
(2015) 04 DEL CK 0252

In the Delhi High Court

Case No : O.M.P. 23, 213 and 419 of 2013

Chennai-Ennore Port Road Co. Ltd.

APPELLANT

Vs

RDS Project Ltd.

RESPONDENT

Date of Decision : 23-04-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 13, 16 (2), 23(3), 34
Contract Act, 1872 — Section 28 (b)

Citation : (2015) 221 DLT 179

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : Arun Kumar Varma, Sahiti Kachroo and Mayank Sapra, for the Appellant; Jagdeep Dhankar, Senior Advocate, Asha Jain Madan and Mukesh Jain, Advocates for the Respondent

Judgement

Dr. S. Muralidhar, J.—These are three petitions by the Chennai-Ennore Port Road Company Ltd. ("CEPRCL") under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act") challenging three separate Awards rendered by the Arbitral Tribunal ("AT") in three references made to it regarding disputes that arose between the Petitioners and the Respondent RDS Project Ltd. ("RDSPL") out of a formal agreement signed between them on 20th May 2003 for execution of "Sea Protection work along the Ennore Expressway" in Chennai.

Background

2. The Petitioner is a Special Purpose Vehicle of the National Highways Authority of India ("NHAI"). Clause 1.1 of the agreement defines the scope of works. The Petitioner was required to construct 10 Groyne rigid hydraulic wooden/concrete structures built to interrupt water flow and limit the movement of sediment in sea/ocean which are found used in tandem with seawalls.

3. Under Clause 1.1 of the agreement, the scope of works was specified as under:

(i) Identification of quarries for supply of stones of required specifications.

(ii) Arranging transportation of these stones from the quarries to the work sites and

(iii) Construction of Groynes according to the specific design, standards and specifications.

4. There were three separate schedules of quantities for Groyne Fields. Schedule A1 specified the quantities for Groyne Fields I and II. Schedule A2, the quantities for construction of, 500m long sea wall north of the northern most Groyne No. 6 in Groyne Field I and Schedule A3, the quantities for strengthening of sea walls between groynes in Groyne Field I and Groyne Field II.

5. Since the construction was peculiar as it was to be carried out underwater, the contract provided for separate bills of quantities ("BOQs") for different layers of the work to be constructed by the Respondent. The quantities were to be paid in metric tons ("MT") basis and this would account for the fact that there was a difference in the quantities of stones brought on site and those forming part of the finished work since there could be some amount of stones that would sink with the waves. The method for measuring the executed quantities for the purposes of payment under the BOQ was also provided in the agreement.

6. The layers were distinguished from each other by the type and quality of stones to be used. The layers were divided into toe layer, filter layer, core layer and armour layer. As regards the method for measuring executed quantities for the purposes of payment, the contract provided that first calculation of theoretical quantities of the stones to be used in any particular layer in the works which was based on the cross section of the layer as provided in the relevant drawings was to be carried out. The volume of any particular layer had to be ascertained from the approved drawings and the cross sections and then multiplying the said volume in cubic meters by the layer specific multiplier units provided in the contract in order to arrive at the theoretical quantities in MT. Thereafter the theoretical quantities were to be compared with the actual weighted quantities of different stones brought to the site. The correct executed quantities of different categories were to be limited for the purposes of payment to 10% excess over the theoretical quantities.

7. During the progress of the works, on account of the site conditions, changes were made to the original drawings. A new layer called the secondary layer was added to the scope of works.

Proceedings before the AT

8. During the execution of the work, certain disputes arose between the parties and were referred to arbitration under three different references to the same AT.

9. The Petitioner filed an application under Sections 12 and 13 of the Act challenging the continuation of one of the Arbitrators. After the said application was rejected by the AT, the Petitioner filed OMP No. 458/2009 in this Court. The said petition was disposed of by an order dated 13th November 2009 giving

liberty to the Respondent to replace the said nominee Arbitrator with a fresh appointee. The Court passed the following order on that day:

"Ms. Asha Jain, learned counsel appearing for Respondent No. 1 without prejudice to her rights and contentions states that even though allegations against Respondent No. 2 are baseless, she has no objection if the present petition is disposed of by giving her liberty to replace her nominee Arbitrator, namely, Respondent No. 2 with a fresh appointee. She, however, prays that Respondent No. 1 should be given liberty to amend its claim statement to include compensation/damages for rehearing and for loss of time that has taken place on account of removal of Respondent No. 2.

In my opinion, Respondent No. 1 would certainly be entitled to appoint another Arbitrator in place of Respondent No. 2 and to claim cost/compensation for rehearing that would occur on account of change of the Arbitrator. However, the said claim would be decided by the arbitral tribunal in accordance with law after hearing counsel for the Petitioner.

At request of learned counsel for the Petitioner, it is clarified that this Court has not expressed any opinion on the merits of the amendment that is proposed to be incorporated by Respondent No. 1.

I further clarify that where the arbitral tribunal has concluded final hearing; it would only rehear final arguments and not proceed de novo with either the pleadings or the evidence on record except in one of the agreements where Respondent No. 1 would be amending its claim statement.

With the aforesaid observations, present petition stands disposed of."

10. The newly constituted AT conducted its last hearing on 19th July 2010. On 25th April 2011, the AT issued directions requiring the Respondent to submit its justification for Claim No. 1 giving details of theoretical quantities of each layer, the quantities executed for each layer along with details of calculations and copies of measurement books. The Respondent was also asked to submit and verify the record to substantiate the quantities of stone stacked at the quarry site and stock yard with reference to Claim No. 6.

11. The Petitioner then made a representation on 11th June 2011 to the AT protesting against the above directions and submitting that in view of the order passed by this Court on 13th November 2009, the AT could not have called upon the Respondent to substantiate its otherwise baseless claims.

12. The disputes between the parties were referred to arbitration under three separate references.

The Award under the first reference

13. Under the first reference the following disputes were referred:

(1) release of withheld payment of stones

- (2) extension of time to become eligible for incentives.
- (3) payment for removal and replacing of PWD stones.
- (4) pricing of core material at Rs. 310 per MT.
- (5) enhancement of rate of armour stone.
- (6) compensation due to deemed suspension of work.

14. In addition to the above, the Respondent also claimed interests and costs. By a letter dated 30th August 2006, the Respondent withdrew claim (d) but later claimed that it had done so under duress.

15. The AT gave a unanimous award dated 10th September 2012 in the first reference in respect of five claims i.e. Claims (i) to (v) and a split verdict (2:1) in respect of Claim No. (vi). The Award of the AT on the claims under the first reference was as under:

16. Aggrieved by the above Award dated 10th September 2012, the Petitioner has filed OMP No. 23/2013.

Claim No. 1 under the first reference

17. Mr. Arun Kumar Varma, learned counsel appearing for the Petitioner, submitted that by the order dated 25th April 2011, the AT attempted to get evidence on record in support of the Respondent's baseless claims and this was contrary to the judgment dated 13th November 2009 passed by the Court in OMP No. 458/2009. He also adverted to the extraordinary delay in the pronouncement of the Award. As regards Claim No. 1 i.e. quantities of boulder payments withheld, he submitted that the AT's conclusion in para 14.04 that the measurement has to be done as per actual weight and not by volume converted into weight, disregarded the terms of the contract. It is submitted that the conclusion in para 14.12 of the Award regarding "actually executed theoretical quantities" and the measurements/calculations thereunder reveal a lack of understanding of the applicable clauses. It is further submitted that in para 14.07 of the Award, the AT had held that a separate allowance had to be made for the core mound whereas in para 14.13, it treated the under layer and the armour layer as the same.

18. In reply to the above submissions, it was submitted by Mr. Jagdeep Dhankar, learned Senior counsel appearing for the Respondent, that the scope of inference by this Court with the Award of the AT under Section 34 of the Act was limited. He referred to the decisions in Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd., (2009) 4 CompLJ 12 : (2009) 12 JT 135 : (2009) 12 SCALE 393 : (2009) 10 SCC 63 : (2009) 15 SCR 253 , Rashtriya Ispat Nigam Ltd. Vs. Dewan Chand Ram Saran, AIR 2012 SC 2829 : (2012) 2 ARBLR 171 : (2012) 191 ECR 269 : (2012) 3 RCR(Civil) 720 : (2012) 4 SCALE 588 : (2012) 5 SCC 306 : (2012) 26 STR 289 : (2012) 50 VST 443 : (2012) AIRSCW 2713 and Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Commission of India,

AIR 2010 SC 3400 : (2010) 8 JT 208 : (2010) 7 SCALE 279 : (2010) 11 SCC 296 : (2010) 9 SCR 176 : (2011) AIRSCW 323 : (2010) AIRSCW 5171 : (2010) 6 Supreme 129 . The decision of this Court in Vale Australia Pty Limited Vs. Steel Authority of India Limited and Another, (2012) 3 AD 657 : (2012) 2 ARBLR 132 was also referred to. He further pointed out that this Court in its order dated 13th November 2009 did not bar the AT from seeking additional documents and had stated that the AT would rehear the final arguments only when it concluded the final hearing. As regards the delay in pronouncement of the Award, he submitted that there were three references made to the AT the last hearing of the last reference concluded only on 4th July 2012.

19. As regards Claim No. 1, Mr. Dhankar submitted that the quantity of stones changed with the revision of the original design and a new item of secondary layer necessitated by the results of the biometry survey indicated that the seabed topography was different. It was submitted that the AT had in fact relied on the various contractual terms and allowed only the theoretical quantities + 10% or the actual weighed and dumped quantities whichever was less. The AT relied upon the quantities as noted in the Annexures B and E to the final bill IPC No. 25 dated 3rd July 2006 submitted by the Petitioner to determine how much of the quantity was unpaid by it. It is pointed out that the Petitioner never really disputed the quantities including theoretical quantities of the stones claimed by the Petitioner. It was submitted that the Respondent had based its claims only on the weighed and dumped quantities as recorded in the weighed bridge and this was noted by the AT in para 14.12 of the Award.

20. The above submissions have been considered. It must be noted at the outset that the application filed by the Respondent under Section 23(3) of the Act seeking to revive Claim No. 2 (extension of time to become eligible for incentive) on the ground that it was made to withdraw the said claim under duress, was dismissed by the AT by its order dated 6th September 2010.

21. The AT made a note of Clause 6.7 in para 10.02.2 of the Award which provided for price adjustment in case of change of quantity. In Para 10.2.1 the AT noted the contractual obligations of the contractor (i.e. the Respondent) and also the schedules which provided the specifications for sea protection works.

22. The AT referred to the fact that under letter dated 10th March 2004, the Respondent had indicated that the secondary layer should be considered as part of the armour layer. The Respondent also by the letter dated 15th March 2004 conveyed their acceptance of the substituted items and rates as per the final design reviewed with the proviso that all other conditions of the contract would remain unchanged. The AT noted that this was reaffirmed by the Respondent by the letter dated 30th March 2004. Consequently, the AT rejected the case of the Respondent that the secondary layer was to be treated as part of the armour.

23. The AT also noted that under Clause 1 (d) (iv) of Schedule 2 which contained specifications for sea protection works, an allowance to the extent of 10% in

respect of cross sections was to be made for making good of settlement of stones in core mound due to normal sinking action caused by wave action or any other cause until the completion of works including maintenance. It also noted that the correct executed quantities for above categories was to be limited for the purposes of a payment to 10% excess over theoretical quantities irrespective of the actual voids specific gravity of stones or the damages due to the natural causes. The said clause also gave the conversion factor for working out the theoretical quantities separately for the filter, armour and core stones.

24. The AT also noted that at the pre-bid meeting held on 18th April 2002, the issue of variation beyond the theoretical quantities and weighed quantities was clarified. The minutes noted that for each groyne, as work progresses, the cross-section constructed would be verified with the drawings and the quantity would be calculated to ensure that the work carried out is as per design. The parameter of theoretical quantities/weighed quantities would be compared and variation of + (-) 10% was permissible on the theoretical quantities and no other allowance was applicable. The DRE had held that each drawing was to be treated as a separate entity.

25. The AT noted that the allowance provided for in the agreement for sinking of the core mound was not the subject matter of the clarification given in the pre-bid meeting since settlement of stones in the core mound due to sinking action could only result in variation on the higher side, the clarification regarding + or-10%. Variation could not be taken to include variation resulting from settlement of stones in the core mound. At the meeting held on 25th April 2011 in respect of Claim No. 1, the AT requested both parties to furnish "the details of theoretical quantities of each layer, quantity executed for each layer, along with details of calculations and copies of Measurement Books." While the Petitioner did not give any details, the Respondent furnished a copy of the final bill by a letter dated 10th June 2011 (IPC No. 25) under which the last payment was made to it by the Petitioner. The AT also noted that the Respondent had declined to make payments for the withheld quantities after appending the following observations:

"Withheld quantities are not entitled for payment. However, DRE has given his decision to release part of the total quantities which the Contractor has not accepted. So the withheld quantities claimed by the Claimants are not accepted by the Respondents."

26. The AT also adverted to its own letter dated 23rd April 2010 seeking details of the dumped quantity of stones and the payments made by the Petitioner. Thereafter in para 14.12, the AT observed as under:

"14.12. From the details mentioned above it is evident that the Claimants have based their claims on the weighted and dumped quantities as recorded at the weigh bridge. The details of actually executed theoretical quantities derived from constructed drawings have not been made available to the AT by either of the

parties. However it was noticed from the submitted documents that details of volumetric content of stones in each layer of all the Groynes had been recorded. AT has arrived at the permissible limits of theoretical quantities from these records quantities and compared the same with the weighted quantities, to arrive at actual withheld quantities legitimately due for payment to the Claimants."

27. The AT then concluded that the intention of the parties in the agreement was that the payment should be "based on the stones actually dumped and recorded in the weigh bridges, corroborated by theoretical quantities derived from actually constructed record drawings." On that basis the AT proceeded to determine that the Respondent was entitled to a sum of Rs. 16,28,700 being the payments withheld for various quantities of stones used in the core, under layer and armour. As against the claim of Rs. 67,72,387, the AT awarded Rs. 16,28,700.

28. The Court finds that the AT has taken a certain view on the interpretation of the clauses in the contract and ultimately has gone by the quantities of stones actually dumped and recorded in the weigh bridges. The phrase "actually executed theoretical quantities" used in para 14.12 may not be the correct expression that should have been used but what actually weighed with the AT is evident from its observation in para 14.13 where it talks of the payments being based on stones actually dumped and recorded in the weigh bridges. The theoretical quantities derived from the drawings were only used for corroboration purposes. The view taken by the AT on the interpretation of the different clauses of the contract is plausible and cannot be said to be perverse.

29. The Court would also like to observe that in terms of the orders passed by this Court on 13th November 2009, it is clear that the AT would not proceed de novo with either the pleadings or the evidence and would only rehear final arguments. The mere fact that an order dated 25th April 2011 passed by the AT required the parties to submit further information/documents could not be construed to be contrary to the above directions. The AT was asking for further information/documents which in any way could not be said to prejudice either party. This was for further clarification of the claims and the responses thereto. What was being sought by the AT was purely factual information which it was entitled to seek in order to give a correct Award. The Court is not persuaded to hold that by seeking further information the AT acted contrary to the order dated 13th November 2009 of the Court.

30. Considering that three references were made to the AT, and the pleadings and evidence were voluminous, the Court is also not persuaded to hold that the pronouncement of the three Awards within about five months of the conclusion of the hearing in the last reference, was extraordinarily delayed.

31. The impugned Award dated 10th September 2012 in respect of Claim No. 1 under the first reference does not suffer from any patent illegality that calls for interference.

Claim No. 5 under the first reference

32. Claim No. 5 under the first reference related to enhancement of armour rates. While the Respondent claimed that it had executed 50,290.49 MT as against the stipulated BOQ of 30,000 MT, the Petitioner claimed that the total quantity of armour executed was only 40,824.74 MT. The criticisms of Mr. Varma of the Award in respect of Claim No. 5 was that the AT misapplied Clause 6.7 by granting the entire additional amounts for all the quantities beyond the specified limit instead of limiting it to the quantity beyond 25% limit over the BOQ. Secondly, it is submitted that the rates awarded differed in respect of the same item of work in two separate references. In other words, the AT awarded Rs. 190 PMT in one reference and Rs. 150 PMT in the other.

33. In reply, it was submitted by Mr. Dhankar that the AT took note of the fact that the Petitioner admitted payment for 40,824.74 MT and, therefore, awarded a sum only based on such quantity. Since the said quantity was above the BOQ quantity, the rate had to be adjusted for the entire excess 10,824.74 MT. As regards the differential rate, Mr. Dhankar submitted that Rs. 190 PMT was in fact the correct rate and perhaps the AT was not justified in awarding Rs. 150 PMT.

34. As regards Claim No. 5, the Court finds that the AT has in fact looked at Clause 6.7 which stated "if the final quantity of the work done differs from the quantity in the BOQ for the particular items by more than 25% provided the change exceeds 1% of initial contract price, the Employers representative shall adjust the rate to allow for the change."

35. The AT also noted that even according to the DRE, each schedule of BOQ was independent and for identical items in different schedules the rates were not same. Three schedules in the BOQ could not be clubbed together. The DRE concluded that 3324.74MT is eligible for rate adjustment after applying the permissible excess of 25% over the BOQ quantity. The DRE, however, did not give any decision on the rate claimed by the Respondents and left it to the parties to settle the issue.

36. The AT referred to the documents filed by the parties and noted that as per the revised schedule, after adding of the secondary layer, the core, secondary layer and the armour had different specifications with different rates. Thus for the purpose of price variation under Clause 6.7 of the agreement, the three layers could not be clubbed together. The RA bill No. 25 dated 3rd July 2006 also showed the quantities for the sub layer and the armour separately. The AT also discussed the drawings which did not show the under layer of 100-300 Kg stones as part of the armour layer. The doubling of stones was neither envisaged in the secondary layer nor in the armour layer.

37. The AT did not accept the claim of the Respondent regarding the total quantity of the armour stones since it concluded that the secondary layer could not be clubbed with the armour. Since the Petitioner had admitted payment for 40824.74 MT, only that quantity was considered by the AT for determining what the excess quantity was. It was further observed that the intent of Clause 6.7

was for the rate adjustment i.e. quantity beyond the agreed quantity + 25%. In those circumstances, it was concluded that "price adjustment is, therefore, permissible for the entire quantity beyond the BOQ quantity for Item No. 3 of Schedule A2 of the agreement i.e. 10824.74MT. Further as against the claim of Rs. 250 PMT, the AT assessed Rs. 190 PMT "to be reasonable".

38. The Court is of the view that the interpretation placed by the AT on Clause 6.7 is plausible. As observed by the Supreme Court in Associate Builders Vs. Delhi Development Authority, (2015) 124 CLA 318 : (2015) 1 SCJ 42 as long as the interpretation is not shown to be perverse or irrational even on the question of interpretation of clauses of the contract, the view of the AT should be taken to be final. On the question whether the price adjustment was permissible for the entire quantity executed beyond the BOQ and not just 25% beyond the BOQ, what the AT has held cannot be termed as irrational or perverse. Consequently, the Court is not persuaded by the submission of the Petitioner that the Award in respect of Claim No. 5 calls for any interference.

Claim No. 6 under the first reference

39. As regards the Award in respect of Claim No. 6 under the first reference, there was a split Award. It was submitted that the AT had ignored payment of Rs. 114.10 lakhs made to the Respondent and also the fact that despite the delayed environmental clearance, the Respondent was unable to carry out other works and was not compelled to stack the stones at the quarry site. There was also no basis for the rate of Rs. 85 PMT applied by the AT.

40. In response to the above submission, it was pointed out on behalf of the Respondents that the determination by the AT of this claim was based on the contractual clauses and the facts as were evident from the documents placed on record.

41. The Court finds that the AT noted that the environmental clearance was obtained only on 8th June 2004 i.e. almost one year after the date of the agreement. The entire site was not handed over to the Respondent. It could take possession of stretches 1 and 2 from the PWD only on 17th May 2004 and 8th February 2005 respectively. Till such time the environmental clearance was not accorded, the work could not start and therefore there was a deemed suspension till then. Clause 9.2 (b) envisaged situations where the Petitioner was in breach of obligations and such breaches adversely affected the ability of the Respondent to perform its obligation under the contract. Clause 10.7 deals with consequences of suspension. Notice was to be given under Clause 10.6 of the general conditions of contract by the Respondent to the Petitioner seeking reimbursement.

42. The AT has discussed in detail also the exchange of correspondence between the parties and has drawn detailed conclusions in that regard in para 33.06 of the impugned Award. The AT has also discussed the findings of the DRE on this aspect. The AT concluded that "there is enough evidence in support of the

Claimants being compelled to stack the stones at the quarry site and the quantity of 2,20,000 tons of stones stacked by the Claimants at the quarry site is acceptable in view of the evidence on record." As against Rs. 100 PMT claimed by the Respondent, the AT has awarded Rs. 85 PMT.

43. The Court finds that the view taken by the AT on the interpretation of the contract as well as the rate cannot be said to be perverse, arbitrary or irrational. As explained in the aforementioned decisions of the Supreme Court, no ground has been made out under Section 34 of the Act for interference with the Award in respect of Claim No. 6 under the first reference.

44. As regards the consequential claim for interest i.e. Claim No. 7 (a) and Claim No. 7 (b), the Court is again unable to find any patent error in the impugned Award which calls for interference.

45. Consequently, the impugned Award dated 10th September 2012 in the first reference is upheld and OMP No. 23/2013 is dismissed with costs of Rs. 10,000 which shall be paid by the Petitioner to the Respondent within four weeks.

Award in respect of the second reference

46. Turning now to the second reference which forms the subject matter of OMP No. 213/2013, the disputes referred were as under:

(1) Change in the scope of work of Schedule A-3.

(2) Release of payments for withheld quantity of 9,481.5 MT of armour stones executed under Schedule A1 (Claim 2 A) and Schedule A2 (Claim 2B) for 500m length of seawall north of the Northernmost Groyne No. 6 in Groyne Field No. 1.

(3) Claim for interest and costs.

47. By the impugned Award dated 28th October 2012, Claim No. 1 was rejected. As far as Claim No. 2A is concerned, while the entire amount claimed for release of withheld payment of stones in the sum of Rs. 26,89,555 were allowed. As regards Claim 2 B i.e. enhancement of rate of armour stones in Schedule A2, the AT allowed a sum of Rs. 30,38,700 as against the claim of Rs. 96,11,119. The AT also allowed 12% simple interest per annum for post pendente lite and future interest.

48. The broad grounds of challenge to the impugned Award in respect of Claims 2 A and 2 B under Reference No. 2 is that the AT has given a new meaning to the terms and conditions of the contract; the manner in which the AT brought evidence on board was against the rules of natural justice and that the AT made unqualified assumptions by ignoring clear and cogent reasons. It was submitted that the AT had come up with a theoretical quantity base on the "As-built drawings" by the Respondent which was specifically denied by the Petitioner. It is submitted that the actually weighed quantity of the stones brought on the site was not to be under the various BOQ items and only a variation of (+)/(-) 10% would be allowed by comparing the theoretical quantities and weighed quantities.

The norms for working this out for the filter stones, armour stones and core stones were already specified in the contract. As regards the payment for the armour stones, it is submitted that the AT came to an incorrect conclusion that the agreed total quantity executed was 50258 MT whereas the Petitioner had submitted that it was 40824.70 MT. It is submitted that the AT should have deducted 7500 MT being 25% of 30,000 MT in order to arrive at new rate.

49. As regards Claim No. 3, it is submitted that it was not supported by any contractual provisions and it was impossible to figure out how the AT arrived at the date of 30th August 2006 for awarding interest.

50. In reply it was submitted by the Respondent that the conclusions of the AT were based on the documentation which have been discussed extensively in the impugned Award. The payment was worked out on the basis of the weighed-bridge quantities. The actual weighed quantities were the quantities derived by the "As-built drawings". As regards the rate of Rs. 150 PMT having been awarded in the present reference, it was explained that it has a fixed component (deployment of machinery and human resources and a variable component." The fixed component was spread over to the total quantity in issue. With higher quantities, the per unit fixed component would get progressively reduced and the variable component would remain the same. This explained how the AT awarded a higher rate per unit with lower quantities in Claim No. 5 of the first reference. It is submitted that while calculating the rate adjustment in Clause 6.7, the AT had inadvertently multiplied 150 with 20258 instead of 9481.95 MT. To that extent it is agreed by the Respondent that the amount should have been Rs. 14,22,292.50 instead of Rs. 30,38,700.

51. According to the Respondent, the award of interest is in conformity with Clause 18.5 which talks of delayed payment and Clause 18.1.1 for disregarded payment. It is submitted that the interpretation placed by the AT on the relevant clauses was a reasonable one and within its jurisdiction.

Claim 2 A under the second reference

52. The Court finds that the AT, as regards Claim No. 2A, discussed the relevant provisions of the contract and in particular the BOQ Schedules. It has also discussed the findings of the DRE on the subject. It has discussed Clause 6.7 and concluded that the actual specific gravity of the stones could not be considered as "As-built drawings" into weight. The AT noted that the limit for payments have to be determined by converting volume of actually executed using multiplier factor specified in the contract. It noted that in the reference itself, the Petitioner has admitted the weigh bridge record as well as "As-built drawings". The AT then drew a comparative statement of quantities of stones on the bases of weigh bridge record and the theoretical quantities. The DRE had adverted to the rate adjustment under Clause 6.7 of the agreement and, therefore, the issue of rate adjustment was within the purview of the arbitration. The actually executed quantities of armour stones exceeded the original armour quantities by 67%. It

was on that basis that it was held that they were entitled to revision of rates for armour stones. For the above reasons, the Court finds no error having been committed by the AT as regards the Award in respect of Claim No. 2A in the sum of Rs. 26,89,555.

Claim No. 2 B under the second reference

53. However, as far as the quantities to which the rates were applied it has been admitted by the Respondent itself that they should have been paid for a lesser quantity i.e. 9481.95 MT which was what the withheld payment was for. That quantity multiplied by 150 works out to Rs. 14,22,292.50. Therefore, as regards Claim No. 2 B for the payment for armour, the amount should be worked out as above and not as set out by the AT.

Claim No. 3 under the second reference

54. As regards the claim for interest, the reasoning of the AT is again based on the clauses of the contract. The Court does not find the award of interest from 30th August 2006 till the date on which the AT entered upon reference or the pendente lite interest and future interest to be warranting any interference by the Court under Section 34 of the Act.

55. OMP No. 213 of 2013 is disposed of by upholding the impugned Award dated 28th October 2012 under the second reference as regards Claim Nos. 1, 2A and 3 and modifying the amount awarded to the Respondent under Claim No. 2 B to Rs. 14,22,292.50.

The Award under the third reference

56. The subject matter of the third reference involved the following disputes:

Claim 1 (i) extra for access to the location of Groyne 9-Rs. 73,15,840.

Claim 1 (ii) Idle charge for machinery-Rs. 20,00,000.

Claim 2 (i) Increase in depth of water by more than 2m at all Groyne Heads

Claim 2 (ii) Upward revision rate: Rs. 7,45,95,400.

Claim 3 Claim for interest and costs.

57. By the impugned Award dated 12th December 2012, the claims were decided by the AT as under:

58. Apart from alleging that the impugned Award under the third reference is against the provisions of the contract, it is submitted by learned counsel for the Petitioner that an order dated 21st June 2011 passed by the AT on the application filed by the Petitioner under Section 16 (2) of the Act was erroneous and deserved to be set aside. It is also submitted that there is no contractual basis for awarding Rs. 20,50,000 and Rs. 5,00,000 under Claims 1 (i) and (ii) respectively. It is submitted that the handing over by the PWD of the site of

stretch II on 8th May 2005 has no bearing on the actual access granted to the Respondent which has was simultaneous with the signing of the contract on 20th May 2003. It is submitted that the very fact that there was a shift of the access road by 100 meters proved that the Respondent shifted the route rather than removing the encroachments. The visit of the AT to the site was several years after the work had been completed and there was, therefore, no basis to award any sum under the above heads.

59. As regards the idle charges, it is submitted that once the AT had found that the Respondent had not furnished any record in support of its claim, there was no justification for awarding a sum of Rs. 5 lakhs.

60. In response to the above submissions it is submitted by Mr. Dhankar for the Respondent that direct access to Groyne No. 9 was not available due to encroachment which was never got cleared by the Petitioners. As regards the order dated 21st June 2011 of the AT, it is submitted that the arguments of the Petitioner were confined to "excepted matters" and the grounds pertaining to delay were not pressed in view of the amended Section 28 (b) of the Contract Act, 1872. As regards Claim No. 1 (ii), it is submitted that the AT had found that the Respondents were compelled by circumstances in June 2005 to de-hire the crane and therefore the idling charges were correctly held to be reimbursable.

61. As regards the order dated 21st June 2011, the Court finds that it is an extremely detailed one which considers all the objections of the Petitioner. The disputes referred to the AT for decision were indeed arbitrable. Only those matters which fell within the defined scope of measurements, drawings and interpretation fell within Clause 3.6 (D). All other matters had to be treated as outside the purview of that clause. Merely because those works were mentioned by the Respondent in the statement of facts, could not be taken to conclude that the disputes fell under those categories.

62. Having perused the statement of facts submitted by the Respondent and having perused the order of the AT dated 21st June 2011, the Court is inclined to agree with the conclusion reached by the AT on the scope of the reference. As rightly observed the amendment to Section 28 (b) of the Contract Act changed the position with regard to time limit imposed by Clause 3.6 (D) with regard to invocation of arbitration.

63. The view taken by the AT that the decision of the DRE on the disputed items has not become final and binding and, therefore, the dispute has to be decided in arbitration, is a plausible view and does not call for any interference.

64. As far as Claim No. 1(i) is concerned i.e. extra for access to the location of Groyne No. 9, the AT has discussed the minutes of the review meetings held between the parties on 17th September 2003. It was concluded that it was the Petitioner who had to clear the encroachment but that was never done. By letter dated 3rd May 2005, Respondent had apprised the Petitioner of the consequences of denial of the work site of even Groyne No. 10 since even that

site was not free from encumbrances. Simultaneously, the Respondent suggested four alternative routes to Groyne No. 9, the fourth one of which was accepted by the Petitioner by letter dated 11th May 2005. When the Respondent again approached the Petitioner for construction of Groyne No. 10 by the letters dated 14th and 30th May 2005, it was rejected by the Petitioner by its letter dated 2nd June 2005. Meanwhile an alternative route for access to Groyne No. 9 was arranged by the Respondent. The AT did visit the site and the Respondent gave it a photographic presentation of the encroachments insisting on the access route. It is in the above circumstances that the AT held that the Respondent was entitled to reimbursement of the expenses incurred in removal and resettlement of encroachments.

65. However the AT noted that "the claimants have not given any evidence or analysis in support of the amounts claimed" and simply determined that "Rs. 20,50,000 is considered reasonable and is awarded against this claim." Likewise, even in respect of Claim No. 1 (ii) there was no discussion of any evidence presented by the Respondent to show that any crane hired by them was lying idle. The only way of proving that would have been to actually produce invoices or other documents. In fact, the AT notes "claimants have not furnished any record in support of their claims for idling charges for other plants and machinery."

66. The AT fails to explain why it has awarded Rs. 5 lakhs with regard to this claim. Consequently, as regards the Award of the aforementioned sums and claims, under Claim Nos. 1(i) and (ii), the Court finds that it is not based on any evidence whatsoever and cannot be sustained in law.

67. Claim No. 2 was for increase in depth of water by more than 2 meters at all Groynes. Here again it is submitted by learned counsel for the Petitioner that the revised design was prepared by the Respondent which was in the primary document and the BOQ flowed from that design and was a secondary document. The proposal of the final design and BOQ items were also accepted. It is submitted that the AT ignored this vital fact. It is submitted that the Respondent did not seek revision in rates given the execution of the work under the revised scope and preferred its claim more than one year after the completion of the work. It is submitted that the AT had travelled outside the scope of reference to decide the submissions and the pleadings made to it.

68. In response, it is submitted by Mr. Dhankar for the Respondent that the AT had reproduced Clause 4.2 of the contract and returned a finding that the intention of the contract was to make payment based on the stones actually dumped and recorded in the weigh bridge. The "As-built drawings" had been prepared by the consultation and contained an abstract of the executed quantities. These documents were never challenged by the Petitioner. The weigh bridge records were not questioned.

69. The Court finds that in discussing Claim No. 2 the AT noted that the revised

BOQ and designs were accepted by the Respondent by their letters dated 15th and 30th March 2004 with the proviso that all other conditions of the contract shall remain unchanged.

70. The AT noted the following deviations from the original contract in para 11.3 of the Award:

(i) Secondary layer, 1,33,000 MT, which was introduced as a new item, is much beyond the permissible limit of variation in quantities of BOQ items specified in contract. Clause 6.7 and rate not to be fixed in arbitrary manner as was done in this the case.

(ii) Armour stone was changed many fold from 0.7 to 1.0 MT in the original contract to 1.0 to 3.0 MT in the Groyne and 2.5 to 4.0 MT in the round head, involving different methodology and machinery for placing the stones.

(iii) Round-head of radius 25.M was introduced at the nose end of all the Groynes which was a new item of work incorporating placement of stones of much higher sizes 2.5 to 4 MT at depths ranging from (-) 5.5 to (-) 7M.

(iv) Substantial change in the sizes of stones in all layers.

(v) Rates were fixed in an arbitrary manner in the revised schedule e.g. filter material was priced at Rs. 110 per MT in original schedule but was revised to Rs. 105 per MT although higher sizes of stones were to be placed at greater depths."

71. The AT then came to the conclusion that since the work involved "substantial extra effort which was beyond the scope of original contract" it was as such "reimbursable." Further the final design of IIT Madras which was adopted in the execution stage indicated that approximately 60% by volume or 63% by weight of stones in the Groynes were to be placed at depths greater than (-) 3 meters. Therefore, the Award in this regard cannot be said to be based on no evidence at all. The view taken by the AT cannot be said to be irrational or perverse calling for interference.

72. Consequently, OMP No. 419/2013 is disposed of by setting aside the impugned Award dated 12th December 2012 under the third reference in respect of Claim Nos. 1 (i) and (ii) but upholding the said impugned Award in all other respects.

Summary of conclusions

73. Accordingly the Court:

(i) Dismisses OMP No. 23/2013 and upholds the impugned Award dated 10th September 2012 in respect of the first reference with costs of Rs. 10,000 which shall be paid by the Petitioner to the Respondent within four weeks.

(ii) Disposes of OMP No. 213 of 2013 by upholding the impugned Award dated 28th October 2012 under the second reference as regards Claim Nos. 1, 2A and 3 and modifying the amount awarded to the Respondent under Claim No. 2 B to

Rs. 14,22,292.50.

(iii) Disposes of OMP No. 419/2013 by setting aside the impugned Award dated 12th December 2012 under the third reference in respect of Claim Nos. 1 (i) and (ii) but upholding the said impugned Award in all other respects.