

(2012) 03 DEL CK 0655
In the Delhi High Court
Case No : CS (OS) No. 1375 of 1989

Nangia Construction (India) Pvt. Ltd.	APPELLANT
Vs	
National Building Construction Corporation Limited	RESPONDENT

Date of Decision : 14-03-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 20, 3, 30, 33, 41

Citation : (2012) 190 DLT 685

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Raman Kapur, with Mr. R.P. Singh, for the Appellant; Ginny J. Rautray, for the Respondent

Judgement

Justice S. Muralidhar

1. These are objections under Sections 30 & 33 of the Arbitration and Conciliation Act, 1940 ("Act") by the Respondent National Building Construction Corporation Ltd. ("NBCC") to an Award dated 30th October 2010 of the sole Arbitrator.

2. The work of widening of four lanes including strengthening of existing pavement of National Highway No. 1 from Km. 50 to Km. 74.80 (Murthal to Smalkha) in Haryana was awarded by Haryana PWD B&R (hereinafter called as "Clients") to NBCC for a sum of Rs.9,43,92,969.46. An agreement dated 24th August 1987 was entered into between NBCC and the Clients. On 26th October 1987, NBCC entered into a separate contract with the Petitioner Nangia Construction India Pvt. Ltd. ("NCIPL") on a back to back basis whereby NCIPL was to be an associate contractor for the whole work.

3. The date of start of the contract was 1st November 1987 and the period for completion was 42 months ending on 30th April 1991. Clause 4 of the agreement dated 24th August 1987 prohibited the NBCC from subletting the whole of the work. However, NBCC entered into the agreement dated 26th October 1987 with

NCIPL on back to back basis with 5% margin money for NBCC, on the terms and conditions governing the agreement between NBCC and the Clients, with certain additional terms and conditions incorporated in the agreement between NBCC and NCIPL.

4. In the agreement between NBCC and NCIPL, NBCC is referred as "Corporation", NCIPL as "Associate Contractor" and the Haryana PWD as "Clients". The relevant Clauses of the agreement read as under:

Clause No.4

All payments and mobilization & other advances, securities, payments for escalation, arbitration award or any other payment received by the "Corporation" from the "Clients" in connection with the said work shall be released to the "Associate Contractor" after deducting 5% margin of the Corporation within a period of 10 working days from the date of receipt of the same by National Building Construction Corporation Ltd. from the Clients. Similarly, any liabilities, recoveries, penalties, compensation etc. that may have to be paid to the "Clients" shall be borne entirely by the "Associate Contractor". The final payment to the "Associate Contractor" shall be based on the actual quantity of the work executed and paid by "Clients" at the unit rates attached herewith as per Annexure-I after making adjustment for 5% on the gross amount as margin of the Corporation and also after deducting the intermediate payment made as above.

Clause No. 9

Before accepting the levels, measurements, payments etc. the corporation shall consult the Associate Contractor or its authorized representatives to find out whether the same are in order. Any discrepancies pointed out by the Associate Contractor or his agent shall be duly brought to the notice of the Clients by the Corporation.

Clause No. 10

In case any penalties are levied by Clients on account of delay in completion of works or any other cause the same would be borne entirely by the "Associate Contractor".

Clause No. 13

The Corporation reserves its right to rescind this contract on account of breach of any condition(s) of this contract by the "Associate Contractor" or if the Corporation is not satisfied at any time, during the pendency of their contract with the arrangements made or being made by the "Associate Contractor" from time to time. The Corporation shall have the right to get the balance work completed at the risk and cost of "Associate Contractor". In case the "Associate Contractor" leaves the job incomplete, the balance of the work shall be got done at the risk and costs of the "Associate Contractor" and extra cost if any incurred

by the "Corporation" shall be recoverable in full from the "Associate Contractor" by confiscating the plant and machinery and other assets or dues of the "Associate Contractor". This will be over and above any compensations/penalty that may be levied by the Clients.

Clause No. 14

All disputes, differences or questions arising out of or in connection with this contract between the "Corporation" and the "Associate Contractor" shall be referred to the sole arbitration of an arbitrator to be appointed by the Chairman-cum-managing Director of the "Corporation" and shall be subject to Indian Arbitration Act, 1940 modified upto date.

Clause No. 15

In case the "Associate Contractor" desires that any of the matters relating to the "agreement" between the "Corporation" and "Clients" should be referred to the arbitration as per relevant clauses of the "Agreement: the "Corporation", after mutual discussions, shall ask the "Clients" to appoint an arbitrator for the purpose. Statement of facts for these matters/claims shall be submitted by the "Associate Contractor" and presentations thereof before the Arbitrator shall also be done with the assistance of the representative/legal adviser of the "Associate Contractor". However this does not prevent "Corporation" to approach Clients directly, if required. 95% of the expenditure incurred directly by the "Corporation" will also be borne by the "Associate Contractor".

Clause No. 20

The "Associate Contractor" has agreed to complete the work within the stipulated time as mentioned in the "Agreement" between the "Clients" and the "Corporation". The "Associate Contractor" shall not vary or deviate from the condition and specifications of the contract. It has been noted and clearly understood by the "Associate Contractor" that if it fails to complete the construction of the work in accordance with the schedule and that if the "Corporation" is dissatisfied about the quality of the work and material used and/or workmanship, the "Corporation" shall, without prejudice to any other rights, which the "Corporation" may have in this regard under the provisions of the agreement and the law, be entitled to terminate the contract and complete the same from other source, as may be decided by the "Corporation" at the risks and costs of the "Associate Contractor".

Clause No. 22

The "Associate Contractor" has clearly understood and taken note of the relevant clauses of "the agreement" between the "Corporation" and the "Clients" and has agreed to perform fully all the obligations, and maintain all documents as stipulated therein and has agreed to perform and maintain other documents, which may further hereinafter be required for the said works.

Clause No. 29

All the interpretation of the various clauses of contract/agreement by the Clients is binding on the "Associate Contractor.

5. The Clients by a letter dated 30th May 1988 approved subletting of the work to NCIPL only for three items i.e. (i) General and Site Clearance (ii) Earthwork Embankment and (iii) Cross Drainage Works, total of Rs.2.49 crores. By its letter dated 19th April 1989, NCIPL protested against the above decision and requested for recognition as "assigned/sub-contractor". In response to this, by letter dated 18th May 1989, the Clients informed NBCC that the subletting of the entire work to NCIPL was in contravention of the terms and conditions of the contract.

6. On account of several factors, the work was delayed. According to NBCC although 42.80% of the time elapsed, NCIPL completed only 5.5% of the work. NBCC wrote on several occasions to the NCIPL regarding the slow progress and gave notices to get the work completed at the risk and costs of NCIPL. The Clients wrote to the NBCC on 18th May 1989 asking them to terminate the contract with NCIPL except the three items for which subletting was approved.

7. By a letter dated 19th May 1989 NBCC terminated its contract with NCIPL. At this stage it may be mentioned that NCIPL had furnished to the NBCC Bank Guarantee dated 19th November 1987 for the mobilization advance in a sum of Rs.89,67,332/-valid up to 30th April 1990. NCIPL also furnished NBCC a performance guarantee dated 7th December 1987 for an identical sum valid up to 31st May 1992. NCIPL states that it submitted five running bills between 26th March 1988 and 28th February 1989 to NBCC. According to NCIPL although NBCC received 89 lakhs in one lump-sum from the Clients on 23rd November 1987, it was disbursed to NCIPL in three instalments. The first instalment of Rs.35 lakhs was released on 24th December 1987, the second instalment of Rs.32 lakhs in March 1988 and the third instalment of Rs.22 lakhs in April 1988.

8. Simultaneously, with the termination of the contract, NBCC informed NCIPL that it was encashing the bank guarantee towards mobilization advance as well as performance guarantee. NCIPL filed Suit No.1375-A of 1989 in this Court u/s 20 of the Act. It also filed I.A. No.3945 of 1989 u/s 41 of the Act praying that NBCC should be restrained from terminating the contract and from encashing the two bank guarantees. On 26th May 1989, a statement was made on behalf of NBCC to the Court that no steps would be taken by it to encash the bank guarantees.

9. Meanwhile, NBCC took up the work on its own but no progress could be made. The Clients terminated the contract with NBCC on 5th October 1989 for three reasons. The first being slow progress of work, the second misutilisation of the mobilization advance and the third being the subletting of the work to NCIPL in violation of Clauses 3 and 4 of the General Conditions of Contract ("GCC").

10. In Civil Suit No.1375-A of 1989 this Court by an order dated 29th May 1989

allowed the application for appointment of a Local Commissioner (LC) to carry out the measurement of the work. The LC submitted a report to the Court on 18th September 1989. Meanwhile the Court permitted NCIPL to make certain amendments to the application. The case of the NCIPL was that encashment of the bank guarantees by NBCC was a fraudulent act since NBCC had obtained those guarantees from NCIPL on a misrepresentation that they had permission to sublet the entire work. NBCC however denied the allegations and maintained that the invocation of the bank guarantees was well within the scope of those guarantees.

11. By a detailed judgment dated 23rd April 1990 [reported in *Nangia Construction India (P) Ltd. Vs. National Buildings Construction Corporation Ltd. and Others*,] a learned Single Judge held that prima facie the NBCC had not disclosed the truth of the matter to the Clients and had taken guarantees for amounts larger than the one which it ought to keeping in view the limited permission that had been granted by the Clients for three items only. It was held that the NCIPL had made out a prima facie case. NBCC was restrained from encashing the two bank guarantees and NCIPL was directed to keep them alive till the final disposal of the application. The challenge to the above order was negated by the Division Bench and the Supreme Court.

12. The above order of the learned Single Judge resulted in the bank guarantees being extended from time to time after 1996. However, after NCIPL failed to deposit the charges for renewal, this Court by an order dated 15th February 1999 permitted the encashment of bank guarantee by NBCC but directed that the amounts shall be kept by NBCC in a fixed deposit. The Bank of India ("BOI") which had issued the bank guarantees was aggrieved by the above order since its charges were not paid. BOI filed FAO (OS) No.81 of 1999 before the Division Bench of this Court. By an order dated 26th October 1999, the appeal was dismissed. Thereafter by an order dated 15th May 2008 in Civil Appeal No. 1315 of 2001 the Supreme Court permitted the encashment of the bank guarantee by NBCC. Pursuant thereto on 7th July 2008, the bank paid the moneys to NBCC. By an order dated 26th July 2010 this Court observed that within the passage of time, NBCC was no longer required to keep the said amount in a fixed deposit.

13. By an order dated 31st July 1991 the learned Single Judge noted that an Arbitrator had been appointed to adjudicate the disputes between NCIPL and NBCC. Pursuant thereto, Mr. P.N. Gadi was appointed as Arbitrator. He entered upon reference on 14th March 1991. Meanwhile, in regard to the dispute between the Clients and the NBCC, the arbitration clause was invoked and a three-member Committee of Arbitrators (COA) was appointed to adjudicate the disputes between the Clients and NBCC.

14. According to NBCC, it wrote to NCIPL on 6th March 1991 informing it that the COA had been constituted to decide the disputes between NBCC and the Clients and that NCIPL could inform NBCC if it desired to refer any matter falling within Clause 15 of the agreement to the COA. However, NCIPL did not respond to the

said letter.

15. Mr. P.N. Gadi, the learned Arbitrator adjudicated the disputes between the parties and passed an order dated 8th October 1994 holding that Claim Nos.1,3,7 and 15 by NCIPL were not referred to him and therefore, were beyond his jurisdiction. NCIPL then filed a petition u/s 3 of the Act being O.M.P. No.9 of 1995. By an order dated 25th January 2001, this Court set aside the said order dated 8th October 1994 and held that prima facie the above claims were covered by Clause 14 of the agreement dated 26th October 1987. Since no reason had been given by the learned Arbitrator for rejecting the claims in his order dated 8th October 1994, the said order was set aside and the issue was remanded to the Arbitrator for a fresh decision. The Court was informed that Mr. P.N. Gadi had expired and Mr. P.B. Vijay was appointed as an Arbitrator in his place by the letter dated 10th July 2000 issued by the CMD, NBCC. This Court then required the parties to appear before the learned Arbitrator, Mr. P.B. Vijay on 19th February 2001.

16. On 24th February 2001, the learned Arbitrator Mr. Vijay passed an order holding that Clause Nos. 1,3,7 and 15 were within the jurisdiction of the Arbitrator as per Clause 14 of the agreement. Seven years later NBCC sought to agitate the same issue by filing an application dated 15th December 2008. In dismissing the said application and reiterating the order dated 24th February 2001, the learned Arbitrator in his order dated 31st March 2009 observed that nearly 8 years after the order dated 24th February 2001, NBCC was seeking to re-agitate the said issue even while the earlier order of the learned Arbitrator had not been challenged by it. The plea of NBCC that the order dated 24th February 2001 of the learned Arbitrator had rendered under Clause 15 redundant was rejected by observing that NBCC had operated the said clause by exercising the option of approaching the Clients directly.

Scope of reference

17. Ms. Ginny J. Rautray, learned counsel for NBCC first objected to the learned sole Arbitrator Mr. Vijay having entertained and decided Claim Nos.1,3,7 and 15 of the NCIPL. She submitted that these claims were beyond the scope of the reference. It is submitted that the order dated 25th January 2001 of the Court was itself not an order of reference of those claims to arbitration. NCIPL ought to have applied to the CMD, NBCC on the basis of the said order seeking reference of Claim Nos.1, 3, 7 and 15, which had been excluded from the letter dated 10th July 2000, to arbitration. Relying on the decision in Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, and Grid Corporation of Orissa Ltd. and Another Vs. Balasore Technical School, , it is submitted that the above claims were not in fact referred and therefore could not have been decided by the learned Arbitrator. It is submitted that the reference was made only under Clause 14 of the agreement dated 26th October 1987. It is further submitted that the liability of NBCC to NCIPL was limited to the amount paid to NBCC by the Clients in respect of those very claims. Since, the said

amounts had to be paid to the NBCC, it was incumbent on the NCIPL to claim the said amount from the Clients under Clause No.15. NCIPL despite having an opportunity refused to participate in the arbitration against the Clients. Relying on the judgment in Vinayak Vishnu Sahasrabudhe Vs. B.G. Gadre and Others, , it is submitted that the Arbitrator derives his authority from the reference which furnishes the scope of his jurisdiction.

18. In reply it is submitted by Mr. Raman Kapur, learned Senior counsel for NCIPL, that the same points have been repeatedly agitated by NBCC before the learned Arbitrator on two occasions i.e. on 24th February 2001 and 15th December 2008. On both occasions they were rejected by the learned Arbitrator giving cogent reasons. It is therefore not open to the NBCC to keep re-agitating the said issues without challenging the said orders of the learned Arbitrator. Moreover, as pointed out by the learned Arbitrator, NBCC had chosen to take up the disputes with Clients directly by invoking Clause 15. The scope of Clause 14 of the agreement was wide and was not subject to Clause 15.

19. The above submissions have been considered. An analysis of Clause Nos.14 and 15 of the agreement dated 26th October 1987 between NBCC and NCIPL shows that Clause No.14 talks of "all disputes, references or questions arising out of or in connection with the contract" whereas Clause No.15 gives an option to NCIPL to request NBCC to refer certain disputes to arbitration after mutual discussions. However, that did not prevent NBCC from approaching the Clients directly and in that event, 95% of the expenditure incurred by NBCC would be borne by NCIPL. It does appear that NBCC opted for the alternative course in Clause No.15 and had the disputes between it and the Clients directly referred to the COA for arbitration. Since it was an option exercised by NBCC itself, it could not thereafter insist that all the disputes between it and the NCIPL in terms of Clause No.14 could not have been referred to arbitration. Secondly, the order dated 25th January 2001 passed by this Court in O.M.P. No.9 of 1995 was not challenged by the NBCC. Thirdly, the learned Arbitrator by two separate orders dated 24th February 2001 and 15th December 2008 held that Claim Nos.1,3,7 and 15 were within his jurisdiction. NBCC cannot be heard to challenge the jurisdiction of the learned Arbitrator after having participating in the arbitral proceedings continuously for several years. The said objection of the NBCC is, therefore, rejected.

Res Judicata

20. It is next contended that the Award dated 1st February 1999 of the COA was binding on the learned sole Arbitrator in respect of the claims of NCIPL (except Claim Nos.5, 6, 12, 14, 18 & 19). Relying on the decision in K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another, , it is submitted that the principles of res judicata and constructive res judicata apply to arbitration proceedings. It is submitted that the issues in the arbitration before the sole Arbitrator insofar as they have been heard and decided by the COA could not be heard and decided by the sole Arbitrator. It is

pointed out by Mr. Kapur, learned Senior counsel for NCIPL that this issue was also raised by NBCC before the learned Arbitrator who rejected it by the order dated 31st March 2009.

21. There is merit in the contention of NCIPL that since NBCC participated in the arbitration proceedings without challenging the above order of the learned Arbitrator and without raising these objections at the time when this Court was approached by NCIPL for extension of time for completion of the arbitral proceedings, NBCC should not be permitted to raise this objection at the present stage. Against the order dated 1st February 2007 passed by this Court in O.M.P. No. 50 of 2005 extending the time for completion of the arbitral proceedings, NBCC filed an appeal in the Supreme Court but did not raise these objections even at that time.

22. In any event, there can be no manner of doubt that NCIPL not being a party to the arbitral proceedings between NBCC and the Clients, the award rendered by COA cannot constitute *res judicata* in respect of the claims of NCIPL before the sole Arbitrator. In fact, the Clients did not recognize NCIPL at all since Clause 4 of the GCC prohibited NBCC from subletting the entire work to NCIPL. In fact, one of the reasons for the Clients to terminate the contract itself was that NBCC had violated terms of contract by sub-contracting the work to NCIPL. However, as will be noticed hereafter, the learned sole Arbitrator has, wherever the claims have overlapped, gone by the Award of the COA.

Claims 1 and 3

23. The next objection of NBCC to impugned Award concerns the decision on the claims and counter claims. It is submitted that learned sole Arbitrator erred in awarding NCIPL Rs.8,78,443/-towards rise of price of material, "Petrol, Oil and Lubricant" ("POL") and labour as per the price adjustment clause. It is submitted that the learned Arbitrator has already paid the said sum under Claim No. 1 while accepting the Award dated 1st February 1999 of the COA.

24. A perusal of the impugned Award shows that the NCIPL had in its written submission restricted Claim No.1 to Rs.185.66 lakhs. The learned Arbitrator went by the Award of the COA in respect of Counter Claim No.3 of the NBCC in the arbitral proceedings by the Clients against it. The said decision was based on the LC's report. The COA determined the work done and the material lying at site and the extra items to be Rs. 85,81,561. After giving a rebate of 2.4% on the work done as per agreement (Rs.65,65,654) and a sum of Rs. 46,13,433 already paid by the Clients to NBCC in respect of the 2nd RA Bill, it was held that a sum of Rs. 38,10,771 was payable. Counter Claim No. 3 of NBCC against the Clients was for reimbursement of escalation on labour and materials (Rs.9,35,931.07 + 3,22,896.22 as interest). The COA allowed a total sum of Rs.3,04,526/-as price variation with the break-up as under:

Labour & Material Rs. 1,19,663

Steel Rs. 53,181

Cement Rs.1,31,682

25. After adding the above sum the balance payable worked out to Rs. 41,15,297.

26. The learned sole Arbitrator while deciding Claim No.1 of NCIPL took the above figure as the basis since it represented "the collective wisdom of 3 learned members." After accounting for the 5% margin payable to NBCC he held that a sum of Rs. 39, 86, 748 was payable by NBCC to NCIPL.

27. However, while dealing with NCIPL's Claim No. 3 which was for a sum of Rs. 8,78,443 on account of "rise of prices of material, POL and labour wages based on price adjustment clause existing in the main agreement" the learned sole Arbitrator observed that "while the claim for price variation for steel and cement is covered under Claim No. 1, price variation on remaining materials, POL and labour as per formula provided in the contract, has not been paid". The learned Arbitrator appears to have committed an obvious error in coming to the above conclusion. A perusal of the Award of the COA indeed shows that the said Award in respect of the Counter Claim No. 3 dealt with not only escalation in the prices of steel and cement as per the formula in the contract but labour and materials as well. It also accounted for the price variation in respect of POL as can be seen in the detailed discussion in Counter Claim No. 3 in the Award of the COA.

28. Consequently, the Award of Rs.8,78,443/-under Claim No. 3 by the learned sole Arbitrator was not tenable in law and requires to be set aside. To this extent, the objection of the NBCC is upheld.

Counter Claim No.1 & Claim 5B

29. The next objection is as regards to the rejection of the sole Arbitrator of NBCC's Counter Claim No. 1. Interestingly, what was claimed by NBCC was not the entire unrecovered amount of mobilization advance in the sum of Rs.67,25,500/-but only the interest thereon in the sum of Rs.27,23,800/-. The contention herein is that under the Award dated 1st February 1999 of the COA, the mobilization advance of Rs.70,79,472/-was awarded in favour of the Clients. Consequently, it was contended that in view of the cancellation of the contract between NCIPL and NBCC this amount had to be returned by NCIPL. On the other hand, under Claim No.5B, the learned sole Arbitrator has directed the refund of the amount forfeited against aforementioned bank guarantees.

30. As noticed hereinbefore, NBCC on its own made a statement before this Court that it would not encash the bank guarantees. That commitment was continued by NBCC at various stages up to the Supreme Court. Ultimately, the bank guarantees were permitted to be encashed in 2008. The claim itself having decided against NBCC both by the COA as well as the sole Arbitrator the question of payment of interest by NCIPL on the said amount does not arise. In any event the mobilization advance was interest free and no interest was claimed by NCIPL under its Claim No.5B. The learned sole Arbitrator was therefore justified in

rejecting Counter Claim No. 1(b).

31. The allowing of Claim No.5 B of NCIPL was consequential on the judgment of the learned Single Judge dated 23rd April 1990. In para 153 of the said judgment, it was held that "it appears prima facie from Annexure-N written by NBCC that the entire amount of mobilization advance has been utilized in connection with the project and therefore the condition that the mobilization advance can be recalled if there is misappropriation, cannot be met." This Annexure-N was a letter written by the NBCC to the Clients that recovery of the mobilization advance be postponed till October 1988. This, in fact is borne out from the Award of the COA where in relation to the Claim No. 4 of the Clients concerning "uncovered portion of mobilization advance" it was noted that the Clients have paid NBCC mobilization advance of Rs.94,39,296.65 out of which the Clients could recover Rs.23,59,824.95 from interim payments.

32. The learned Single Judge, noted in para 139 of the judgment dated 23rd April 1990, the submission of NCIPL that NBCC starting making recoveries of the mobilization advance from the running bills submitted by NCIPL with effect from May 1988 even while it represented to Clients that the said recoveries by the Clients should be postponed till October 1988. The learned Single Judge accepted the plea of NBCC that there was no warrant to encash the mobilization advance guarantee to the extent of Rs.67,25,500/-which also implied that NBCC had already recovered Rs.23,59,824/-from NCIPL.

33. Apart from the above prima facie findings, it also appears that NBCC was not able to counter the submission of NCIPL that in fact it had utilized the entire mobilization advance amount in the works performed by it till the date of termination of the contract. Once the said termination was held to be legally unsustainable then the consequence had to follow. The case for denying NCIPL the amount representing the encashed bank guarantee did not exist. The impugned Award in respect of Claim 5 B does not call for interference.

Counter Claim No. 2

34. Ms. Ginny J. Rautray, learned counsel for NBCC, next assailed the impugned Award to the extent it only partly allowed Counter Claim No.2 which was for a sum of Rs. 10,24,893 being the "unrecovered advance" given to NCIPL during the execution of the work. Since NCIPL admitted to receiving Rs. 5.5 lakhs only that amount was awarded to NBCC. Handing over a compilation of documents, Ms. Rautray sought to demonstrate that in terms of the report of the LC, NBCC had made payments to NCIPL in the sum of Rs. 10,24,983. NCIPL categorically denies receiving anything more than Rs.5,50,000. It is pointed out by Mr. Kapur that three of the payments appear to have been made in the month of March 1989 by way of demand drafts but no receipts have been produced.

35. It is not possible for the Court at this stage to re-examine the evidence in order to hold that the award in respect of Counter Claim No.2 was erroneous. That would be beyond the scope of the jurisdiction of this Court under Sections

30 and 33 of the Act. The Award in respect of Counter Claim No.2 is therefore upheld.

Counter Claim No.4

36. It was then submitted by Ms. Rautray that the Award in respect of Counter Claim No. 4 was erroneous. Counter Claim No.4 was for Rs.5,03,517/-on account of hire charges of plant and machinery. From the reply filed by NCIPL before the learned Arbitrator, it appears that NBCC had included the charges of the vibratory road roller up to 5th October 1989. With the contract having been itself terminated on 19th May 1989 no hire charges were payable beyond the date of termination. The learned Arbitrator held that both the parties have failed in performing their reciprocal obligations and therefore this Counter Claim did not survive.

37. The amount claimed in the sum of Rs.5,03,517/-did in fact include the hire charges for the period beyond the termination of the contract. From the reply of NCIPL it is seen that the hire charges upto 19th May 1989 was Rs.2,32,080/-and beyond the said date it was Rs.2,71,437/-. Claim No. 1 made by the Clients against NBCC was for the entire sum of Rs.5,03,517/-for the entire period from 9th January 1989 upto 5th October 1989. Clearly, therefore, NBCC cannot seek to recover the entire sum from NCIPL. NBCC can recover a sum of Rs.2,32,080/- but without interest from NCIPL. To this extent the impugned Award is modified.

Conclusion

38. In conclusion the impugned Award dated 30th October 2010 in respect of Claim No.3 in favour of NCIPL for a sum of Rs.8,78,443 is set aside. Counter claim No.4 of NBCC to the extent of Rs.2,32,080 is allowed. In all other respects, the impugned Award is upheld.

39. On the recomputed sum NCIPL would be entitled for pendente lite simple interest at 12% per annum from 19th August 1989 till the date of the Award and post-Award interest at 12% per annum from the date of the Award till the date of payment.

40. The impugned Award dated 30th October 2010 as modified to the above extent is made rule of the Court. Decree be drawn up accordingly. The suit is disposed of.