in [the] price of the material nor had refuted such abnormal increase and had accepted the performance of the contract. Above all there is no provision in the Agreement, which prohibits the Claim raised by the Claimant. In my view the Claimant is entitled for Claim No.1.”

33. The arguments advanced on behalf of Mr. Chandan Kumar concerning the bills of suppliers and the dates mentioned therein is a case of cherry-picking. In the SOD there is no specific reference to any such objection. There is nothing to demonstrate that in deciding the quantum of compensation the learned arbitrator took into account the suppliers' bills to which reference was made by Mr. Chandan Kumar. What went through the learned arbitrator's mind in awarding compensation is reflected in paragraphs (III)(l) and (III)(p) of the 1st Award and 2nd Award respectively. A perusal of these paragraphs would show that while the learned arbitrator looked at various documents placed on record by PCL he went by the rate analysis placed on record by PCL which was not refuted by IRCON. Furthermore, while granting compensation for the extra lead he also adjusted the same for escalation paid under Clause 4 of the SCC. To demonstrate the methodology adopted by the learned arbitrator it would help if I were to refer to the following observations made in paragraph III(l) of the 1nd Award. Pertinently, a somewhat similar methodology is adopted in paragraph III(p) of the 2st Award as well.

“1) The Claimant in support of the claim has enclosed various documents towards [the] purchase of material from its vendor. The Claimant submitted that the price of material include[s] [an] element of extra lead on account of [the] ban on mining by the Supreme Court firstly in NCR of Delhi, which later was extended upto Rajasthan. The Claimant had stated that the nearest source after the ban was Bewari in Rajasthan, which is about 100 K.M. After the ban in Rajasthan, the nearest source of material were about 250 K.M. The Claimant also stated that the average rate of transportation per truckload of 6 tyre trucks was Rs.7000/- which fact the Respondent has not been refuted any averment of the Claimant in the Reply. The Respondent during oral submission stated that the Noida Authority had taken a decision for compensation for an abnormal increase in [the] price of the material. No such basis of computation was placed before me by the Respondent. The Claimant submitted that the Greater Noida Authority in its estimates for construction of peripheral roads in Greater Noida has taken Rs.4.75 per km per cu.m and on same basis Claimant be paid for extra lead. In my view the Claim at such a rate is not justified, as the said estimate is for 2004-2005, whereas the claim of the Claimant is merely for the year 2002 and for short period of 2003. Claimant had given rate analysis of various items to the Respondent before the award of work and has placed on record score of documents. There is no denial by the Respondent to the rates claimed by the Claimant nor Respondent has denied any document placed on record by the Claimant. In my view Claimant is entitled for [sic: to] the abnormal increase in price, which is due to extra lead due to the ban on mining by [the] Supreme Court. The Respondent has paid escalation to the claimant as per Clause 4 of SCC. As per Clause 4 of SCC variation in [the] material is to be granted as per index of [the] wholesale price for all commodities published by RBI. The amount of escalation paid under Clause 4 of SCC by the Respondent to Claimant has to be reduced from the award, as otherwise it will amount to double compensation. The escalation on material as per Respondents Abstract of Escalation Bill works out to Rs.28,64,811/-. Further Claimant is also not entitled for [sic: to] profit and overhead on the same as the Claimant is seeking the [sic] compensation on account of abnormal increase in [the] price of material in its letter. I hold that the Claimant is entitled for [sic:to] the revised claim of Rs.76,81,461/- (Rs.1,21,80,944/- minus Rs.11,07,358/- (profit @10%) minus Rs.5,27,314/- (overhead) minus Rs.28,64,811/- (escalation on material paid).”

34. To my mind, the arbitrator is the master of the evidence placed before him both with regard to the quantity and quality. The arbitrator who is an Engineer and appointed by the CEO, NOIDA, is a person who would have requisite domain knowledge as to how the price of raw material got impacted due to the ban on mining put in place by the Supreme Court. In my opinion, this is not a case of no evidence. IRCON has not only sought to muddy the waters, so to speak, by adverting to certain bills submitted by suppliers of raw material but has gone beyond the objections taken before the learned arbitrator both in the SODs as well as in the hearing held before him. The fact that the rate-analysis carried out by PCL was not objected to by IRCON is an aspect which correctly weighed with the learned arbitrator while awarding amounts qua Claim no.1 in both awards. While viewing this aspect of the matter, it would be wholesome to apply the *dicta* laid down by Hon'ble Mr. Justice Sabyasachi Mukherjee (as he then was) in *Municipal Corporation of Delhi vs. Jagan Nath Ashok Kumar and Ors.*, (1987) 4 SCC 497.

"... 5. It is familiar learning but requires emphasis that Section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B. Mukharji, J. as the learned Chief Justice then was, expressed the above view in *Haji Ebrahim Kassam Cochinwall v. Northern Indian Oil Industries Ltd.* MANU/WB/0245/1950 : AIR1951Cal230 and we are of the opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J. in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd.* [1948] 2 All E.R. 186 observed at pages 188/189 of the report as follows:

A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does

not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold Awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an Arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award.

6. This in our opinion is an appropriate attitude.

7. xxxxxxx

8. After all an arbitrator as a Judge in the words of Benjamin N. Cardozo, has to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". ..."

(emphasis is mine)

35. As regards amounts awarded by the learned arbitrator for earth-compaction in layers of 200 mm. instead of 300 mm., it was not disputed before me by Mr. Chandan Kumar that compaction work in 200 mm. layers involved extra effort both in terms deployment of machinery and labour. The objection of IRCON thus, was not that the work of earth-compaction in layers of 200 mm. was not carried out by PCL but its objection was that as per Clause A-2.3.6(3) of the Technical Specifications and Conditions of Particular Application required PCL to spread and to carry out compaction of pond ash in horizontal layer of not more than 300 mm. and, therefore, it was not entitled to any amount for carrying out compaction work in layers of 200 mm. The learned arbitrator while noting this objection has also recorded a finding of fact that IRCON has not denied the contents of PCL's letters dated 19.1.2004/10.2.2004 whereby it

adverted to the fact that IRCON had directed it to carry out earth-compaction in layers of 200 mm. instead of 300 mm. After noting this fact, the learned arbitrator in respect of compaction claim has made the following crucial observations:

“The claimant submitted that the Claim of the Claimant is for of compaction in layers of 20 cm, whereas Claimant was to do compaction in layers up to 300MM Thickness and the Claimant has complied with clause A-2.3.6(3), by not doing compaction in layers of more than 30 cm and doing compaction in layers of 20 cm. The aforementioned clause do [sic: does] not deal with payment nor provide that the Contractor will be paid [the] same rate for doing compaction in layers up to 300MM or 30 Centimeter. The Claimant had claimed Rs.18.85 per cu.m and has given [an] analysis of the rate. The Respondent has also not disputed the rate analysis. In my view, the rate claimed is on [the] higher side. I award [the] Claimant rate of Rs.16/- per cu.m. Respondent has admitted in Certificate dt.12.1.2004 that Claimant has done embankment fill with fly ash of 153937 cu.m and the same quantity is in Abstract of Final Bill prepared by the Respondent.”

36. I find no error in the approach adopted by the learned arbitrator. Once the learned arbitrator has found that as a matter of fact earth-compaction in layers of 200 mm. was carried out at the behest of IRCON it was certainly obliged to pay for the same since it required the deployment of extra machinery and labour. As is noted hereinabove, concededly, before the learned arbitrator IRCON had not raised any objection in terms of the provision contained in Clause 9.3(ii) of the SCC. Clause 9.3(ii) of the SCC reads as follows:

(ii) to omit a part of the work in case of non-availability of a portion of the site or for any other reasons and the Contractor shall be bound to any out the works accordance with any instructions given to him in writing signed by the Engineer-in-Charge and such alterations, omissions, additions or substitutions shall form part of the contract as if originally provided therein and any altered additional or substituted work which the Contractor may be directed to do in the manner above specified as part of the works, shall be carried out by

Contractor on the same conditions in all respect including price on which he agreed to do the main work.

36.1. A plain reading of the clause would show that it relates to alterations, omissions, additions or substitutions in the contract which arise on account of an omission of a part of the work in case of non-availability of a portion of the site or for any other reason. It is in these circumstances that the contractor on the instruction given in writing in that behalf by the Engineer-in-Charge is required to carry out the work on the same conditions in all respect including the price on which it had agreed to do the main work.

36.2 The instant case is not one of omission of a part of the work due to either non-availability of the portion of the site or for any other reason. This is a case where the same work had to be done, which was, spreading and compaction of pond ash, *albeit*, in a different manner which led to the deployment of additional machinery and labour as the number of earth layers increased in comparison to those initially envisaged under the contract.

36.3. Thus, apart from the fact that the clause relied upon by Mr. Chandan Kumar has no relevance qua the issue as to whether or not the claim under this head ought to have been awarded, the fact that this objection was not taken before the learned arbitrator impels me to reject the submission as an objection of this nature ought to have been taken in the SOD, however much one may relax the rigour of pleadings in the arbitration proceedings. The arbitrator being a creature of the contract should know what exactly is the defendant's objection to a claim so that he can assess for himself the contours of his jurisdictional periphery.

36.4. Therefore, the objection taken by Mr. Chandan Kumar which was not articulated in the pleadings filed by IRCON it certainly cannot be permitted to be raised for the first time in a Section 34 petition filed in this court.

37. In respect of the claim for interest, once again, an argument was raised before me which was not advanced before the learned arbitrator. Before me,

Mr. Chandan Kumar has raised the objection that since an NCC was issued by PCL, the contract stood novated and, therefore, no interest in terms of Clause 7.2 of the SCC could be awarded. To be noted, the objection before the learned arbitrator in the SOD was as follows:

“...Claims no.4, 5, 6 & 7 are related with compensation due to delay in payment, these claims are directly related with respect to [the] completion date.

Clamant is reckoning date of completion as 31.03.2003 but has not substantiated through any document which proved that work was completed on 31.03.2003 & pursuant to Clause 7 of General Conditions of Contract Para 2. “The final bill shall be submitted by the Contractor within one month of the date fixed for completion of the work or on the date of the certificate of completion furnished by the Engineer in Charge.”

Since, date of completion does not [get] established through documents submitted by claimants.

As such, these claims are not tenable...”

38. The learned arbitrator in the two awards rendered by him notes that during arguments he had sought certain clarifications. According to the learned arbitrator, IRCON furnished its clarifications on 25.11.2009/3.12.2009 whereas PCL gave its clarification on 30.12.2009. This aspect is mentioned in the opening part of the awards. A perusal of the clarification would show that the dates of completion for the 2001 CA and 2002 CA were 28.2.2003 and 31.3.2003 respectively.

38.1 The learned arbitrator took into account in fixing the date of completion the abstract of the release of security deposit placed on record by PCL. This again is an aspect which falls completely within the domain of the learned arbitrator. He had two versions before him and he chose one over the other. No objection, as noted above, was taken that because an NCC was furnished by PCL it could not claim interest *qua* delayed release of security deposit in terms of clause 7.2 of the SCC. I am also satisfied that the rate of interest awarded by

the learned arbitrator is reasonable since on mobilization advance IRCON in terms of Clause 11.2 of the SCC was entitled to claim interest at the same rate i.e. 15 percent per annum.

39. Thus, for the foregoing reasons, I am not inclined to interfere with awards dated 28.5.2010 and 28.4.2011. Consequently, the captioned petitions are dismissed. All pending applications shall stand closed. Costs will follow the result reached in the petitions.

RAJIV SHAKDHER
(JUDGE)

JULY 17, 2019
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