
(2013) 11 BOM CK 0120

In the Bombay High Court

Case No : Arbitration Petition No. 494 of 2007 Alongwith Arbitration Petition No. 105 of 2008

Jawaharlal Nehru Port Trust

APPELLANT

Vs

Afcons Infrastructure Ltd.

RESPONDENT

Date of Decision : 27-11-2013

Acts Referred:

Citation : (2013) 11 BOM CK 0120

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Pradeep Sancheti, sisted with Mr. Bhalerao, assisted with Ms. Hemali Kurne, assisted with Mr. Darshit Jain, instructed by Vyas and Bhalwal, for the Appellant; Chirag Balsara, A/w. Mr. Dhiraj Mhetra, instructed by . Desai and Diwanji, for the Respondent

Final Decision : Disposed Off

Judgement

Roshan Dalvi, J.—These two Petitions are filed U/s. 34 of the Arbitration and Conciliation Act, 1996 for setting aside the award dated 17th September, 2007 under two contracts entered by and between the parties for construction of the extension of Port Craft Berth at the premises of the Petitioner. Both contracts are contained in the letter of the Petitioner dated 25th February, 1999, 1st March, 1999 and the tender submitted by the Respondent dated 15th March, 1999 and 17th March, 1999 and further correspondence between the parties as set out in the letter of the Petitioner dated 1st September, 1999.

2. Under clause 17 of the contract between the parties they agreed to refer their dispute to two arbitrators, one to be nominated by each of them and the third to be nominated by the arbitrators. Under the arbitration clause the parties agreed that only the questions and disputes raised for the execution of the work until its completion would be referred to arbitration. The disputes arising thereafter would not be referred to arbitration except those relating to maintenance of the construction during the maintenance period. The disputes having arisen, an

arbitration has been invoked and undertaken. The award is challenged essentially upon the ground that it travels beyond the contract between the parties.

3. In that regard the Court would be bound and completely governed by the law laid down in the case of Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, .

4. The parties have referred to various clauses of the contract in paragraph 1 contained in part II with regard to claims of the Respondent herein which have been granted and the grant of which has been challenged.

5. It need not be even be mentioned that this Court, which is not an appellate Court, cannot go into the intrinsic calculations of the various specified amounts so granted. The main aspect to be seen is whether the arbitrators have exceeded the jurisdiction in going beyond the terms of the contract such as to rewrite the contract between the parties. Consequently it will be appropriate to take up the contentions of all the parties with regard to the grant of each of the claims and the challenge to each of the grants to determine the extent of the exercise of jurisdiction by the arbitrators.

6. Claim No. 1: This relates to payment for boring in diaphragm wall from RL + 6.8 meters (m) to 5.125 m at which level the diaphragm wall begins as shown in the claim diagram relied upon by the Petitioner.

7. Under clause 4.1.20 of the tender specification the boring was to be in clay, mud, boulders, gravel, but not basalt which was separately considered.

8. The Petitioner has explained by diagram how the boring in the diaphragm wall was to be done by the Respondent. There are guide walls on the either side of a berth. The Respondent was to construct guide wall and diaphragm wall. The boring of the diaphragm is specified in clause 4.9 of the contract. It would be from the level + 5.125 m. It is contended by the Petitioner that the Respondent could not claim the expenses of boring wall from any higher level. Under clause 4.9A the measurement for boring was to be downward from the level where the boring was to encounter the soil. Under clause 4.9 B the concrete used for this purpose would be the actual consumption being under, as shown in the drawings and ordered by the Engineer-in-charge of the Petitioner. Under that clause it was agreed that the construction actually consumed up to the limit of theoretical volume shown in the drawings would be paid. Hence it is argued that it would be actual consumption until the limit of the height of digging is reached. This is admittedly paid.

9. Bill of Quantity (BOQ) in the contract under clause 4b shows the quantity of the boring required. This would be boring into weathered basalt rock or sand but not basalt. The quantity agreed between the parties for such boring was 2280. It is contended by the Respondent that this was within this quantity.

10. The claim of the Respondent for such boring has been accepted by the arbitrators. The claim was made for "back filling" for propping the guide walls.

The arbitrators have considered that there was no boring in the technical specifications for such work and hence the method adopted by the claimants was taken to be not as decided under the terms of the contract. The arbitrators have also considered that the Petitioner herein never objected to such work. The arbitrators considered clause 4.9A. The arbitrators specially considered the condition of the contract that the measurement for such boring was to be downward from the level of the boring encountering the soil. The arbitrators further considered the estimate of the quantity which was within the aforesaid limit of 2280 and held that the Petitioner herein has not produced any evidence to show that the work of boring exceeded the quantity mentioned in the BOQ.

11. The claim is, therefore, seen to be within the aforesaid terms of the contract. The work is seen to be within the quantities specified in the contract. The work has been seen by arbitrators to be done as per the mode of excavation laid down in the contract. The claim is, therefore, rightly allowed.

12. Claim No. 2: This is in respect of short payment for the construction of the guide wall. Two guide walls are shown in the diagram of the claims relied upon by the Petitioners herein showing the level + 6.8 to 5.125 being the specified level in the contract. The claim is for constructing the said two guide walls.

13. The agreement with regard to the guide wall is contained in clause 4.3.2 of the contract. Contract stipulates two guide walls to be constructed on both sides of the diaphragm wall under the said clause. These walls are required to be suitably propped to maintain a specified tolerance. Clause 4A of the BOQ shows the quantity of 315 m for the guide walls on both sides (of the diaphragm) of the specified thickness mentioned therein.

14. It is the contention of the Petitioner that the Petitioner would have to pay for one running lane on both the walls since the guide walls have to be built on both sides of the diaphragm wall to hold it. It is argued that there could never have been a guide wall on one of the sides and hence whatever is the agreed rate between the parties would be for the guide walls and cannot be taken separately for both of them.

15. Under clause 1.4 of the BOQ the Respondent claimed to be paid for the actual payment of the work already carried out. The Respondent, therefore, claimed an amount for the actual quantity in the length of the two actual guide walls constructed on the either side of the diaphragm wall. It is contended on behalf of the Respondent that their claim as also the award does not exceed the quantity of 315 m in the BOQ for both sides of the diaphragm wall. This, therefore, is the pointer to the intention of the parties that for the quantity permitted for construction of the guide wall on both sides payment would be made up to the limit of quantity specified in the BOQ being 315m.

16. The arbitrators have considered that the Petitioners herein have not disclosed the excess of the constructed guide walls on the both sides of the diaphragm wall to the extent of the length of 315 m. The arbitrators have seen that the BOQ was

to be twice the length of the diaphragm wall. This is amplified in the diagram of the claimant relied upon by the Petitioners. The arbitrators have correctly considered the intention of the Petitioner to make payment for guide walls on both sides from diaphragm wall. Their observations that "otherwise reference to the length of 3.5 m of the guide wall is meaningless", is rather than meaningful. One side of the guide wall being length of 154.50 m which the Petitioner accepts for payment itself shows their contention being misconceived since it is about half of the quantity allowed under the BOQ. The arbitrators have also considered the drawings showing two "L" shaped guide walls on either side of the diaphragm wall and that the claimant was to be paid according to the actual quantity ordered and carried out under clause 1.1 and 1.4 of the BOQ.

17. It is argued that for technical matters the approval of the Engineer-in-charge was binding upon the claimant and that this was a technical matter under clause 82 of the contract. It has been rightly considered by the arbitrators that the decision of the Engineer-in-charge upon the technical matters would be only for the supervision of the work in terms of the contract.

18. Clauses a, b r/w. Clause c(ii) makes this position clear. It is further seen that the payment which is to be made upon the execution of the contract would be the contractual matter and must be guided by the terms of the contract for the determination of the payment. It is, therefore, however, arbitrable once the contract is executed and the claim is made. Hence the grant of claim No. 2 for the running length of the two guide walls within the BOQ of 315 m is within the terms of the contract and correctly granted.

19. Claim No. 3: is not disputed since it is of a small amount.

20. Claim No. 4: is for the extra rate for diaphragm wall construction under clause 52 of the contract. The parties have specified the power and authority of the Petitioners herein for making amendments, additions, alterations or changes or for giving further instructions or directions to the claimant to carry out certain work varying and altering the lines, levels and positions of the work specified in the contract. For such work upon such alterations the claimant was to be entitled to add or deduct the contract price based on the rates of the contracts. If such extra rate was agreed by the parties they would be governed by such rate; if not, the extra rates for such extra work had to be determined by the Petitioner. For that purpose the Respondent was to claim for extra work under a statement in writing given before the 10th day of every month for the work performed during the preceding month, failing which claims made later for any extra work was not to be accepted.

21. The extra rate for diaphragm wall construction is claimed under four heads a, b, c and d; 4a & 4d as also 6 & 7 being the same claims.

22. Claim Nos. 4a & 4d, 6 & 7: The Respondent claimed that they have put up additional work in respect of boring in quarry run. In its letter dated 2nd May, 2000 for the work done until 30th April, 2000 the Respondent showed that it had

completed 27 piles out of 28 piles in the bore craft work of boring in quarry run as annexed to the letters. In the other letter also dated 2nd May, 2000 the excess consumption of concrete and provision of steel plates on both sides of the re-enforcement used for the work has been claimed. This consumption was effected at the same time that boring from the quarry run material was done. Both the claims are, therefore, made within the period contemplated under clause 52. This additional work was informed to the petitioner under the later part of clause 52 which required the Respondent to inform the additional rates and price claimed for extra work performed during the preceding month before 10th of every month.

23. The Petitioner has claimed that the Respondent has been duly paid for all boring operations done upto the contract limit and that the Petitioner is not liable to make any extra payment because the Respondent has used extra concrete for boring or piping work whether or not it was informed.

24. The Respondent has not shown the entitlement to such additional consumption of material or work under any specific provision of the contract.

25. The agreement with regard to use of concrete in pipes for concrete actually consumed up to the specified limit of volume obtained as per gross section of the pipes under clause 4(4) and which has been paid by the Petitioner. Further consumption of concrete is, therefore, outside the limits of the contract and accordingly neither payable by the Petitioner, nor recoverable by the Respondent.

26. Claim No. 4b: In the pre-bid questions at the meeting dated 1st March, 1999 the claimant had wanted clarification that it would have boring operation only in murrum which is soft material soil for avoiding obstructions during the boring. The Petitioner had given specification of the reclamation work. They have specified that the materials used for reclamation would consist of quarry run material. They have also warned that the however, material may contain stones of boulders size. They had expressly specified that no claim of the contractor would be entertained if the quarry run material was not found in the area of the proposed work.

27. It is contended on behalf of the Petitioner that consequently the Petitioner contracted itself out of the liability to provide for extra rate for boring quarry run in the diaphragm wall construction.

28. It is argued on behalf of the Respondent that the obstruction of the quarry run was not foreseeable and hence under clause 23 of the contract such obstruction had to be informed to the employer for claiming the cost incurred by reason of such obstruction.

29. The Petitioner also relied upon clause 1.2.13 of the special applications annexed to the tender forming a part of the contract dated 17th September, 1999 in this behalf. Under this clause the Respondent was to carry out soil investigations. The information provided by the Petitioner was to be only to guide

the Respondent regarding the soil conditions. It specified in the conditions clause that no claim whatever would be entertained if the soil conditions would be different from those communicated in the tender document. Hence if the Respondent encountered any obstruction in the soil by quarry which was different from the soil conditions of murrum proposed in the area, the Petitioner contracted itself out of the liability to entertain any claim in that behalf. It would have to be seen whether the claim for extra rate for boring in the quarry was not enforceable by the Respondent in view of their own question No. 48. The question proceeds on a presumption that the filling through the land which was to be reclaimed would be only of murrum. The answer specifies that the filled material for reclamation purpose would consist of quarry run material. The Petitioner thereafter have studied that they would avoid such material as far as possible and instead use the filling of the murrum. Yet in the same answer the Petitioner has specified that no claim would be entertained if reclamation is to be in quarry run material. Once the Respondent puts a specific question prior to the contract and has been fore-warned, it cannot be stated that the Respondent could not foresee such conditions.

30. This would be because the filling in the area to be reclaimed was to be done through a third party in another contract entered into by and between Petitioner and such party. Though the contract of the Petitioner would be for murrum filling the Petitioner would not know if there was any object for such third party who may have used quarry run material instead.

31. The arbitrators have considered that when the Petitioner proposed filling of the area though under the contract it was implicit upon the Petitioner to see that the contract was for murrum filling and was so carried out. The Petitioner has relied upon tender specification under clause 4.1.20 showing that the boring was to be in three components which included basalt rock as also boulders along with clay, mud and gravel. It is, therefore, justifiably argued that the Respondent was put to notice that boring to be run in the reclaimed plan could be of any such form.

32. Indeed the answer to question No. 14 in the meeting 1st March, 1999 prior to the bid shows that the murrum filling was proposed in the area. The arbitrators have observed that the Petitioner had to take any steps to make it possible to have murrum filling only in the identified areas. Though murrum filling was proposed the arbitrators have considered this act of negligence and failure of the Petitioner to act upon promise/assurance. They have considered that there was no due diligence of the Petitioner in getting the filling of murrum from excavation contractor nor the other contract entered into by the Petitioner. (Mr. S.C. Thakur & Co.) At present the Petitioner has not shown the document relating to that contract and an adverse inference has been drawn for failure and neglect to produce that contract.

33. It would have to be seen whether the mere production of the contract would go further than the specific express warning in reply to question No. 48 as also in

clause 1.2.13 and 4.1.20. The non production of the contract may require the Court to presume that the Petitioner's contract with the excavation contractor specially specified the filling by murrum only. The non production of the contract cannot go further to fix additional contractual liability upon the Petitioner. It cannot be taken that the contract would show that it was for the Petitioner to inspect, observe or supervise the actual filling. In fact the contract of such kind would fix liability for the filling by murrum only upon the contractor. Filling by boulders or quarry run material would certainly constitute a breach of such contract and the non production of the contract may require the arbitrator or the Court to accept that fact. However, the specific contracting out by the Petitioner in reply to question No. 48 as also in clause 1.2.13 above is specifically in view of a breach by a third party which the Petitioner may not be able to prevent. The fact remains that such obstruction specifically asked for was clarified. The Respondent accepted the contract despite the disclaimer set out by the Petitioner. Hence unfortunate though it be, the Respondent would not be entitled to extra rate for boring in the quarry run instead of murrum. The award in respect of that claim exceeds the contractual limits of the work and would tantamount to an award made in excess of jurisdiction by the arbitrators.

34. A further claim under claim No. 4b is for providing and fixing plates on both sides of the diaphragm wall. These have been fixed upon the discretion of the Respondent so that the loose concrete which would move out whilst boring operation is in progress would be contained.

35. The claimant appears to have put the steel plates to control excess consumption of concrete whilst boring in the quarry run material which consumed greater amount of concrete than required or accepted.

36. The contract makes no provision for providing or fixing any such plates. The plates are not specified in the BOQ; they were to be only fixed because the construction was loosening whilst boring.

37. Under clause 2.1 the rates and prices set out in the BOQ was to be filled in accordance with the value of finished work specified in the list showing the quantity against the various specified works which also does not make any provision for fixing plates. In fact item No. 3 in the BOQ specifies the provision for steel re-enforcement which has been also made for which the Respondent is paid. Providing plates other than the steel reinforcement is not specified in the contract.

38. The arbitrators have considered that in the normal construction of diaphragm wall using steel plates is not the normal practise. These were provided only when the soil was of poor quality. The arbitrators have, therefore, granted the claim of the Respondent on the basis of quantum meruit for the actual work done not intending to do it gratuitously upon the bills/payments-cum-receipts produced by the Respondent. The extent of grant of quantum meruit cannot be gone into as in appeal if the award is in terms of the contract for which the claims are made.

When the contract is for specified items and no more and the specified items have been paid by the Petitioner, the provision of the plates which was the work genuinely done in the interest of the Petitioner by the Respondent and for which otherwise claim in quantum meruit would lie, would not stand the test of the grant in Arbitration.

39. It is held in the case of Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, , which dealt with the challenge to an award in a similar contract for excavation as in this case, that the contract had expressed prohibition and stipulation for non payment of any extra amount on any ground. It was held that there was specific term of the contract which did not permit extra amount to be paid on any ground for extra work done. The contract laid down a specific bar and an award passed by the arbitrator in respect of such claims would be in excess of jurisdiction requiring the Court to set it aside as a jurisdictional error.

40. As held in the case of Rajasthan (Supra) the award passed in disregard of the terms of the contract is in excess of his jurisdiction. Drawing from the case of Associated Engineering Co. Vs. Government of Andhra Pradesh and another, the Court accepted the contention that the arbitrator who acted in disregard of the contract acted without jurisdiction. This tantamounted to misconduct on his part and vitiated the award.

41. There was no escalation clause in the contract in the case of Rajasthan (Supra). Drawing from the case of Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, , the Supreme Court repelled the contention that it had to be seen from the terms of the agreement whether it permitted entertainment of the claim by necessary implication and that all that was not specifically excluded could be taken to be implied into the contract, a proposition which would mock at the terms agreed upon. It was held that the parties could not be allowed to depart from what they have agreed. Consequently thereafter no agreement can be implied in respect of plates. Though the Respondent would have been entitled on the basis of quantum meruit in a suit for reasonable work done in the interest of the contract but not intending to do so gratuitously, such payment would be ruled out in a contract required to be considered in arbitration. The consideration then would be in excess of jurisdiction. Hence it has been ultimately held that if there is specific term in the contract which does not permit or give the arbitrator to power to decide dispute raised by the claim or there is specific bar in the contract to raise particular claim, the award passed would be in excess of jurisdiction. Consequently claim No. 4 as awarded could not have been allowed and the award in respect of claim No. 4 (4a and 4b) is liable to be set aside.

42. Claim No. 5 pertains to the payment for core drilling in the diaphragm wall, boulders and the cone test. These three items are for the purposes of test.

43. Clause 1.3.3 deals with the test. Clause 1.3.3 specifies that it is in respect of field laboratory samples and testing of materials and finished product. The

finished product is concretised construction put up by the respondent. Under clause 1.3.3(a) all materials and all works were to be in conformity with the specification in the entire construction. The contractor was to set up an independent field laboratory with modern equipments to carry out tests for different materials and finished product according to the specification. The respondent as the contractor was to appoint the staff in the laboratory and set up its infrastructure of equipments and staff at its expense. This would, therefore, be for all specialized tests.

44. Under clause 1.3.3(b) the respondent herein was required to carry out quality control tests in the presence of the Engineer-in-charge of the petitioner or its representative.

45. Under clause 1.3.3(c) the tests were to be carried out at the risk and cost of the respondent herein as the contractor. These would be the tests as required by the Engineer-in-charge or his representative from time to time.

46. Under clause 1.3.3(d) the tests are to be carried out at the risk and costs of the respondent as the contractor.

47. Under clause 1.3.3(f) the tests have to be carried out as per tendered documents and as ordered by the Engineer-in-charge of the petitioner.

48. Under clause 1.3.3(g) the decision of the petitioner with regard to the number of tests to be carried out as required by it would be final.

49. Under clause 1.3.3(h) no extra payment is to be made to the contractor for carrying out any of these tests which are required to be at his cost.

50. The respondent as the contractor was directed to carry out certain tests in concrete under clause 3.3 of the contract. This falls under Chapter 3 of the work order. Under clause 3.3.1 a qualified and experienced Engineer-in-charge was employed for concrete quality control. Class of concrete to be provided was set out in the table in clause 3.3.2. For the testing of the strength of such concrete a 28 day test is required to be carried out on cubes taken at the works under clause 3.3.27. The Engineer-in-charge may direct additional test of the core samples to be taken from hardened concrete under clause 3.3.28(a).

51. The claim is made under clause 3.3.27. The tests are stated to be under the special clause of the contract being under Chapter 3.3 relating to concrete. It is contended by the respondent and it was accepted by the arbitrator that this was excluded from the general provision regarding tests under clause 1.3.3. It is the case of the petitioner that the testing for concrete, as much as any other material, falls squarely within 1.3.3 and is a part of the tendered documents under clause 3.3.28.

52. It is seen that clause 1.3.3 relates to the field laboratory to be set up for the testing of materials and finished product of which the concrete is the most important in the construction put up by the respondent. The strength of the

concrete would have to be tested from time to time. It involves a course of 28 days test on the cubes taken at the works. It is for this that the field laboratory is to be set up, manned by staff and equipped with modern equipments. It is impossible to take concrete testing out of the provisions relating to the testing of finished products in the field laboratory contemplated under clause 1.3.3. It is seen that the quality control tests are imperative to be carried out by the respondent upon the requirements of the Engineer-in-charge of the petitioner at the respondent's risk and cost as per specifications in tendered documents of which clause 3.3.27 and 28 relate to the specification of testing of concrete.

53. It may be mentioned that in the chapter of workmanship the other aspects relate to re-enforced concrete under clause 3.4, principal casts concrete under clause 3.5 shattering under clause 3.6, special features-concrete under clause 3.7 and steel work under clause 3.8. The construction would involve essentially concrete and steel. The quality control would, therefore, be required essentially for concrete and steel. The tests, therefore, would require to be carried out essentially for concrete and steel. It is for those tests that the contractor has to set up specific field laboratory with equipments and staff. It would be those tests that it would carry out as and when required by the Engineer-in-charge. The respondent has not been able to show any other tests which were required to be carried out under the contract which would merit the construction of a field laboratory contemplated under clause 1.3.3 as specifically required for the tests in respect of concrete and steel under clause 3.3.27 & 28. The said clauses, therefore, would have to be read together as they are seen to relate to the same aspect. The tests under clause 3.3.27 & 28 would be covered under clause 1.3.3(h). The respondent would have to bear all the costs for all the tests including the setting up of the laboratory itself. The tests in the diaphragm wall, the tests in the boulders, the tests of cone penetration of concrete cones would, therefore, be governed by the same clauses aforesaid.

54. It is argued on behalf of the respondent that the arbitrator rightly considered the special specifications of the contract relating to concrete which had to be read de hors the general clauses relating to the setting up of the field laboratory and the test of the finished product and hence concluded that the tests under clauses 3.3.27 & 3.3.28 were not covered under clause 1.3.3(d) & (f) as the concrete cubes were earlier confirmed to be in accordance with the tender requirement. It was also considered that those tests were not necessary but carried out as per the directions of the petitioner's representative and hence amounted to additional work for which the respondent as the claimant had to be compensated.

55. Once it is seen that the tests which were contemplated under clause 1.3.3 included the test of concrete for quality control purposes and once it is seen that the laboratory had to be set up and the petitioner's Engineer-in-charge could order the tests, it cannot be accepted that there was no need for such quality control. The quality control was as under the aforesaid provisions read together;

the tests had to be carried out whenever called upon in the laboratory set up by the respondent at his costs in accordance with the tender documents which included clauses 3.3.27 & 3.3.28 for the specialized raw material-concrete.

56. Since the contractor had to incur those costs, a claim in that behalf could not have been made. The amount awarded under that aspect would, therefore, be contrary to the terms of the contract and required to be interfered with.

57. Claim No. 6 & 7 are not separately pressed.

58. Claim No. 8 for dismantling the guide wall and removal of the dismantled material has been disallowed and appeal therefrom has not been filed.

59. Claim No. 9 is with regard to the reduction in the contract sum by (-) 10% claimed for justified enhancement of contract costs.

60. The Petitioner claims that such a claim can be made only after the entire contract is completed because only at such time would be parties be able to ascertain whether there was (+) or (-) in % of the contract price. If it was more than the bid amount it had to be accounted for. The Respondent claims the difference of 19% upon the contract price. The Appellant claims that since such a claim is to be made only after the completion of the work it would not form a part of arbitration agreement under the proviso to clause 75 of the contract which runs thus:

It is term of this contract that only questions and disputes as were raised during the execution of the work till its completion and not thereafter shall be referred to arbitration. However, this would not apply to the questions and disputes relating to liabilities of the parties during the maintenance period after completion of the work.

61. The clause refers to questions and disputes actually raised. It is not shown when the question and dispute would be raised. The question and dispute as to any additional amount payable for reduction in the contract sum was actually raised by the Respondent during the substance of the contract in accordance with clause 52 of the contract so as to claim it under clause 53 of the contract. The claim under clause 53 was payable after the work was completed because then the exact percentage of the variation would be calculated and ascertained.

62. The contract commenced on 17th September, 1999. The claim was made on 18th April, 2000. The completion certificate dated 17th October, 1999 showed the completion of the work by 28th September, 2002. It is claimed by the Petitioner that only after 28th September, 2002 can it be ascertained whether there was any variation in the contract price. The Respondent has shown the claim variation in the contract price at least upon an approximation during the progress of the contract itself. First such claim was made on 18th April, 2000. The letter of the Respondent shows that substantial variation in quantities of the subject work was likely on completion which was accepted to be (-) 18%. The Respondent also submitted the statement of the tentative projected quantities on

completion of the entire job. Of course, it must be conceded that the justification of the price would be possible only after completion of work. In the letter dated 31st August, 2001 the Respondents again submitted the reduction in the contract sum upon the claim of contract price justified to the extent of 20.60% as per the statement attached to that letter. Again on 5th October, 2001 the Respondents claimed the variation exceeding (+) (-) 10% as per the clause 53 to the extent of 20.69%.

63. The claim was raised during the execution of the contract three times. It was not raised thereafter. It had to be ascertained. But for the ascertainment the parties had dispute which was arbitrated.

64. The learned Arbitrators have considered the contract price being 14.34 Crores from the letter of acceptance and the value of the work being 11.28 Crores from the certificate of completion. They have computed the difference to be 17.66% and accordingly granted the adjusted contract price to that extent as per clause 53 upon considering the evidence led by the Respondent.

65. It can be seen that such adjustment had to be and was agreed to be made. The claim was pending within the contract period. The fact that it had to be granted upon computation after the period of the contract cannot take it out of the preview of the arbitral dispute.

66. The arbitration clause would have to be read as whole. Clause 75 shows all disputes between the parties to be referred to arbitration. These include the questions and disputes raised during the execution of the work and till its completion. What it, therefore, excepts is that only such disputes as may be raised for the first time after the date of the completion of the contract and no other. Where the work was not completed by the Respondent, the Respondent would incur costs but the amounts payable cannot be determined. Consequently the Respondent would require to make its claims as and when they are incur so that the Appellant would have notice of those claims and would also be in a position to inspect and ascertain the reason for the claims, if required. Of course, the claims in absolute figures shown in statement of the Respondents would have to be thereafter ascertained and calculated and the disputes adjudicated.

67. The arbitration clause cannot be read as specifically excepting a term of the contract being the term of variation under clause 53 merely because its precise computation cannot be done during the period of the contract.

68. The argument on behalf of the Appellant that the Arbitrators have themselves seen completion certificate which could be granted only after completion of the contract for determination the variation in price is misconceived because though claimed earlier, the actual ascertainment of the variation would be only taking into account a completion certificate showing the value of the work.

69. It is argued that clause 75 makes an exception for maintenance contract

which may be made after the contract period. That would be naturally so. The construction would be required to be maintained as per terms of the contract itself. The maintenance would commence after the completion of the contract. Hence the dispute with regard to the maintenance may be referred to arbitrator even after the certified completion of the contract. That, however, does not except the other terms of the contract which can not be computed during time the contract was in force and which upon being computed became enforceable.

70. Consequently the argument that the claim No. 9 could not have been made and could not have been granted cannot be and is not accepted. Having seen that the claim can be made and having seen that the learned Arbitrators have considered the best possible manner of determining the extent of the variation by accepting as the best value, the calculation cannot be interfered with.

71. Claim No. 10 is in respect of reimbursement for the increased in cost of steel under clause 6.4 of the contract.

72. The clause shows the tender prices of steel to be based on the specified basic prices of steel and cement and structural steel with regard to the high strength development reinforcing steel, FE 415(steel) manufactured by TISCO and SAIL. The prices mentioned in the contract were Rs. 20,000/- per ton. The variation of the prices of steel other than that was not to be paid. If there was to be any increase or decrease in the cost of the material, such increase or decrease was to form an addition or deduction to or from the contract prices. Such addition or deduction would be paid upon the measured quantities of the work under Clause 53 of the contract.

73. The Respondent has not shown any increase or decrease in the cost of FE 415 Steel of TISCO and SAIL. Hence the question of addition or deduction to or from the contract prices would not apply. It is the claim of the Respondent that they could not obtain FE 415 Steel. They have obtained letters from TISCO and SAIL in that regard. The letter of SAIL was forwarded by the Respondent to the Petitioner under cover of its letter dated 11th October, 1999 which letter specified that FE 415 steel was not in regular production in SAIL and, therefore, there was no consistent supply. They offered FE 500 Steel instead. Consequently the Respondent wrote to the Petitioner that they had received such a letter and requested the Petitioner to allow the Respondent to use steel of higher grade than that specified in the contract. The Respondent claims that the Petitioner did not object to the use of the higher grade of steel.

74. The Petitioner claims that the higher cost for the higher grade of steel to be used was not requested or accepted by the Petitioner. It is argued on behalf of the Petitioner that the contract between the parties specified contract of the specified materials based upon the BOQ where rates were fixed and could not be varied because the items were not available.

75. It is also shown that the letter of TISCO which was dated 20th March, 2002 which was obtained much later. It does not mentioned about FE 415 steel at all.

It mentions about CRS 42 product which is stated by the Respondent to be an alternative product, but which was manufactured only at the plant in Jamshedpur and could not have been sent except upon a specified contract. Of course, since that was also not FE 415 steel, it does not matter whether the Respondent had ordered the alternative quality of steel.

76. It is the case of the Respondents that as shown in the two separate letters of SAIL and TISCO, they could not obtain FE 415 steel. Hence they obtained FE 500 steel from SAIL upon informing the Respondents of higher grade for such steel.

77. The Arbitrators have interpreted clause 6.4 of the contract. They have observed that the Respondents were compelled to use FE 500 steel manufactured by TISCO and SAIL. The variation in prices only of that steel could be allowed. The variation of prices of any other steel was not to be paid. However, the variation of the prices which was to be allowed only for FE 415 steel of TISCO and SAIL could have been allowed only if the produce was available. Only then the variation could have been seen. When the product itself is not available, the question of variation would not arise. The Respondent would require to use the higher variety of steel and only claim the exact increase costs of such purchase and which they have not done under claim No. 10. The learned Arbitrators have observed that the Respondent had no option but to use FE 500 steel which incidentally is of higher quality. They have also observed that if the Petitioner had any reservation, they should have made it clear when the Respondents requested the change of steel. Under their letter dated 11th December, 1999. The learned Arbitrators have considered that it was not that the Respondent, without reference to the Appellants, changed the quality of steel and claimed increased costs. The aforesaid correspondence considered by the Arbitrators shows that they requested better steel. The argument that the Petitioner would not reject better steel, but the Respondent could not obtain the increased cost of better steel in view of the contract beats conscience. The learned arbitrators have not granted the additional cost only as quantum meruit or on equitable considerations but upon the reasoning that under the aforesaid letters of TISCO and SAIL which are shown not to have been refuted by the Appellant show that the quality of the steel agreed was itself not available allowing the Respondent to use better quality of steel albeit at proportionate higher cost. Hence that claim is rightly allowed and cannot be interfered with. Claim Re interest: The Petitioner has also claimed that interest on interest has been granted by the Arbitrators which is illegal. The award shows interest @18% p.a. claimed by the Respondents from 1st January, 2001 till payment. The learned Arbitrators have granted simple interest @ 12% p.a. on the award amount from 3rd June, 2002 until the date of the award. On the said award amount they have granted further simple interest @12% p.a. from the date of the award till the date of payment. The grant of interest is contemplated u/s 31(7) of the Act. The interest granted until the date of the award would be in the discretion of the arbitrators under subsection 7(a) thereof for a reasonable rate. The grant of interest from the date of the award is in fact statutorily to be @18%

p.a. except if otherwise directed which, in this case, is directed to be @12% p.a. Interest is, therefore, correctly granted. Hence the following order:

ORDER

1. The awards passed and challenged in both the Petitions are confirmed and maintained except under claim Nos. 4 and 5.
2. Interest granted under the aforesaid awards is also confirmed.
3. It may only be clarified that the interest amount would be paid on the principal amount as the award amount. The principal + interest till the date of the award would not constitute the award amount.
4. Both the Arbitration Petitions are disposed off accordingly.