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

Judgment pronounced on: 12.07.2023

+ O.M.P. (COMM) 170/2017 and IA No.11895/2020 (Stay)

SATLUJ JAL VIDYUT NIGAM LTD.

..... Petitioner

Through: Mr. Sanjay Jain, ASG alongwith
Mr.Uttam Datt, Ms. Sonakshi Singh,
Ms. Tanya Aggarwal, Mr. K. K.
Upadhiya and Mr. Kumar Bhaskar,
Advs.

versus

M/S JAIPRAKASH HYUNDAI CONSORTIUM & ORS.

..... Respondents

Through: Mr. A. S. Chandhiok, Sr. Adv.
alongwith Mr. Lovkesh Sawhney, Sr.
Adv., Ms. Simran Kohli, Ms. Vidushi
Keshan, Mr. Durgesh Kr. Pandey and
Mr. Rohit Kumar, Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

O.M.P. (COMM) 170/2017

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 assails the Arbitral Award dated 11.01.2009, read with the order dated 26.02.2009 passed by the Arbitral Tribunal on an application filed by the petitioner under Section 33(1) of the Arbitration and Conciliation Act, 1996.



2. The disputes between the parties pertain to a contract for construction of civil works of pressure shafts and power house complex of the 'Nathpa Jhakri Hydro-Electric project'. The subject matter of the dispute is the alleged quantum increase in the minimum wages payable to labour during the course of execution of the contract. It is the case of the respondent (claimant before the Arbitral Tribunal) that, as of 30 days prior to submission of the bid, the minimum wage of unskilled labour, as notified by the State Government of Himachal Pradesh was Rs. 22/- per day. It is submitted that after submission of the bid, the minimum wage was increased to Rs. 24/- per day w.e.f. 14.11.1993 and thereafter to Rs. 26/- per day w.e.f. 01.10.1994. It is stated that thereafter, there was a quantum increase in minimum wage to Rs. 45.75/- per day w.e.f. 01.03.1996. The claims raised before the Arbitral Tribunal were founded on the assertion that such increase in the minimum wage could not have been foreseen by the respondent/claimant and that the additional cost occasioned thereupon was also not taken into account by the claimant while tendering; the same was also not contemplated in the indexing of any inputs to the Price Adjustment Formula as contained under Clause 70 of the General Conditions to the Contract ("GCC"). It was contended that the financial impact of increase in minimum wages, being occasioned owing to "subsequent legislation", is payable to the respondent (claimant) in terms of Clause 70 (v) of the GCC.

3. Prior to reference of the aforesaid dispute to arbitration, the respondent/claimant is stated to have raised its claims before the concerned Engineer-in-Charge of the petitioner; the respondent/claimant is also stated to have taken recourse to filing an appeal before the CMD of the petitioner. The dispute/s having remained unresolved, the respondent (claimant)



thereafter sought reference of the same to the Dispute Review Board (“DRB”) prior to initiation of arbitration. The relevant contractual clause on the basis of which the claim was raised by the respondent/claimant on account of increase in minimum wages, is reproduced hereinbelow: -

“

Changes in Costs and Legislation

Clause-70 Increase or Decrease of Costs.

(i) *Price Adjustment Factor*

The amount payable to the Contractor and valued at base rates and prices in the Interim payment certificates issued by the Engineer-in-charge pursuant to sub-clause-60 (i) hereof shall be adjusted in respect of the increase or decrease in the indexed costs of labour, materials and fuel and lubricants in accordance with the following principles and procedures:

- a) The cost of electrical energy supplied by the NJPC at fixed prices shall be excluded from the scope of price adjustment;*
- b) Price adjustment shall apply only for work carried out within the stipulated time or extensions granted by the NJPC and shall not apply to work carried out beyond the stipulated time for reasons attributable to the Contractor;*
- c) Price adjustment shall be calculated for the local and foreign components of the payment for work done in the manner explained in the sub-clause (iii) hereof.*
- d) The price adjustment shall be determined during each quarter from the formulae as detailed hereinafter under sub-clause (iii) of this Clause.*

The following expressions and meanings are assigned to the value of the work done during each quarter:

R = Total value of work done during the quarter excluding cost of electrical energy supplied by the NJPC at fixed prices and any adjustment in payments resulting from legislative or statutory action as per sub clause (v) of this clause.

R_I = Portion of ‘R’ as payable in local currency.

R_F = Portion of ‘R’ as payable in foreign currency (at fixed exchange rates) expressed in the currency concerned.

R = R_I + R_F



(ii) Other Changes in Cost

To the extent that full compensation for any increase or decrease in costs to the Contractor is not covered by the provisions of this or other Clauses in the Contract, the unit rates and prices included in the Contract shall be deemed to include amounts to cover the contingency of such other increase or decrease in costs.

(iii) Formulae of Price Adjustment

a) Local Currency Component

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

$$V_L = 0.85 P_i / 100 \times R_L (i - i_0) / i_0$$

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

i₀ = the average consumer price index number for industrial workers in H.P. (General Index) for the quarter preceding the latest date of submission of bids, as published by Labour Bureau, Ministry of Labour.

i = the average consumer price index number for industrial workers in HP (General Index) for the quarter under consideration as published by Labour Bureau, Ministry of Labour.

P_i = percentage of local labour component as specified in Annex-XI.

(II) Price adjustment for increase or decrease in cost of local materials procured by the Contractor other than fuel and lubricants shall be paid in accordance with the following formula:-

$$V_m = 0.85 P_m / 100 \times R_L (m - m_0) / m_0$$

V_m = Increase or decrease in the cost of work during the quarter under consideration due to changes in rates for local materials other than fuel and lubricants.

m₀ = the average index number of whole sale prices in India (Base



1981-82 = 100) for all commodities except fuel and lubricants for the quarter preceding the latest date of submission of bids as published in Reserve Bank of India Bulletin.

m = the average index number of wholesale prices in India (Base 1981 – 82 = 100) for all commodities except fuel and lubricants for the quarter under consideration, as published in Reserve Bank of India Bulletin.

P_m = Percentage of local material component other than fuel and lubricants as specified in Annex-XI.

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

$$V_f = 0.85 P_f / 100 \times R_l (1 - l_o) / l$$

V_f = increase or decrease in the cost of work during the quarter under consideration due to changes in rates for fuel and lubricants.

l_o = the average official retail price of High Speed Diesel (H.S.D.) as per list prices of Indian Oil Corporation, Chandigarh on the date thirty days prior to the latest date of submission of bids.

l = the average official retail price of High Speed Diesel Oil (H.S.D.) as per list prices of Indian Oil Corporation, Chandigarh for the 15th day of the middle calendar month of the quarter under consideration.

P_f = percentage of fuel and lubricants as specified in Annex-XI.

For the application of this clause the price of H.S.D. is chosen to represent fuel and lubricants group.

(b) Foreign Currency Component:

(I) The foreign currency component of each payment which is convertible into foreign currency at fixed exchange rate, shall be adjusted according to the following formula:

$$V_{FC} = 0.85 \times R_F \times (F_1 - F_0) / F_0$$

V_{FC} = increase or decrease in cost of work payable due to change in cost of foreign in-put.



F_0 = the index or combination of indices applicable for the foreign in-put on the date thirty days prior to the latest date of submission of bid as published in the country of origin.

F_1 = corresponding index or combination of indices for the quarter under consideration (average index in case indices are published at lesser intervals)

(II) The bidder shall, in his bid, indicate the foreign input and the appropriate index or combination of indices applicable for the foreign input on the Proforma attached at Annex-XIA, the source of which shall be a Government or a recognized public Organization. The bidder shall also attach specimen of the publications, for information of the NJPC, of the preceding twelve months publications. If this index is not acceptable to the NJPC then he shall specify an alternative index and the source of publications of the index. The percentage of various components of the foreign input is specified in Annex-XIA.

(III) If the bidder has requested payment in more than one foreign currency, R_F shall be broken up and the formula applied separately to each currency component taking into account the foreign input of the currency and corresponding Indices (Index and currency belonging to the same country).

(IV) The currency of foreign exchange payment and the index shall belongs to the same country. If this is not the case then a suitable correction factor Z_o/Z (multiplying factor) will be applied to the formula (b) (I) to allow adjustment. In the multiplying formula;

Z_o = number of units of currency of country of the index, equivalent to one of currency of payment on the date thirty days prior to latest date of submission of bids.

Z = corresponding number of such currency unit on the date of current index.

(IV) At the end of each quarter defined by the months March, June, September and December of each year, the Contractor shall submit, to the Engineer-in-Charge, a claim, if any, on account of Price Adjustment for the completed quarter in accordance with the provisions of Contract. However, interim payments for price adjustment shall be certified every month on the basis of indices of the preceding quarter and adjustment that may be necessary after the indices for the corresponding quarter are available shall be made in the next immediate Interim Payment Certificate



of the quarter.

(v) *Subsequent Legislation*

If, after the date 30 days prior to the latest date of submission of bids for the works, there occur in India changes to any National or State statute, Ordinance, Decree or other Law or any regulation or bye-law of any local or other duly constituted authority, or the Introduction of any such National or State Statue, Ordinance, Decree, Law, Regulation or bye-law which causes additional or reduced cost to the contractor, other than under sub-clauses (i), (ii) of this clause, in the execution of the works, such additional or reduced cost shall be certified by the Engineer-in-charge after examining the records provided by the contractor and shall be paid or credited to the NJPC and the Contract Price adjusted accordingly. Notwithstanding, the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have been taken into accounting the indexing of any input to the price adjustment formulae in accordance with sub-clauses (i), (ii) and(iii) of this clause.

....."

4. Annexure-XI which is referred to in the aforesaid formula is reproduced as under:-

".....

PERCENTAGE OF LOCAL LABOUR COMPONENT, LOCAL MATERIAL COMPONENT AND LOCAL FUEL AND LUBRICANTS COMPONENT FOR PRIOR ADJUSTMENT

(Refer Clause-70 of Chapter-111)

<i>Sl. No.</i>	<i>Component</i>	<i>Percentage</i>
<i>1.</i>	<i>Local Labour</i>	<i>Thirty Percent</i>
<i>2.</i>	<i>Local Materials</i>	
<i>2.1</i>	<i>Steel</i>	<i>Ten Percent</i>
<i>2.2</i>	<i>Other Materials</i>	<i>Forty Five Percent</i>
<i>3.</i>	<i>Local Fuel and Lubricants</i>	<i>Fifteen Percent</i>

....."

5. Two crucial aspects of the aforesaid contractual provisions are as under:

(i) for the purpose of calculating price adjustment payable towards increase or decrease in cost of local labour, the labour component is prescribed as



30%; this percentage is inbuilt in Annexure-XI, and is made an input to the formula prescribed in GCC Clause 70(iii);

(ii) the calculation of price escalation is pegged to the relevant consumer price index (hereinafter referred to as “CPI”) for industrial workers for the quarter under consideration, as published by Labour Bureau, Ministry of Labour.

6. Although the contract contains the aforesaid formula for calculation of the escalation amount payable to the claimant/contractor to cover increase in the labour cost during the course of execution of the contract, it was the contention of the claimant that the sudden spurt in the minimum wage was an event which was not taken into account in indexing of any inputs to the aforesaid formula as prescribed *vide* sub-clauses (i), (ii) and (iii) of Clause 70 of GCC, and the claimant was therefore entitled to reimbursement of the additional cost occasioned thereby on the basis of Clause 70 (v) of GCC.

The Statement of Claim

7. The respondent in their statement of claims prayed for the following:

“

(i) award an amount of Rs.66,03,82,096.00 (Rupees sixty six crores three lacs eighty two thousand ninety six only) to the Claimant as per Annexure-A.

(ii) award an amount of Rs. 77,77,10,892.00 (Rupees seventy seven crores seventy seven lacs ten thousand eight hundred and ninety two only) towards interest up to 05.12.2005 as per Annexure- A.

(iii) award interest @16% per annum compounding on monthly basis on the sum of amounts, as mentioned in para (i) and (ii) above from 05.12.2005 up to the date of award,

(iv) award interest @18% per annum compounding on monthly basis on the sum of amounts as mentioned in para (i) (ii) and (iii) above for the period from the date of award to the date of payment.



(v) award Rs. 5.75 lacs (subject to modification to actuals) as the cost of arbitration as requested in para 6.7.5 herein above,

(vi) grant such other relief as considered fit and proper by the Arbitral Tribunal
.....”

8. The Statement of Claim filed by the respondent before the Arbitral Tribunal seeks an amount of Rs.66.03crores (plus interest) on the basis that in the formula prescribed in the contract is required to be tweaked/ altered so as to ensure that the calculation of price escalation be pegged to the minimum wages, instead of CPI. In this regard, the following was pleaded in the statement of claim filed by the respondent before the arbitral tribunal:

“.....

6.3.1. The additional expenses that the Claimant had to incur on account of quantum jump in the minimum wages, both verifiable and non-verifiable, can be computed based on the formula provided in the Contract for price adjustment for labour cost by replacing the average consumer price index number for industrial workers in H.P. by minimum wages as under:

$$V_L = \frac{0.85P_1 \times R_1 w - w_0}{100 w_0}$$

where V_L = Increase or decrease in the cost of work in rupees during the quarter under consideration

P_1 = Percentage of the local labour component (30%)

R_1 = Portions of total value of work done during the quarter payable in rupees.

w_0 = Minimum Wages on the date 30 days prior to the last date of submission of bid

w = increased minimum wages in rupees.

*The additional cost worked out from the aforesaid formula comes to Rs.66,03,82,096.00 up to December, 2003 i.e., end of maintenance period as per the details given in **Annexure – A**.*

.....”

Alternate methodology canvassed during Arbitral Proceedings

9. During the course of arbitral proceedings, the respondent/claimant



sought to canvass an alternative basis for its claim. The circumstances which impelled the respondent to do so will be adverted to hereinafter. Under this alternative methodology, the alleged additional cost due to enhanced wages worked out to the tune of Rs. 27,42,89,815.00/- (plus interest). This has been amplified in a communication dated 24.09.2007 addressed by the claimant to Arbitral Tribunal in which it is *inter alia* stated as under:-

“

.....

1.0 During presentation of its claim by the Claimants, the Hon'ble Arbitral Tribunal had desired the Claimants to submit documents in support of the actual additional cost occasioned to the Claimants on account of increase in the minimum wages. The Claimants had brought to the notice of Hon'ble Arbitral Tribunal that it was not possible to produce documentary evidence in support of the entire additional cost borne by the Claimants because, in addition to direct payment by the Claimants, several works/jobs were also got done through subcontracts, workshops and other sundry workers, therefore, the Claimants had to pay increased cost to them as well after aforesaid statutory increase in the minimum wages.

This was however, brought to the notice of the Hon'ble Arbitral Tribunal, that the Claimants had some muster rolls amounting to Rs, 17,47,42,445/- for the payment made to the unskilled labour deployed directly on works.

The Claimants submitted the list of available muster rolls during the proceedings held on 23.01.2007 and details of additional cost incurred due to quantum increase in minimum wages vide letter no. JA:T&C:17.4/AT/D-10/186 dated 14.02.2007.

.....”

10. The aforesaid communication enclosed two statements viz. “Statement-1” and “Statement-2” purporting to establish that the total amount incurred by the claimant towards “labour component” was to the tune of Rs.77.26 crores as against Rs.35.62 crores inbuilt in the Contract Price. It has been further sought to be brought out that as against this extra expenditure, the proportionate escalation recovered in terms of the contractual formula [prescribed in Clause 70(iii) of the GCC (supra)] was



Rs.14.21 crores; hence, the total amount realised/ recovered towards expenditure on labour during the relevant period was Rs.35.62 crores [being inbuilt in the contract price] + Rs.14.21 crores [recovered through the price escalation formula], totalling Rs. 49.83 crores. The difference between the incurred costs of Rs. 77.26 crores and the recovered amount of Rs. 49.83 crores *i.e.* Rs. 27.42 crores was stated to be recoverable by the respondent from the petitioner.

11. Further reference to the “statements” enclosed alongwith the aforesaid communication dated 24.09.2007 addressed by the respondent to the Arbitral Tribunal would be apposite while dealing with the challenge mounted by the petitioner to the impugned Award.

The Award

12. The impugned Award after noting the background and the rival contentions of the parties, proceeds to delineate the issues that arose before it for consideration as under:-

“

i) *Whether, under the facts and circumstances of the matter, the claim is barred by limitation as contended by the Respondents.*

ii) *Whether, the notifications issued by the Govt. of Himachal Pradesh fixing/revising the minimum wages under the Minimum Wages Act, 1948 amount to subsequent legislation attracting the provisions of Clause 70(v) of the General Conditions of contract.*

iii) *Whether, under the facts and circumstances of the matter, the claim of the Claimants for expenses that the Claimants had to incur on account of revision of Minimum wages is tenable as per the Contract.*

iv) *If the answer to the issue no.iii supra is in the affirmative, as to what extent the claim is tenable.*

v) *Other reliefs.*
.....”



13. As regards the issue (i) above, the impugned award proceeds to hold that the claims raised by the respondent/claimant were not barred by limitation.

14. With regard to issue (ii), the Tribunal proceeds to hold as under:-

“

Seeing tile Scheme of the Minimum wages Act, legal and constitutional provisions, the Arbitral Tribunal is of the opinion that notifications issued by the State Govt. of HP fixing/revising the Minimum wages in respect of the scheduled employment under the powers conferred on it under its Section 5(2) are legislative in nature and are subsequent legislation. Any change in the Minimum Wages by issue of notification issued by the State Govt. of HP under the powers conferred on it by Section 5(2) of the Minimum Wages Act shall attract the provisions of clause 70(v) of the General Conditions of Contract.

.....”

15. With regard to issue (iii) the impugned award holds that the additional cost which the respondent/claimant had to allegedly incur due to revision of minimum wages was payable to the respondent. Importantly, however, the impugned award specifically and rightly holds that the escalation on the labour component already received by the Claimants as per the formula given in Clause 70(iii) shall have to be deducted while working out the ‘additional costs’ that could be awarded to the respondent (claimant).

16. As regards issue (iv), the impugned award holds that the basis upon which an amount of Rs.66,03,82,096.00 had been claimed in the statement of claim [viz. substituting the CPI with another set of inputs] was unsustainable. As to the extent to which any claim could be awarded to the respondent (claimant), the Arbitral Tribunal proceeds to hold as under:

“

a) The Claimants has put up calculations showing that he had incurred an expenditure of RS.77.26 crore towards the labour wages out of which Rs.35.62 crore has been realized through the BOQ items as on



base date. He has further been reimbursed Rs.14.21 crore through escalation as per clause 70(iii) on the labour component only. Thus, the total labour expenses and escalation recovered amounts to Rs.49.83 crore. This leaves a balance of Rs.27.42 crore as the additional expenditure which has occasioned due to revision of minimum wages. There appears to be no reason to dispute this figures.

b)

c) The expenditure of RS.27.23 crores incurred additionally shall now have to be considered for further calculations. This amount is for the period of March 1996 to Dec 2003. However, the work has admittedly been completed on 31.12.2002. The corresponding amount of such additional expenditure for this period from March, 1996 to Dec 2002 as calculated on the basis of statement on record comes to Rs.26.90 crore only. This additional expenditure is with regard to the base rate of RS.22.00 per day (reference Ann-A on page 16 of the SOC). In this way, the claim of the Claimants is sustained for Rs.26.90 crore only....”
.....”

17. Thus, the impugned award holds as under :-

- (i) That the respondent/claimant had incurred expenditure of Rs.77.26crores towards labour wages during the course of execution of the contract in the relevant period.
- (ii) Out of the aforesaid expenditure of Rs. 77.26 crores, Rs. 35.62 crores was inbuilt in the BOQ item rates, and was realised during the course of execution of the said BOQ items;
- (iii) In addition to the aforesaid amount of Rs. 35.62 crores, the respondent/claimant also realised Rs.14.21 crores through escalation payable under Clause 70 (iii) of the GCC. It may be noted that the actual amount of escalation paid to the Respondent by applying the formula contained in Clause 70(iii) of the GCC is Rs. 43.18 crores. However, for the purpose of making out a claim, the Respondent (Claimant) has taken/ assumed the labour escalation recovered by it to be only to the tune of Rs. 14.39 crores i.e. 1/3rd of Rs. 43.18



crores. As elaborated in para 11(c) of the award, this has been done on the basis that the price escalation formula is premised on the labour component being 30% whereas according to the Respondent (Claimant), while submitting their bid, they had indicated the breakdown of their rates in a sealed cover, as per which labour component is only to the tune of 10%. Hence, the labour escalation paid under Clause 70(iii) has also been scaled down proportionately, for the purpose of computing the claim. Whether or not this scaling down is justified or not is the central controversy in this matter.

- (iv) Thus the total amount recovered by the respondent/claimant towards labour was Rs. 49.83 crores (Rs. 35.62 crores + Rs.14.21 crores)
- (v) Thus the balance of Rs. 27.42 crores as the additional expenditure which was occasioned due to revision of minimum wages (being the difference of aggregate expenditure amount of Rs.77.26 crores and the recovered amount of Rs. 49.83 crores).
- (vi) In para 19 (d) of the Award, the Tribunal, after making some adjustments keeping in mind the claim period, sustains the entitlement of the respondent/for an amount of Rs. 26.90 crores. The Tribunal also proceeds to grant pre-award and post-award interest on the said amount.

18. The majority award was rendered by the two out of three Arbitrators whereas one of the Arbitrators gave a dissenting award.

SUBMISSIONS ON BEHALF OF THE PARTIES:-

19. In the above background, Mr. Sanjay Jain, learned ASG appearing for the petitioner has attacked the interpretation accorded by the Arbitral Tribunal to the clause 70 of GCC. According to him, the price escalation



formula incorporated in Clause 70 (iii) of the GCC already provides a dispensation for compensating the Respondent (contractor) on account of increase in cost of labour. According to him, this makes Clause 70 (v) inherently inapplicable since the latter contemplates only such kind of costs for which there is no provision in Clause 70 (iii).

20. However, the primary submission that has been advanced on behalf of the petitioner, is with regard to the manner in which the respondent has computed its claim before the arbitral tribunal. In particular, it is emphasised that the entire price escalation already paid to the respondent/contractor by applying the formula under GCC Clause 70(iii) has not been taken into account while computing the alleged extra cost/s on account of enhancement of minimum wages. He submits that although an amount of Rs. 43.18 crores has been paid to the respondent by applying the said formula, in the Respondent's computations, credit has been given for only 1/3rd of the said amount. He submits that there is virtually no reasoning in the award for this arbitrary and notional reduction.

21. It is further submitted on behalf of the Petitioner that according to the respondent/claimant itself, it paid a sum only of Rs. 17.47 crores to unskilled workers between March, 1996 to December, 2003. There is no proof as regards payment made to unskilled, semi-skilled and other categories. Yet, for the purpose of the award, it has been assumed that the respondent/claimant had incurred an expenditure of Rs. 77.26 crores towards labour wages during the course of execution of the contract in the relevant period. He therefore submits that the award is based on no evidence and as such, it is liable to be set aside.

22. Per contra, learned senior counsel for the respondent strenuously



emphasized that the interpretation accorded by the arbitral tribunal to the relevant provisions of the contract is beyond the pale of interference in exercise of jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996. He submits that since minimum wages were not an input for the purpose of the price escalation formula contained in clause 70 (iii), and since minimum wages are also not taken into account in the CPI basket, the arbitral tribunal was justified in concluding that the respondent was entitled to additional costs in terms of clause 70 (v).

23. It is further submitted on behalf of the respondent that the substantive pleas of the Respondent in support of its entitlement, are fully covered by the judgment of Supreme Court in the case of *NHAI vs. ITD Cementation India Ltd.* (2015) 14 SCC 21. It is also submitted that the arbitral tribunal is the master of quality, quantity and adequacy of evidence and the same cannot be reappraised by this Court. In this regard, he relied upon the judgment of Supreme Court in *Associate Builders. Vs. Delhi Development Authority* (2015) 3 SCC 49.

24. Reliance is also placed on behalf of the respondent upon the analysis furnished by the petitioner to the arbitral tribunal *vide* its letter dated 01.05.2007 and the analysis furnished by the respondent *vide* letter dated 24.09.2007. He submits that the said analysis proceeds on the basis that the labour component of the contract in question was to the tune of 10%, as mentioned in the sealed bid envelope submitted by the respondent at the time of submission of bid. He submits that it was on account of this that the tribunal has rendered a finding that although the price escalation formula refers to the weightage of labour being 30%, the actual labour component to which the formula caters is only 10% whereas the remaining 20% is for



other items of works. Therefore, the arbitral tribunal was right in slashing/reducing the price variation paid in terms of clause 70 (iii) for the purpose of computing the entitlement of the Respondent (Claimant). He has further submitted that the members of the arbitral tribunal were experienced technical persons who considered all aspects of the matter and the view taken by them is not liable to be interfered with. In this regard, he relied upon the following judgments :-

- a) *Subhash Ramkumar Bind alias Vakil and Another versus State of Maharashtra*¹
- b) *State of Madhya Pradesh versus Ramcharan*²
- c) *State of Bombay and another versus F. N. Balsara*³
- d) *Kailash Nath and Another versus State of U.P. and Others*⁴
- e) *Video Electronics (P) Ltd. & Anr. versus State of Punjab & Anr.*⁵
- f) *Narinder Chand Hem Raj versus Lt. Governor & Administrator, UT H.P. & Ors.*⁶
- g) *U. Unichoyi & Ors. v. State of Kerala*⁷
- h) *Edward Mills c. Ltd Vs. State of Ajmer*⁸
- i) *Modi rubber Ltd Vs. CCE*⁹

25. He further refers to the judgment of the Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181, to contend that the law permits the arbitral tribunal to adopt any formula for quantification as deemed appropriate.

¹(2003) 1 SCC 506

²AIR 1977 MP 68

³1951SCR 682

⁴AIR 1957 SC 790

⁵(1990) 3 SCC 87

⁶(1971) 2 SCC 747

⁷(1962) 1 SCR 946

⁸(1955) 1 SCR 735

⁹ILR (1978) 2 Del 352



ANALYSIS AND CONCLUSION:-

26. At the outset, it is necessary to take note of the scope of the present proceedings.

27. In *Associate Builders versus Delhi Development Authority*¹⁰, after taking note of the judgments of the Supreme Court in the case of *ONGC Ltd. versus Saw Pipes Ltd.*¹¹, *Hindustan Zinc Limited versus Friends Coal Carbonisation*¹², *McDermott International Inc. versus Burn Standard Co. Ltd. & Ors.*¹³, *Centrotrade Minerals & Metals Inc. versus Hindustan copper Ltd.*¹⁴, *DDA versus R. S. Sharma & Co.*¹⁵, *JG Engineers (P) Ltd. versus Union of India & Anr.*¹⁶, *Union of India versus Col. L.S. N. Murthy & Anr.*¹⁷, and *ONGC Ltd. versus Western Geco International Ltd.*¹⁸, the Supreme Court delineated the scope of examination of an arbitral award in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996.

28. It was emphasized that when a Court is applying the “Public policy” test to an arbitral award, it does not act as a Court of appeal and consequently, errors of facts cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers any arbitral award.

29. At the same time, it was also held that where (i) a finding is based on

¹⁰(2015) 3 SCC 49

¹¹(2003) 5 SCC 705

¹²(2006) 4 SCC 445

¹³(2006) 11 SCC 181

¹⁴(2006) 11 SCC 245

¹⁵(2008) 13 SCC 80

¹⁶(2011) 5 SCC 758

¹⁷(2012) 1 SCC 718

¹⁸(2014) 9 SCC 263



no evidence or (ii) an arbitral tribunal takes into account something irrelevant to the decision which would necessarily be perverse (iii) ignores vital evidence in arriving at a decision; such a decision would necessarily be perverse. For the purpose of considering whether a decision could be regarded as perverse, the Supreme Court took note of the judgment in the case of ***H. B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal and Others versus M/S Gopi Nath & Sons and Others***¹⁹ wherein it was observed as under :-

“

7.

It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

.....”

30. In the context of considering whether patent illegality vitiates an award, it was held by the Supreme Court in ***Associate Builders*** (supra) as under :-

“

42.3 (c)

An arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

.....”

In the above conspectus that it needs to be examined whether the impugned arbitral award deserves to be sustained or not.

31. As regards the conclusions drawn by the arbitral tribunal on the issue

¹⁹1992 Supp (2) SCC 312



as to whether the notifications issued by the government of Himachal Pradesh fixing/revising the minimum wages under the Minimum Wages Act, 1958, amounts to “subsequent legislation” this Court is inclined to defer to the conclusions/findings rendered by the arbitral tribunal. This is in view of the settled legal position that interpretation of the contract is the domain of the arbitral tribunal and the same would not be interfered in proceedings under Section 34, as long as such interpretation is not *ex-facie* perverse. Further, in a situation when two interpretations are possible, the interpretation accorded by an arbitral tribunal would pass muster, if the view taken by the arbitral tribunal is a possible view, even if a more plausible interpretation is canvassed by the petitioner.

32. Thus, the conclusion of the arbitral tribunal to the effect that notification/s issued under the Minimum Wages Act attract the provisions of Clause 70 (v) of the GCC, brook no interference in exercise of jurisdiction under Section 34 of the A&C Act, 1996.

33. This brings us to the more troublesome aspect of the award *viz* whether the claimant was able to establish the extent of additional cost/s asserted by it as having been incurred on account of revision of Minimum Wages.

34. As noted hereinabove, in the statement of claim that was filed by the respondent, the respondent (claimant) initially sought to advance its claim by seeking to alter/substitute the contractual formula [contained in GCC Clause 70(iii)] by replacing one set of inputs therein with another. The arbitral tribunal rightly found that the same could not be permitted. The relevant findings in this regard in the impugned award are as under :-

“.....



15.

ii....

e....

It may be noted here that the Claimants have submitted a claim of Rs.66,05,82,096.00 as per the formula given hereinabove. **This formula is not given in the Contract.** The Claimants state that they have calculated the price adjustment for labour cost by replacing the average consumer Price index Number for industrial workers in HP by minimum wages as per CPWD norms, discussed above.**The Arbitral Tribunal opines that the contention of the Claimants for calculating the additional cost due to increase in minimum wages by a formula not given in the Contract cannot be sustained. The additional cost for labour incurred by the claimants cannot be calculated on the basis of some formula not provided in this Contract.....**

.....
The Arbitral Tribunal opines that the Claimants have to be compensated for the extra cost caused to them by enhancement of Minimum Wages, **however they cannot be allowed to be compensated on the basis of the formulae adopted by them in calculations given in the Statement of Claims as the same is not a part of the Contract. The Claim of the Claimants in this respect has been made for the sum of Rs.66,03,82,096.00.....**

19...

(a)....**The formula given by the contractor for calculating the increased cost due to additional payment for the amount of Rs. 66.03 crores is not part of the agreement and cannot be used for the claim for payment of additional cost.....**

.....”

35. Having so rejected the claim as advanced in the Statement of Claim, the tribunal proceeds to consider an alternative hypothesis advanced by the respondent/claimant for the purpose of sustaining its claim. This alternative hypothesis was advanced without any formal amendment of the Statement of Claim and the foundation for this, is to be found in a communication dated 24.09.2007 addressed by the respondent to the arbitral tribunal. The gist of this communication has been noticed hereinabove. The purport of this communication was to demonstrate to the arbitral tribunal that “work for



about 75% of the Contract Price was actually executed by the claimants after the quantum increase in minimum wages i.e., during 01.03.1996 to 31.03.2003 and the claimants had to incur Rs. 77.26 crores on the labour component as against Rs. 35.62 crores built in the Contract Price (Statement-2) for the works executed during the period” [para 3.2.2.3 of the said communication dated 24.9.2007].

36. It was also sought to be submitted by the respondent that as per the muster rolls available with it, the actual payment made by the respondent to unskilled labour, was Rs.17,47,42,445/- (approximately Rs.17.47crores). According to the claimant, this amount was actually expended on unskilled labour did not include the amount spent on skilled and semi-skilled labour as well as indirect expenses on labour. This has been brought out in “Statement-1” enclosed alongwith the communication dated 24.09.2007 which is reproduced as under:

नित्यमेव जयते



NATHPA JHAKRI HYDROELECTRIC PROJECT (1600 MW)

PAYMENT OF UNSKILLED LABOUR AT THE RATE OF MINIMUM WAGES PREVALENT FROM TIME TO TIME VIS-A-VIS RATE OF MINIMUM WAGES PREVALENT ON BASE DATE OF CONTRACT

Month	Rate of Min. Wages	As per Actual Payment (with two shifts working)			As per rate of wages on base date		
		Amount of Daily wages	OT Amount	Total Payment	Wages	Over Time	Total
1	2	3	4	5 = (3 + 4)	6 = [(3/2)x22]	7 = [(4/2)x22]	8 = (6 + 7)
Feb'96	26.00						
Mar'96	45.75	543985	203827	747812	261588	98015	359603
April'96	45.75	792360	125734	918094	381026	60462	441488
May'96	45.75	816081	121361	937442	392432	58359	450791
June'96	45.75	866133	269524	1135657	416501	129607	546108
July'96	45.75	989383	267006	1236389	466151	128396	594547
Aug.'96	45.75	898154	277476	1173630	430937	133431	564368
Sept.'96	45.75	971127	340213	1311340	466990	163600	630590
Oct.'96	45.75	975964	314183	1290147	469318	151083	620399
Nov.'96	45.75	954999	243514	1198513	459234	117100	576334
Dec.'96	45.75	607995	208205	816200	292369	100120	392489
Sub Total		8394181	2371043	10765224	4036544	1140173	5176717



नित्यमेव जयते



Sub Total		8394181	2371043	10765224	4036544	1140173	5176717
Jan.'97	45.75	983342	356120	1339462	472864	171249	844113
Feb.'97	45.75	1295922	745496	2042418	623658	356490	982146
Marc.'97	45.75	1550660	1044472	2805122	750477	502260	1252737
April'97	45.75	1555667	1016410	2572067	748075	488765	1236840
May'97	45.75	1427666	874279	2301945	686528	420418	1108946
June'97	45.75	1556382	1007775	2574157	753233	484613	1237846
July'97	45.75	2357026	1626623	3983649	1133433	782201	1915634
Aug.'97	45.75	1786273	1268041	3054314	858973	609768	1488741
Sept.'97	45.75	1770509	1258966	3029495	851392	605414	1456806
Oct.'97	45.75	1691408	1123250	2814658	813355	540142	1353497
Nov.'97	45.75	1744807	1135542	2880349	839033	546053	1385086
Dec.'97	45.75	1645067	1087477	2732564	791080	522940	1314020
Sub Total		19385729	12644471	31930200	9322099	6032313	15354412
Jan.'98	45.75	2383679	1532574	3916153	1146202	736975	1883177
Feb.'98	45.75	1196632	782558	1958190	574949	366695	941644
Marc.'98	45.75	1308888	834972	2143860	629411	401517	1030928
April'98	45.75	1337790	884114	2221904	643309	425148	1068457
May'98	45.75	1453581	927293	2380874	808990	445911	1144901
June'98	45.75	2254203	1471831	3726034	1083988	707766	1791754
July'98	45.75	1614036	1022608	2638644	776148	491746	1267894
Aug.'98	45.75	1670115	1110112	2780227	803115	533824	1336939
Sept.'98	45.75	1646301	1117873	2764174	791664	537556	1329220
Oct.'98	45.75	1499706	1042388	2542094	721170	501258	1222428
Nov.'98	45.75	2719231	1740438	4459669	1307608	836932	2144540
Dec.'98	51.00	1831406	1189260	3020666	790018	513014	1303032
Sub Total		20914468	13636021	34550489	9966572	6498342	16454914
Jan.'99	51.00	1827715	1287778	3115493	788426	555512	1343938
Feb.'99	51.00	2030050	1315133	3345183	875708	567312	1443020
Marc.'99	51.00	2200972	1213235	3414107	949396	523356	1472752
April'99	51.00	1558102	1008950	2567052	672122	435233	1107355
May'99	51.00	2543380	1605297	4146877	1087144	692481	1789625
June'99	51.00	1616143	1010196	2625339	696728	435771	1132499
July'99	51.00	1806047	1134254	2940301	779079	489286	1268355
Aug.'99	51.00	1648513	1077429	2725942	711123	464773	1175896
Sept.'99	51.00	1910235	1175711	3085946	824023	507169	1331192
Oct.'99	51.00	1578580	968004	2544584	880956	416708	1097664
Nov.'99	51.00	1410207	810076	2220283	608325	349445	957770
Dec.'99	51.00	1328232	786376	2116808	572963	340084	913047
Sub Total		21457076	13392439	34849515	9255893	5777130	15033123
Jan.'00	51.00	1268920	793500	2062420	547377	342294	889671
Feb.'00	51.00	1222304	719436	1941740	527268	310345	837613
Marc.'00	51.00	1329882	796661	2126543	573675	343658	917333
April'00	51.00	1332519	865176	2197695	574812	373213	948025
May'00	51.00	1334140	809776	2143916	575511	349315	924826
June'00	51.00	1216548	744321	1960869	524785	321080	845865
July'00	51.00	1227618	754584	1982202	529561	325507	855068
Aug.'00	51.00	864344	431256	1295600	372854	186032	558886
Sept.'00	51.00	1081720	559847	1641567	466624	241503	708127
Oct.'00	51.00	1015511	548701	1564212	438064	236695	674759
Nov.'00	51.00	930148	534860	1465008	401240	230724	631964
Dec.'00	51.00	1057877	709526	1767403	456339	306070	762409
Sub Total		13981531	8267644	22149175	5988110	3566436	9554546
Jan.'01	51.00	698318	403683	1102001	301235	174138	475373
Feb.'01	51.00	1544921	810763	2355684	666437	349741	1016178
Marc.'01	51.00	1104405	699882	1804287	476410	301910	778320
April'01	51.00	554562	360594	915156	239223	155550	394773
May'01	51.00	635525	448322	1083847	274148	193394	467542
June'01	51.00	643791	410962	1054753	277714	177278	454992
July'01	51.00	832396	584641	1417037	359073	252196	611271
Aug.'01	51.00	905481	623830	1529311	390600	269103	659703
Sept.'01	51.00	972248	593725	1565973	419401	266117	675518
Oct.'01	51.00	800232	535262	1335494	345198	230897	576095
Nov.'01	51.00	865614	583385	1448999	373402	251666	625058
Dec.'01	51.00	771231	419209	1190440	332688	180835	513523
Sub Total		10328724	6474258	16802982	4455529	2792817	7248346

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Jan.'02	51.00	251158	128766	377922	108342	54683	163025
Feb.'02	51.00	246584	150565	397149	106370	64950	171320
Marc'02	55.00	449433	302481	751914	179773	120992	300765
April'02	55.00	513831	332980	846811	205532	133192	338724
May'02	55.00	389521	225264	594785	147808	90108	237914
June'02	55.00	368232	212083	580315	147293	84833	232126
July'02	55.00	336944	184206	521150	134778	73882	208480
Aug.'02	55.00	348325	206288	554591	139330	82506	221836
Sept.'02	80.00	1238647	850746	2087393	453437	311940	765377
Oct.'02	80.00	381860	264222	645882	139942	98881	236823
Nov.'02	80.00	395670	254624	850294	145079	93362	238441
Dec.'02	80.00	358130	257912	814042	130581	94568	225149
Sub Total		5254133	3368115	8622248	2038265	1301695	3339960
Jan.'03	60.00	987086	604485	1591551	361932	221637	583569
Feb.'03	60.00	991479	595888	1587367	363542	218492	582034
Marc'03	60.00	1006056	637062	1843118	368887	233589	602476
April'03	60.00	722863	413309	1136172	265050	151547	416597
May'03	60.00	863305	392921	1058226	243212	144071	387283
June'03	60.00	788836	515586	1304422	289240	189048	478288
July'03	60.00	764035	522928	1286861	280146	191740	471886
Aug.'03	65.00	714468	525353	1239821	241820	177812	419632
Sept.'03	65.00	670689	448718	1119407	227002	151874	378876
Oct.'03	65.00	616055	415893	1031948	208511	140764	349275
Nov.'03	65.00	598138	417424	1015560	202446	141282	343728
Dec.'03	65.00	644069	415990	1080059	217993	140797	358790
Sub Total		9167077	5905535	15072612	3269781	2102653	5372434
Grand Total		108782919	65959526	174742445	48332893	29211559	77544452

37. As noted above, the purport of the above statement was to bring out that the actual expenditure on unskilled labour (as worked out on the basis of muster rolls available with the respondent/claimant itself) was to the extent of Rs. 17,47,42,445/- (approximately 17.47 crores). It has also been brought out therein that but for the enhancement in minimum wages, this amount would have been Rs.7,75,44,442/- (approximately Rs. 7.75 crores).

38. Alongwith the aforesaid "Statement-1", the communication dated 24.09.2007 also encloses a "Statement-2", the purport of which is to establish the quantum of total additional cost as a result of the jump in minimum wages with effect from 01.03.1996. "Statement-2" is reproduced as under:



ADDITIONAL COST ARISING OUT OF QUANTUM JUMP IN MINIMUM WAGES W.E.F. 01.3.1996
INTEREST THEREON FROM THE DATE OF ACCRUAL UPTO THE
DATE OF REFERENCE TO
HON'BLE ARBITRAL TRIBUNAL

All amounts are in Rupees

R.A Bill No.	Month/Period	Value of work done	Labour expenses @ 10% at base date	Rate of Minimum Wage	Amount actually paid with enhanced wages	Total escalation amount actually received for the work done		Proportionate escalation on labour expenses	Total labour expenses including escalation recovered	Additional cost due to enhanced wages	Period upto 05.12.05 (In months)	Interest @ 16% PA
						Percentage	Amount					
0	1	2	3=0.10x(2)	4	5=(4/22)x3	6	7=(2x6)	8=(7/2)x3	9=(3+8)	10=(5-8)	11	12=(10x0.16x11/12)
26	3/20/1998	84055557	8405555.7	45.75	17604509	24.36%	20622084	2062209	10627765	7070744	116.17	10961405
27	3/31/1998	28690884	2869088.4	45.75	5968149	24.36%	6968807	696881	3667849	2368300	116.17	3714807
28	4/30/1998	75425649	7542564.9	45.75	15685107	26.09%	19678552	1967855	9610420	6174687	115.17	9461849
29	5/31/1998	60904135	6090413.5	45.75	12665305	26.09%	15889904	1588991	7879411	4958884	114.17	7568850
30	5/30/1998	79738832	7973883.2	45.75	16932052	26.09%	20803861	2080396	10054260	6527783	113.17	9848699
31	7/31/1998	64405439	6440543.9	45.75	13393813	26.55%	19032112	1903211	8343858	5049780	112.17	7562421
32	8/31/1998	72688730	7268873.0	45.75	15115988	26.55%	21476540	2147854	9418834	5899132	111.17	8447633
33	8/30/1998	64250838	6425083.8	45.75	13383139	26.55%	18988800	1898880	8324370	5038268	110.17	7400680
34	10/31/1998	66226609	6622660.9	45.75	14396988	31.15%	21564089	2156409	9679070	5316919	109.17	7738306
35	11/30/1998	60458232	6045823.2	45.75	14443739	31.15%	21635616	2163562	9109185	5334564	108.17	7693849
36	12/31/1998	86902212	8690221.2	45.75	18071710	31.15%	27070039	2707004	11397225	6674485	107.17	9537394
37	1/21/1997	87262877	8726287.7	45.75	18146713	32.40%	28273172	2827317	11553805	6593108	106.17	9333204
38	2/28/1997	75595148	7559514.8	45.75	15720355	32.40%	24492828	2449283	10308798	5711567	105.17	8009128
39	3/20/1997	135797875	13579787.5	45.75	28239788	32.40%	43995512	4399551	17878539	10280147	104.17	14250680
40	3/21/1997	39258760	3925876.0	45.75	8194038	32.40%	12719838	1271984	5197960	2996178	104.17	4119823
41	4/30/1997	65288060	6528806.0	45.75	13572790	32.60%	21407954	2140793	9687902	4805194	103.17	6747585
42	5/31/1997	76421967	7642196.7	45.75	15892290	32.60%	25096405	2509641	10148938	5743458	102.17	7824121
43	6/30/1997	82872365	8287236.5	45.75	13033002	32.60%	20596532	2059653	8322889	4710113	101.17	6353628
44	7/31/1997	79279062	7927906.2	45.75	16485823	34.25%	27152062	2715206	10642815	5043008	100.17	7803921
45	8/31/1997	83309826	8330982.6	45.75	17324980	34.25%	28539819	2853982	11184348	6140314	99.17	8119133
46	9/30/1997	80848013	8084801.3	45.75	16770704	34.25%	27821250	2782126	10826727	5943877	98.17	7780270
47	10/31/1997	96220476	9622047.6	45.75	20009496	38.37%	36919797	3691980	13314028	6665458	97.17	8674835
48	11/30/1997	82499033	8249903.3	45.75	12967138	38.37%	23681213	2368121	8048111	4349027	96.17	5578812
49	12/31/1997	65422378	6542237.8	46.75	13604881	38.37%	25102566	2510257	9052485	4552386	95.17	5776874
50	1/31/1998	75082357	7508235.7	45.75	15615798	40.19%	30179818	3017982	10527198	5388800	94.17	6389248
51	2/28/1998	59608855	5960885.5	45.75	12375304	40.19%	23918830	2391883	8342656	4032645	93.17	5008620
52	3/20/1998	48632798	4863279.8	45.75	9867503	40.19%	18741722	1874172	6537452	3160051	92.17	3883482
53	3/31/1998	54880371	5488037.1	45.75	11408483	40.19%	22048383	2204838	7690675	3717588	92.17	4568868
54	4/30/1998	47769648	4776964.8	45.75	9933818	40.74%	19481354	1948136	6723101	3210615	91.17	3603087
55	5/31/1998	46887482	4688748.2	45.75	9750480	40.74%	19101852	1910186	6598041	3151519	90.17	3788966
56	6/30/1998	53799608	5379960.8	45.75	11187915	40.74%	21918042	2191804	7571785	3815130	89.17	4298037
57	7/31/1998	61002528	6100252.8	45.75	12685753	42.86%	26157883	2615788	8719041	3989712	88.17	4666783
58	8/31/1998	59849393	5984939.3	45.75	12445953	42.86%	25963420	2596342	8551281	3894672	87.17	4528847

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All amounts are in Rupees

R.A Bill No.	Month/ Period	Value of work done	Labour expenses @10% at base date	Rate of Minimum Wage	Amount actually paid with enhanced wages	Total escalation amount actually received for the work done		Proportionate escalation on labour expenses	Total labour expenses including escalation recovered	Additional cost due to enhanced wages	Period upto 05.12.05 (in months)	Interest @ 16% PA
						Percentage	Amount					
0	1	2	3=0.10x2	4	5=(4/22)x3	6	7 = (2 x 6)	8 =(7/2) x 3	9 = (3 + 8)	10=(5+6)	11	12=(10x0.16x11/12)
59	9/30/1998	56183461	5618346	45.75	11985685	42.89%	24095756	2409576	8028922	3656763	66.17	4201377
60	10/31/1998	48888909	4888890	45.75	10166288	43.38%	21212058	2121206	7009903	3156365	65.17	3584368
61	11/30/1998	73014893	7301489	45.75	15183779	43.38%	31881162	3188116	10468805	4714173	64.17	5280559
62	12/31/1998	56236153	5623615	51.00	13036582	43.38%	24400665	2440067	8083702	4672680	63.17	5514570
63	1/31/1999	64732369	6473236	51.00	12667983	41.88%	22817633	2281763	7755032	4632931	62.17	5404519
64	2/28/1999	47883245	4788325	51.00	11100208	41.88%	19982525	1998253	6794576	4315630	61.17	4870882
65	3/20/1999	33687241	3368724	51.00	7811833	41.88%	14048380	1404838	4774562	3037071	60.17	3454226
66	3/31/1999	30807800	3080780	51.00	7164990	41.88%	12885462	1288546	4370326	2785664	60.17	2977689
67	4/30/1999	68818218	6881822	51.00	15876728	42.31%	29158720	2915872	9807864	5168834	79.17	6311821
68	5/31/1999	58864531	5886453	51.00	13660353	42.31%	24947893	2494789	8381242	5277938	78.17	5500803
69	30/06/1999	70067635	7006764	51.00	18242050	42.31%	29546616	2954662	9971320	6271627	77.17	6453086
70	31/07/99	57578289	5757830	51.00	13347657	44.14%	25415081	2541506	8286336	5048361	76.17	5127115
71	31/08/99	23668357	2366836	51.00	5486765	44.14%	10447213	1044721	3411657	2075189	75.17	2079903
72	30/09/99	20227834	2022783	51.00	4689179	44.14%	9828568	982856	2915839	1773540	74.17	1753913
73	31/10/99	20597341	2059734	51.00	4867585	51.51%	10815730	1081573	3181307	1688258	73.17	1945113
74	31/12/99	32599147	3259915	51.00	7657076	51.51%	18791821	1879182	4989097	2617979	71.17	2484288
75	31/01/00	25853025	2585303	51.00	6993202	51.89%	13404788	1340480	3925763	2067418	70.17	1934277
76	29/02/00	20134158	2013416	51.00	4667484	51.89%	10439591	1043958	3067372	1610082	69.17	1484954
77	31/03/00	34888077	3488808	51.00	8080737	51.89%	18073913	1807391	5283199	2787536	68.17	2533688
78	30/04/00	19703081	1970308	51.00	4587532	54.59%	10755912	1075591	3045899	1521633	67.17	1362775
79	31/05/00	23440870	2344087	51.00	5434020	54.59%	12796371	1279637	3623724	1810286	66.17	1597164
80	30/06/00	20988787	2098879	51.00	4681179	54.59%	11447407	1144741	3241720	1619459	65.17	1407202
81	31/07/00	17345145	1734515	51.00	4020821	56.21%	9749706	974971	2709486	1311435	64.17	1122064
82	30/08/00	18121714	1812171	51.00	3737306	56.21%	9082015	908201	2518372	1218934	62.17	1010415
83	30/11/00	19480728	1948073	51.00	4511351	61.94%	12053974	1205398	3151471	1358860	60.17	1090885
84	20/03/01	23088275	2308828	51.00	5352515	61.07%	14100520	1410052	3718990	1633525	58.17	1223401
85	31/05/01	27306548	2730655	51.00	6330155	61.78%	16894524	1689452	4417108	1912047	54.17	1381730
86	31/06/01	35585309	3558531	51.00	8267867	62.28%	22205221	2220522	5707053	2480814	51.17	1682377
87	31/10/01	29173742	2917374	51.00	6783003	62.89%	18344449	1834445	4751819	2011184	49.17	1318532
88	31/12/01	25882918	2588292	51.00	5856085	62.89%	16155707	1615571	4104863	1771223	47.17	1113381
89	28/02/02	28224242	2822424	51.00	6542892	60.55%	17118003	1711800	4534224	2008668	45.17	1209754
90	30/04/02	29845789	2984577	55.00	7461443	62.95%	18761050	1876105	4880882	2600761	43.17	1498398
91	30/06/02	22870433	2287043	55.00	5742808	62.88%	14438214	1443821	3740564	2001644	41.17	1098789

R.A Bill No.	Month/ Period	Value of work done	Labour expenses @10% at base date	Rate of Minimum Wage	Amount actually paid with enhanced wages	Total escalation amount actually received for the work done		Proportionate escalation on labour expenses	Total labour expenses including escalation recovered	Additional cost due to enhanced wages	Period upto 05.12.05 (in months)	Interest @ 16% PA
						Percentage	Amount					
0	1	2	3=0.10x2	4	5=(4/22)x3	6	7 = (2 x 6)	8 =(7/2) x 3	9 = (3 + 8)	10=(5+6)	11	12=(10x0.16x11/12)
82	31/06/02	20134839	2013483	55.00	5033715	57.38%	13588868	1358887	3370173	1683542	39.17	858513
83	31/10/02	24718965	2471897	60.00	6714126	58.43%	16614814	1661482	4153049	2578079	37.17	1277886
84	31/12/02	19108393	1910839	60.00	5211552	58.43%	13078538	1307853	3218586	1990057	35.17	954811
85	28/02/03	27538176	2753818	60.00	7510413	72.41%	19640093	1964010	4747656	2762555	33.17	1221788
86	30/06/03	19868927	1986893	60.00	5443345	73.72%	14713721	1471372	3457285	1976080	29.17	758563
87	12/31/2003	4833240	483324	65.00	1425003	76.41%	3788743	378874	862286	565705	23.17	174785
Total		356213244	35621324		77282852		142178888		498363137	274289315		327148382

Percentage of contract: 74.99

Price i.e., 475 crores = 75

39. Significantly, the purported actual expenditure on unskilled labour as

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 By: RADHA FISHT
 Signing Date: 12.07.2023
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brought out in “Statement-1” is not reflected in “Statement-2” at all. The said “Statement-2” seeks to arrive at the total expenditure on labour not on actuals, but on the premise that labour expenditure amounts to 10% of the total work done under the contract. As per the said statement, since the total contract value was to the tune of Rs. 356,21,32,414/- (Rs. 356.21 crores), labour expenses @ 10% amount to Rs. 35,62,13,249/ (Rs. 35.62 crores). Further, in the said “Statement-2”, this amount has been increased proportionate to the extent of increase in minimum wages so as to reach the conclusion that the amount actually paid to the labourers is to the tune of Rs. 77,26,82,952 (approximately Rs. 77.26 crores).

40. Significantly, although “Statement-2” uses the expression “actually paid” [in the relevant column where the aforesaid amount of Rs. 77.26 crores is derived], the computation therein is only a mathematical derivation, and is not supported by any evidence at all as to the actual amount expended by the respondent/claimant on labour. As mentioned, the muster rolls available with the respondent/claimant showing expenditure on unskilled labour were only to the extent of Rs. 17.47 crores. The arbitral award notes in Para 19 (B) that “*the claimant has put up calculation showing that he had incurred an expenditure of Rs. 77.26 crores*”. Thus, even the arbitral tribunal itself notes that this figure of Rs. 77.26 crores is based on a mathematical calculation/ derivation. There was no evidence before the arbitral tribunal to reach the conclusion that the extent of actual expenditure on labour was to the tune of Rs. 77.26 crores. Yet, for the purpose of the claim, the award proceeds on the basis that Rs. 77.26 crores was the actual expenditure incurred by the respondent/claimant on labour. In doing so, the arbitral tribunal acted without evidence.



41. Learned senior counsel for the respondent/claimant is right in contending that the respondent/claimant is not precluded from claiming damages/ amounts based on a formula. Indeed, many judgments of various High Courts and of the Supreme Court have recognised that award of damages on the basis of recognised industry formula such as the **Hudson's** formula, is permissible. However, it is completely incongruous to suggest that a mathematical formula can be deployed to work out the "actual payment" to labour.

42. It is also notable that that the formula propounded by the claimant in its statement of claim to work out the additional cost on account of enhancement of minimum wages, was rejected by the arbitral tribunal itself (as noticed herein above). It was in the light of the difficulty with the formula propounded by the respondent/claimant that it sought to found its claim on basis of the actual additional cost borne by it. However, while avowedly seeking to demonstrate the "actual amount paid towards enhanced wages" the respondent/ claimant resorts to a mathematical derivation [as contained in Statement-2, (supra)]. This was not materially different from the formula propounded by the claimant originally alongwith its statement of claim which was rejected by the arbitral tribunal itself.

43. Thus, there was no basis for the arbitral tribunal to reach the conclusion that the respondent/claimant had "incurred an expenditure of Rs. 77.26 crores" towards labour wages in the relevant claim period.

44. The subsequent part of the award is even more problematic.

45. After concluding that the claimant had incurred an expenditure of Rs. 77.26 crores towards the labour wages, the tribunal proceeds to ascertain how much of it was actually recovered through the BOQ item rates and on



account of payment of price escalation as per the formula prescribed in GCC Clause 70(iii).

46. Admittedly, the BOQ rates quoted by the respondent/claimant factored in expenditure on account of labour wages. Assuming the labour component of the contract was to the extent of 10% of the contract price, the amount already recovered out of BOQ rates paid to the respondent/claimant was to the tune of Rs. 35.62 crores (10% of the total original contract price). In addition to the original BOQ rates, the respondent/claimant had also been paid an amount towards price escalation as per the formula prescribed in clause 70 (iii) of the GCC. Admittedly, the amount paid to the Respondent/ Claimant as per the said formula was to the tune of Rs. 43.18 crores. This has been noted in Para 11 of the award. Thus, when one adds the figure of 35.62 crores to the actual price escalation of Rs. 43.13 crores duly paid to the respondent/claimant, the total amounts to approximately Rs. 78.75 crores *i.e.*, more than the amount of total expenditure stated to have been incurred by the respondent/claimant towards labour wages. As such, the price escalation formula more than adequately makes up for the additional cost on account of minimum wages and therefore there was no occasion to award any additional amount to the respondent (claimant) on that count.

47. It was in this backdrop, that the respondent (claimant) resorted to a novel device/ mechanism. It was asserted that as per the breakdown of unit rates provided by the claimant at the time of tendering, the labour component of the total contract value was stated to be only 10%. For this reason, even though labour escalation had actually paid to the respondent/claimant on 30% of the contract value, the same must be proportionately scaled down/ reduced. Although contention of the



respondent (claimant) to this effect is recorded in para 11 of the award, the same does not form part of the pleaded case of the respondent (claimant) at all.

48. Thus, through the above devise/ mechanism, even though the actual amount paid to the respondent/claimant towards labour escalation is Rs. 43.18 crores, it was notionally reduced to Rs. 14.39 crores. (1/3rd of Rs. 43.18 crores). In other words, although, by applying the price escalation formula incorporated in clause 70(iii) of the GCC, the respondent/claimant have actually pocketed an amount of Rs. 43.18 crores, for the purpose of assessing the claim of the Respondent, this amount has been assumed to be Rs. 14.39 crores. Clearly, this is *ex-facie* arbitrary, perverse and results in re-writing the contract between the parties.

49. The only portion in the award where this aspect has been adverted to is reproduced hereunder: :

“
11.....

*c) Now in the aforesaid statement dt.24.09.2007, the Claimants have submitted that the amount of wages incurred by them comes to Rs.77,26,82,952.00 against which they have recovered Rs.35,62,13,249.00 through the BOQ items and RS.14,21,79,888.00 through escalation on the proportionate basis on payment to labour. The Respondents in their letter dt.01.05.2007 have indicated the escalation paid to the Claimants for the labour component in local currency is Rs.43.18 crore as shown in para 9(C) above. **It is be worthwhile to mention here that the escalation is calculated on the labour component as 30% of the value of work done in a particular period. In the sealed bid filed by the Claimants as per the contract condition, the labour expenses are indicated as about 10% only as shown at sl no.F in para no.9 above. The Respondents have also considered 10% component of labour in their Statement furnished with letter dt.01.05.2007, while calculating the realized labour component, in para 3.2.2.4 of their letter dt.24.09.2007, the Claimants have stated that the entire escalation calculated by the Respondents and considered towards labour component is totally misleading. The Claimants states that the price***



adjustment formula is only a mechanism to regulate the total escalation on the amount of work done compared to base date for the relevant period. The escalation recovered through mechanism of labour component also caters to those items which do get escalated but are not directly covered in the price adjustment formula. Such expenses can be like cost of machinery, salary of staff, overhead etc. in this way, when the total labour expenses (direct and indirect @ 150%) are only 10% of the cost of work. The Price adjustment formula in clause 70(iii) provides escalation @ 30%. This difference of 20% obviously indicates escalation payable on items other than labour expenses although they are covered under the heading labour component. The Claimants have indicated that @ 10%, the escalation amount received by them on labour expenses is Rs.14.21 crore. The total escalation paid towards labour component as per the Respondents @ 30% is Rs.43.18 crore. The corresponding proportionate escalation received by the Claimants thus comes to Rs.43.18/3 - Rs.14.39 crore against which the Claimants has shown the receipt of Rs.14.21 crore. The figures of the Claimants and the Respondents towards escalation paid to the Claimants on labour expenses compare with each other, it will be justified to take the figure of Rs.14.39 crore as per the Respondents in further calculations. This brings to the conclusion that the Claimants have received an amount of Rs.50.03 crore by way of payment through BOQ item and as well as escalation on labour component. Leaving an amount of (Rs.77.26 (-) Rs.50.03) =Rs.27.23 crore (approximately) only unrealized towards labour expenses. This amount is within the amount of the claim of Rs.28.88 crore put up before the DRB.

.....

15.

...

c)the proportionate escalation recovered on in-built labour component for 75% of the work executed during the period works out Rs.14.21 crore only.....

.....

19....

b) The Claimants has put up calculations showing that he had incurred an expenditure of Rs.77.26 crore towards the labour wages out of which Rs.55.62 crore has been realized through the BOQ items as on base date. He has further been reimbursed RS.14.21 crore through escalation as per clause 70(iii) on the labour component only. Thus, the total labour expenses and escalation recovered amounts to Rs.49.83crore. This leaves a balance of Rs.27.42 crore as the additional expenditure which has occasioned due to revision of minimum wages. There appears to be no reason to dispute this figures.

....



.....”

50. While recording the contention of the respondent/claimant in para 11(c) of the award (as extracted above), the impugned award does not give any reasons for accepting the aforesaid plea of the respondent/claimant. Thus, the award on this count is not only at variance with the pleaded case of the Respondent (Claimant), it is also unreasoned and palpably absurd. There is simply no basis to conclude that although labour escalation is computed and paid on 30% of the contract price, however it must be assumed that out of this 30% percent, only 10% thereof is towards labour costs and 20% is in respect of other heads of cost. In this regard, it is notable that Annexure-XI of the contract (supra) specifically mentions 30% to be the local labour component on which labour escalation is paid as per GCC Clause 70(iii). Similarly, Annexure-XI assigns weightage to “steel”, “other materials” and “local fuel and lubricants” for the purpose of applying the price escalation formula. The notional scaling down of the labour escalation amount (from Rs. 43.18 crores to Rs. 14.39 crores) results in re-writing Annexure-XI of the contract.

51. It is also unfathomable that when an amount of Rs. 43.18 crores has been actually paid to the respondent/claimant towards labour escalation, why should 2/3rd thereof be ignored while assessing the extent to which the Respondent/ Claimant was required to be compensated on account of increase in minimum wages. It is also unfathomable as to how and on what basis it has been concluded that 2/3rd of Rs. 43.18 crores (i.e. Rs. 28.78 crores), although paid to the Respondent/ Claimant under the head “labour escalation” was actually towards items “other than labour expenses” [as per the contention of the Respondent/ Claimant recorded in para 11 (c) of the



award].

52. It is completely perverse to proceed (as the impugned award does) on the basis that respondent/claimant realised only an amount of Rs.14.21 crores (and not 43.18 crores) through escalation payable under Clause 70 (iii) of the GCC. In the face of such perversity which is writ large on the face of the impugned arbitral award, the same cannot be sustained.

53. The reliance sought to be placed by learned counsel for the respondent on petitioner's communication dated 01.05.2007 and/or other communication/s addressed by the petitioner during the course of arbitration, is totally misplaced. The purport of the said communication/s was evidently to highlight the contradiction/s in the respondent's calculations. The same cannot be construed as any admission on the part of the petitioner as regards the 'scaling down' of the escalation amount.

54. At this stage, it would be apposite to highlight the duty of care that Arbitrators must exercise in dealing with financial claims based on the mathematical derivations in the context of complex construction contracts. An arbitrator's obligation of care, skill and integrity has been emphasized by the various authors and has also been judicially recognized. In *Mustill and Boyd: Commercial Arbitration*²⁰, it has been stated as under:

“.....
When accepting the burden of the reference, the arbitrator can be regarded as undertaking three principle duties – namely to take care, to proceed diligently and to act impartially. The existence of a moral obligation to perform these duties is undeniable.
.....”

In *Gary B. Born: International Commercial Arbitration*²¹, it has been stated as under:

²⁰Sir Michael J. Mustill, Stewart C. Boyd – Commercial Arbitration (Second Edition), , PP. 224

²¹Gary B. Born, International Commercial Arbitration, Second Edition, PP. 1992



“.....

International Arbitrator's Obligations of Care, Skill and Integrity

The arbitrator's obligation to resolve the parties' dispute includes an obligation to conduct the arbitral proceedings and decide the case with appropriate care, skill and professional integrity. The arbitrator's duties of care and skill are in some respects akin to those imposed on other professionals, such as lawyers, accountants and bankers (although as discussed below, the enforcement of these obligations is radically different because of the arbitrator's entitlement to immunities). This obligation includes devoting the necessary time and attention to the case, and addressing the evidence and submissions with the skill and ability necessary to understand. These obligations also extend to a duty to decline appointment in arbitrations for which a potential arbitrator is ill-prepared or ill-suited, whether by virtue of lack of expertise, language abilities, or otherwise...

.....”

Entertaining financial claims based on novel mathematical derivations, without proper foundation in the pleadings and/or without any cogent evidence in support thereof can cause great prejudice to the opposite party. Especially in the context of construction contracts where amounts involved are usually astronomical, any laxity in evidentiary standards and absence of adequate diligence on the part of an arbitral tribunal in closely scrutinizing financial claims advanced on the basis of mathematical derivations or adoption of novel formula, would cast serious aspersions on the arbitral process. The present case is an example where substantial liability has sought to be fastened on one of the contracting parties based on specious paper calculations. It cannot be overemphasized that arbitral tribunals must exercise due care and caution while dealing with such claims.

55. In the circumstances, the impugned arbitral award is set aside. Accordingly, the present petition stands allowed. All pending applications also stand disposed of. There shall be no orders as to cost.

JULY 12, 2023
rb/rohit

SACHIN DATTA, J