(2016) 02 DEL CK 0227

In the Delhi High Court

Case No : FAO (OS) 402 and 437/2014

National Highways Authority of India — APPELLANT

Vs

Hindustan Construction Company — RESPONDENT

Date of Decision : 24-02-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Contract Act, 1872 — Section 5, Section 73
Evidence Act, 1872 — Section 65(g)

Citation : (2016) 2 ArbiLR 1 : (2016) 155 DRJ 646 : (2016) 4 RAJ 499

Hon'ble Judges : Pradeep Nandrajog and Mukta Gupta, JJ.

Bench : Division Bench

Advocate : Pradeep K. Bakshi, Prachi V. Sharma and Kushagra Pandit, Advocates, for the Appellant; Dayan Krishnan, Sr. Advocate instructed by Rishi Agrawala, Malavika Lal, Aakshi Lodha, Nadia Rafiq and V. Mittal, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Pradeep Nandrajog, J.—1. OMP No. 633/2012 filed by M/s. National Highways Authority of India (NHAI); a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) laying a challenge to an arbitral award dated March 16, 2012 has been disposed of by the learned Single Judge vide order dated July 08, 2014. Two references were made to the Arbitral Tribunal which the Tribunal has called dispute 8 and dispute 8A. The learned Single Judge has upheld the Award passed by the majority pertaining to dispute 8, except claim at serial No. 7, and also pertaining to dispute 8A, except claim No. 7 and 8 thereof.

2. Whereas NHAI continues to be aggrieved by the award in so far it has been upheld by the learned Single Judge and has thus filed FAO (OS) No. 402/2014, praying that the impugned order be set aside in so far it has dismissed a part of the objections filed to the majority award and the award be set aside; Hindustan Construction Company (hereinafter referred to as HCC) has challenged the order

passed by the learned Single Judge to the extent it has tinkered with the award. However, during arguments in the appeal filed by HCC, Sh.Dayan Krishnan learned senior counsel for HCC, on instructions from the instructing counsel, who in turn took instructions from the Head of the Legal Department of HCC made a statement that HCC gives up claim No. 7 under both disputes 8 and 8A decided by the Arbitral Tribunal. Thus with reference to FAO (OS) No. 437/2014 we would be required to decide whether the impugned order was justified in setting aside the award concerning loss of earning capacity and profits awarded by the majority arbitrators to HCC concerning dispute 8A; noting that such a claim was not made when claim was filed under dispute 8.

3. There was a difference of opinion amongst the members of the Arbitral Tribunal on some issues. The majority award is by two members. The dissent is by the third Arbitrator.

4. Bid by HCC being accepted, on June 02, 2004 an agreement containing the terms on which HCC had to construct the Allahabad By-Pass, requiring construction of a road from Km.158 to Km.198 except Ganga Bridge, was executed between NHAI and HCC. The contract was based on FIDIC Conditions of Contract as modified by The Conditions of Particular Application (COPA). The scope of the work to be executed was defined in Clause 1.1.1 and 1.1.2 of Additional Technical Specifications. The total price of the contract was Rs. 446,99,12,839 (Rupees Four Hundred Forty Six Crores Ninety Nine Lacs Twelve Thousand Eight Hundred and Thirty Nine only). The date of commencement of the work was June 09, 2004 and completion period, being 30 months, was December 08, 2006.

5. It is not in dispute that the work of Main Carriage Way was completed on May 21, 2009 and full work was completed on September 30, 2009, meaning thereby, the contract period got extended by 33.70 months. What was envisaged to be completed in 30 months took a little more than double thereof.

6. There being an arbitration clause in the agreement the dispute, concerning who was responsible for the delay and depending thereon to what amount would HCC be entitled to were referred to an Arbitral Tribunal comprising three members. Disputes No. 8, 8A, 9, 10 and 11 fell in the lap of the Arbitral Tribunal and since disputes No. 9, 10 and 11, raised by HCC were abandoned by writing a letter to the Arbitral Tribunal, recording said fact, the Arbitral Tribunal concentrated on disputes No. 8 and 8A.

7. Pertaining to dispute No. 8, it had various claims by HCC for the extended period beyond December 09, 2006 till April 30, 2008 and dispute No. 8A had various claims by HCC for the extended period beyond May 01, 2008 till September 20, 2009.

8. Pertaining to dispute 8, the item wise claim of HCC were:-(i) Additional Overhead Costs in the extended period, (ii) Additional Costs on account of extended stay of plant and equipment at site, (iii) Additional Costs towards

uncovered compensation in Cement costs in the extended period, (iv) Additional Costs towards uncovered compensation in steel costs in the extended period, (v) Additional costs towards uncovered compensation in labour costs, (vi) Additional costs towards uncovered compensation in POL costs, and (vii) Additional costs towards financing charges. Pertaining to dispute 8A, the item wise claim of HCC were:-(i) Additional Overhead Costs in the extended period, (ii) Additional Costs on account of extended stay of plant and equipment at site, (iii) Additional Costs towards uncovered compensation in Cement costs in the extended period, (iv) Additional Costs towards uncovered compensation in steel costs in the extended period, (v) Additional costs towards uncovered compensation in labour costs, (vi) Additional costs towards uncovered compensation in POL costs, (vii) Additional costs towards financing charges, (viii) Loss of earning capacity and profits, and (ix) Additional due to the increase in price of materials used in the guide bund work.

9. The heads of items under dispute No. 8 and 8A are identical from serial No. 1 to serial No. 7. Under dispute 8A there were two other items; being, loss of earning capacity and profits and additional cost due to the increase in price of materials used in the guide bund work.

10. Before the learned Arbitral Tribunal issues concerning arbitrability of the claims were argued as also the jurisdiction of the Arbitral Tribunal. These were raised by NHAI and were rejected by the majority and the minority award and we eschew reference thereto because neither before the learned Single Judge nor in the appeal NHAI has raised those issues.

11. The foremost issue to be decided by the Arbitral Tribunal was : who was responsible for the delay? The next issue which arose for consideration was to the meaning of ''cost'' as defined under clause 1.1(g) (i) of the General Conditions of the Contract and especially the phrase but does not include any allowance for profit therein. In view of a price adjustment component concerning labour, cement, steel, fuel and lubricants, other local material consumed and for spares and components of the tools, plant and machinery used being provided for as per a formula with specified indices and applying which HCC had been given price adjustment during the extended period of the contract, it arose for consideration before the Arbitral Tribunal whether additional costs as per items No. 1 to 7 under disputes 8 and 8A and item No. 9 under dispute 8A were payable at all, and if yes in what amount.

12. For the purpose of the two appeals we need not decide item No. 7 under dispute 8 and 8A. The reason being that learned senior counsel for HCC conceded to the point that the computation of the claim before the learned Arbitral Tribunal for said item concerning dispute 8 and 8A was completely unintelligible, and notwithstanding HCC successfully defending it before the learned Single Judge, said claim could not be justified concerning its quantification and conceded that while deciding the appeal the award could be modified setting it aside in so far the sum of Rs. 976.28 lacs has been awarded

under dispute 8 and Rs. 392.78 lacs has been awarded under dispute 8A. Similarly we need not decide the correctness of the award by the majority concerning item No. 5 under dispute 8 and 8A pertaining to additional cost towards uncovered compensation in labour cost because challenge thereto in appeal was given up by learned counsel for NHAI.

13. On the subject of delay, the learned Arbitral Tribunal noted that as per HCC the delay was attributable solely to NHAI and could be classified under 8 sub-heads as follows: (i) Delay in handing over unencumbered possession of land to the extent of ROW to undertake and complete the main carriageway and service road as per the planned sequence, (ii) Delays due to interference and stoppage of works by locals on the allegation of non- payment of compensation/adequate compensation for acquisition of their land for construction, (iii) Delays due to repetitive realignment ordered so as to accommodate the project road within the restricted ROW available/erroneously acquired by NHAI, (iv) Belated addition and deletion of structures resulting to disruptions to the planned sequence of construction, (v) Delay caused to the execution of the structures due to unavailability of land for construction and unhindered access pursuant to the same, (vi) Delays in commencement of the work due to non approval for cutting of trees in the project corridor, (vii) Delays in commencement of the works due to non approval of source for pond ash, and (viii) Delay in handling over of land for the construction of the guide bund etc. The learned Arbitrators noted that as per NHAI delay was attributable to HCC for the following : (i) Input material like bitumen etc. not available, (ii) Frequent breakdown of equipment showing old/ poorly maintained equipment. Poor deployment of equipment - less than requirements. Poor planning, (iii) Proper permissions not taken, (iv) Slippages behind expected schedule, (v) Available stretches not taken up, (vi) Delay in doing testing and putting up for approvals, (vii) Capacity of plant inadequate, and (viii) Manpower shortage.

14. In a somewhat lengthy summarization of the argument by HCC and NHAI, commencing from para 9.11 till para 11.4.11, the majority Arbitrators noted clause 1.1(e) (i), 1.1(g) (i) (ii) (iii) (iv), 6.4, 12, 42.2, 60.8, 70.2 and 70.3 of the General Conditions of the Contract as modified by the Conditions of Particular Application. The learned majority also noted the relevant pages of the pleadings of HCC and NHAI and the respective arguments of the parties concerning the interpretation of the clauses as also the basis on which the claims had to be computed, if delay was found attributable to NHAI. Discussing the pleadings and making a brief reference to the documents relied upon, the learned majority Arbitrators highlighted that the Engineer to the contract : BECOM - Lasa J.V. had given a diagrammatic representation, being Annexure A-2 to Ex.RA-120, of the critical events which led to the delay till final completion of the works i.e. September 30, 2009 and that the analysis was in line with clause 44 of the General Conditions of the Contract and based thereon had recommended extension of time without levy of liquidated damages. The majority also noted (para 11.6.1) that NHAI was also relying on the same diagrammatic

representation to show contributory delay by HCC.

15. The learned majority Arbitrators noted that the exercise carried out by the Engineer to the contract would show that as against claim of HCC that entire 1209 days'' delay was attributable to NHAI the Engineer had decided that only 1027 days'' delay was attributable to NHAI. The majority further considered whether this deficit of 182 days was rightly opined by the Engineer as attributable to HCC. Holding that no delay could be attributable to HCC, the conclusion arrived at by the majority on this issue is at paras 11.6.10 and 11.6.11 of the majority award, which two paragraphs read as under:-

"11.6.10 AT''s above view is further reinforced by following:

i) The Claimant had sought over all extension of time for 1209 days where as the extension of time granted was for 1027 days, leaving a deficit of 182 days. The Reason for the shortfall is not explained by the Engineer.

ii) There was no murmur during the determination of EOT by the Engineer on Claimant''s delays. Had there been so, the Engineer would have considered the effect of the same in assessment of EOT. The observation by the Engineer at RA-120 was an exception, which was dealt by AT hereinbefore. Even in RA-120, AT notes the contradictory view of Engineer. For instance, in RA-120, the Engineer commented on initial delays in mobilization contributed by Claimant, whereas the Engineer during contemporaneous time (31.07.2006) has granted EOT with costs towards the first interim EOT application submitted by the Claimant.

iii) As matter of fact, the standard engineering principles requires consideration of only critical activities in arriving at the impact of delay. This was exactly done by the Engineer in assessing the delays/defaults of Respondent. The Engineer had not considered all the delay events claimed/quantified by the Claimant. The Engineer, as admitted in RA-120, had considered only critical activities for extension of contract period.

iv) Assuming that there are some delays on the part of the Claimant, still it is the duty of the Engineer to assess whether the delays are of critical in nature and would impact the time and require extension of contract period. This exercise was done by the Engineer in ascertaining the delays/defaults of Respondent in RA-120. However, the Engineer had made only a general mention in RA-120 about Claimant''s delays without putting the same into a test whether the delays are of critical in nature having impact on overall completion of works in the absence of such an analysis, AT is not in a position to appreciate the charts submitted by Respondent showing the progress of work in available stretches. As observed by AT, the cascading effects of admitted delays and disruptions of Respondent/Engineer would undoubtedly cause slow progress of work in available stretches, for which Claimant cannot be faulted or responsible. The root cause for all the disruptions in progress of work is none other than the admitted delays and disruptions caused by Respondent/Engineer.

v) Thus, there is no evidence available with AT to ascertain the quantum of Claimant''s contributory delays. Even after affording an opportunity to Respondent by AT, the Respondent could not produce the quantified effect of contributory delays, if any, by the Claimant. On the other hand, as enunciated hereinabove, evidence is available, that too an undisputed evidence shows that the contract period was extended for 1027 days on account of Respondent''s defaults/delays (EOT determinations by Engineer, RA-120 & Respondent''s admission).

11.6.11 Considering the above aspects, the Tribunal, without any hesitation concludes that there is no credible evidence to show that the Claimant has contributed delays concurrently with the delays of the Respondent. The reason for extension from 09.12.2006 to 30.09.2009 is entirely attributable to the Respondent."

16. As regards the minority award, observing that he agreed with paras 1.1 to 8.21 of the majority award as also broadly agreed with the submissions and arguments recorded in the majority award under paras 9.0 to 9.3.10 as also 10.0 to 10.52, it is recorded that if contractor was responsible for delay he would not be entitled to any additional amounts in the form of overheads, price escalation etc. Thereafter recording that he agreed with para 11.0 to 11.0.1 of the majority award, he disagreed with para 11.02. We note that the point on disagreement was whether the contractor ought to have exhausted the remedy by approaching the Dispute Resolution Board before proceeding to arbitration. A note of disagreement which is obviously irrelevant. Recording that he agreed with the observations of the majority in para 11.1 and its sub-paras upto 11.1.5, the learned Minority Arbitrator proceeded to note Sections 5 and 73 of the Indian Contract Act as also Clause 6.4, 12.2, 42.2, 44, 70.1, 70.2 and 70.3 of the General Conditions of the Contract, followed by document RA-120 to conclude that there were some critical delays by HCC (referred para 15.8.8.1). The effect thereof is lesser sums awarded by the learned Minority Arbitrator under the claim for additional overhead costs in the extended period and additional costs on account of extended stay of plant and equipment at site.

17. Put in a tabular form, the sums awarded by the Majority and the Minority would be as under:-

Dispute No. 8 (for the extended period from 09.12.2006 to 30.04.2008)

Dispute No. 8A (for the extended period from 01.05.2008 to 30.09.2009)

18. In our onwards journey, we propose to note at seriatim the rival arguments on the points of dispute and deal with the same simultaneously and not the traditional way of noting the rival arguments on all points followed by our opinion thereon.

19. At the forefront is the finding by the majority arbitrators that HCC was not responsible for the delay and entire delay is attributable to NHAI. It being settled

law that a finding of fact returned by an Arbitral Tribunal can be challenged on the limited ground of either perversity or ignoring material evidence, we refrain from re-appreciating the evidence discussed on this issue by the majority and the minority, but would highlight that both have centred on document RA-120 filed by NHAI, which had an enclosure Annexure A-2. It is a diagrammatic representation prepared by the Engineer to the contract and highlights the critical activities and the deferment of the same. In other words, the chart brought out the reasons for the delay. In para 9.3.5 of the award the learned majority has noted the page number of the record to highlight the document(s) relied upon for their opinion. The majority has referred to document RA-21 and RA-22 relied upon by NHAI in which the Engineer to the contract had warned the contractor to be more painstaking and not to be idling around. The majority has thereafter noted that as per clause 42.1 of the General Conditions of the contract the site had to be handed over in three phases : (i) Km.158 to Km.169 on June 09, 2004, (ii) Km.169 to Km.184 on September 09, 2004, and (iii) Km.184 to Km.198 on December 09, 2004. The majority has referred to RA-120 which graphically detailed the dates when land was acquired.

20. Faced in the teeth of the evidence discussed by the majority Arbitrators, attempt by learned counsel for NHAI was to make us read each and every relevant document and the number would be more than 200; an exercise which we refuse to indulge in, for the reason the exercise contemplated by learned counsel for NHAI would have required us to sit as a Court of appeal over the award. Since no headway could be made by learned counsel for NHAI to pierce into the award with reference to the finding on delay being perverse or ignoring material evidence, we repel the attack to the majority award on the issue of delay being attributable to NHAI, which finding has been upheld by the learned Single Judge. It is settled law that appreciation of evidence and return a finding on a question of fact lies within the domain of the Arbitrator.

21. Thus, consequences of the delay being attributable to NHAI have to flow.

22. This would take us to the next limb of the issues to be discussed. Since the discussion would necessitate noting of clause 1.1(e) (i), 1.1(g) (i) (ii) (iii) (iv), 6.4, 12, 42.2, 60.8, 70.2 and 70.3 of the General Conditions of the Contract as modified by Conditions of Particular Application, we note the same. They read as under:-

"1.1(e) (i) "Contract Price" means the sum stated in the Letter of Acceptance as payable to the Contractor for the execution and completion of the Works and the remedying of any defects therein in accordance with the provisions of the Contract.

x x x

1.1.(g) (i) "cost" means all expenditure properly incurred or to be incurred, whether on or off the site, including overhead and other charges properly allocable thereto but does not include any allowance for profit.

(ii) "day" means calendar day.

(iii) "foreign currency" means a currency of a country other than that in which the Works are to be located.

(iv) "writing" means any hand-written, type-written, or printed communication, including telex, cable and facsimile transmission.

x x x

6.4. If by reason of any failure or inability of the Engineer to issue, within a time reasonable in all the circumstances, any drawing or instruction for which notice has been given by the Contractor in accordance with the Sub-Clause 6.3 the Contractor suffers delay and/or incurs costs then the Engineer shall, after due consultation with the Employer and the Contractor determine:

(a) any extension of time to which the Contractor is entitled under Clause 44, and

(b) the amount of such costs, which shall be added to the Contract Price and shall notify the Contractor accordingly, with a copy to the Employer.

x x x

12. If, however, during the execution of the Works the Contractor encounters physical obstructions or physical conditions, other than climatic conditions on the Site, which obstructions or conditions were, in his opinion, not foreseeable by an experienced contractor, the Contractor shall forthwith give notice thereof to the Engineer, with a copy to the Employer. On receipt of such notice, the Engineer shall, if in his opinion such obstructions or conditions could not have been reasonably foreseen by an experienced, contractor, after due consultation with the Employer and the Contractor, determine:

(a) any extension of time to which the Contractor is entitled under Clause 44 and

(b) the amount of any costs, which may have been incurred by the Contractor by reason of such obstructions or conditions having been encountered, which shall be added to the Contract Price.

x x x

42.2 If the Contractor suffers delay and/or incurs costs from failure on the part of the Employer to give possession in accordance with the terms of Sub-Clause 42.1 the Engineer shall, after due consultation with the Employer and the Contractor, determine:

(a) any extension of time to which the Contractor is entitled under Clause 44, and

(b) the amount of such costs, which shall be added to the Contract Price, and shall notify the Contractor accordingly, with a copy to the Employer.

x x x

60.8(ii) (B) (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.

x x x

70.2 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.

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 below. The amount certified in each payment certificate is adjusted by applying the respective price 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; price adjustment for extensions 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 below; and

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

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,

R1 = Portion of ''R'' as payable in Indian Rupees

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

R = R1 + Rf

To the extent that full compensation for any rise or fall costs to the contractors not covered by the provisions of this or other clauses of 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.

(i) Adjustment for Labour component

Price adjustment for increase or decrease in the cost due to labour shall be paid in accordance with the following formula:

$VL = 0.85 \times P1/100 \times R1 \times (Li - L0)/L0$

VL = increase or decrease in the cost of work during the month under consideration due to changes in rates for local labour.

Lo = the average consumer price index for industrial workers for Allahabad centre on the day 28 days prior to the closing date of submission of bids as published by Labour Bureau, Ministry of Labour, Government of India.

Li = The average consumer price index for industrial workers for Allahabad centre on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related as published by Labour Bureau, Ministry of Labour, Government of India.

P1 = Percentage of labour component of the work.

(ii) Adjustment for cement component

Price adjustment for increase or decrease in the cost of cement procured by the contractor shall be paid in accordance with the following formula.

$Vc = 0.85 \times Pc/100 \times R1 \times (C1 - Co)/Co$

Vc = Increase or decrease in the cost of work during the month under consideration due to changes in the rates for cement

Co = The all India average wholesale price index for cement on the day 28 days prior to the closing date of submission of bids as published by the Ministry of Industrial Development, Government of India, New Delhi.

C1 = The all India average wholesale price index for cement on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related, as published by Ministry of Industrial Development, Government of India, New Delhi.

Pc = Percentages of cement component of the work.

(iii) Adjustment for steel component

Price adjustment for increase or decrease in the cost of steel procured by the Contractor shall be paid in accordance with the following formula;

$Vs = 0.85 \times Ps/100 \times R1 \times (S1 - S0)/S0$

Vs = Increase or decrease in the cost of work during the month under consideration due to changes in the rates for steel.

So = The all India average wholesale price index for steel (Bars and Rods) on the day 28 days prior to the closing date of submission of bids as published by the Ministry of Industrial Development, Government of India, New Delhi.

Si = The all India average wholesale price index for steel (Bars and Rods) on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related as published by Ministry of Industrial Development, New Delhi.

Ps = Percentage of steel component of the work Note: For the application of this clause, index of Bars and Rods has been chosen to represent steel group.

(iv) Adjustment for Plant and Machinery and Spares component

Price adjustment for increase or decrease in the cost of plant and machinery spares procured by the Contractor shall be paid in accordance with the following formula;

Vp = 0.85 x Pp/100 x R1 x (P1 - P0)/P0

Vp = Increase or decrease in the cost of work during the month under consideration due to changes in the rates for plant and machinery spares

P0 = The all India average wholesale price index for heavy machinery and parts on the day 28 days prior to the closing date of submission of bids as published by the Ministry of Industrial Development, Government of India, New Delhi.

Pi = The all India average wholesale price index for heavy machinery and parts on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related as published by Ministry of Industrial Development, New Delhi.

Pp = Percentage of plant and machinery spares component of the work.

Note: For the application of this clause, index of Heavy Machinery and Parts has been chosen to represent the Plant and Machinery Spares group.

(v) Adjustment for Bitumen Component

Deleted.

(vi) Adjustment for Fuel and Lubricants

Price adjustment for increase or decrease in cost POL (fuel and lubricant) shall be paid in accordance with the following formula:

Vf = 0.85 x Pf/100 x R1 x (Fi - F0)/F0

F0 = The average official retail price of High Speed Diesel (HSD) at the existing consumer pumps of IOC at Allahabad on the day 28 days prior to date of submission of bids.

Fi = The average official retail price of HSD at the existing consumer pumps of IOC at Allahabad on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related

Pf = Percentage of fuel and lubricants component of the work.

Note: For the application of this clause, the price of High Speed Diesel oil has been chosen to represent fuel and lubricants group.

(vii) Adjustment for Other Local Materials

Price adjustment for increase or decrease in cost of local materials other than cement, steel, bitumen, plant spares and POL procured by the contractor shall be paid in accordance with the following formula:

Vm = 0.85 x Pm/100 x R1 x (M1 - M0)/M0

Vm = Increase or decrease in the cost of work during the month under consideration due to changes in rates for local materials other than cement, steel, bitumen, plant spares and POL.

Mo = The all India average wholesale price index (all commodities) on the day 28 days prior to date of submission of bids, as published by the Ministry of Industrial Development, Government of India, New Delhi.

Mi = The all India average wholesale price index (all commodities) on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related as published by Ministry of Industrial Development, Government of India, New Delhi.

Pm = Percentage of local material component (other than cement, steel, bitumen, plant spares and POL) of the work.

(viii) Adjustment for Foreign Currency Component (for each of the foreign currencies in which the contract price is payable)

(a) The foreign currency component of each payment which is convertible into foreign currency at fixed exchange rate shall be adjusted according to the following formula:

VFc = 0.85 x R1 x (Fe - Fe)/Feo

VFc = Increase or decrease in cost of work payable due to changes in cost of foreign input

Feo = the index applicable for the foreign input (plant, material, engineer''s salary etc. as the case may be) on the day 28 days prior to date of submission of bids as published in the country of origin.

Fei = corresponding index on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related (average index in case indices are published at lesser intervals.

a. The bidder shall, in his tender, indicate the foreign input,(plant, material, engineer''s salary etc.) and appropriate index, the source of which shall be a Government or public organization. The bidder shall also attach specimens of the publications of the last 12 months for information of the Employer. If this index is not acceptable to the Employer, then he will specify an alternative index and the source of publishing of the index.

b. If the bidder has requested payment in more than one foreign currency, R1 shall be suitably broken up and the formula applied separately to each currency component by taking into account the foreign input of the currency and corresponding indices (index and currency belonging to the same country).

c. The currency of foreign exchange payment and the index shall belong to the same country.

(ix) If the Contractor changes the country of origin of the source of supply of any input to the Works, he shall immediately notify the Engineer who shall modify the price adjustment provisions subsequent to such change to reflect the relevant cost index from the actual country of origin of the input.

(x) If the currencies in which the Contract Price is expressed are different from the currencies of the sources of the relevant indices, the Engineer shall determine the correction to be applied in calculating the Price Adjustment Factor [Formula viii(a)] in order to avoid distortions in the amount of price adjustment. Such correction shall be applied to the increment of price fluctuation in the base costs of the respective inputs and shall correspond to the ratio of the exchange rates between the respective currencies on the date of the base indices and the date of the current indices as defined in sub-clause viii(a).

(xi) The following percentages will govern the price adjustment for the local currency portion (R1) of the contract:

(Note: Bidders may review the above percentages with reference to the planned construction method programme and may suggest necessary modifications with full justification in the pre-bid conference, to enable the employer to take those comments into account for modifying/re-fixing the percentages as appropriate.

23. On the issue of recompense to HCC, at the forefront of the defence of NHAI was the definition of ''contract price'' and ''cost'' defined as per clause 1.1(e) (i) and 1.1(g) (i) of the General Conditions of the Contract, contents whereof we have noted in the preceding paragraph. The argument was that contract price meant the sum stated in the letter of acceptance and cost meant all expenditure properly incurred or to be incurred whether on or off the site, including overhead and other charges properly allocable thereto but does not include any allowance for profit. Extending the argument forward, and making a reference to clause 6.4 of the General Conditions of the Contract it was urged that as per the clause if the contractor suffered on account of delay or incurred costs then amount of such costs had to be added to the contract price. Adding on thereto a reference to clause 12 of the General Conditions of the Contract as also clause 42.2 of the General Conditions of the Contract, it was urged that cost envisaged by said two clauses i.e. upon the happening of conditions referred to in the clauses, HCC would be entitled to extra cost, which as per clause 42.2 of the General

Conditions of the Contract shall be added to the cost. Further elaboration of the argument was with reference to clause 70.3 of the General Conditions of the Contract to urge that as per said clause the contract price was to be adjusted for increase or decrease in the prices of labour, materials, fuels and lubricants as per the formula provided under the clause and as per sub-para (a) of clause 70.3 of the General Conditions of the Contract this price ''adjustment shall apply for work carried out within the stipulated time or extensions granted by the employer''. The crystal formed from the decoction brewed as aforenoted by NHAI was that during the extended period of the contract cost adjustments for price of labour, materials, fuels and lubricants had been worked out and paid and thus nothing more was payable. The legal backing to the argument was that parties were bound by the contract and the contract was the bible for the Arbitral Tribunal and the Arbitral Tribunal had to sing the psalms from the bible and any deviation would be blasphemy. An argument accepted by the minority Arbitrator. The argument in response of HCC was that clause 1.1(g) (i) of the General Conditions of the Contract excluded any allowance for profit and this meant that as per contract there would be no allowance for profit with reference to the various formula under the contract because the presumption would be that the prospective bidder had taken into account the profit, but said profit would be the one which the contractor had in mind while bidding and therefore restricted to the bid amount during the validity period of the contract and therefore beyond the contract stipulated date the contractor would be entitled to profits under the general principle of law concerning damages and in respect of which authors on the law related to contract had so opined. On the subject of adjustment of the contract price concerning labour rates, prices of materials, fuels and lubricants the argument was that as per clause 70.3 of the General Conditions of the Contract the adjustment as per formula, may be even during the extended period of the contract (as per sub-para (a) thereof), recompensed HCC on a unit value of ''1'', only ''0.85'' variation and thus on the general principles of law of damages it would be entitled to full recompense. Juxtaposing clause 70.2 of the General Conditions of the Contract with clause 70.3 thereof it was urged that meaningfully read i.e. on a harmonious reading of the two clauses, to give some meaning to clause 70.2, the contract would be that compensation for any rise or fall in cost to the contractor not covered by the provisions of the contract would be deemed to include amounts to cover the contingency of such rise or fall of costs but limited to clause 70.3 and therefore damages fell outside the terms of the contract, as they do in every case of breach of contract.

24. The majority award is fairly lengthy and written by men with non- legal background and thus has a fair amount of diffusion of thoughts, and to a reader does cause some degree of discomfort and one gets the feeling of being taken around the forest and have an experience akin to the one on a safari on a tiger sighting. But, the distillate of the majority opinion could be summarized that for such elements of recompense which are not provided in the contract, if there is breach by a party, the other party would be entitled to remedy the loss incurred

as a direct consequence of the breach.

25. The view taken by the majority Arbitrator conforms to the principles of law relating to damages and we simply note that for a similar contract such damages awarded have been upheld by this Court. The decision is dated January 31, 2013 in FAO (OS) No. 461/2012 NHAI Vs. Oriental Structural Engineers Pvt. Ltd. The same has been upheld by the Supreme Court. But we note a point over here because it would be relevant on the subject of loss of profits because the Division Bench in said judgment had noted that the learned Arbitral Tribunal had declined claim for loss of profit because clause 1.1(g) (i) was interpreted by the Arbitral Tribunal to include all expenditure properly incurred or to be incurred whether on or off the site. We note that the contractor had accepted the award and therefore the view taken by the Arbitral Tribunal in said case against the contractor was not a subject matter of a judicial scrutiny. But claims for recompense on account of increase in price of material, labour, petrol and lubricants in a similar contract was upheld by the Division Bench with seal of approval granted by the Supreme Court.

26. In view of the binding judicial precedent it has to be held that the view taken by the majority Arbitrators cannot be faulted and a challenge thereto on said aspect of recompense under Section 34 of the Arbitration and Conciliation Act, 1996 must fail.

27. Learned counsel for NHAI had fairly conceded that if delay was held attributable to NHAI and on the maintainability of the claims 1 to 6 for dispute 8 and 8A, NHAI would be liable to recompense HCC the additional overhead costs in the extended period of the contract as also additional costs on account of extended stay of plant and equipment at site as also further amounts towards cement, steel, labour and POL after taking into account the amounts paid as per indices and formula under clause 70.3 of the General Conditions of the Contract.

28. Learned counsel attacked the quantum awarded by the majority Arbitrator, which was Rs. 2729.42 lacs and Rs. 2688.58 lacs for additional overhead costs pertaining to dispute 8 and dispute 8A and Rs. 2902.02 lacs and Rs. 1414.53 lacs on account of plant and equipment pertaining to dispute 8 and 8A. Learned counsel contrasted the figures awarded by the minority to bring home the huge gap. Learned counsel also referred to the fact that for the extended period of the contract the value of the work done was Rs. 226.30 crores i.e. approximately half value of the tendered work cost being Rs. 446.99 crores. For this extended period escalation in sum of Rs. 62.19 crores had been paid. The focused argument therefore was that on these two claims the award in sum of Rs. 103 crores (approximately) was unreasonable. Learned counsel for NHAI argued that the award pertaining to these two heads of claim for dispute 8 and 8A was sans any evidence and therefore was perverse.

29. A perusal of the award would show that the majority as well as the minority Arbitrator have referred to the data in a standard book compiled by the Ministry

of Road Transport and Highways. The compilation is popularly known as Standard Data Book of MoRTH. The majority as well as the minority have noted that as per the data average overheads for roads, minor structures and major structures were 8%, 20% and 25%. The average being 17.67%. Based thereon the majority has determined the overhead costs. We find that the minority award has treated as if the majority award has applied the percentage 23.94. This is incorrect. Percentage adopted by the majority is 17.67. But we need not be bogged down by the majority versus minority opinion, because the concern with an award by a Court is to see whether there is rationality in the award and not to find out whether something else could also be equally rational.

30. Since there is rationality emerging in the majority award and the percentage picked up is from Standard Data Book of MoRTH we find no infirmity in the award, which has been upheld by the learned Single Judge.

31. On the subject of additional costs on account of extending stay of plant and equipment at site the argument that the majority and the minority awards are without any evidence is wrong for the reason we find that the manner of proof contemplated by the parties was a certification by the Chartered Accountant of HCC to file compilation with reference to the account books, stock register etc. of HCC. Record of the Arbitral Tribunal shows that the Chartered Accountant did the necessary ground work and filed a tabulation with reference to the books maintained by HCC. The extract of the compilation, summarized by the Chartered Accountant, forms part of the majority award in the form of enclosures to Annexure 1 to the award and we find that the learned Chartered Accountant has extracted the equipment deployed during the extended period of the contract Based on the jointly signed monthly reports. This has been highlighted by the majority award while annexing the tabulation as an Annexure to the award. The entire equipment used at the site, with reference to the jointly signed monthly reports is reflected in the Annexure. Section 65(g) of the Indian Evidence Act, 1872 reads :-

"65. Cases in which Secondary evidence relating to documents may be given : Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-

(a) - (f)........

(g) When the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole connection.

In case....

In case.....

In case......

In case (g), evidence may be given as to general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

32. Challenge by NHAI to the award concerning additional costs on account of extended stay of plant and equipment at site is also repelled.

33. Whilst it may strike jarring, that for a balance work of Rs. 226 crores for the extended period, escalation as per contract in sum of Rs. 62.19 crores having been paid, a further sum of approximately Rs. 103 crores is payable as per the award for the prolongation thereof on account of two claims which directly flow out of the delay being solely attributable to NHAI, but once we find that the Arbitral Tribunal has referred to a basis recognized in the industry for computation of these claims, the raised eyebrows must fall.

34. We find that the majority Arbitrators have not awarded any money to HCC for additional costs towards uncovered compensation in cement cost as also steel cost in the extended period of the contract under reference 8 and so has the minority. For the period covered by reference 8A, the majority has made a negative award in sum of Rs. 300.47 lacs and Rs. 42.65 lacs, and the minority NIL. Since this part of the award has not been challenged by HCC either before the learned Single Judge nor before us, the award of the majority obviously stands, and to this extent NHAI would smile because these amounts would be offset from the amount payable by it to HCC.

35. Additional costs towards uncovered compensation in petrol, oil and lubricants (POL) have been awarded by the majority and as noted in the tabular statement above. The minority has awarded NIL.

36. Challenge to the award on this count by NHAI has failed before the learned Single Judge and in respect of quantification of the amounts, learned counsel for NHAI could not show any infirmity in the majority award which has declined any additional cost to compensate for cement and steel pertaining to dispute 8 because the price fluctuation resulted in recompense as per the formula provided and pertaining to dispute 8A it found that on the formula the contractor had received more than what was due even as per the formula and the award on these two heads of claim is against the contractor, who has accepted the majority award evidenced by HCC not filing any objections to the majority award. Therefore we are left to deal with labour and POL escalations awarded by the majority pertaining to dispute 8 and 8A and would simply highlight in Annexure 5(a) and 6(a) to the majority award the computations have been worked out. Nothing could be shown to us to discredit the computations and thus we concur with the view taken by the learned Single Judge that challenge to said part of the award must fail. For parity of reasons challenge to the majority award concerning additional recompense due to increase in price of materials used in the guide bund work must also fail.

37. Though the learned Single Judge has upheld the majority award pertaining to claim No. 7 for dispute 8 and 8A, but during arguments when we confronted

learned senior counsel for HCC with the lack of rationality in the computation in Annexure 7(a), learned counsel conceded that he was unable to decipher any logic in the computation and therefore conceded that the majority award may be set aside on said count.

38. Since we are a court of record with our decisions on legal points having a binding precedent value, we would be failing not to observe that a claim for additional costs towards financing charges is maintainable, for example, if bank guarantees have to be kept alive, a contractor would be entitled to maintain a claim to be recompensed charges paid to the bank for keeping the bank guarantee alive. If it is held that delay was attributable to the owner of the work, the contractor would be entitled to be reimbursed these amounts for the bank guarantee to be kept alive during the extended period of the contract. But to sustain the claim there must be evidence or a rational basis for the claim to be sustained.

39. That leaves us to the last point. For dispute 8 the contractor i.e. HCC has not claimed a penny on account of loss of earning capacity and profits. For dispute 8A it raised a claim and the majority has awarded Rs. 22.6295 crores.

40. The learned Single Judge has held the majority award to be without jurisdiction. The reasoning is that clause 1.1(g) (i) of the contract while defining cost to exclude allowance for profit. Therefore, according to the learned Single Judge the contract did not entitle the contractor to a loss of profit.

41. The reasoning of the learned Single Judge is incorrect. The definition of cost under the contract, while including expenditure incurred whether on or off the site including overheads and excluding allowance for profits would only mean that amounts payable to the contractor whether during the contract or extended period of the contract would be payable as per the contract and would exclude the profits relatable to the contract. But a claim for loss of earning capacity and profit is entirely different. It means that the manpower, plant and machinery used at the site by the contractor during extended period of contract disabled the contractor to use the same for another contract and it is loss of profit of that contract which has to be recompensed. The majority award has extracted a quote from Hudson''s Building and Engineering Contracts as under:-

"When delay in completion of the whole project results, a contractor will usually suffer:

a loss of the profit earning capacity of the particular contract organization affected, due to its being retained longer on the contract in question without any corresponding increase in the monetary benefit earned and without being free to move elsewhere to earn the profit which it otherwise might do."

42. The learned majority Arbitrators have also noted the maintainability of such claims as per law declared by the Supreme Court in the decision reported as , 2004 (1) Arb.LR 652 (SC) Bharat Coking Coal Ltd. Vs. L.K. Ahuja as under:-

"It is not unusual for the Contractors to claim loss of profit arising out of diminution in turnover on account of delay in a matter of completion of work. What he should establish in such a situation is that had he received the amount due under the contract, he could utilized the same for some other business in which he could have earned profit."

43. The view taken by the learned Single Judge to overrule the majority award pertaining to claim No. 8 under dispute 8A is accordingly overruled.

44. To bring the curtains down FAO (OS) No. 402/2014 filed by NHAI is partially allowed and the majority award awarding Rs. 9.7628 crores and Rs. 3.927 crores to HCC under claim No. 7 for disputes 8 and 8A is set aside. FAO (OS) No. 437/2014 filed by HCC is allowed insofar the learned Single Judge has set aside the majority award awarding Rs. 22.6295 crores to HCC for loss of earning capacity and profit under claim No. 8 for dispute No. 8A and the majority award awarding said amount is restored.

45. Parties in both appeals shall bear their own cost.

