

(2012) 12 DEL CK 0159
In the Delhi High Court
Case No : O.M.P. No. 27 of 2010

National Highways Authority of India

APPELLANT

Vs

ITD Cementation India Ltd.

RESPONDENT

Date of Decision : 13-12-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Contract Act, 1872 — Section 28

Citation : (2013) 1 AD 29 : (2013) 197 DLT 650

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

Bench : Single Bench

Advocate : Vikas Goel and Mr. Kunal Kohli, for the Appellant; Amit George, Abin Mathew and Ms. Jojoy Sunil, for the Respondent

Final Decision : Dismissed

Judgement

Justice S. Muralidhar

1. The challenge in this petition u/s 34 of the Arbitration & Conciliation Act, 1996 ("Act") by the Petitioner, National Highways Authority of India

("NHAI") is to an Award dated 22nd April 2009 as modified on 21st August 2009 passed by the arbitral Tribunal ("AT") in the disputes between

NHAI and the Respondent, ITD Cementation India Ltd. [earlier known as Skanska Cementation India Ltd. ("SCIL")] arising out of the award of

the work of widening of four lanes and rehabilitation of existing carriageway of Pune-Satara Road (NH-4) from (Km 725.00 to Km 760.00)

Package-1.

Background Facts

The contract was executed on 10th May 2001 between NHAI and SCIL

Subsequently, on 26th May 2005, the name of the Contractor was changed to that of the Respondent. The letter of acceptance ("LoA") was issued on 12th April 2001; however, the work started on 1st July 2001.

Although the scheduled date of completion was 31st December 2003, the actual date of completion was 30th March 2004.

2. The claims filed by the Respondent were as under:

The impugned Award

3. By the impugned Award, the AT partly allowed the above claims as under:

4. In addition, the AT directed NHAI to pay the Respondent interest as under:

If payments of awarded amount was delayed beyond 21st July 2009, post-Award interest @ 12% p.a. was payable on the amount of the Award

including Claim No. 2.4 with effect from 23rd April, 2009 till date of payment

5. When the present petition was listed before this Court on 22nd January 2010, it was dismissed as regards the challenge to Claim Nos. 1, 4 and

2.5. Notice was issued in the petition limited to the finding on Claim No. 2.2, i.e., withdrawal of deemed export benefits ("DEB"). It may be

mentioned here that to the extent of rejection of its challenge to the remaining claims, NHAI filed FAO(OS) No. 217 of 2010 which was disposed

of by the Division Bench ("DB") on 10th August 2010 in view of the settlement arrived at between the parties. Consequently, the scope of the

present petition is confined to Claim 2.2.

6. This Court has heard the submissions of Mr. Vikas Goel, learned counsel for the NHAI and that of Mr. Amit George, learned counsel for the

Respondent.

Limitation

7. The first submission of the NHAI is that the Respondent's claim in respect of DEB was barred by limitation. It is submitted that inasmuch as the

withdrawal of DEB benefit was effective from 1st April 2001, by a notification dated 30th May 2001, and the Respondent made its claim only on

27th January 2005, the claim in this behalf was barred by limitation. It is submitted that the work was admittedly completed on 30th March 2004

and the Respondent did not have to wait till then to make its claim as regards DEB. It is further contended that the AT did not consider the

decisions cited before it by NHAI. Reliance is placed on National Hydroelectric

Power Corp. Ltd. v. Karam Chand Thapar & Bros. (CS) Ltd.

(decision dated 11th February 2010 in Arb. P.3 Obj. of 2004). The decision of the learned Single Judge this Court in National Highways

Authority of India v. Afcons Infrastructure Ltd.(decision dated 6th September 2011 in OMP No. 761 of 2010) which was affirmed by the DB on

2nd July 2012 in FAO(OS) No. 120 of 2012 (National Highways Authority of India v. Afcons Infrastructure Ltd.) [hereinafter referred to as the

(Afcons case"')] is sought to be distinguished on facts by pointing out that in the said case, the Contractor had made the claim within a period of

three years of the cause of action. In any event, it is stated that the issues that arise in the present case were not considered in the Afcons case.

8. In the impugned Award, the AT has dealt with the issue of limitation extensively in paras 4.3.7 to 4.3.7.8. It was noted that the Respondent

finalized and quantified the total value of the amount to be claimed only after 31st December 2004, i.e., after the completion of the work. It was

observed that the relevant clauses for raising of claims were Sub-Clauses 60.10 and 60.11 of the Conditions of Particular Application ("COPA").

The AT negated the other preliminary objection raised by NHAH that the Respondent had failed to include the DEB claim in its statement of

completion filed on 16th June 2004 in terms of Sub-Clause 60.14. The AT noted that the Respondent had included this claim in its final statement.

Under Sub-Clause 60.12 the Respondent had to give a written discharge to NHAH confirming that the total of the final statement represented the

full and final settlement of all moneys due to it. The discharge became effective after the payment due under the final certificate issued pursuant to

Sub-Clause 60.13 had been made and the performance security returned to the Contractor.

9. The decision in National Hydroelectric Power Corp. Ltd. v. Karam Chand Thapar & Bros. Ltd. is clearly distinguishable on facts. That was a

case where there was unprecedented flood in the area where the project of construction of a dam was being executed. In those circumstances, it

was observed that when the flood took place on 9th and 10th September 1992, the Contractor did not have to wait till 1st May 1996 to invoke

the arbitration clause. As far as the present case is concerned, the quantification of the claim relating to DEB could not have been possible without

the completion of the contract. Considering that there must have been supplies at different stages during the execution of the contract, which

attracted the payment of excise duty, it was impractical to expect that at every such instance the Respondent should make a DEB claim. If the

Respondent waited till the completion of the work to formulate its claims it can hardly be stated that the claims were barred by limitation. In the

circumstances, the view taken by the AT that the starting point for computation of limitation was the completion of the work, cannot be faulted.

Further it requires to be noted that the Respondent went by the procedure set down in the contract and preferred its claims first before the

Engineer on 27th January 2005 and thereafter when there was no response from the Engineer, sought arbitration by notice dated 17th/23rd June

2005.

10. Turning to the decision of the learned Single Judge in the Afcons case, it is seen that in para 6 the submission of NHAI that the claim of the

Contractor in that case was barred by limitation as it was preferred on 11th March 2005 in relation to the notification dated 31st March 2001 was

noted. However, it was rejected in para 7 of the said decision. This was affirmed by the DB after noting that ""there is no factual dispute that the

deemed duty concession or facility was withdrawn with effect from 1-4-2001, much after the bid was submitted and even accepted.

11. In the facts of the present case, there is no dispute that the bid was submitted on 3rd March 2001 and the LoA was issued on 12th April

2001, whereas the notification withdrawing DEB was issued on 30th May 2001. Consequently, the objection of NHAI on the ground of limitation

was rightly rejected by the AT and this Court does not find any ground to interfere with the said finding.

The 100 crore limit

12. It is then submitted that inasmuch as the value of the contract was Rs. 95.97 crores and the minimum specific investment required by the

relevant notification granting DEB was Rs. 100 crores, the Respondent could not have been unaware that it was not entitled to DEB. Reference is

made to the statement made by the Respondent in its statement of claim that it ""had considered ""Nil"" duties payable on all investments scheduled to

be made for executing the said project."" It is submitted that the finding of the

AT that Rs. 100 crores investment was with respect to the entire work of the National Highways Development Project ("NHDP") and not specific to the contract in question would render the very criteria superfluous. It is further submitted that the earlier decision of the learned Single Judge of this Court dated 6th August 2012 in OMP No. 624 of 2007 (Bhageeratha Engineering Ltd. v. National Highways Authority of India Limited), which was affirmed by the DB in its decision dated 16th October 2012 in FAO (OS) No. 495 of 2012 (National Highways Authority of India Limited v. Bhageeratha Engineering Ltd.) [hereinafter referred to as the (Bhageeratha case)] as well as the decision dated 16th May 2012 of the learned Single Judge in OMP No. 96 of 2007 (National Highways Authority of India v. Hindustan Construction Company Ltd.) [hereinafter referred to as the (HCCL case)] did not consider the points now being raised by NHAI. In particular, reference is made to para 10.2(g) of the Export/Import Policy of 1997-2002 ("EXIM Policy") read with para 10.9 of the Handbook of Procedures as well as Appendix 14B and Appendix 40 to contend that inasmuch as the project was not funded by an agency notified by the Department of Economic Affairs ("DEA"), the Respondent was not entitled to DEB in terms of para 10.2(g) of the EXIM Policy. It is submitted that in any event if the Respondent was not entitled in the first place to DEB, the question of NHAI having to reimburse the Respondent did not arise. A further submission in this regard is that under Clause 13.4, of the instructions to the Bidder the Respondent was mandated to include all taxes payable as on the 28th day prior to the last date of submission of the bid. The excise duty was payable and not completely exempted and the question of DEB only arose later on, upon a certificate being issued by NHAI. Inasmuch as the Respondent did not include the excise duty in the prices quoted by it, it could not seek a refund. It is submitted that these submissions were not considered by the AT.

13. The AT has dealt with the above submissions from paras 6.4.3 to 6.4.9 of the impugned Award. It has been held further that the condition for minimum investment of Rs. 100 crores is applicable to the entire NHDP and not confined to the contract in question for construction of package PS-I.

14. In the first place, it must be noted that the above contention arose for consideration before the Court in the HCCL case in which the Award of the AT negating a similar plea of NHAI was upheld by the learned Single Judge of this Court. The decision of the learned Single Judge in HCCL case was again referred to in the decision in Bhageeratha case by the learned Single Judge which was affirmed by the DB. Independent of the above decisions, this Court finds that the view taken by the AT that the criterion of minimum investment of Rs. 100 crores was relatable to the NHDP as a whole was a plausible view. There can be no doubt that the investment in the project had to be that of the NHAI. Merely because the Respondent had in its statement of claim mentioned that it had "considered the nil duty payable on investments scheduled to be made for executing the project" did not mean that the investment was taken to be that of the Respondent. Clearly, the Respondent was only a Contractor and was not making any investment in any project. There can be no doubt that it was NHAI which was making the investment. When the Respondent first submitted its bid it was for a sum of Rs. 115 crores, whereas the LoA issued was for Rs. 95.97 crores. However, what was "invested" by NHAI in the project was the actual amount for which the project was performed. In terms of the bill at completion, the value of the work certified by NHAI was Rs. 129.16 crores and after rebate and without escalation it was Rs. 112.86 crores. Clearly, therefore, NHAI "invested" Rs. 112.86 crores in the project. Therefore, even if one were to accept the contention of NHAI that DEB investment limit was specific to the present project, it stood fulfilled.

Certification of funding of project by external agency

15. The more serious objection is to the absence of certification that the project was funded by an external agency. In order to appreciate this submission, a reference may be made first to para 10.2 of the EXIM Policy, which reads as under:

10.2 The following categories of supply of goods by the main/subcontractors shall be regarded as "Deemed Exports" under this Policy, provided

the goods are manufactured in India:

(a) supply of goods against Advance Licence/DFRC under the Duty Exemption/Remission Scheme;

(b) Supply of goods to Export oriented Units (EOUs) or units located in Export Processing Zones (EPZs) or Special Economic Zone (SEZs) or

Software Technology Parks (STPs) or to Electronic Hardware Technology Parks (EHTPs);

(c) supply of capital goods to holders of licences under the Export Promotion Capital Goods (EPCG) scheme;

(d) supply of goods to projects financed by multilateral or bilateral agencies/funds as notified by the Department of Economic Affairs, Ministry of

Finance under International Competitive Bidding in accordance with the procedures of those agencies/funds, where the legal agreements provide

for tender evaluation without including the customs duty;

(e) supply of capital goods, including in unassembled/disassembled condition as well as plants, machinery, accessories, tools, dies and such goods

which are used for installation purposes till the stage of commercial production and spares to the extent of 10% of the FOR value to fertilizer

plants.

(f) supply of goods to any project or purpose in respect of which the Ministry of Finance, by a notification, permits the import of such goods at

zero customs duty coupled with the extension of benefits under this chapter to domestic supplies;

(g) supply of goods to the power and refineries not covered in (f) above and coal, hydrocarbon, rail, road, port, civil aviation, bridges and other

infrastructure projects provided minimum specific investment is Rs. 100 crores or more;

(h) supply of marine freight containers by 100% EOU (Domestic freight containers-manufacturers) provided the said containers are exported out

of India within 6 months or such further period as permitted by the Customs; and

(i) supply to projects funded by UN agencies.

The benefits of deemed exports shall be available under paragraph (d) (e) (f) and (g) only if the supply is made under the procedure of

International Competitive Bidding (ICB).

16. A perusal of the above para shows that there are several categories of supplies of goods by a Contractor which could be regarded as

"deemed export". Sub-para (d) specifically talks of "supply of goods to projects financed by multilateral or bilateral agencies/funds" notified by

DEA. Sub-para (g), which is relevant for the purposes of the present case, deals with the supply of goods to roads, bridges and other

infrastructure projects. The further requirement is that for being eligible to DEB, supply has to be made under the procedure of International

Competitive Bidding ("ICB").

17. Also relevant to the dispute on hand is para 10.9 of the Handbook of Procedures which reads as under:

10.9 In respect of supplies under categories mentioned in paragraphs 10.2 (d) (e), (f), (g) and (h) of the Policy, payment against such supplies shall

be certified by the Project Authority concerned, as prescribed in form given in Appendix 14-B. However, supplies to the projects funded by such

agencies alone, as may be notified by Department of Economic Affairs, Ministry of Finance, shall be eligible for deemed export benefits. A list of

such agencies/funds is given in Appendix-40.

18. Appendix 14-B sets out Form 1-A which reads as under:

FORM I-A

(Certificate of Payment to be issued by the Project Authority for Supplies made to Categories (d), (e), (f) and (g) of Para 10.2 of the Policy)

Certified that the goods of quantity and value as described below and in Invoice No. _____ dated _____ have been supplied to us

on date against purchase order No. dated _____ and we have paid to the suppliers, namely, M/s. the sum of Rs. (figures and words)

_____ on _____ (date) being _____ percent of the value of the goods/equipments/capital goods supplied as

per terms of the contract No. _____ dated _____ entered into with the suppliers in accordance with the conditions applicable to:

*(i) Supply of goods to projects financed by multilateral or bilateral Agencies/Funds as notified by the Department of Economic Affairs, Ministry of

Finance vide their Reference No. _____ dated _____ under international competitive bidding or under limited tender system in

accordance with the procedures of those agencies/Funds, where the legal agreements provide for tender evaluation without including the customs

duty; and

*(ii) Supply of capital goods to fertiliser plants if the supply is made under the procedure of international competitive bidding;

*(iii) Supply of goods to any project or purpose in respect of which the Ministry of Finance vide their Notification No. _____ dated _____

permits the import of such goods at zero customs duty coupled with the extension of benefits under Deemed Exports for domestic supplies.

*(iv) Supply of goods to such projects in the Power, Oil and Gas sectors in respect of which the Ministry of Finance, extends the benefits of deemed exports to domestic supplies.

It is also certified that the supplies have been accepted by us at the site at the price/stated in the invoice.

*(use whichever is applicable)

Description, Quantity and Value of goods supplied.....

Signature

Name

Designation.....

Name of the Project.....

Place:

Date:

Note: 1. This certificate should be signed by the Chief Executive Incharge of the project concerned or by a senior officer specially authorised by him for this purpose.

2. In case of supplies to Fertilizer Projects, this certificate should be signed by such officer/authorities as may be notified from time to time by the Department of Fertilizers.

19. At the first blush, the submission of the learned counsel for NHAH that para 10.9 of the Handbook of Procedures clearly refers to sub-para

10.2 [(d) (e) (f) (g) and (h)], appears attractive. However, on a careful scrutiny of the relevant sub-para, it is difficult to accept the submission. In

the first place, the Handbook of Procedures cannot expand the scope of the EXIM Policy itself. The reliance placed by the learned counsel for

NHAH on the decision in *Suhag Traders Pvt. Ltd. Vs. Apparel Export Promotion Council and Others*, to contend that even the Handbook of

Procedures is a statutory document overlooks the fact that the EXIM Policy is also by the same yardstick a statutory document. The procedures

are to operationalize the EXIM Policy. They cannot possibly insert a new criterion that does not form part of the EXIM Policy itself. The

conditions that are to be met by a Contractor to avail DEB are set out under para 10.2. It is only para 10.2(d) that talks of supplies of goods to

projects financed by multilateral or bilateral agencies/funds. Para 10.2(i) talks of supplies to projects funded by UN agencies. The only requirement

that is to be met for availing DEB is that the procedures of an ICB is to be followed where the supplies are under sub-paras (d), (e), (f), (g) and

(h) of para 10.2.

20. Para 10.9 of the Handbook of Procedures states that the certification relevant for the supplies under the above sub-paras is to be given in a

certain format. A careful reading of Form 1-A indicates that there is an asterisk mark against Clauses (i), (ii), (iii) and (iv) and it further explains

asterisk to mean "use whichever is applicable." Consequently, each of the above clauses of Form 1-A have to be read as corresponding to the

relevant sub-para of para 10.2 of the EXIM Policy. While Clause (i) of Form 1-A would correspond to sub-para (d) of para 10.2 of the EXIM

Policy, there is no corresponding clause in Form 1-A as regards sub-para (g) of para 10.2 which concerns projects of construction of roads,

bridges and infrastructure. If, in fact, any funding of a project under para 10.2(g) is made by an external agency, then Form 1-A should be used for

issuing the necessary certification.

21. However, that is not to say that the DEB qua para 10.2(g) would be available only if the project is funded by an external agency. In other

words there is no mandatory requirement that in order to avail DEB, where supply is made for a road, bridge or infrastructure project, there has to

necessarily be funding by an external agency. This becomes clear when one refers to Appendix 40 which sets out the agencies approved by the

DEA for funding of projects. The note states: ""please see Para 10.2(d) of the Policy and Para 10.9 of this Handbook."" It is this that has weighed

with the AT in concluding that the requirement that the issuance of certificate in Form 1-A is relatable to supplies made in para 10.2(d) of the

EXIM Policy. There is no illegality in the said conclusion.

Re: Clause 13.4

22. The contention of the NHA that the Respondent ought to have included the

excise duty payable in terms of Clause 13.4 when submitting its

bid is based on an erroneous understanding of that clause which reads as under:

13.4 All duties, taxes and other levies payable by the Contractor under the Contract, or for any other cause, as of the date 28 days prior to the

deadline for submission of bids, shall be included in the rates and prices and the total bid price submitted by the bidder, and the evaluation and

comparison of bids by the Employer shall be made accordingly.

23. What the above clause in fact requires the Contractor to do is to account for all the taxes, duties and other rebates payable. At the time when

the bid was submitted by him the Contractor estimated the value to be above Rs. 100 crores and, therefore, even if the excise duty was

subsequently refundable under the DEB scheme, the Respondent was justified in proceeding on the footing that ultimately there would be no excise

duty. The averment made by the Respondent in its statement of claim that it had considered "nil duty" only meant that although excise duty was

payable, it was refundable in terms of the notification which subsequently stood withdrawn after the submission of the bid and its acceptance.

Is Sub-Clause 60.14 hit by Section 28 of the Contract Act?

24. The next submission is that the Respondent failed to include DEB claim in the statement at completion pursuant to sub-Clause 60.14 which

reads as under:

Sub-Clause 60.14: Cessation of Employer's Liability

The Employer shall not be liable to the Contractor for any matter or thing arising out of or in connection with the Contract or execution of the

Works, unless the Contractor shall have included a claim in respect thereof in his Final Statement and (except in respect of matters or things arising

after the issue of the Taking Over Certificate in respect of the whole of the Works) in the Statement at Completion referred to in Sub-Clause

60.10.

25. It is submitted by the NHA that the clause itself was not hit by Section 28 of the Indian Contract Act, 1872 ("Contract Act"), as it did not

prescribe any period within which the claim ought to be made. In terms of Sub-Clause 60.10 the claim did arise at the stage of preparing the

statement at completion. It is submitted that, in fact, even during the stage of

interim payment statement, the claims ought to be raised which was not done in the present case. It is submitted that the reference by the AT to Sub-Clauses 60.12 and 60.13 to explain the failure of the Respondent to adhere to Sub-Clause 60.14 resulted in the AT taking an implausible view as, according to NHAI, these clauses were not relevant at all.

Reliance is placed on the decision of the Supreme Court in Food Corporation of India Vs. Chandu Construction and Another, and the judgment of this Court in N.D.R. Israni Vs. Delhi Development Authority, .

26. The above submission overlooks the fact that the Respondent would not have been able to quantify the actual amount of excise duty payable

till the project was actually complete. Only then he would have had a fair idea of all the goods supplied for the project and the corresponding

excise duty payable thereon. The reference by the AT to Section 28 of the Contract Act was not irrelevant. Indeed, Sub-Clause 60.14 results in

extinguishing of the claim if such claim is not included in the final statement. As correctly noted by the AT, the Respondent did include the claim in

relation to DEB in its final statement of claim. There is a distinction between the statement at completion under Sub-Clause 60.10 and the final

statement in terms of Sub-Clause 60.11. Sub-Clause 60.11(b) talks of ""any further sums which the contractor considers due to him under the

contract"" beyond what is accounted for in the statement at completion.

27. Both the decisions referred to by the learned counsel for NHAI are distinguishable in their application to the facts of the present case. The

relevant provisions of the contract were themselves different. What is relevant here is that the above sub-clauses, i.e., Sub-Clauses 60.10 and

60.14 have to be read harmoniously to arrive at a correct interpretation of what was required to be done by the Contractor. This Court finds no

error having been committed by the AT in rejecting the above plea of NHAI.

Are the claims barred by the principles of Order II Rule 2 CPC?

28. It was next submitted by the NHAI that under Order II Rule 2 of the Code of Civil Procedure, 1908 ("CPC"), the Respondent is precluded

from initiating a separate civil suit successfully for DEB when its earlier claim relating to rebate on varied works was pending. On the strength of the

decisions in Chugh Kathuria Engineers (P) Ltd. Vs. Delhi Development Authority (DDA), and Virgo Industries (Eng.) P. Ltd. Vs. Venturetech

Solutions P. Ltd., , it is submitted that the AT ought not to have entertained the claims at all. It is submitted that the claims of rebate on varied

works as well as DEB were essentially based on what the Respondent presumed. It was entitled to the claims when it submitted the bid.

Therefore, both the claims could have easily been submitted with a single reference. The Respondent did not have to wait to make a separate claim for DEB.

29. The decision in Chugh Kathuria Engineers (P) Ltd. v. Delhi Development Authority refers to the earlier decisions to conclude that the principles

of the CPC would be ""attracted even to the arbitral proceedings"" although the Act itself states that the CPC is ""not strictly applicable to arbitral

proceedings"". The object of extending the CPC principles to arbitral proceedings is to ensure that the arbitral proceedings are just and fair. Neither

party should be prejudiced or harassed as a result of the procedure adopted by the AT. Parties should not be able to abuse the process of law by

filing frivolous and vexatious claims. Only when the procedure adopted by the AT is found to be unsupportable by any known means of a

reasonable and fair procedure, can it be said that the arbitral Award passed as a result thereof is patently illegal.

30. The Court concurs with the finding of the AT that the claims which formed the subject matter of the two references were distinct and separate.

The provisions of the CPC are not to be applied mechanically in which case there would be no distinction between the proceedings in a civil court

and the proceedings before an Arbitrator. In each case, when a challenge is raised to the Award on the ground that the principles underlying a

certain provision of the CPC have not been followed, the Court must examine whether non-adherence to such principles has, in fact, resulted in the

miscarriage of justice or a patent illegality attracting any of the grounds u/s 34 of the Act. In the present case, the earlier reference was made on

26th June 2004, whereas the subsequent claims were made on 27th January 2005 to the Engineer, i.e., approximately within a period of six

months. It was not as if NHAI was unable to defend itself in the subsequent claims or that the claims were frivolous or vexatious. While it was

possible for the Respondent to have sought amendment to the earlier claims, no prejudice was caused to NHAI because there was a separate

reference made in respect of the subsequent claims. In large scale projects, it is not unheard that different facets of the projects constitute the

subject-matter of separate references which, at times, are decided by separate arbitral Tribunals. Therefore, in the context of large scale works

contracts, there cannot be any rigid application of the principles of Order II Rule 2 CPC unless it is demonstrated that the prejudice has been

caused to either party as a result of such non-adherence. In the present case, the Court is not satisfied that any prejudice has been caused to

NHAI as a result of the Respondent having made a separate reference in respect of the claims which forms the subject-matter of the impugned

Award of the AT.

Appointment of auditors

31. The last objection is that the AT was in error in directing NHAI to appoint its Chartered Accountant ("CA") for verifying the claims of the

Respondent. This meant that the onus which was on the Respondent to prove its claim was unfairly shifted to the NHAI and resulted in NHAI

having to bear costs of Rs. 4,00,000 for the fees of the Auditor. It is submitted that NHAI gave full justification of submitting the report of its own

Auditor which had certified that a sum of Rs. 3.72 crores was payable to the Respondent.

32. It is submitted by Mr. Amit George, learned counsel for the Respondent, that the AT, in fact, did not entirely accept the case of the

Respondent either. A perusal of the impugned Award shows that after analyzing the two Auditors' reports, one submitted by the Auditor of NHAI

and other by the Auditor of the Respondent, the AT held that they were at variance. The AT, in para 6.5.6 of the Award, noted as under:

6.5.6. The Claimant also confirmed in his letter dated 25th August 2008 and during subsequent hearings, and confirmed by the Respondent, that

the copies of the Bills and Certificates submitted in CH 35 were verified by the Respondent, with their counsel and their CA in the office of the

Claimant. The Respondent had verified and found all the documents to be in order except that few of the bills of authorized IOCL dealers

contained a 2% credit card transaction charge. The same was considered by the Claimant and reduced Rs. 10,115/- on this account. The final

amount claimed under category 1 & 2 (Refer page 10 of CH-17) is Rs.

52,924,725. The Claimant revised the evaluation taking into account the Respondent's observations and comments. The Claimant's valuation of the final claim amount is Rs. 69,698,190/-.

33. It is plain, therefore, that even during the pendency of the arbitral proceedings, both the parties had occasions to examine the documents.

NHAI had verified the documents and found that barring a few of the bills, all the documents submitted by the Respondent were perfect and in

order. It is on that basis that the value of the final amount claim was determined at Rs. 5,29,24,725. Learned counsel for NHAI draws attention of

the Court to a certificate of NHAI stating that it did not accept the above determination.

34. This Court finds that the said certificate is only a self-serving one addressed by the Auditor to NHAI to justify its earlier report. It nowhere

disputes the veracity of any of the documents submitted by the Respondent before the AT. It is on the basis of the verification of such documents

that the above amount has been determined. This Court finds no illegality having been committed by the AT in requiring the certification by the

Auditors. The objection is, accordingly, rejected.

Interest

35. Finally, it was submitted that the AT ought not to have directed payment of compound interest. It is seen that the AT has, in paras 9.1 and 9.2,

given the reasons for doing so. A reference has been made to Sub-Clause 60.8 of the Contract, in terms of which the rate of interest payable on

unpaid sums was to be 1/30th of 1% per calendar day, which works out to 12% per annum compounded monthly. In the circumstances, the

award of interest @ 12% per annum compounded monthly for the pre-reference and pendente lite period cannot be said to be erroneous. The

award of post-Award interest @ 12% per annum from the date of the Award to the date of payment also cannot be said to be unreasonable. The

petition is, accordingly, dismissed, but in the circumstances, with no order as to costs.