

(2012) 11 DEL CK 0197

In the Delhi High Court

Case No : FAO (OS) No. 48 of 2012

National Highways Authority of India

APPELLANT

Vs

Hindustan Construction Company

RESPONDENT

Date of Decision : 08-11-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Environment (Protection) Act, 1986 — Section 3(1), 3(2)(v), 5

Limitation Act, 1963 — Section 14

Citation : (2013) 1 ARBLR 10 : (2013) 196 DLT 498 : (2013) 135 DRJ 200

Hon'ble Judges : Vipin Sanghi, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Sandeep Sethi with Ms. Padma Priya, Ms. Meenakshi Sood and Ms. Preeti Gupta, for the Appellant; Pravin H. Parekh, with Mr. Sameer Parekh, D.P. Mohanty, Vishal Prasad, Ms. Ritika Sethi and Ms. Suman Yadav, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—A contract was awarded by the appellant to the respondent/contractor for construction of the Allahabad by-pass project in U.P. vide agreement dated 02.06.2004. The project stands completed. However, certain disputes arose inter se the parties qua different aspects of the contract and in view of the arbitration clause, the same were referred to arbitration. We may note that the appellant has a Dispute Resolution Board (DRB) consisting of technical experts in the field, to which matters are first referred to. Since the respondent was not satisfied with the opinion of the DRB, in terms of the agreement, the respondent could and, therefore, did invoke the arbitration. The disputes in the present case culminated in a reference to arbitration of three technical persons who have made the award dated 30.03.2010. The award is unanimous on certain aspects while, on other aspects, there is a dissenting view of one of the arbitrators. The appellant being aggrieved by both the unanimous view and the majority view preferred objections u/s 34 of the Arbitration and

Conciliation Act, 1996 (the Act), which have been rejected by the learned Single Judge vide the impugned order dated 30.11.2011. We may notice that there are two sets of objections registered as O.M.P. Nos. 455/2010 and 456/2010 to two arbitral awards both dated 30.03.2010, which have been dealt with by this common order relating to the same contract but arising out of two different references to the same arbitral tribunal. Reference No. 1 related to Dispute Nos. 1, 2, 3 and Reference No. 2 related to Dispute Nos. 4, 5, 6 and 7. It was agreed that the present appeal, which arises out of the order in O.M.P. No. 456/2010 may be taken up separately as the issues are distinct from the other.

2. Learned senior counsel for the appellant submits that there are three aspects which are required to be examined in the present appeal:

- i) The extra amount awarded for the making of embankment;
- ii) The allowing of the claims of the respondent qua toll tax and service tax on transportation imposed by a subsequent legislation;
- iii) The award of compound interest even post the award period and that too on both the principal and the interest amount.

3. We now proceed to deal with the aforesaid three aspects though not in seriatim.

The allowing of the claims of the respondent qua toll tax and service tax on transportation by a subsequent legislation:

4. The imposition of tax through a subsequent legislation is, admittedly, akin to the issue of additional royalty, which already forms subject matter of adjudication in various pronouncements of this Court. This issue was once again examined in a recent pronouncement in FAO (OS) No. 451/2012, titled National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd., decided on 18.09.2012. Thus, while considering appeals on the same issue raised by the appellant in FAO (OS) No. 49/2012 and 433/2012, we considered it appropriate only to extract the reasoning already recorded in Oriental Structural Engineers Pvt. Ltd. (supra) rather than once again pen down the same thought which is already reflected in our aforesaid judgment by this Bench. Thus, for dealing with this issue, we follow the same course of action and reproduce our observations as under:

2. The learned Single Judge has noted that the challenge to the award was primarily made in respect of Claims No. 1 & 3, i.e., the claim for payment of additional cost caused by subsequent notification increasing sales-tax on fuels from 2.5% to 5% and the claim for payment of additional cost caused by subsequent notification increasing royalty on soil, sand and boulders, which were allowed by the Arbitral Tribunal, apart from the grant of interest. The learned Single Judge has observed that these issues are covered by Division Bench judgments of this Court in National Highways Authority of India Vs. ITD Cementation India Ltd., , and M/s OSE-GIL J.V. Vs. National Highways Authority

of India, FAO (OS) 347/2010 decided on 09.02.2011. The learned Single Judge rejected the appellant's submission that the Court should await the decision of the Supreme Court in Special Leave Petitions preferred by the NHAI against the aforesaid decisions of the Division Bench, being SLP (Civil) No. 21466/2011 titled National Highways Authority of India & Another Vs. M/s OSC-GIL J.V. and SLP (Civil) No. 9799/2010 titled National Highways Authority of India Vs. ITD Cementation Limited, wherein leave has been granted by the Supreme Court.

3. The learned Single Judge has also rejected the submission of the appellant founded upon the Supreme Court decision in Union of India (UOI) and Others Vs. West Coast Paper Mills Ltd. and Another, , to contend that this Court should, in view of the pendency of the Special Leave Petition, defer the hearing of the objection petitions to await the decision in the said Special Leave Petitions by observing that similar request had been declined by the Division Bench of this Court in the appeal of M/s OSE-GIL J.V.

xxx xxx xxx xxx

6. On merits, the submission of learned counsel for the appellant is that the learned Single Judge should have awaited the decision of the Supreme Court in the two Special Leave Petitions aforesaid and not dismissed the objection petition. Before us as well, reliance is placed by the appellant on the judgment of the Supreme Court in West Coast Paper Mills Limited (supra).

7. Having heard learned counsel for the appellant and considered the decision of the Supreme Court in West Coast Paper Mills Limited (supra), we are of the view that there is no merit in the present appeal and, consequently, we do not consider it necessary to issue notice on the appellant's applications seeking condonation of delay. The question of our entertaining the application for stay of the impugned judgment, therefore, does not arise.

8. It is not in dispute that the Claims No. 1 & 3 allowed by the Arbitral Tribunal in favour of the respondent are totally covered by the judgments of the Division Bench in ITD Cementation Limited (supra) and M/s OSE-GIL J.V. (supra). In fact, the aforesaid decision in ITD Cementation Limited (supra) has even subsequently been followed in Larsen & Toubro Limited Vs. NHAI, FAO (OS) No. 345/2010 decided on 03.06.2011. In OSE-GIL J.V. (supra), a similar argument was raised before the Division Bench and rejected by it. The Division Bench observed as follows:

At that stage, learned Senior Counsel, appearing for the Appellant had drawn our attention to the fact that notice had been issued in Special Leave to Petition against the Division Bench Judgment in ITD Cementation India Ltd. Nevertheless, on 29.11.2010 we passed the following Order in FAO (OS) 140/2008:-

We have noted that the questions which have arisen in this Appeal had also arisen before a Division Bench in National Highway Authority of India vs-ITD Cementation India Ltd. in FAO (OS) 216/2007. We are informed that the

impugned Order follows this decision of the Division Bench, as the Learned Single Judge was bound to do. The contention is that since a SLP has been preferred against the decision in FAO (OS) 216/2007, this Court ought to adjourn proceedings to await a Judgment of Their Lordships in that Appeal. Mr. Nandrajog, learned Senior Counsel for the Appellant, states that Leave has been granted by the Hon''ble Supreme Court. We cannot subscribe to the submissions made by learned Senior Counsel for the Appellant. In our view the proper course is to decide the present Appeal on the parity of reasoning adopted by the Division Bench in FAO (OS) 216/2007. Taking any other approach would lead not only to multiplicity of proceedings but also to a legal anathema, which is, the likelihood of different views being expressed by co-ordinate Benches. Needless to state, the Appellant before us will not be precluded from filing a SLP before the Hon''ble Supreme Court. In such a situation, we are in no manner of doubt that both the SLPs will be heard together. That is, however, for Their Lordships to decide. The impugned Judgment is premised on NHAI vs-ITD Cementation India Ltd., with which we respectfully concur. We also find no error in the impugned Judgment. In these circumstances, the Appeal is dismissed. Pending Application also stands dismissed.

9. Learned counsel for the appellant has not even urged before us that the decision of the Division Bench in ITD Cementation Limited (supra) needs re-consideration by a larger bench of this Court and we find no reason to adopt that course of action. The decision in ITD Cementation Limited (supra) and OSE-GIL J.V. (supra) being judgments of coordinate benches, we are bound by the same. So far as the decision in West Coast Paper Mills Limited (supra) is concerned, the reliance placed on the said decision appears to be wholly misplaced. That was a case dealing with the aspect of applicability of Section 14 of the Limitation Act. In that context, the Supreme Court observed that once an appeal is filed before it and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once the Supreme Court grants special leave and decides to hear the matter on merits. The aforesaid proposition was invoked to hold that the provision contained in Section 14 of the Limitation Act was available to the respondent.

10. In our view, the said principle cannot be invoked by the appellant to require this Court to stay its hands and not to proceed to dispose of the objection petition, or even this appeal, particularly when the issues raised by the appellant have attained finality insofar as this Court is concerned. Accordingly, we dismiss the aforesaid applications as well as the present appeal.

5. Learned senior counsel for the appellant, qua this issue, also sought to contend that there is an issue of quantification of the amount relatable to the mode and manner how this amount is sought to be established by the respondent.

6. In our view, this is not something which can be urged before us as it would amount to a plea for reappreciation of evidence, led before the arbitrator by this Court. The arbitral tribunal has taken note of the evidence to come to the conclusion based on facts, which aspect is not required to be interfered with. We, thus, find no merit qua this aspect of the appeal.

The award of compound interest even post the award period and that too on both the principal and the interest amount:

7. Learned senior counsel for the appellant sought to make a grievance that the arbitral tribunal granted 12% compound interest for the preference, pendente lite and future period. It is, however, not in dispute that there is a contractual provision for grant of compound interest and thus the appellant cannot make a grievance regarding the aspect of grant of compound interest. The contractual provision itself states that interest should be granted at 12% with monthly rates. The relevant clause in this behalf is clause 60.8(b) of the "Conditions of Particular Application" (CoPA), which reads as under:

(b) In the event of the failure of the Employer to make payment within the times stated, the Employer shall pay to the Contractor interest compounded monthly at the rate(s) stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid in the currencies in which the payments are due. The provisions of this Sub-Clause are without prejudice to the Contractor's entitlement under Clause 69 or otherwise.

8. The Supreme Court in *State of Haryana and Others Vs. S.L. Arora and Company*, has held that compound interest can be awarded only if there is a specific contract or authority under a statute for compounding of interest. This has also been observed in the case of *Pt. Munshi Ram and Associates (P) Ltd. Vs. DDA*, , where one of us (Sanjay Kishan Kaul, J.) was a member of the Division Bench and rendered the opinion on behalf of the Bench.

9. In addition to the fact that the contractual terms, in the present case, itself prescribed the rate of interest, learned senior counsel for the respondent points out that this aspect has not even been urged before the learned Single Judge and forms no part of the adjudication. This aspect has also not been disputed by learned senior counsel for the appellant.

10. We, thus, see no reason to interfere with the aspect of rate of interest or compounding of interest under the award as affirmed by the learned Single Judge.

The extra amount awarded for the embankment

11. The first issue raised is really the contentious one inter se the parties over which elaborate submissions have been advanced. Ms. Padma Priya, learned counsel for the appellant has succinctly explained to us how the different kinds of embankments are constructed and the clauses in respect thereof. She submits that the embankment can be made exclusively of soil which is obtained from

adjoining areas on payment of royalty, or there may be a combination of soil and pond ash which is used. It is pointed out that pond ash is available free of cost and its use is mandated vide Notification dated 14.09.1999 issued by the Ministry of Environment and Forests u/s 3(1), 3(2)(v) and section 5 of the Environment Protection Act, 1986, wherever possible, as an endeavour of the Government to avoid pollution which such ash causes. However, there is significant cost incurred in bringing such pond ash to site from distances up to 100 Kms. Where both soil and pond ash is used, there are different layers which may be laid of soil and pond ash. The top and bottom layer and the sides comprise of soil. There is, thus, almost a casing of soil created around the embankment of ash, with different layers of soil and pond ash being used within that casing. It is submitted that an embankment cannot be made only using ash as it would fly away when dry.

12. There is, undisputedly, a different method of calculation employed for computation of payment to be made for embankment which may be made exclusively of soil, and of both soil and pond ash. It is also pointed out to us that the cost of pond ash is much higher (being more costly to bring it to the site) than the soil. The relevant clause in this behalf is clause 2.02 of the Bill of Quantity (BoQ) dealing with Bill No. 2-Earth Work, which reads as under:

BILL OF QUANTITIES

BILL No. 2 - EARTHWORK

13. The controversy which has arisen for adjudication is that while on behalf of the appellant it is contended that the rate per cubic metre has to be paid dependant on the quantum of soil or pond ash used, on behalf of the respondent it is submitted that the two rates operate in different situations. According to the respondent, if only soil is used then sub clause (a) would apply and if pond ash is used along with soil then sub clause (b) would apply. The respondent submits that in case sub clause (b) applies, irrespective of the quantum of pond ash or soil used, the per cubic metre rate quoted against item (b) has to be paid for the total quantity.

14. Insofar as the aforesaid aspect is concerned, it is pointed to us that the DRB, qua this issue, opined in favour of the appellant, but the respondent was not satisfied with the same. There is also a divergence of view in the arbitral tribunal as the finding has been reached in favour of the respondent by a majority of 2:1.

15. It is submitted on behalf of the appellant that if the majority opinion of the award is perused, even the manner setting out the relevant clause is not correct. Out attention has been drawn to para 11.3.1 of the majority award which reads as under:

11.3.1 The scope of the works to be executed under BOQ items 2.02(a) and (b) provide as follows:

16. It is thus submitted that if this is compared to the clause at it exists and

extracted aforesaid, the BoQ item is only one, i.e. embankment, and there are two sub paragraphs dealing with the rate per cubic metre for soil and pond ash. It is not that the BoQ items are two, which are referred to aforesaid as "soil embankment" and "pond ash embankment" by the arbitral tribunal. It is thus his submission that the clause itself has been wrongly reproduced and incorrectly read, and does not brook of two possible interpretations, where the view of the arbitrators ought to prevail.

17. It is submitted before us that there could be different ratios of pond ash and soil used while making the embankment for different stretches. Thus, some areas may have a ratio of 9:1, while the others may have a ratio of soil as high as 3:1 qua pond ash vis-?-vis the soil. The other aspect emphasized is as to the manner in which the contract was understood by the parties themselves inasmuch as it is the respondent who submitted the Interim Payment Certificates (IPC) for a period of 30 months on the basis of the understanding of the clause propounded by the appellant, and payments were accordingly received by them. Such IPCs were submitted after joint measurements were made, making separate quantification of the soil and pond ash used. It is thus submitted that it does not lie in the mouth of the respondent to contend that it is not possible to separately quantify the amount of soil and pond ash used in carrying out the works.

18. It is pointed out to us that reliance was placed by the respondent before the arbitrator on clause 60.9 to canvass that the IPC was not final but was only provisional. The said clause reads as under:

The Engineer may by any Interim Payment Certificate make any correction or modification in any previous Interim Payment Certificate which has been issued by him, and shall have authority, if any work is not being carried out to his satisfaction, to omit or reduce the value of such work in any Interim Payment Certificate.

19. It is however submitted that a reading of the aforesaid clause would show that the power lies only with the engineer and in the present case, the engineer himself ultimately had opined in favour of the appellant.

20. Learned senior counsel for the appellant submits that it was not open for the majority arbitrators to accept the plea of the respondent that it was only an inadvertent error which was sought to be corrected subsequently.

21. Learned senior counsel for the respondent on the other hand seeks to contend that the aforesaid submission of learned counsel for the appellant, at best, can be styled as one possible view of the clause. Since the arbitral tribunal, albeit by a majority, has taken a particular view, it is not for this Court to substitute its mind with another view which may be taken as if it was the arbitral tribunal. Interference is called for only if the view is absurd or de hors the terms of the contract, as the arbitral tribunal is always bound by the terms of the contract, being a creature of the contract.

22. Learned senior counsel for the respondent also submits that the appellant is seeking to read the clause in a manner different from how it has been framed. He submits that there are only two eventualities provided, i.e. soil alone is used, and where ash and soil has been used. To accept the contention of the appellant would amount to creating three categories, i.e. only soil being used, only pond ash being used and soil and pond ash being used. He submits that it is undisputed that an embankment cannot be made only of pond ash.

23. Learned senior counsel for the respondent has also drawn our attention to the majority view of the arbitrators to contend that the measurement had to be made by a concept of volumes, and not the cross section of volumes. In this behalf, he has referred to the relevant clauses which have, in fact, been reproduced in the majority view. These clauses are clause 305.8 of the technical specifications-which is relevant for measurements and payment for item No. 2.02(a). The same reads as under:

Earth embankment/sub grade construction shall be measured separately by taking cross sections at intervals in the original position before the work starts and after its completion and computing the volumes of earthworks in cubic metres by the method of average end areas...

24. Clause 305.2.2.3.3 relatable to Item No. 2.02(b) reads as under:

Measurement for payment: Same as Clause 305.8 of MoRTH specifications.

25. Learned counsel thus submits that the methodology of measurement provides that the same be done by taking the cross sections at intervals in the original position and after its completion and, thus, whether the embankment made is only of soil, or soil and pond ash, identical methodology has to be adopted. This cross section cannot be further bifurcated into parts by measuring volumes of soil and pond ash separately.

26. Learned senior counsel for the appellant has also emphasized that the respondent realized their mistake albeit after more than two years when the issue of cash flow arose as they were receiving less amount than due to them under the contract, and the delay in raising the issue would not make a difference, as the parties should be bound by the terms of the contract.

27. If we peruse the majority view of the arbitral tribunal, we find that the findings are as under:

(a) BoQ Item 2.02 (a) and 2.02(b) for embankment construction is for finished items of works mentioned for each of the items in all respects and not for the type of materials to be used in the respective items;

(b) The manner of measurement is same for both the nature of embankment, whether the embankment is covered by clause 2.02 (a) or clause 2.02(b), by taking a composite cross section as a whole of the embankment and determining the volume by average end area method;

(c) There is no scope to separate out different cross sections of embankment being taken by measuring the area occupied by soil and pond ash separately, for determination of the quantum;

(d) The methodology adopted by the engineer to make measurement is contrary to the provisions of the contract;

(e) It cannot be said that there was consensus ad idem between the parties with regard to the method of measurement of pond ash embankment in view of the plea of the respondent that there was an inadvertent error which could be corrected. The principle would apply where the contract conditions are not very clear, which is not so in the present case.

28. On the other hand, the minority view would show the following salient features:

(a) Different materials are to be measured separately and this is what the respondent has been doing itself and, thus, what the engineer was doing was as per the contract;

(b) The consensus ad idem is apparent from the fact that for 2 1/2 years the measurements were jointly carried out in a particular manner;

(c) Clause 60.9 of CoPA conferred the power only on the engineer by making him the final authority and the engineer has not agreed with the respondent for revision of the IPC;

(d) The conduct of the parties is a relevant factor in interpreting the terms and conditions of the contract if the parties have been acting in a particular manner for a long time. In this behalf the observations of the Supreme Court in Transmission Corporation of A.P. Ltd. and Others Vs. Lanco Kondapalli Power Pvt. Ltd., were relied upon wherein it is observed:

Conduct of the parties is also a relevant factor. If the parties had been acting in a particular manner for a long time upon interpreting the terms and conditions of the contract, if pending determination of the lis, an order is passed that the parties would continue to do so, the same would not render the decision as an arbitrary one.

29. We now turn to the opinion of the learned Single Judge. We find that there is only a limited discussion in para 26 on this aspect which reads as under:

26. As regards non-payment for executed work of embankment which forms the subject matter of Disputes 2 and 4, this is purely a question of fact based on the measurement. There is no dispute in relation to the construction of the embankment that is covered under item 2.02 (a) of the BOQ. In fact NHAI has already paid HCC for the said construction. Clause 305.8 of the MORTH TS provides for measurement of the cross section of the embankment as one whole composite section and paid under item No. 2.02 (b). The decision of the majority members of the Arbitral Tribunal based on an analysis of the material before

them was a possible view to take. Merely because another view as evidenced by the dissenting opinion is possible interference by this Court u/s 34 of the Act is not warranted.

30. We have examined the aforesaid submissions. There is no doubt in our mind that insofar as the principle of law is concerned, it is well settled that it is not for this Court to substitute its mind as that of an arbitral tribunal if there are different possible views qua the interpretation of clauses of the contract. Interference would be called for only if the terms of the contract are lucid and clear, and a completely different version is accepted by the arbitral tribunal which borders on absurdity. Thus, it cannot be that if the contract says "A", the arbitrator can say "B", and the Court is devoid of jurisdiction to interfere with that aspect.

31. We find from a perusal of the impugned order of the learned Single Judge that there has been no discussion on this crucial issue. This is the reason we have been called upon to pen down a more detailed order appreciating the rival contentions of the parties. In our view, the first fallacy in the majority view of the arbitral tribunal is the manner of extraction of the terms of the contract itself. Para 11.3.11 of the Majority award where BoQ Item 2.02(a) and (b) have been extracted seeks to suggest as if there are two item numbers - one dealing with the construction of soil embankment, while the other dealing with the construction of pond ash embankment. The fact is that the original contract provides only for one BoQ Item for construction of embankment. However, the said construction of embankment can take place in two manners. The first is where only soil is used and the other is where soil and pond ash is used. The technical specification clause is the same, i.e., clause 305. It is not in dispute that the costing is quite different for soil and pond ash, largely on account of the transportation cost. The expression used in clause 2.02 (a) is "with soil" and in clause 2.02(b) is "with pond ash". This is not as if in the second situation only pond ash is used. Both soil and pond ash is used. If we were to accept the contention as sought to be propounded in the majority view of the arbitral tribunal as also of learned counsel for the respondent, it would mean that "with pond ash" in sub clause (b) is used to mean "with soil and pond ash". It is nobody's case that any embankment can be completely constructed and finished with only pond ash. When sub clause (b) uses "with pond ash" it means, and can only mean-that part of the embankment which is made of pond ash alone. The opening words of clause 2.02 of the BOQ which use the expression "....complete as per Technical specification clause 305 with all leads and lifts" only connote that the payment for this BOQ item would be due only after completion of the work of making the embankment in a given section or stretch, i.e. upon the finishing of the soil embankment (if it is only of soil) or of soil and pond ash embankment (if it is of both the substances) with all layers of soil and pond ash in place as per the technical specification.

32. It is obvious to us how clause 2.02 - which deals with the sole item of

construction of embankment, has dealt with two eventualities, i.e., where only one material is used or two different kinds of materials are used. Insofar as the content/volume of soil is used, it has to be paid at a particular rate, while the quantity of pond ash has to be paid at another rate. It has also been rightly pointed out to us that the ratio of the soil and pond ash can vary and the percentage of pond ash can be high or low as the ratio varies from 9:1 to 3:1 (pond ash : soil). It would hardly be expected that irrespective of the ratio of pond ash used (which is determined by the engineer), one rate for embankment would have to be paid and that too the higher rate, where the price differential is almost 2 1/2 times. Adoption of such a mechanism for payment would lead to absurd results.

33. In our view, the terms of the contract can brook of no two views at all and the terms are clear. The learned Single Judge has, in fact, only observed that the view taken by a technical team being one possible view, he would not like to examine the same any further. He has, however, not examined the submission of the appellant as set out above. This, to us, appears to be a clear error in the impugned judgment. On a conjoint reading of BOQ item No. 2.02 and clause 305.8 of the technical specification, to us, it is clear that the cross sections have to be taken in respect of the different materials used, i.e. soil and pond ash. Pertinently, it is not the case of the respondents that the two are mixed into a mixture and then used. Soil and pond ash are used separately. Thus, the cross sections are to be taken at intervals. We cannot permit the respondent to contend that it is not possible to compute the volumes of the two materials in the cross section, when for 30 months both the appellant and the respondent were actually making measurements accordingly. The respondent itself made the IPCs and submitted for payments which were duly paid by the appellant. Such measurements were made on the basis of actual utilization of the two materials. We fail to appreciate how the arbitral tribunal could have come to a conclusion that the mode of measurement of the two items separately was not in accordance with the contract. The majority view, after having noticed the principles of consensus ad idem, seems to have failed to appreciate this vital issue. This is not a mere mistake, but for about 30 months the parties acted in a particular manner and completed 70% of the work. This could hardly be categorized as an "inadvertent error", which was utilized by the respondent as an escape route to contend that a mistake can always be corrected. It is also not in dispute that clause 60.9 of the CoPA vests the authority only with the engineer who has opined against the respondent. He alone could have changed the IPCs. It was not for the arbitral tribunal to do so.

34. We are unable to accept the stand that merely because some element of pond ash is used, the rates for the entire work would go up by about 2 1/2 times even where only soil is primarily used, irrespective of quantum of pond ash. This could never be the intent of the drafters of the contract and the parties also understood the contract in a particular manner till the respondent started having a second thought of realising extra money from the appellant.

35. We are thus of the unequivocal view that the interpretation put forth by the majority view of the arbitral tribunal, which has received the imprimatur of the learned Single Judge, is not a plausible view of the terms of the contract which are crystal clear and brook of no two views. Such a view, we feel would border on absurdity. We are conscious of the fact that it is an arbitral tribunal manned of three technical people. But then there is also a minority view of one technical person, apart from the fact that the DRB of three technical people also opined otherwise, apart from the engineer concerned.

36. We, thus, set aside the award insofar as it has granted Dispute No. 4 in favour of the respondent while upholding the award in all other respects. No other issue is pressed before us. The appeal is allowed to the limited extent aforesaid, leaving the parties to bear their own costs. We grant six weeks time to the respondent to reconstitute the amount to the appellant which is overdrawn in view of our judgment rendered today. The question of discharge of the bank guarantee would only arise post restitution and settlement of the aspects which have been raised by the appellant in C.M. No. 1901/2012. We make it clear that in case the amount is not paid to the appellant within the time of six weeks, the appellant would be free to move for encashment of the bank guarantee to that extent.