(2012) 10 BOM CK 0029

In the Bombay High Court

Case No : Arbitration Petition No. 162 of 2009

M/s. Angerlehner Structurals and Civil Engineering Co. APPELLANT

Vs

Municipal Corporation of Greater Mumbai RESPONDENT

Date of Decision : 01-10-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 28(3), 34, 34(4)

Citation : (2012) 10 BOM CK 0029

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Z.T. Andhyarujina with Ms. Dohita Lewis, Mr. Javed Gaya instructed by Chamber of Javed Gaya, for the Appellant; Kevic Setalwad, with Ms. Daisy Dubash and Mr. H.C. Pimple, for the Respondent

Judgement

Anoop V. Mohta, J.—This is a petition u/s 34 of the Arbitration and Conciliation Act, 1996 (for short, "the Arbitration Act"). The majority award is under challenge.

Events:-

In the month of August, 1999 bids invited by the Mumbai Municipal Corporation (for short "MMC"). On 12 September, 1999, the Petitioners submitted its bid. On 21 September 2000, awarded them the Contract for Rehabilitation of sewer lines by Lining/Coating method (Contract : SO/CA/02) for the price of US$ 44,06,347.00 plus Indian Rupees 10,29,01,768.00. On 2 March 2001, an Agreement SO-CA-02 ("Contract") was executed between the parties. The contract was initially for a period of 24 months, but was extended on justifiable grounds to nearly 29 months with the date of commencement as 11 January 2001 and the extended date of completion as 31 May 2003.

2. On 14 March 2001, letter from the Engineer (MMC) to the Petitioners, informing them that M/s. TTI Consultants have been appointed as the "Consultants" under the Contract. On 11 April 2001, work order issued by the

Engineer to the Petitioners, pursuant to which they commenced their work under the Contract. The work successfully completed within the time stipulated in the Contract.

3. This works contract was partly financed by the World Bank and in all such contracts there is a provisions for price adjustment if the contract extends beyond 18 months. Accordingly clause 70.3 of the COPA contained a price adjustment formula that was to be applied to the payments made under the contract. The Petitioners used to prepare and raise its Bills (including price adjustment for local currency) from time to time based on the agreed contractual formula. However, the consultant rejected the Bills citing a discrepancy in the contractual formula and unilaterally altered the same and calculated the amounts that were due and payable to the Petitioners and released the amounts to the Petitioners. On 14 February 2002, the Petitioners requested that this issue be resolved. On 12 October 2002, Consultant''s letter addressed to the Petitioners informing them that no extra claim was permissible due to the Petitioners'' misinterpretation of the contractual formula. On 20 August 2003, the Petitioners'' letter submitted copies of the Statement of completion to the Engineer and sought payment under the contract on the basis of the Interim Payment Certificates (IPC''s).

4. On 1 December 2003, Dy. Chief Engineer, MMC''s letter to the Petitioners that its claim for non-payment of certain dues on account of formula of price adjustment had not been accepted by them. The Petitioners were informed that the price adjustment claim had been admitted as per the "corrected formula recommended by the Consultant".

5. On 5 June 2004, the Petitioners'' letter to the Engineer informing him that they were going to approach the MMC for its final opinion and scrutiny pursuant to clause 67 of the GC/COC.

6. On 24 June 2004, the Petitioners'' letter to the DRE informing him that his claim was wrongly rejected by both the Engineer and the MMC. On 23 September 2004, the DRE recommended that the Petitioners have been paid correctly in accordance with the changed formula.

7. On 21 October 2004, a Notice of Arbitration given by Petitioners to the MMC, nominated Dr. Harald Wagner as its Arbitrator. On 29 October 2004, a letter by the Respondents to Mr. Sharad Upasni, Former Chief Secretary of the Government of Maharashtra appointing him as their Arbitrator. On 15 December 2004, the reference was made to the President of Institute of Engineers (India) to appoint a third and presiding Arbitrator. On 11 July 2007, dissenting Award of Dr. Harald Wagner in favour of the Petitioners. Majority Arbitral Award of Mr. S.P. Upasani and Mr. S.L. Garg rejecting the Petitioners'' claim entirely.

8. On 10 October 2007, the Petitioners filed the present Arbitration Petition. On 5 January 2012, the Respondents filed reply. On 11 June 2012, the Petitioners filed rejoinder to the reply filed by the Respondents. Annexed as Annexure I to this

rejoinder is Award dated 18th April, 2012, passed in other similarly placed matter (AJECT V. MCGM). This Award was, as alleged, made on the legal principles in relation to the same formula, as in the instant case, drafted by the same Consultant (M/s. TTI Consultants) and a copy of this Award was issued by the Arbitral Tribunal presided over by Mr. Ajit Pawar, a former head of the PWD Dept. and two retired High Court Judges, namely Mr. S.K. Shah and Mr. B.P. Saraf.

Submissions:-

9. The relevant portion of the submissions of the Petitioners is as under:-

5. Sub-Clause 70.1 and 70.3 of COPA provide for Price Adjustment. According to these Sub-Clauses amounts payable to the Claimant, in various currencies, are to be adjusted for rise or fall in the cost of labour, equipment, plant, materials and other inputs to the works, by applying to such amounts the formula prescribed therein. It is further states that price adjustment shall be calculated for the local and foreign components of the payment for work done as per formula given in the contract data.

6. As per Sub-Clause 60.1, the Contractor is mandated to submit monthly statements to the Engineer showing the amounts the contractor considers himself to be entitled. The statement is also to include amounts reflecting changes in cost pursuant to Clause 70. As per Sub-Clause 60.2 the said statement is to be approved or amended by the Engineer in such a way that in its [Engineer''s] opinion, it reflects the amounts in various currencies due to the contractor in accordance with the contract. The Engineer is mandated to determine amount due to the Contractor and to issue an ''Interim Payment Certificate'' to the Employer certifying the amounts due to the Contractor.

7. The relevant formula referred to in Sub-Clause 70.3 of the contract are as under:-

A. R=RI+RF

B. Where ''R'' is the total value of the work done during the month, ''RI'' is the portion of ''R'' as payable in foreign currency at fixed exchange rate.

C. The other formula governing value of price adjustment of various components of works are:-

8. It may be noted that all formula at Paragraph 7(c)(i) to paragraph 7(c)(vii) above contain the term ''R'' in them to be used for calculating the value of price adjustment component for various parts of the work."

9. ...

10. The Petitioner had made its Bid on the basis of what it read it was entitled to including the price adjustment formula and that is demonstrated by Sub-Clause 70.2 of the Contract "To the extent that full compensation for any rise or fall 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 rise or fall of costs" cautions the prospective bidder that it needs to take into account the provisions made in the price variation clauses while preparing and quoting its price bid.

10. The learned Senior Counsel for the Respondents submitted to maintain the award, by referring to the clauses and the supporting majority Arbitrators'' reasons, apart from the Judgments so relied.

11. The power of the Court to interfere with the interpretation given by the Arbitral Tribunal is quite limited. The view if possible and plausible then also scope is limited. Jigar Vikamsey, An Indian National Vs. Bombay Stock Exchange Limited,

12. The Petitioners have also in support of the challenge, relied on Central Bank of India Ltd., Amritsar Vs. the Hartford Fire Insurance Co. Ltd. AIR 1965 SCC, 1288 , State Bank of India and Another Vs. Mula Sahakari Sakhar Karkhana Ltd., Bishwanath Prasad Singh Vs. Rajendra Prasad and Another, and Haji Abdul Rahaman Vs. The Bombay and Persia Steam Navigation Co. (1892) 16 Bom. 561.

13. The Learned Counsel appearing for the Petitioners has also relied on Tamil Nadu Electricity Board Vs. M/s. Bridge Tunnel Constructions and others, . The relevant portion of the same is as under:-

If he makes an award disregarding the Contract it would be a jurisdictional error beyond the scope of the reference, he cannot clothes himself to decide conclusively the dispute as it is an error of jurisdiction which ultimately requires to be decided by the Court.

14. There is nothing provided to deal with correction or interpretation of agreed formula. The Respondents counsel has relied upon the following judgments to support the award in every aspects.

a) National Highways Authority of India Vs. Unitech-NCC Joint Venture .

b) National highways Authority of India Vs. Unitech-NCC Joint Venture, (2011) 178 DLT 496 (DB)

c) William Charles Binns Vs. W. & T. Avery Ltd., AIR 1934 Calcutta 778.

d) Dagdu Valad Jairam & Ors. Vs. Bhana Valad Jairam & Ors., 28 B. 420(=6 Bom. L.R. 126)

e) Mumbai Metropolitan Region Development Authority Vs. Unity Infraproject Ltd.,

15. It is relevant to note here the following clauses of the contract and all the terms and conditions.

Priority of Contract Documents-

5.2 The several documents forming the Contract are to be taken as mutually explanatory of one another, but in case of ambiguities or discrepancies the same shall be explained and adjusted by the Engineer who shall thereupon issue to the Contractor instructions thereon and in such event, unless otherwise provided in the Contract, the priority of the documents forming the Contract shall be as follows;-

1) The Contract Agreement (if completed);

2) The Letter of Acceptance;

3) The Tender;

4) Part II of these Conditions;

5) Part I of these conditions; and

6) Any other document forming part of the Contract.

Sub-Clause 70.1 Price Adjustment

70.1 The amounts payable to the Contractor, in various currencies pursuant to Sub-Clause 60.1 shall be adjusted in respect of the rise or fall in the cost of labour, contractor''s Equipment, Plant, materials, and other inputs to the Works, by applying to such amounts the formulae prescribed in this clause.

Sub-Clause 70.3 Adjustment Formulae

70.3 Contract price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures as per formula given in the contract data, the amount certified in each payment certificate is adjusted by applying the respective prices adjustment factor to the payment amounts due in each currency:

(a) Price adjustment shall apply only for work carried out within the stipulated time or extensions granted by the Employer and shall not apply to work carried out beyond the stipulated time for reasons attributable to the Contractor, shall be paid in accordance with sub-clause 70.6;

(b) Price adjustment shall be calculated for the local and foreign components of the payment for work done as per formulae given in contract data; and

(c) Following expressions and meanings are assigned to the value of the work done during each quarter:

R= Total value of work done during the month. It would include the value of materials on which secured advance has been granted, if any, during the month, less the value of materials in respect of which the secured advance has been recovered, if any, during the month. This will exclude cost of work on items for which rates were fixed under variations clause (51 and 52) for which the escalation will be regulated as mutually agreed at the time of fixation of rate.

RI= Portion of ''R'' as payable in Indian Rupees.

RF= Portion of ''R'' as payable in foreign currency (at fixed exchange rates)

R= RI+RF

To the extend that full compensation for any rise or fall 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 rise or fall in costs.

16. The parties having once agreed and acted upon the clauses and accepted the formula, the heavy burden lies upon the employer-Respondents to demonstrate that there was mistake and it was never intended to act upon. The Respondents, therefore, need to prove that the price escalation was to be calculated currency-wise and not on the basis of R, but R-1. The Respondents must prove that there is apparent ambiguity in the document and in the formula, otherwise, it is difficult to accept the submission that such unilateral clarification and/or amendment to the agreed formula, is permissible and so also its effect on the claim raised by the Petitioners.

17. The Arbitral Tribunal and/or even the Court needs to consider the nature of work/project and its technical aspects, while considering the agreed clauses and conditions and the formula. Admittedly, the contract was signed on 11 May 1999 which was in relation to micro-tunneling works at various locations in Mumbai, which was partly the World Bank aided works. There is no question of change of agreed formula unilaterally. The parties, in fact, acted upon the same. The issues arose at later stage, in view of the doubt raised by the experts. The terms and conditions and/or formula is clear and there is no vagueness, the view if takes by the Arbitral Tribunal, based upon the same, the interference of the Court, as recorded, is limited. But, the things are otherwise. By changing/amending the formula unilaterally the decision is given. There is no question of such restriction on the power of the Arbitral Tribunal and/or on the Court to interpret the clauses read with the original formula.

No bar to look into the minority view:-

18. Two views based upon the same terms and conditions including the questionable formula are on record. The learned majority Arbitrators rejected the claim/case of the Petitioners. The learned dissenting Arbitrator, however, passed the order in favour of the Petitioners. Under the Arbitration Act, majority views prevailed for all the purposes. There is nothing under the Arbitration Act not to read and refer the view expressed by the dissenting Arbitrator. The Court u/s 34 of the Arbitration Act, even otherwise, considering the material placed on record, may pass the order supporting and/or against the majority views or independently take a particular view, which may, in a given case, by accepting the view/opinion of the dissenting Arbitrator. There is no bar that the Court cannot just take into consideration both the views and pass appropriate order

based upon the material available on record.

Unilateral change in agreed formula not permissible:-

19. Admittedly, there is a dispute with regard to the agreed formula and its applicability. Everyone concerned, bound by the terms and conditions of the contract read with the agreed formula. In such type of construction contract, the contractor and/or such other person always take note of terms and conditions and the basic formulas before executing or accepting the contract/work. The Respondents and/or the employer also bound to read, refer and rely the same for every purpose. In the present case, we are concerned with the important element of the formula "price adjustment". In the clauses and the formulas, there are various components like labour component, cement component, steel component, increase and decrease in cost of bitumen, POL, local materials, plant and machinery and foreign currency component. There is no dispute that, as advertised and as agreed, the contract was accordingly signed and the parties proceeded, and in fact as recorded above, the Petitioners completed the project also. The Petitioners, admittedly, received part interim payment based upon the agreed formula.

20. It is settled law that out of two or three formulas available under the construction contract and in case of vagueness and ambiguity, the Arbitrator based upon the facts and circumstances, as submitted by the concerned party, if preferred one formula out of it, and passes the award, the Court may not entertain the objections to such mode. McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, . If there is some confusion and/or clarification is required to the formula, as submitted by the learned Senior Counsel appearing for the Respondents based upon the clauses of the contract, the concerned officials and/or the Executive Engineer bound to explain and/or clarify the ambiguity and/or discrepancy based upon the documents on record. The power of clarification or the discrepancy, even if any, so referred and mentioned in clause 5.2, in my view, cannot be read and permitted to be read that the employer can amend and/or change the formula itself. It is a commercial contract. The parties knowing fully the effect of the clauses read with the formula so agreed, considering the nature of construction executed the contract. Both the parties acted upon accordingly, therefore, such agreed terms and conditions and/or formula, in my view, just cannot be altered and/or amended unilaterally and basically without consent of the other party, in such fashion.

21. The submission raised by the learned Senior Counsel appearing for the Respondents based upon the various judgments cited and referred that the interpretation given by the Arbitrator and/or experts and/or Engineers, just cannot be interfered with, by the Court. The possible interpretation and/or view expressed by the experts and/or Arbitrator and as settled, the Court normally reluctant to interfere with it. But, in the present case, the Respondents/employer, unilaterally changed the agreed formula without consent of the Petitioners and refused the claim made by the Petitioners. The power of clarification and/or

removal of doubts or discrepancies of the existing formula, cannot be equated with the power of unilateral change and/or correction in the formula itself. It is impermissible. It is clear breach of the contract.

22. First of all, there should be a clear case of removal of ambiguity and/or vagueness in the formula. This contemplates pre-existence of the agreed formula. In the present case, we are not dealing with such situation. Admittedly, as recorded above, the Respondents, on a foundation of "mutual mistake" unilaterally, changed the clauses of the formula itself and refused to grant the claim so made by the Petitioners. Sub-clause 70.3 (i) to 70.3 (vii), the term "R" has been used by the Respondents through out. The commercial understanding of the word and its meaning as elaborated, remained unchallenged till this date. There is nothing on record to show that the Respondents, at any point of time, sought clarification and/or amendment to the formula, at earliest. Both the parties, therefore, are bound to treat "R" as "R" throughout. Once each and every items of formula and/or the clauses are defined since the beginning, it cannot be changed. The payment/calculation needs to be based upon unchanged formula. I am not inclined to accept the submission of the Learned Counsel appearing for the Respondents-Corporation that it can be changed and/or interpreted at any point of time. The terms and conditions and the clauses, so announced and agreed, unless altered by consent of the parties, bind all, for all the purposes.

The binding effect on the monetary claim and the agreed formula:-

23. The another angle of the matter is, as submitted, that the use of "R" and its meaning, if accepted as contemplated by the Petitioners and/or the claimants, it would be contrary to the spirit of the contract. Admittedly, this agreed formula and its terms referring to price variation, play important role so far as the monetary claim is concerned. The formula so announced and agreed was known and so also the nature of project and/or the work. Therefore, the submission revolving around the concept of "mutual mistake" is also unacceptable, as there is no material whatsoever, brought on record by the Respondents-employer to justify the same. There was opportunity available with the Respondents either to amend the same at the earliest, pending the execution of the work, and/or during the course of Arbitration proceedings to lead evidence to support their case of "mutual mistake". The submission and/or the averments of mutual mistake, just cannot be accepted unless there is a clear and apparent material and/or documents and/or evidence of the parties to overwrite and to take away the written agreed formula and its financial effect on the claim. All these things are missing in the present case. There is no question of unilateral rectification.

24. The parties, including the Arbitral Tribunal, in view of the settled position of law, bound by the terms and conditions of the contract, so also the agreed formula. this Court in Haji Abdul Rahman Allarakhia and Anr. Vs. The Bombay and Persia Steam Navigation Company (1892) 16 Bom 561, has observed as under:-

A plaintiff seeking rectification must show that there was an actual concluded contract antecedent to the instrument sought to be rectified, and that such contract is inaccurately represented in the instrument.

25. The Apex Court in D.C.M. Ltd., etc. Vs. Municipal Corporation of Delhi and another etc., has observed as under-

13. The arbitrator was required to examine the narrow question whether the formula had been properly applied. It was not open to him to examine the correctness or otherwise of the formula. He had to examine how the formula had been worked. The formula had clearly set out the various factors to be taken into account.

The arbitrator, therefore, was not right in distorting this formula by removing the factor of transmission and distribution losses from calculation of the units sold. The arbitrator''s jurisdiction was confined to examining whether the calculations were in accordance with the formula. Therefore, in effect, the arbitrator has acted beyond the scope of his reference in eliminating an important factor in calculation of the formula.

The Similar contract and same formula, but different view by another Tribunal and its effect:-

26. It is relevant to note that, in the present case, an application was moved by the Petitioners to bring on record another award passed by the Arbitral Tribunal arising out of similarly placed contract and the work, where the Respondents were party. The same was rejected as it was placed on record on 19 September 2006 at quite late stage of the Arbitration proceeding. The submission of the Learned Counsel appearing for the Respondents was accepted and the learned Tribunal not permitted the Petitioners to place on record the said award and the additional material on record, basically by observing that no new evidence can be taken on record at the time of rejoinder. The Petitioners have raised issue out of the same even in this Section 34 Petition. The copy of the award was also placed on record. Normally, there is no question of accepting the new documents on record for the first time in Section 34 Petition. The Presiding Arbitrator, as well as, one of the Arbitrator who was the Arbitrator in the present matter, were fully aware of the reasoned award so passed based upon the similar terms and conditions and the formulas, apart from similar nature of the work.

The important documents placed at late stage:-

27. The Arbitrator, normally needs to follow the basic principle of CPC (for short, CPC) and/or the Evidence Act. But, at the same stroke, it is not binding for all the purposes. The documents and/or material, though placed at rejoinder stage, but goes to the root of the matter and in the given case important for the final adjudication, pending before them, in my view, just cannot be overlooked even by the Arbitral Tribunal. The provisions of CPC and/or the Evidence Act are not applicable, this itself also means in a given case, those necessary restrictions

also. If the case is made out, considering the principle of natural justice, fair-play and equity, the Arbitral tribunal can take note of all these evidence and/or documents, as it goes to the root of the matter. There is no serious dispute with regard to the award so passed in respect of M/s. Arabian Jacking Enterprises for Contracting and Trading Company (AJECT) Vs. The Municipal Corporation of Greater Mumbai (MCGM) dated 18 April 2012. The submission was made that the facts and circumstances were different. But, after considering the same formula and the submission, the same Respondents have been directed to pay the amount with interest. The similar submissions revolving around the right of Respondents to change the formula unilaterally and/or by mutual mistake and/or it was only with the interpretation of the terms and conditions, were rejected.

The formula, cannot be changed unless consented at earliest:-

28. I am inclined to observe here that in such commercial agreements and basically when both the parties agreed and acted upon, just cannot be change any clause and/or clauses of formula unilaterally, unless there is consent and/or the further agreement and/or amendment recorded accordingly. The concept of opportunity at relevant time is very relevant while amending any clause of the agreement. In a given case, the either party may provide justification and/or clarification and/or oppose the same at the relevant time itself, before proceeding with the project. In the present case, immediately after three bills, the dispute arose. The Petitioners referred and objected to such amendment and/ or modification of formula. The experts of the Respondents gave their opinion. The contractor, however, never accepted the same. The fact remains that the formula so agreed initially sought to be amended and/or changed by the Respondents pending the project and thereby rejected the claim. The Petitioners, if not willing to give consent and/or never agreed to change the agreed formula, it was a matter of dispute at the relevant time itself. In my view, this is not the case of discrepancy and not a case of clarification. It is a clear case where, the Respondents want to unilaterally amend the formula itself, which in my view, just not permissible without giving full opportunity to the parties. The conclusion, therefore, given by the majority Arbitrator in this matter, by overlooking the similarly placed award. The party, one who makes a positive statement referring to interpretation of the clauses, if failed to prove the same and/or failed to support the same, this destroy their own case. This supports the claimant''s case that the agreed formula was intended for all the purposes. The majority Arbitrator, therefore, in my view, committed an error in rejecting the claim of the Petitioners.

29. Considering overall view of the matter and the award so placed on record, "M/ s. AJECT", the minority view required to be maintained. But under the Arbitration Act the Court, u/s 34, nowhere permitted to accept the minority view, in such manner. The challenge u/s 34 Petition is always to the majority award, therefore, to set aside the majority award itself, in no way means acceptance of the minority award in the present case. In such situation, the appropriate order will

be to remand the matter for re-consideration on all points.

30. I have already, based upon the Supreme Court Judgments, observed in GWL Properties Ltd. Vs. James Mackintosh & Co., Arbitration Petition No. 272 of 2010 dated 16 March 2012, referring to Jigar Vikamsey, An Indian National Vs. Bombay Stock Exchange Limited, that-

(d) The jurisdiction of the Court to interfere with an Award made by an Arbitrator is limited, unless there is an error apparent on the face of the Award and/or jurisdictional error and/or legal misconduct. Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd., .

(e) The wrong point of law and apparent, improper and incorrect findings of facts which are demonstrable on the face of the material on record, may be treated as grave error and/or legal misconduct.

31. I have already observed in Axios Navigation Co. Ltd. Vs. Indian Oil Corporation Limited 2012 Vol. 114 (1) Bom. L.R. 0392

19 The Court even otherwise, is entitled and empowered to express opinion on merits of the matter if case is made out even by setting aside the majority view/ opinion. It cannot be stated here that the Court ought not to have looked into the reasons given by dissenting Arbitrator''s opinion. Any opinion given by any of the Arbitrator whether by majority and/or by minority, if based upon the valid foundation of law and the record, just cannot be overlooked by the Court u/s 34 of the Arbitration Act, 1996. The Court''s independent reasonings irrespective of the reasons given by the majority and/or minority Arbitrator should prevail.

32. In view of above, the judgments so cited by the learned senior counsel appearing for the Respondents, need no further discussion. The facts are totally distinct and distinguishable. I have already recorded that this is not the case of the interpretation of the formula and the clauses. It is case of unilateral amendment of the formula. The judgments, therefore, so sited, in my view, nowhere sufficient to reject the case and/or the submissions so made by the Learned Counsel appearing for the Petitioners. The formula in question and the unilateral change of the structure of the formula was not the issue in the judgments so cited. This is not a case of mere interpretation of the formula without changing its structure and the items. The submission revolving around Section 28(3) of the Arbitration Act is also of no assistance. It is not even a case of rectification of term or formula or interpretation of agreed formula. It is relevant to note and conclude by referring to following paragraph of Dhulipudi Namayya Vs. The Union of India AIR 1958 AP 533

Thus, the mere fact that a new and a collateral terms is annexed to an absolute acceptance would not affect the formation of the contract on the basis of the original offer which is unconditionally accepted. As observed in the case of AIR 1949 211 (Federal Court) .

If after a contract is concluded and its terms settled further negotiations are started with regard to new matters, that would not prevent full effect being given to the contract already existing, unless it is established as a fact that the contract was rescinded or varied with the consent of both the parties or that both parties treated it as incomplete and inconclusive. Once completed, the contract can be got rid of only with the concurrence of both parties.

The remand is permissible mode to avoid further delay:-

33. Section 34 (4) of the Arbitration Act, permits the Court to remand the matter for particular point and/or points and so also the CPC (for short, "CPC"). I have already observed in Angel Capital Angel Capital & Debt Market Limited Vs. Mr. Sharad Munot, Arbitration Petition No. 972 of 2009, dated 31 August 2012, that if all issues and/or all points are inter-linked and/or inter-connected, the limited points and/or issues just cannot be remanded back for a fresh adjudication. In the present case, the whole case revolving around the formula in question, therefore, there is no question of remanding back the matter on a particular point. I am inclined to keep all points open and thereby granted opportunity to both the parties to make their submission afresh before the Arbitral Tribunal. If the Arbitral Tribunal and/or its members are not available, the parties are at liberty to take appropriate steps to reconstitute the Tribunal. In the facts and circumstances, just by quashing the award, I am not inclined to delay the proceedings further, so far as the settlement of dispute between the parties. The parties, by consent, subject to permission of the Tribunal, may proceed based upon the same material and/or evidence available on record, or even in a given case may lead additional evidence by consent and/or by obtaining appropriate permission from the Tribunal. The requirement is an early disposal of the Arbitration proceeding. No case to interfere with the cost so awarded. In the result following order:-

ORDER

a) The impugned majority award dated 11 July 2007 is quashed and set aside, except the award of cost.

b) The matter is remanded back for re-consideration, by giving opportunity to the parties.

c) All points are kept open.

d) The hearing is expedited.

e) The parties to take steps accordingly.

f) The Petition is accordingly allowed partly.

g) There shall be no order as to costs.