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

Reserved on : 21st January, 2019

Date of decision : 26th February, 2019

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O.M.P. 403/2010

IRCON INTERNATIONAL LIMITED

..... Petitioner

Through: Mr. Dinesh Agnani, Senior Advocate
with Ms. Leena Tuteja and Mr. Ishaan
Chawla, Advocates. (M:9810049061)

versus

M/S JAIPRAKASH ASSOCIATES LTD.

..... Respondent

Through: Mr. Lovkesh Sawhney, Advocate.
(M:9810010392)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*'the Act'*) challenges the impugned award dated 15th April, 2010 whereby the Ld. Sole Arbitrator has awarded the claims raised on behalf of M/s. Jaiprakash Associates Ltd. (*hereinafter 'the Contractor'*) against IRCON International Limited (*hereinafter 'IRCON'*).

2. IRCON awarded contract dated 15th March, 2004 to the Contractor, for "*construction of civil works including tunnels, bridges, earthwork etc. in Zone-III (KM 134-142) of Laole Quaziund Section of Udhampur, Srinagar, Baramulla New B.G Railway Line Project ('work')*." The total period for completion of the work was 36 months. However, it is the admitted position that during the said period, the Contractor could execute a part of the work, to the tune of Rs. 26.44 crores as against the total project cost of Rs.168.46 crores. Due to the slow progress of work, IRCON issued a show cause

notice on 12th January, 2007. In response to this show cause notice, the Contractor replied on 18th January, 2007 and alleged that the delays were due to IRCON's breaches, including non-handing over of the site in time, not providing safe working conditions in terrorist affected areas etc. The Contractor, thus, requested for an extension of 840 days without levy of penalty, subject to certain conditions. These conditions were not found to be acceptable to IRCON and, accordingly, the parties agreed for a time extension of 3 months without levy of liquidated damages. Thereafter, correspondence was exchanged between the parties and IRCON on 22nd February, 2007 suggested foreclosure of the contract on some conditions. A counter proposal was received from the Contractor on 1st March, 2007 for foreclosure. Finally, the parties signed a 'foreclosure document' on 29th/30th March, 2007 agreeing to foreclosure. As per the foreclosure document, IRCON agreed to reimburse '*a reasonable claim*' of expenditure incurred towards mobilisation etc. Pursuant to the foreclosure document, the Contractor raised several claims in respect of the expenses incurred by it, for which it claimed reimbursement on 29th May, 2007. The claims raised were to the tune of Rs. 35.71 crores. The claims were rejected by IRCON on 23rd July, 2007 and on 3rd October, 2007, the Ld. Sole Arbitrator was appointed to adjudicate the dispute between the parties.

3. Before the Ld. Arbitrator, the main claims raised were in respect of reimbursement of expenditure incurred, loss of profit and other losses incurred by the Contractor. The Ld. Arbitrator awarded a sum of Rs.16.97 crores towards compensation and Rs.4.85 crores as interest. The counter claims raised by IRCON were rejected. The operative portion of the award is set out hereinbelow.

“Summary of Award

IN CONCLUSION, M/S. IRCON International Limited (Respondents) shall pay to M/s. Jaiprakash Associates Limited (Claimants) a sum of Rs. 21.82 crores (Rupees twenty one crores eighty two lakh only) towards full and final settlement of all claims/counter claims of both the parties arising out of the disputes and differences as referred by the Managing Director, IRCON International Limited in his letter no. IRCON/CO/ARBN/J&K/JP/870 dt. 03.10.2007

THAT the amount as mentioned above shall be paid to the Claimants within 60 days from the date of publication of the award failing which the amount of award will carry a simple interest of 12 % per annum w.e.f date of publication of AWARD till the date of payment.

THAT this AWARD has been published on a stamp paper of Rs. 1,000/- supplied by the Claimant and the total expenses due as stamp duty shall be borne by the Claimants, as applicable.

THAT any of the expenses incurred by the parties in connection with the arbitration will be borne by themselves. As agreed in the first meeting dt. 16.10.2007, Arbitrator's fee etc. will be shared equally by both the parties.

Section 33 of the Arbitration & Conciliation Act, 1996 provides for correction & interpretation of Award: Additional Award within 30 days from the date of receipt of Arbitral Award.

Accordingly, either of the party may refer, if they have any such request to make to me within 30 days by giving a notice to the other party for any correction & interpretation: Additional Award within a period of 30 days.”

4. The objections raised by Mr. Agnani, learned Senior Advocate are two-fold, namely that the foreclosure document only provided for reimbursement of reasonable expenses and not for awarding of claims for losses. He submits that the foreclosure document was the final settlement between the parties and ought to be treated as such. He further submits that the award of Rs.16.97 crores towards expenses is completely baseless and unverified. He further submits that the Ld. Arbitrator has gone beyond his mandate. The calculations by the Arbitrator are guesswork and not based on any evidence.

5. It is further submitted that the contractor had failed to mobilize sufficient manpower and equipment, which in fact resulted in issuance of show cause notice under Clause 89 of the GCC. Reference is made to letter dated 12th January, 2007 which enumerated the various deficiencies in the work carried out by the contractor and gives seven days' notice under Clause 89 of the general conditions of contract. It is submitted that the Ld. Arbitrator did not take into consideration the various shortcomings in the execution of the work by the contractor. In fact, even during the period in which the contractor was carrying out the said work, it ought to have completed work worth Rs. 41.99 crores instead of Rs. 25.64 crores. This, according to IRCON showed that there was inadequate mobilization on the ground. The contractor having been forced to exit the work due to its own shortcomings and deficiencies ought not to profit from the same by claiming expenditure which it did not incur. It is further submitted that the Ld. Arbitrator failed to consider that IRCON had paid mobilization advance in two installments in terms of the GCC and also machinery advance. The said two payments were advances given to the contractor, which carried

interest being PLR + 1% per annum. This amount was not repaid by the contractor and the said amount and the interest on the advance given is approximately Rs. 29.87 crores.

6. It is further submitted that the Ld. Arbitrator was bound by the foreclosure documents and hence could not have awarded amounts towards interest liability and corporate expenses. It is urged that the present being a case of termination under Clause 89 of the GCC due to defaults of the contractor, the award of compensation is not justified.

7. On the other hand, Mr. Sawhney, learned counsel appearing for the Contractor submits that the Ld. Arbitrator had got verification of the expenditure incurred done, by constituting a committee vide order dated 10th May, 2008. The said committee consisted of representatives of both parties and the amounts awarded by the Arbitrator are, in fact, much lesser than what the said committee had verified. It is further submitted that all along it was clear that any settlement or foreclosure would be subject to the claims of the Contractor. This is clear from a reading of the various letters, which have been written by the Contractor. IRCON was always aware that the Contractor had incurred huge expenditure. The delay in the execution of the work, was completely due to the breaches of IRCON as also conditions prevalent in the sensitive area where the project was being implemented. He, thus, states that the award is completely reasonable and is not liable to be interfered with.

8. It is further submitted that the foreclosure document was an agreement between the parties and IRCON had agreed to reimburse reasonable expenses. Since the Joint Committee had verified the expenditure incurred by the contractor, the argument that the expenditure is inflated is

liable to be rejected. It is further submitted that the mobilization advance paid along with interest amount is fully secured by way of bank guarantee. The last bank guarantee issued by the contractor is for a sum of Rs. 23,27,40,000/-, which is valid till 31st March 2019. Thus, the mobilization and equipment advance is fully secured. It is further urged by the contractor that though Clause 89 was invoked by IRCON, when the contractor refuted the same, the contract period was extended by three months, and in fact, the initial notice under clause 89 was not followed up. Finally, the foreclosure document was executed, and this continues to bind the parties.

Analysis and Findings

9. Before going into the respective contentions of the parties, it is important to extract the relevant portion of the foreclosure document, which was accepted by the parties.

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<i>1</i>	<i>IRCON does not insist upon immediate return of advance made by IRCON to JAL, which could not be adjusted/recovered so far because of inadequate progress of work for reasons beyond JAL's control despite substantial investment in deployment of resources and expenditure for execution of works. JAL is preparing details for the amount it considers to be its entitlement & towards compensation for idling/under utilization of</i>	<i><u>JAL will work out the expenditure incurred by them on account of mobilization etc and submit a reasonable claim within a period of 2 months from the date of foreclosure of the contract. The claims submitted by JAL will be examined along with the counter claims of IRCON within 2 months from the date of submission of the claims and if the same are not resolved amicably, the dispute shall be referred to Arbitration as requested by JAL. The procedure for</u></i>
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	<i>resources which will be submitted to you shortly.</i> <i>In case JAL and IRCON come to an agreement to the said compensation, the outstanding advance payment could be adjusted against it and the balance amount payable on either side could be squared up within an agreed period.</i> <i>However, in case no agreement is reached between IRCON and JAL on the aforesaid compensation, the matter could be referred to Arbitration under the Arbitration to be mutually agreed by JAL and IRCON or by 3 Arbitrators. In such situation (i.e. grant of Arbitrator) JAL will be agreeable to keep in force the BG for the outstanding advance payment till the matter is settled by Arbitrator.</i>	<i>appointment of Arbitrator shall be as per Clause 90 of GCC. The request of JAL for not depositing the un-adjusted/un-recovered mobilization advances at this stage and instead covering it by a suitable BG including the interest amount thereon is agreed to. JAL will however submit the fresh BG or amend the existing BG suitably to cover the outstanding mobilization advances along with the interest thereon as per the details given in Annex-I and keep it valid along with interest accruable for the extended period till such time the Arbitration is concluded and the Arbitration award is published. The settlement of account in respect of Mobilization Advance will be carried out on publication of the award. No further extension of BGs will be allowed on publication of award by the Arbitrator. IRCON will be at liberty to encash the BG, if on publication of the award, the amount of unsettled/unadjusted advances is not deposited by JAL. Further IRCON will release the BGs submitted by JAL, if no amount is payable by JAL to</i>
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		<i>IRCON as a result of award by the Arbitrators.</i>
2	<i>The work already done by JAL shall be jointly measured for finalization of payments including payment for extra items before the foreclosure of the contract.</i>	<i>The work already done by JAL shall be jointly measured for finalization of payment within two months of issue of this letter.</i>
3	<i>JAL shall furnish Performance Guarantee for an amount equal to 3% + 5% against retention money= 8% of the value of work done by JAL</i> <i>BG shall be valid for a period of 12 months from the date of foreclosure of the contract OR date on which IRCON or any other agency commences the work whichever is earlier.</i> <i>JAL's existing Performance Guarantee and the Retention money available with IRCON shall be released by IRCON to JAL before foreclosure of the contract.</i> <i>The foreclosure of the contract will be deemed to be with the mutual consent of the parties without levy of any liquidated damages or claim by IRCON.</i>	<i>Accepted.</i> <i>Partly Accepted. PBG shall be valid for a period of 12 months from the date of foreclosure of the contract.</i> <i>Existing PBG will be released after receipt of new PBG and fresh/additional BG for mobilization advance.</i> <i>The foreclosure of the contract will be deemed to be with the mutual consent of both the parties without levy of any liquidated damages and any risk & cost liability on JAL on account of getting the balance work executed by IRCON.</i> <i>IRCON however reserves its right to submit counter claims before the Arbitrator and also for mutual settlement of compensation stated above under item I</i>

4	<i>JAL will allow free access to the site of work to IRCON or any agency appointed by IRCON for carrying out remnant of work in a manner decided by IRCON without any objection by JAL. JAL will vacate the work site within a reasonable time after the foreclosure of the contract.</i>	<i>Noted. JAL will vacate the site within one month of issue of this letter or by the time the new agency is fixed whichever is earlier.</i>

You are hereby requested to give your acceptance to the above, so that further necessary action is taken for signing the supplementary agreement for the foreclosure of the contract. Till such time the supplementary agreement is signed, this letter will be taken as the formal agreement and the date of foreclosure for all purposes will be taken as the date of issue of this letter.”

10. Though the above document provides that a subsequent agreement would be executed, in fact no such subsequent agreement came to be executed. Thus, the foreclosure document is to be taken as the final agreement between the parties.

11. The above table was incorporated as part of a letter, which was communicated to the Contractor by IRCON on 29th March, 2007. While setting out the stand of the Contractor, IRCON gave its own response to the same and at the end, the acceptance of IRCON's stand was sought. On behalf of the Contractor, its director Mr. Samir Gaur, signed this document with the remark “accepted” on 30th March, 2007. Thus, in respect of the

foreclosure and the rights and liabilities post the foreclosure, the foreclosure document binds the parties.

12. As per the foreclosure document-

- The Contractor could raise reasonable claims within a period of two months in respect of expenditure incurred on account of mobilisation etc. The same were to be, thereafter, examined by IRCON. If the same were not resolved between the parties, the claims would be referred to arbitration.
- The mobilisation advance and equipment advance and any other advance would then be retained by the Contractor subject to furnishing of the bank guarantee to IRCON for securing the said advances along with interest.
- In respect of work executed by the Contractor, joint measurement would be taken by the parties and payment would be made within two months from the foreclosure document. Performance Bank Guarantee was also to be issued until the fresh Bank Guarantee towards advances would be submitted. Upon the submission of the letter, the Performance Bank Guarantee was to be released.
- The foreclosure was with mutual consent of the parties without levy of liquidated damages and also any risk and costs liability on the Contractor, if IRCON decided to get the works executed by any third party.
- However, IRCON could raise its counter claims before the Ld. Arbitrator and also seek settlement of compensation.

13. After the signing of the foreclosure document, the contractor vide letter dated 29th May 2007 claimed a sum of approx. Rs. 35.71crores towards the expenditure incurred. The contractor raised this claim on the basis of the foreclosure document which permitted it to “*submit a reasonable claim.*”

14. On 23rd July 2007, IRCON rejected the expenditure claim on the ground that the same is a huge claim and is unreasonable. The letter is set out below:

“ The said contract was foreclosed vide this office letter No. IRCON/1014/J&K.KQ/Zone-III/36/ dated 29.03.2007. As per the terms and conditions of the foreclosure, it was understood that M/s. JAL will work out the expenditure incurred by them on account of mobilization etc. and submit a reasonable claim within a period of 2 months from the date of proposal of the contract. M/s. JAL has submitted a claim of Rs. 35.7 Crore vide letter under reference dated 29.05.2007. Such a huge claim is unreasonable and not acceptable to M/s IRCON. In view of the above, it is advised that the matter may be referred to arbitration for settling the reasonable claims. IRCON will also submit its counter claims during the arbitration proceedings.”

15. Vide letter dated 12th September 2007, the contractor invoked arbitration and on 3rd October 2007 a sole arbitrator was appointed by IRCON.

16. The parties filed their pleadings before the Arbitrator. On 10th May 2008, IRCON raised an objection before the Ld. Arbitrator that the contractor had failed to submit documents in support of the claims. In rejoinder, the contractor submitted a long list of documents, which it relied

upon. Considering the nature of documents, the Ld. Sole Arbitrator constituted a joint committee for verification of the documents. The said committee consisted of the DGM and Manager (finance) of IRCON and two officials of the contractor. The Ld. Arbitrator directed that a joint statement would be submitted by the committee. The relevant portion of the order passed by the Ld. Arbitrator dated 10th May, 2008 is extracted below.

“ In their counter statement of facts, M/s. IRCON International Limited have said that the Claimant have not submitted the documents substantiating the deployment of men and machines on the project. In their rejoinder, M/s. Jaiprakash Associates Limited submitted a long list of such documents.

It was, therefore, decided that all such documents referred to by the claimant will be jointly verified by a Committee consisting of:-

a. On behalf of Ircon International Limited

i. Shri Vinod Kumar/DGM

ii. Shri Yogesh Malik/Manager (Finance)

b. On behalf of Jaiprakash Associates Limited

i. Shri K.J. Singh

ii. Shri Atiq Ahmed Siddiqui.

And the ‘Joint Statement’ will be submitted to the Sole Arbitrator by 30.6.2008.”

17. The above said committee submitted a report dated 13th September 2008, which reads as under:-

“REPORT OF THE COMMITTEE

A committee of the following representatives was constituted by the learned arbitrator during the hearing on 10th of May 2008.

Representatives of Claimant Representatives of Respondent

Sh. K J Singh

Sh. Vinod Kumar Sharma

Sh. Atiq Ahmad Siddiqi

Sh. Yogesh Malik

*The committee was directed to examine the expenditure details submitted by the Claimant and scrutinize the vouchers in support of the expenditure incurred by the Claimant. The report was to be submitted by 30th June, 2008. This date was extended to 31st August and later to 30th September 2008. The committee representatives met in the office of the Claimant at Noida on 18th & 19th June and 21st July 2008. The committee members visited the site office of the Claimant from 11th Sep to 13th Sep 2008 to verify the accounting records and related vouchers for the total expenditure incurred on mobilization etc. and on various heads of account as per the Statement of Claim (SOC). The expenditure details and vouchers were examined by the committee vis-a-vis the audited accounts for the financial years 2004 - 2005 to 2006-2007 (Three Years). During the verification, certain typographical discrepancies were detected particularly under the head of Manpower. Expenditure incurred by Claimant towards donation and penalties has also been removed from the total expenditure incurred. The net impact on account of these errors amounts to Rs 34.50 lacs resulted into reduction of expenditure on manpower from Rs 15.57 crores to Rs 15.26 crores . The other heads of expenditure have been found to be correct vis-a-vis the audited records. The total expenditure as shown on page 411 of **SOC**, thus verified , works out of Rs 45.50 crores, which includes the owning cost of the equipments for the total period of its deployment only and excludes the amount of margin money on Bank Guarantee. The details of the expenditure verified have been given below:-*

<i>Sr. No.</i>	<i>Heads</i>	<i>Amounts (Rs. Crores)</i>
<i>1.</i>	<i>Manpower</i>	<i>15.26</i>

2.	<i>Equipment (Owning cost for the total deployment period)</i>	<i>11.07</i>
3.	<i>Camp Construction</i>	<i>3.93</i>
4.	<i>Access Roads</i>	<i>3.03</i>
5.	<i>Electrical Installation</i>	<i>0.96</i>
6.	<i>Water Supply System</i>	<i>0.64</i>
7.	<i>Communication System</i>	<i>0.56</i>
8.	<i>Land Lease and Compensation</i>	<i>0.86</i>
9.	<i>Rehandling of Steel From Nachlana Bridge to worksite</i>	<i>0.34</i>
10.	<i>Transportation of heavy equipment in knock down condition</i>	<i>0.11</i>
11.	<i>Civil works for construction Plants</i>	<i>0.50</i>
12.	<i>Maintenance of Bank Guarantees</i>	<i>1.81</i>
13.	<i>Maintenance of Insurance Policies</i>	<i>0.06</i>
14.	<i>Interest liability on Advance</i>	<i>6.37</i>
		<i>45.50 crore</i>

”

18. Thus, as per the report of the committee, the total expenditure incurred by the contractor on the project was Rs. 45.50 crores.

19. The Ld. Arbitrator vide the impugned award dated 15th April 2010 held that the foreclosure document dated 29th March, 2007 is the final binding contract between the parties. The arbitrator holds that the conclusion

of the relationship between the parties was not covered by clause 88 and 89, but was by execution of a supplementary agreement under clause 56 of the general conditions of contract. The Ld. Arbitrator further held that the foreclosure documents, being later in point of time, would prevail in the case of any contradiction between the original contract and the foreclosure documents. Finally, the Ld. Arbitrator awarded a sum of Rs. 16.97crores under various heads, in addition to interest. The observations of the Arbitrator are set out hereinbelow:

“ The decision to grant 90 days extension unilaterally by the Respondents was to consider the reply of the Claimants to 7 days notice with all the prons & cons of the reply including discussion with Northern Railway. This means that any action that followed in this case was well considered decision on the part of the Respondents and the stand now that is a case of determination of Contract under Clause 89 of GCC is an afterthought. This makes it very clear that this is not a case of determining the Contract under Clause 89 of G.C.C.

9. In view of the above, I have come to a conclusion that this is not a case of determination of Contract under Clause 89 of G.C.C. at all. This is a case of amendment to the existing Contract in form of a Supplementary Agreement under Clause 56 of G.C.C. This is covered by Clause 62 of Contract Act 1872 (effect of novation, rescission and alteration of contract) being a material alteration. The Respondent's letter dt. 29.03.2007 duly accepted by the Claimants on 30.03.2007 is a Supplementary Agreement. This Supplementary Agreement has come into existence much later than the original Contract. Therefore, in case any contradiction in the provisions of the two, the provision of the Supplementary Agreement shall prevail. The Claimants are therefore right when they

insist that the role of the present Arbitration is only to arrive at reasonable amount of claims submitted by the Claimants and further to adjudicate on the counter claims of the Respondent.

10. I would, therefore, confine my role to arrive at a reasonable amount for each claim of the Claimants and to the Counter Claims of the Respondents only. Any amendment in claims/ counter claim made due to any calculation or with-drawl by the party concerned will, of course, be considered.”

20. Thus, the only role that the Arbitrator assumed for adjudication was the determination of the reasonable compensation payable to the contractor for the expenditure incurred.

21. The Ld. Arbitrator observed that the stand of IRCON was that the figures given by the contractor were highly inflated and there was no authentic data in support of the said figures. Ld. Arbitrator, however, held that since he was not equipped with any machinery to go into the accounts on his own, he had appointed a joint committee to verify the claims. Once the verification has been done by the Joint Committee, the Ld. Arbitrator held that he had no reason to disbelieve the said figures.

22. The Ld. Arbitrator thereafter holds that there were several reasons why the work could not be started by the contractor on all fronts. However, he concluded that several of the reasons were *‘beyond the control of both the parties’*. It was further observed that *the contractor “had not deployed the full machinery and manpower”*. After doing so, the Arbitrator observed as under:-

“Due to various reasons as pointed out by the Claimants themselves the work could not be started at all fronts. Besides other reasons, non availability of

land & non up-gradation of arterial access roads, bridges across Bichlari river & Mahu Mangat Nala did not permit full deployment. There have been reasons beyond control of both the parties. Therefore, it will not be fair to accept that the amount realized out of the expenditure of mobilization etc. can be directly proportional to the total cost of work. The Claimants are well experienced company who have handled such projects. Using their experience & prudence; they must have mobilized their resources keeping in view the working conditions and thus avoided large scale wastages. They have also not deployed the full machinery and man power. As a matter of fact, there are two joint meetings held on 24.10.2005 and another one held on 09.06.2006. Both these meetings were attended by Shri Samir Gaur & Shri R.K. Jain from the side of the Claimants where the Claimants have agreed for improving the deployment of men & machinery.

In this manner, it can be seen that both the parties were reasonable & sincere towards the making the project a success but unfortunately due to circumstances beyond control of both of them, the progress could not be achieved. In my opinion, other problems could be solved by adopting better techniques, better coordination and extension of time. But the main difficulties were delay in land acquisition by Respondents, militancy and delay by the Respondents in upgrading the arterial road and bridges which did not allow the project to proceed. I would, therefore, consider it fair to make an assessment about the cost of work which could be done by the Claimants with the deployment of man & machinery at various fronts which were open. For this purpose the Respondents have submitted on 20.02.2009 a written brief wherein they have submitted a detailed table showing the cost of work which was possible to be done. The table indicates the cost of

tunneling work as Rs.40.75 crores and that for bridges Rs. 1.24 crores. The total to the possible work thus works out to Rs. 41.99 crores.

To my mind this amount of Rs. 41.99 crores is a fair assessment and I therefore use this figure for working out the expenditure realized against the Head of Expenditure column in the table showing claims submitted by the Claimants. For the sake of convenience, I will use the same formula for the manpower & equipments also. The formula will be

(i) Realized amount = Expenditure chargeable to contract /41.99 x 25.64

(ii) Claim = Unrealized amount = Expenditure chargeable to contract - realized amount”

23. By applying the formula extracted above, the Ld. Arbitrator came to the conclusion that Rs.16.97 crores is the unrealized portion of the expenditure i.e. the acceptable claim towards expenditure incurred by the contractor, which has not been realized through the value of work done. The arbitrator denied the loss of profits claim. The Arbitrator also awarded interest at 12% per annum on the amount awarded. The counter claims of IRCON were rejected.

24. The first submission that is to be considered is as to whether the cessation of relationship between the parties was under clause 88 or 89 of General Conditions of Contract or whether it constituted novation under Clause 56. Clauses 56, 88 and 89 are set out below:

“56. Modification to contract to be in writing – In the event of any of the provisions of the contract requiring to be modified after the contract documents have been signed, the modifications shall be made in

writing and signed by IRCON and the contractor and no work shall proceed under such modifications until this has been done. Any verbal or written arrangement abandoning, modifying, extending, reducing or supplementing the contract or any of the terms thereof shall be deemed conditional and shall not be binding on IRCON unless and until the same is incorporated in a formal instrument and signed by IRCON and the contractor, and till then IRCON shall have the right to repudiate such arrangements.

88. (1) Right of IRCON to determine the contract:- *IRCON shall be entitled to determine and terminate the contract at any time should, in IRCON opinion, the cessation of work becomes necessary owing to paucity of funds or from any other cause whatever, in which case the value of approved materials at site and of work done to date by the contractor will be paid for in full at the rate specified in the contract. Notice in writing from IRCON of such determination and the reasons therefor shall be conclusive evidence thereof.*

(2) Payment on determination of contract:- *Should the contract under sub- clause (1) of this clause and The contractor claims payment for expenditure incurred by him in the expectation of completing the whole of the work, IRCON shall admit and consider such claims as are deemed reasonable and are supported by vouchers to the satisfaction of the Engineer. IRCON's decision on the necessity and propriety of such expenditure shall be final and conclusive.*

(3) *The contractor shall have no claim to any payment of compensation or otherwise, whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full but which he did not derive in consequence of determination of contract*

89. Determination of contract owing to default of contractor :- *(1) If the contractor should*

- i) Become bankrupt or insolvent, or*
- ii) Make an arrangement with or assignment in favour of his creditors, or agree to carry out the contract under a Committee of inspection of his creditors, or*
- iii) Being a Company or Corporation, go into liquidation (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or*
- (iv) Have an execution levied on his goods or property on the works, or*
- (v) Assign the contract or any part there-of otherwise than provided in Clause 18 of these conditions or*
- (vi) Abandon the contract, or*
- (vii) Persistently disregard the instructions of the Engineer, or contravene any provision of the contract, or*
- (viii) Fail to adhere to the agreed programme of work by a margin of 10% of the stipulated period.*
- (ix) Fail to remove materials from the site or to pull down and replace work after receiving from Engineer notice to the effect that the said materials or works have been condemned or rejected, or*
- (x) Fail to take steps to employ competent or additional staff and labour as required under these conditions, or*
- (xi) Fails to afford the Engineer or Engineer's representative proper facilities for inspecting the works or any part thereof as required under these conditions, or*
- xii) Promise, offer or give any bribe, commission, gift or advantage either himself or through his partner, agent or servant to any officer or employee of IRCON or to any person on his or their behalf in relation to the execution of this or any other contract with IRCON*

Then and in any of the said cases, the Engineer on behalf of IRCON may serve the contractor with a notice in writing to that effect and if the contractor does not within seven days after the delivery to him of such notice proceed to make good his default in so far as the same is capable of being made good and carry

on the work or comply with such directions as aforesaid to the entire satisfaction of the Engineer, IRCON shall be entitled after giving 48 hours in writing under the hand of the Engineer to rescind the contract as a whole or in part or parts (as may be specified in such notice) and adopt either or both of the following courses:-

- a) To carry out the whole or part of the work from which the contractor has been removed by employment of the required labour and material, the costs of which shall include lead, lift freight, supervision and all incidental charges.*
- b) To measure up the whole or part of the work from which the contractor has been removed and to get it completed by another contractor the manner and method in which such work is completed shall be in the entire discretion of the Engineer whose decision shall be final.*

And in both the cases (a) and (b) mentioned above, IRCON shall be entitled (i) to forfeit the whole or such portion of the security deposit as it may consider fit, and (ii) to recover from the contractor the cost of carrying out the work in excess of the sum which would have been payable according to the certificate of the Engineer to the contractor if the work had been carried out by the contractor under the terms of the contract, such certificate being final and binding upon the contractor. Provided, however, that such recovery shall be made only when the cost incurred in excess is more than the security deposit proposed to be forfeited and shall be limited to the amount by which the cost incurred in excess exceeds the security deposit proposed to be forfeited. The amount thus to be forfeited or recovered may be deducted from any moneys then due or which at any time thereafter may be deducted from any moneys then due or which at any time thereafter may become due to the contractor by IRCON under this or any other Contract or otherwise.

Provided always that in any case in which any of the powers conferred upon IRCON by sub-clause (1) of

Clause 89 hereof of Clause 89 hereof shall have become exercisable and the same shall not be exercised, the non-exercise thereof shall not constitute a waiver of any of the conditions thereof and such powers shall notwithstanding be exercisable in the event of any future case of default by the contractor for which his liability for past and future shall remain unaffected.

(2) Right of IRCON after rescission of contract owing to default of Contractor – In the event of any or several of the courses, referred to in sub-clause (1) of the clause, being adopted:-

a) The contractor shall have no claim to compensation for any loss sustained by him by reason of his having procured any material or entered into any commitments or made any advances on account of or with a view to the execution of the works or the performance of the contract and Contractor shall not be entitled to recover or be paid any sum for any work thereto for actually performing under the contract unless and until the Engineer has certified the performance of such work and the value payable in respect thereof and the contractor shall only be entitled to be paid the value so certified.

b) The Engineer or the Engineer's Representative shall be entitled to take possession of any materials, tools, implements, machinery and buildings on the works or on the property on which these are being or ought to have been executed, and to retain and employ the same in the further execution of the works or any part thereof until the completion of the works without the contractor being entitled to any compensation for the use and employment thereof or for wear and tear or destruction thereof.

c) The Engineer shall as soon as may be practicable after removal of the contractor fix and determine ex-parte or by or after reference to the parties or after such investigation or enquiries as he may consider fit

to make or institute and shall certify what amount (if any) had at the time of rescission of the Contract been reasonably earned or would reasonably accrue to The contractor in respect of the works then actually done by him under the contract and what was the value of any unused or partially used materials, or any constructional plant and temporary works upon the site.

d) IRCON shall not be liable to pay to the contractor any moneys on account of the contract until the expiration of the period of maintenance, damages for delay in completion (if any) and all other expenses incurred by IRCON have been ascertained and the amount thereof certified by the engineer. The contractor shall then be entitled to receive only such sum or sums (if any) as the Engineer may certify would have been due to him upon due completion by him after deducting the said amount, but if such amount shall exceed the sum which would have been payable to the contractor, then the contractor shall upon demand pay to IRCON the amount of such excess and it shall be deemed a debt due by the contractor to IRCON and shall be recoverable accordingly.

25. A perusal of clause 89 shows that the same provides for “*determination of contract owing to default of the contractor.*” If there is any default, as per the contract, IRCON was required to give notice of seven days to the contractor to make good the default and follow it up with a 48-hour notice in writing to rescind the contract as a whole or as a part. Though IRCON gave the first notice of seven days, the second notice was not issued. After prolonged correspondence, the foreclosure document dated 29th March 2007 was executed. Thus, the arbitrator was right in holding that the sequence of events showed that there was no termination of contract due to

default under clause 89. A perusal of the foreclosure document further shows that the same was similar to the mechanism provided in clause 88.

26. Under both the above clauses, parties could agree to modify/vary the contract. Under clause 88(2), expenditure incurred which is considered reasonable is liable to be reimbursed by IRCON. No profits were liable to be awarded. The Ld. Arbitrator holds that the foreclosure document is a binding contract and applies the principles as contained in Clause 88 in awarding the expenditure to the contract. The finding that the foreclosure document is a binding contract and that the only issue for determination was the amount of expenditure that could be considered reasonable for being reimbursed is fully justified in the facts, and is not liable to be interfered with.

27. Thus, all that is required to be seen is whether what has been awarded is *“the expenditure incurred by them (sic contractor) on account of mobilization etc.”* and *“whether the same is reasonable”*.

28. In order to determine the expenditure incurred by the contractor, the Ld. Arbitrator appointed a joint committee to verify the total expenditure incurred. The said committee confirmed the total expenditure as being Rs. 45.50 crores. The Ld. Arbitrator applies a formula to arrive at the reasonable expenditure to be reimbursed. He does this by applying the formula used by IRCON to show the cost of work that ought to have been done by the contractor. It is after applying this formula that the Arbitrator arrives at a figure of Rs. 16.95 crores as being the reasonable expenditure. The amounts determined are tabulated by the Ld. Arbitrator as under:

<i>Sr. No</i>	<i>Heads of Expenditure</i>	<i>Total Expenditure</i>	<i>Expenditure chargeable to contract</i>	<i>Expenditure realized through the value of work</i>	<i>Unrealized portion of expenditure = Acceptable claims</i>
1.	<i>Manpower</i>	<i>15.26</i>	<i>15.26</i>	<i>9.31</i>	<i>5.95</i>
2.	<i>Equipment</i>	<i>40.33</i>	<i>11.07</i>	<i>6.75</i>	<i>4.32</i>
3.	<i>Camp Construction</i>	<i>3.93</i>	<i>1.72</i>	<i>1.05</i>	<i>0.67</i>
4.	<i>Access Roads</i>	<i>3.03</i>	<i>3.03</i>	<i>1.85</i>	<i>1.18</i>
5.	<i>Electrical installation</i>	<i>0.96</i>	<i>0.24</i>	<i>0.15</i>	<i>0.09</i>
6.	<i>Water Supply System</i>	<i>0.64</i>	<i>0.19</i>	<i>0.11</i>	<i>0.08</i>
7.	<i>Communication System</i>	<i>0.56</i>	<i>0.12</i>	<i>0.07</i>	<i>0.05</i>
8.	<i>Land lease and Compensation</i>	<i>0.86</i>	<i>0.86</i>	<i>0.52</i>	<i>0.34</i>
9.	<i>Re-handling of Steel from Nachnala bridge to work site</i>	<i>0.34</i>	<i>0.34</i>	<i>0.00</i>	<i>0.34</i>
10.	<i>Transportation of heavy equipment in knocked down condition</i>	<i>0.11</i>	<i>0.11</i>	<i>0.00</i>	<i>0.11</i>
11.	<i>Civil works for Construction Plants</i>	<i>0.50</i>	<i>0.50</i>	<i>0.30</i>	<i>0.20</i>
12.	<i>Maintenance of bank Guarantees</i>	<i>3.86</i>	<i>1.81</i>	<i>1.10</i>	<i>0.71</i>
13.	<i>Maintenance of</i>	<i>0.06</i>	<i>0.06</i>	<i>0.03</i>	<i>0.03</i>

	<i>Insurance policies</i>				
14	<i>Interest liability on Advances</i>	6.37	6.37	3.88	2.49
		76.81	41.68	25.12	16.56
	Add 2.5% Corporate expenses which are considered reasonable				0.41
	Total				16.97

The conclusions given by the Arbitrator are based on the table extracted in the Report of the Committee and include various heads such as interest liability on advances, corporate expenses etc. The question is whether all these amounts are liable to be awarded in favour of the contractor.

29. Since the final document agreed to by the parties, is the foreclosure document, what is liable to be reimbursed is only expenditure on account of mobilization etc. which is reasonable. The Ld. Arbitrator has come to the conclusion that the delay in this matter was not purely attributable to IRCON, in fact it was for reasons beyond the control of both the parties. This combined with the fact that there were repeated complaints by IRCON that sufficient man power and equipment mobilization had not taken place, led to cessation of the contract. Further, the non-execution of a substantial portion of the work is also clear from the total value of work executed during the period of the contract which is Rs.26.44 crores out of Rs. 168.46 crores i.e., approx.15% of the value of the contract. Thus, it cannot be held that IRCON is liable to reimburse the entire expenditure. Some part of the blame lies on the contractor and only such expenditure is liable to be reimbursed which relates to mobilization etc., as per the foreclosure

document. A perusal of the table above shows that the Ld. Arbitrator has gone beyond the foreclosure document, while holding that the said document is binding. Reimbursement of amounts which do not constitute expenditure towards mobilization etc., would not be permissible. Accordingly, the following heads of expenditure are not liable to be granted namely-

- (I) Maintenance of bank guarantee.
- (II) Maintenance of insurance policies.
- (III) Interest liability on advance and corporate expenses.

30. The remaining amounts towards items 1 to 11 in the above table are awarded in favour of the contractor i.e. a sum of Rs. 12.99 crores. The loss of profits claim has been rightly rejected by the Arbitrator.

31. Thus, the O.M.P. is disposed of by awarding a sum of Rs. 12.99 crores to the contractor with interest @ 6% per annum from the date of award i.e. 15th April, 2010 till date. Parties are directed to work out the adjustments after taking into consideration the mobilization advance, equipment advance, and the interest thereon, payable by the contractor to IRCON. The exercise be completed within a period of 8 weeks from today. The Bank Guarantee of the contractor which is valid till 31st March 2019, may be encashed by IRCON and the adjustment of the accounts may be worked out accordingly within a period of four weeks.

32. OMP is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 26, 2019/dk/MR