

(2019) 01 DEL CK 0288

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 160 Of 2012

National Highways Authority Of India

APPELLANT

Vs

Sunway Construction Sdn Bhd

RESPONDENT

Date of Decision : 22-01-2019

Acts Referred:

National Highways (Fees for the use Of National Highways Section And Permanent Bridge – Public Funder Project) Rules, 1997 — Rule 11
Arbitration & Conciliation Act, 1996 — Section 34

Citation : (2019) 173 DRJ 709 : (2019) 3 R.A.J. 311 : (2019) 257 DLT 220 :
(2019) 3 AD(Delhi) 373

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Maurya Vijay Chandra, Amit George, Rishabh Dheer, Swaroop George, Rajsree Ajay

Final Decision : Disposed Off

Judgement

Prathiba M. Singh, J

1. The present petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') has been filed by the National Highway Authority of India (hereinafter, "NHA") challenging the impugned award dated 3rd October, 2011. The said award was passed by a three-member tribunal by a 2:1 majority.

2. The Respondent-Sunway Construction SDN BHD (hereinafter, "Contractor"), a Malaysian company was awarded the contract for "Rehabilitation and upgrading of Km 406.00 to km 449.150 of NH-76 to 4-lane configuration in the State of Rajasthan (Contract Pkg. RJ-9)" (herein after "Project"). The contract was awarded vide NHA's letter dated 30th June, 2005, however a formal contract was signed between NHA and the Contractor only on 11th August, 2005. The time for completion of the work was 30 months from the scheduled date. Thus, date of completion was 25th April, 2008. The total value of the awarded contract was Rs.286,85,00,000/-excluding provisional sums. The

price including provisional sums was Rs.329,64,75,000/-.

3. The work was to be executed by the Contractor on NH-76, in the State of Rajasthan. The contractor was to carry out new construction as also widening/strengthening and maintenance of the existing road and carriageway.

4. The General Conditions of Contract agreed to between NHAH and the Contractor were the Conditions of Contract published by FIDIC i.e., International Federation of Consulting Engineers (hereinafter, "FIDIC"). The conditions of contract as stipulated by FIDIC, were supplemented by the parties by entering into a detailed contract called the Conditions of Particular Application (hereinafter, "COPA"), which were customised for the present contract. Accordingly, the applicable conditions of contract in the present case, were the FIDIC conditions as modified or added to by the COPA. The entire work under the aforesaid contract was divided into various items, which was to form part of the Bill of Quantities (hereinafter, "BOQ"). These items, as contained in the BOQ, was to be executed by the Respondent as per the technical specifications. The payment for works executed was to be released to the Contractor on the basis of the measurements recorded for the various items contained in the BOQ. The Contractor was to raise IPCs (Interim payment certificates or Interim bills) which was to be paid in terms of the contract. In one such IPC raised in August 2007, the Contractor claimed Price adjustment by adding excise duty in the price of concerned materials. This was objected to by the Engineer, leading to a dispute between the parties. Thereafter the Contractor also claimed reimbursement of amounts paid by it towards toll collected by the State of Rajasthan on the Kalisindh Bridge and the Parvati River Bridge on NH-76 in Baran Dist., State of Rajasthan.

5. Thus, two disputes arose between the parties which were referred to the Dispute Adjudication Board under Clause 67.1 of the COPA. Both, in respect of the dispute on price adjustment and payment of toll tax, the DAB decided in favour of the Contractor. Dissatisfied with the said decisions and pursuant to clause 67.2 of the COPA, the NHAH conveyed its intention to refer the said disputes to arbitration vide letters dated 15th December, 2009 and 21st January, 2010, respectively. Thus, vide letters dated 4th January, 2010 and 25th January, 2010, the disputes were referred to arbitration. The Arbitral Tribunal entered reference on 2nd March, 2010 and passed the impugned award dated 3rd October, 2011 by a 2:1 majority, in favour of the Contractor. The present petition has been filed challenging the said award in respect of the said two disputes/claims which are as under: -

"Dispute No.2: Payment of Price Adjustment in accordance with Clause 70 of COPA.

Dispute No.3: Reimbursement of Toll Tax collection at Kalisindh Bridge & Parvati River Bridge on NH-76 in Baran district."

6. The Arbitral Tribunal by a 2:1 majority held in favour of the contractor in

respect of both the claims. NHAI has challenged the findings of the Tribunal in the present petition. The objections raised in respect of each of the disputes is considered and decided herein below: -

A. Dispute No.2: Payment of Price Adjustment in accordance with Clause 70 of COPA

7. The said dispute relates to the manner of calculation of price adjustment for Bitumen and for fuel. As per the terms of COPA, the payment of price adjustment was being certified by the Engineer and paid by NHAI, under the monthly IPCs, based on the monthly statements submitted by the Contractor under clause 60.1 of COPA. During the currency of work, the NHAI Policy Matter Circular dated 14th February, 2005 was issued, and the Engineer informed the Contractor that sub-clause 70.3 of the COPA, which prescribed the formulae for calculation of price adjustment, is superseded by the said circular. The circular pertained to the inclusion/exclusion of component of excise duty from the base and current rates of materials for the purpose of payment of price adjustment. The Engineer, thus, in IPC 19 excluded the excise duty while calculating the percentage of the material used in the completion of the work for that month. Thus, the question whether the component of excise duty should be considered while working out the Price Adjustment under clause 70 of the COPA, is the subject matter of the present dispute. Price Adjustment was to be determined as per sub-clause 70.3 of the COPA. The relevant extract of the said clause reads as under: -

"Sub-Clause 70.3: Adjustment Formulae i).....iv).....

v) Adjustment for Bitumen Component Price adjustment for increase or decrease in the cost of Bitumen shall be paid in accordance with the following formula:

$$V_b = 0.85 \times P_b \times R_i \times \frac{(B_i - B_o)}{100 B_o}$$

V_b = increase or decrease in the cost of work during the month under consideration due to changes in the rates for bitumen.

B_o = the average official retail price of bitumen at the IOC refinery for the place as defined in Appendix to Bid, on the day 28 days prior to the date of submission of Bids.

B_i = the average official retail price of bitumen at the IOC refinery for the place as defined in Appendix to Bid, on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related.

P_b = Percentage of bitumen component of the work.

vi) Adjustment for Fuel and Lubricants Price adjustment for increase or decrease in the cost POL (fuel and lubricants) shall be paid in accordance with the following formula:

$$V_f = 0.85 \times P_f \times R_i \times \frac{(F_i - F_o)}{100 F_o}$$

$$100 F_o$$

Vf = increase or decrease in the cost of work during the month under consideration due to changes in the rates for fuel and lubricants.

Fo = the average official retail price of High Speed Diesel (HSD) at the existing consumer pumps of IOC for the place defined in the Appendix to Bid, on the day 28 days prior to the date of submission of Bids.

Fi = the average official retail price of High Speed Diesel (HSD) at the existing consumer pumps of IOC for the place defined in the Appendix to Bid, 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."

8. The case of NHA I was that the project which was awarded to the Contractor was a World Bank aided project and hence the Contractor was exempted from paying any excise duty on the cost of materials used in the project. On this fact, there is no dispute. The question is as to whether excise duty is to be included while calculating and determining the price adjustment for Bitumen and fuel. Both Bitumen and fuel have a similar formula for determination of price adjustment. Bitumen is represented by the

letter 'B' in the formula and fuel is represented by letter the 'F':

"A. Formula for Bitumen

$$V_b = 0.85 \times P_b \times R_i \times (B_i - B_o)$$

$$100 B_o$$

B. Formula for Fuel

$$V_f = 0.85 \times P_f \times R_i \times (F_i - F_o)$$

$$100 F_o"$$

9. The manner of determining the price adjustment is by applying the above formula both for Bitumen and Fuel. The formulae are identical. For the sake of convenience, the Bitumen formula is being referred to. The formula has three clear segments. Vb represents the increase or decrease caused in the cost of the work, due to changes in the rate of Bitumen, i.e., it represents the value to be attributed to Bitumen in a particular month due to rise or fall in the rates of Bitumen. Vb is, therefore, what is to be determined as the price adjustment to be given to the contractor.

10. Bi and Bo are the official retail price of Bitumen at the Indian Oil Corporation Refinery in Mathura. Bo refers to the price which was prevalent 28 days prior to the submission of the bid. Bi is the retail price of Bitumen at the same refinery,

prevalent 28 days prior to the submission of the IPC. The retail price of Bitumen, 28 days prior to the date of submission of the bid, would thus be a fixed amount during the entire period of the contract, as the same would have been ascertained by the contractor at the time of submission of the bid itself. The value of Bi, however, changes on a month to month basis. By inserting Bi value every month, part 'C' of the formula can be easily determined. The manner of calculation of Bi and Bo is not an issue inasmuch as the retail price would always include the excise duty. This is clear from the clarifications issued by NHAI annexed as Annexure P-5 in the Petition.

11. However, what is in issue is the manner in which Pb is to be determined.

12. Pb stands for the percentage of Bitumen component in the work executed in a particular month. It is the submission of NHAI that the value of Bitumen as part of the total value of the work, executed in a particular month, should be taken without the excise duty. The contractor argues to the contrary. Submissions have been made from both the sides.

13. The impugned award conflates the issue. The award proceeds on the basis that the issue is in respect of determining Bi and Bo, which is not the case. The retail price would obviously include the excise duty. If Bo included the excise duty then Bi would naturally include the excise duty.

This is clear from the following extract of the award:

"7.4.1(d)(v) Bitumen

As per the formula stipulated for component of "Bitumen" the increase or decrease in the cost of Bitumen is to be worked out based on variation in the average official retail price of bitumen at the IOC Refinery on the day 28 days prior to the closing date of submission of Bids i.e., "Bo" and the average official retail price of bitumen at the IOC refinery prevailing on the day 28 days prior to the last day of the period to which a particular IPC is related to i.e., "Bi". The above stipulations read together with stipulations at Sub-clause 70.5 of Clause 70, would indicate that "Bo" is "Base Price" and "Bi" is "Current Price" of Bitumen for the purpose of adoption in the formula. This price adjustment is not based on "Indexed cost" but is based on "official retail price" at the IOC refinery at KOTA

.....

The retail price is the price at which the material/goods are sold to consumers. It has also been found in para (iii) above in case of adjustment of Fuel & Lubricants that the retail price for consumers at pumps shall always be inclusive of excise duty. Any material which comes out of the storage place of factory or place of manufacture has to pay the excise duty before it is sold in retail or wholesale. The AT therefore finds that such retail price, at which the goods are sold to the consumers/general public, shall be inclusive of excise duty. The value of "Bo" and "Bi" shall therefore be inclusive of the excise duty.

.....

The reading of definition of "Bo" together with the definition of "Base Price" under clause 70.5 makes it clear that the "base price" of the bitumen shall be the official retail price prevailing in the previous month prior to the closing date for submission of bids.

.....

The AT has already found above that the "official retail price" includes the excise duty."

14. It is settled by the Supreme Court in National Highway Authority of India v. Progressive MVR (JV) AIR 2018 SC 1270, where the Supreme Court has held in respect of the same formula as under:

"31. The DAB thereafter worked out the formula in the following manner:

x, y, z percentages are to be worked out as per provisions note below Sub-clause 70.3(ix). Thus, $p(x,y,z)$ percentages

= Cost of material consumed during the months x 100 Work done in that month as per IPC

= Quantity of material consumed during the month x Rate of material x 100 Work done

The Contractor has quoted rates in the tender based on base rates of material and IPC is based on BOQ rates quoted by the contractor on base rates of material. Therefore for working out actual percentage of cost of material of bitumen, cement and steel used in execution of work as per the IPC for the month, base rate of material can only be used as per the provisions of contract in order to arrive at actual percentage, numerator and denominator is based on BOQ rates determined on base rates. The numerator should also be based on base rates. This is why rate of material in numerator should be rate of material at the time of bid. This is a fixed rate and not variable as claimed by the contractor. The contract provision is quite clear in this regard and there is no ambiguity.

32. It is also pointed out that if the current cost of material is adopted, instead of base case as claimed by the contract, price adjustment will be paid twice. One due to increase in percentage factor (x, y and z) due to use of current rate instead of base rates and second due to application of price adjustment factor $b1-bo/bo$.

It also demonstrated, by giving examples, that when the base rate is adopted, the price adjustment was quite proximate with the prevailing price which compensated the contractor realistically. On the other hand, on adoption of current rate, the calculation of price adjustment was almost three times the amount of increase in cost of bitumen incurred by the contractor.

33. We are quite in agreement with the aforesaid analysis carried out by the DRB.

34. As mentioned above, the majority Award has held that even the intention of the parties was to take into consideration the current cost. For this purpose, it had taken into consideration the manner in which IPC payments were made. However, we find here, though unfortunately, that there was no consistent practice. Sometimes the payments were made on the basis of current cost and sometimes on the basis of base cost. Maybe different officers understood the formula in a different manner which resulted in the aforesaid varied approach. However, when it came to the knowledge of the Authorities at appropriate level, directions were given to pass the IPC keeping in view only the base rate.

35. We find due rationale in the aforesaid approach. As a result, we hold that while applying price adjustment formula for calculating the price adjustment of bitumen, it is the base rate which is to be applied and not the current rate."

Thus, the Supreme Court held that while passing IPCs, the comparison has to be between the base rate and the prevailing price.

15. Thus, there is no issue as to how B_i and B_o are to be determined.

However, the question raised in the present petition is the determination of P_b and whether excise duty is to be included while determining P_b . The ground raised by the NHAI in its petition is set out below:

? Clause 70.3(v) of COPA which deals with the calculation of Price Adjustment of Bitumen is as under:

$$V_b = 0.85 \times \{P_b \times RI\} \times \{(B_i - B_o)\}$$

$$100 B_o$$

(3) (2) (1)

? In the present case there is no dispute between the parties regarding the values and manner in which R_i , B_i and B_o have to be calculated. As far as P_b is concerned the same has to be found out in accordance with clause 70.3(xi)(4) of COPA.

? The purpose of this formula is to adjust the price of Bitumen in every IPC from the levels which prevailed at the time when the bids were submitted and prices agreed between the parties.

? The formula is divided into three parts:

Part 1- Value/extent of rise and fall in the markets in relation to Bitumen. This is calculated by dividing the difference of the current average official retail price of Bitumen (B_o) at the Indian Oil Corporation's refinery in Mathura. This is the value by which the price of Bitumen will be adjusted in any particular IPC. These figures are available from the aforesaid refinery and have no connection with the

actual cost incurred by the Respondent in getting Bitumen for the project. It is immaterial whether this average official retail price includes the element of Excise Duty or not. This is just a measure for ascertaining the movement of prices of Bitumen in a given period of time. In other words this is just a scale for finding out market movement.

Part 2 - Indicates the amount in a particular IPC which is to be adjusted by the value calculated from Part 1 above. For this purpose it is necessary to find out the percentage value of Bitumen out of the total value of work done i.e. value of R (value of work done in an IPC on BOQ rates and value of secured advance towards materials). This is calculated by applying the following equation:

If 'Rs.A' worth of bitumen is involved in work of the value of 'Rs.B' (at BOQ Rates) then how much worth of bitumen will be involved in the total value work i.e. 'Rs.R' (value of work done in an IPC on BOQ rates and value of secured advance towards materials)?

The answer to the above is: $(A/B) \times R$.

It is pertinent to note here that the factor A/B is what existed at the time of bidding and can only be calculated by adopting the cost of bitumen taken into account by the bidder at that point of time. This factor is then used to find the value of bitumen which has to be adjusted in each IPC.

The dispute in the present case pertains to this part of the formula where the petitioner says that the price of bitumen should be taken without the Excise Duty component because admittedly bitumen was available to the respondent without payment of excise duty for this project and the BOQ prices were based on cost of bitumen without excise duty element.

Part 3 - Only 85% of the product of Parts 1 and 2 will be paid as price adjustment. That is why part 3 consists of the fixed value of 0.85.

? For finding out the value of Pb or percentage "X" in respect of any particular IPC, the actual physical quantity of bitumen used in the works covered by the said IPC is considered. Thereafter it is necessary to find out the value (in terms of money) of this quantity of bitumen used in the works in that particular IPC. This money value of the quantity of bitumen used in the work in a particular IPC is then divided by the total value of work executed in that particular IPC after rebate (Ri) and multiplied by 100. Therefore it is apparent that the denominator in this question insofar as value of the work done in a particular IPC is on BOQ rates. On the basis of basic mathematical principles, the numerator must also be based on factors other than BOQ rates (eg inclusion of Excise Duty when no such duty was levied or paid), it would come from a family which would be different from that of the denominator and would therefore lead to an incorrect and absurd conclusion. This would be contrary to the basic mathematical principles governing fractions and percentages. This could not be the intent and purpose of this term of the contract.

? According to the note appended below clause 70.3(xi) the actual percentage of costs mentioned therein is in relation to the material used for execution of work as per the "interim payment certificate" for the month. In this regard attention is invited to Clause 60.1 of COPA of the contract where it is clear that the value of the work done in any IPC would be based on the BOQ rates. It clearly indicates that by this reference too the value of the three materials for calculating the percentages X, Y and Z has to be from costs of these materials as incurred by the respondent. In the present case since admittedly such costs to the respondent did not involve payment of any Excise Duty in its calculations is contrary to the contract and leads to absurdity."

16. In response the Contractor pleads as under:

"The further contention of the Petitioner that the numerator and denominator are different is also incorrect. The note under Clause 70.3(xi) clearly stipulates X, Y, Z are actual percentages of material i.e. cost of material of bitumen, cement and steel used for execution of work in a particular IPC. Nowhere is it indicated that it has to be based on the base price, without excise duty, of items X, Y, Z of 28 days prior to the acceptance of bids.

The Respondent gave a reference to the following formula with respect to determination of Pb:

$$V_b = 0.85 \times P_b / 100 \times R_i \times [B_i - B_o / B_o]$$

The Petitioner has stated that there are three factors in the formula, however, there are four factors in the formula as can be seen as under:

- 1) First part - 0.85
- 2) Second part - $P_b/100$
- 3) Third part - R_i
- 4) Fourth part - $B_i - B_o / B_o$

Part I, Part III and Part IV

There is no dispute in the interpretation of the first part, as far as the understanding of the Petitioner and the Respondent is concerned. Regarding the third part i.e. R_i , it is very clear from Clause 60.2 (a)(iv) that it has to be based on the work done as per BOQ and material in advance calculated in a particular IPC, which is based on the material brought at site minus material consumed when priced at the relevant price level at that particular IPC, which is a clear indication that it has to be priced at the market rate. There is no dispute in the determination and understanding of the fourth part of the formula also between the Petitioner and the Respondent.

Part II

Both numerator and denominator are of the same nature i.e. both are

represented by 'Rs.' only and both represent the cost and there is no other relationship between the two. So the question of any different relationship between the numerator and denominator does not exist. Hence, the argument that the claim is contrary to the basic mathematical principles governing fractions and percentages has no validity since both the numerator and the denominator are expressed in terms of 'Rs.' only and there is no other relation between numerator and denominator in as much as numerator is the value of the material priced at base rates in the particular IPC and denominator is the value of work done as per BOQ rates. The note under Clause 70.3 (xi) clearly stipulates that the percentage of material has to be worked out by multiplying the quantity of bitumen with the base price prevalent in the previous month of the date of receipt of bids. It is also seen that in its contracts the Petitioner accepts that there is no rationale/logic in the determination of percentages to be used in the formulas nor any set practice is being followed by the Petitioner. The Petitioner has adopted different permutations and combinations for the purpose of determination of such percentages. Therefore, the provisions in each agreement have to be given effect to as they are and these cannot be modified by way of any alleged logic or rationale that illegally furthers the interest of the Petitioner. While determining the percentage of bitumen, cement and steel it is possible that in some cases the other materials may become negative. If the price indices go down during the execution of work, then the price adjustment will become negative. So in determination of the percentages, if a negative reading comes in case of other materials, there cannot be any objection. Even if excise duty is not included, the other materials can still go negative in the formula and such a contention therefore has no relevance in this issue."

17. The manner in which inclusion or exclusion of excise duty would change the value of the price adjustment can be easily illustrated with an example:

Illustration:- If the total value of the work executed by the contractor is Rs.1 lakh and the value of the Bitumen used with excise duty as per the retail price is Rs.1,100/- (100/- for excise duty) then the value of Bitumen would constitute 1.1% of the total value of work done. If, however, the value of Bitumen is taken without excise duty i.e. Rs.1,000/- divided by the total value of the work i.e. Rs.1 lakh then the value of Bitumen would be 1% of the total value of work done.

There is a clear difference of 10% in the value to be attributed to Bitumen, in the above illustration.

18. Thus, by taking a higher value as the value of Bitumen and including excise duty in it, which excise duty the Contractor is not expected to pay to the government, the Contractor is able to ascribe a higher value to Bitumen and seek price adjustment on that basis. This would clearly not be permissible. Since the project was a World Bank aided project and the Contractor is not expected to pay excise duty, the value of Bitumen as a percentage of the total value of the work executed, has to be taken without the component of excise duty included therein. If this is not to be so, the Contractor would be able to seek a higher

value for Bitumen and keep the excise duty part of the said value of Bitumen to himself without depositing the same with the Government, in view of the exemption. This would result in a double benefit to the contractor - first, that the contract is exempt from excise duty and secondly, excise duty is loaded for the purpose of calculating price adjustment, which duty the contractor is not expected to pay or deposit with the government. The contractual provisions cannot be interpreted in this manner.

19. The Contractor relies upon the clarifications issued by the NHAI when clarifications were sought by bidders. The said clarification is in respect of whether the retail price at IOC refinery at Mathura should include excise etc., The query raised and the clarification given is extracted below:

6.

Sub-Clause 70.3 C v) of COPA

It is stated that average official retail price of bitumen at IOC refinery at Mathura is to be considered to calculate Price Adjustment for bitumen component. Bitumen emulsion and bitumen of various grades are to be used on the work. Following clarifications may please be given in this regard: i) Grade of bitumen/bitumen emulsion which is to be considered to calculate price adjustment for bitumen component. ii) Whether average official retail price of bitumen/ bitumen emulsion will be inclusive of excise duty, sales tax and other taxes if any.

The average rate is only w.r.t. the variability within the period considered and is inclusive of all taxes. Grade of Bitumen is as per specification s.

20. The above clarification is in respect of Bi and Bo and not Pb. Insofar as the retail price to determine Bi and Bo is concerned, there is no doubt that the same would include excise duty. But the issue is in respect of calculation of Pb. The award, on this aspect, has missed the point. The award has proceeded on the basis that the question is determination of Bi and Bo which it clearly is not.

21. The fact that the parties may not have adequate clarity and some payments may have been made by calculating base price of Bitumen and fuel wrongly, does not by itself mean that the clause does not require to be correctly interpreted.

22. In order to calculate Pb, the rate of Bitumen and fuel has to be the BOQ rate and not the retail price announced by the IOC refinery, 28 days prior to the bid. The rate of Bitumen and fuel at BOQ rate is not to be confused with Bo, which is the error the Arbitral Tribunal has committed.

While excise duty would be included in Bo and Bi, for calculating Pb, which is the value of Bitumen and fuel used in the project as a percentage of the total value of the work, excise duty cannot be included.

23. It is, therefore, held that while calculating the value of Bitumen and fuel as a percentage of the total value of the work executed, excise duty shall not be

included. The award, on this claim, is accordingly set aside.

B. Dispute No.3: Reimbursement of Toll Tax collection.

24. The dispute, on this issue arose as the Kalisindh bridge, where some part of the work was to be executed, was not handed over to the Contractor. The Rajasthan Government had retained the carriageway and the bridge. The Contractor was thus forced to pay toll to the Rajasthan Government in respect of its vehicles which were transiting through the bridge. The question that arose before the Tribunal was as to whether the contractor was to pay the toll or is entitled to reimbursement/adjustment.

25. The work on this project commenced on 24th October, 2005 on the stretch of road consisting of a bridge on the river Kalisindh. The Contractor was entitled to complete exemption of toll tax for the vehicles which were deployed for the purposes of construction. Various IPCs were raised by the Contractor and paid by NHAI, reimbursing the toll which was paid by the Contractor. However, in one IPC, the entire toll collected in the past bills was withheld due to which the Contractor raised the present claim. It is the Contractor's case that it was never disclosed to it that the toll would be liable to be paid, as it was unusual, in a project of this nature, not to hand over complete physical possession of the bridge to the Contractor. The Contractor further argued that NHAI had disputes with the Rajasthan Government, because of which the bridge was not handed over fully and toll continued to be collected.

26. The NHAI, however, argued that payment of toll is mandatory and the contract does not have any provision for reimbursement of the toll. NHAI relies on Rule 11 of the National Highways (Fees for the use of National Highways Section and Permanent Bridge - Public Funder Project) Rules, 1997 to argue that toll tax is collected in perpetuity and there can be no exemption. NHAI further relies upon the tender document to argue that the Contractor had to satisfy himself as to the physical condition of the bridge, prior to submitting the bid. Reliance is placed on clause 11.1 of the conditions of contract which reads as under: -

"11.1 The Employer shall have made available to the Contractor, before the submission by the Contractor of the Tender, such data on hydrological and sub-surface conditions as have been obtained by or on behalf of the Employer from investigations undertaken relevant to the Works but the Contractor shall be responsible for his own interpretation thereof.

The Contractor shall be deemed to have inspected and examined the Site and its surroundings and information available in connection therewith and to have satisfied himself (so far as is practicable, having regard to considerations of cost and time) before submitting his Tender, as to:-

- (a) the form and nature thereof, including the sub-surface conditions,
- (b) the hydrological and climatic conditions,

(c) the extent and nature of work and materials necessary for the execution and completion of the Works and the remedying of any defects therein, and

(d) the means of access to the Site and the accommodation he may require.

and, in general, shall be deemed to have obtained all necessary information subject as above mentioned, as to risks, contingencies and all other circumstances which may influence or affect his Tender. The Contractor shall be deemed to have based his Tender on the data made available by the Employer and on his own inspection and examination, all as aforementioned."

27. The scope of the work as described in the instructions to bidders was very clear. The same is described as under: -

"SCOPE OF WORKS

1. The Works consists of:

(a) Construction of new flexible/rigid 2/3-lane pavement parallel to existing carriageway, construction of new, flexible/rigid 4 lane road/bypasses/detours/service roads and reconstruction/strengthening/widening of the existing carriageway.

(b) Construction of culverts, minor and major bridges and grade separators, rail over/under bridges, widening/rehabilitation, repair of existing bridges.

.....

2A. Road Works

a).....d).....

e) widening and strengthening/reconstruction of the existing carriageway including raising; f).....m).....

n) maintenance of existing road during the construction period.

2B. Bridge Works

k) construction of approaches on either side of the bridge, R.C.C. retaining walls/reinforced earth walls;

l) rehabilitation/repair/widening of existing bridges.

m) maintenance of existing bridges during construction."

28. A perusal of the scope of work and the road work described above clearly shows that the Contractor needed physical possession of the bridge. It defies logic for the NHAI to argue that the Contractor is expected to carry out the widening, strengthening and reconstruction of the existing carriageway and construct a new four lane road/bypass, without having free access to the existing carriageway. In a project of this nature, vehicles of the Contractor use the existing carriageway and bridge extensively and to collect toll from them every

time the Contractor's vehicles pass through the bridge, in effect constitutes levying a penalty which negates the very purpose of awarding the project. The Contractor, without there being a clear stipulation in the contract, cannot be expected to imagine that it would not get free access to the existing carriageway and free access to the space where the new carriageway/bridge is to be built. The finding of the Arbitral Tribunal that the bridge was handed over to the Contractor and was to be in the possession of the Contractor is correct. The observations of the Tribunal in this regard are as under: -

"8.4.1..... The AT perused the terms and conditions of the Contract in this respect and observations are as under:

(i) The short description of the work as per Agreement dated 11.08.2005 is Rehabilitation and Upgrading of km. 406.000 to Km. 449.15 of NH-76 to 4-lane configuration." The Bill no.7 of BOQ is for "Rehabilitation of existing bridges." The scope of work is described at Annexure 1, "Instructions to Bidders." It includes, repairs of existing bridges vide clause 1(b), maintenance of existing road during the construction period vide clause 2A (n), rehabilitation/repair/widening of existing bridges vide clause 2B(1), and maintenance of existing bridges during construction vide clause 2B(m). Moreover it has also been stipulated vide clause 2813 of Supplementary Technical Specifications which are the amendments/modifications/additions to the existing clauses of general technical specifications, that, "Existing brick masonry/concrete wing wall shall be dismantled for construction of adjacent 2 lane bridge as shown in drawings or as directed by the Engineer. This stipulation is obviously with reference to existing Kalisindh Bridge, as the new 2 lane bridge was to be constructed adjacent to the existing 2 lane Kalisindh bridge. Taking cognizance of all the above stipulations of the contract, which envisage some work to be done for existing bridges including maintenance during construction period, and in the absence of any provision regarding exclusion of Kalisindh bridge from handing over to the claimant the AT finds that the existing Kalisindh bridge is part and parcel of the works to be executed under the Contract and therefore contract envisages its handing over to the Claimant. In this respect Respondent's only contention is that the contract provides for two lane new bridge and as such the existing Kalisindh bridge is not the part of the contract and therefore was not to be handed over is not getting substantiated by any term or condition of the contract. The AT finds that there is no clause in contract which stipulates that the Kalisindh Bridge is not the part of the Contract.

(ii) The Respondent has contended that the existing 2 lane Kalisindh Bridge was not to be handed over to the contractor as new 2 lane bridge was being constructed on different alignment near the existing bridge. The Claimant has contended that it has been stipulated vide clause 3 "Availability of the Project area" that "The Employer shall provide the right-of-way for road and bridge works and other appurtenance works to the contractor as per details in Schedule A in Section VIII, at page 122 of Part 1(A). The AT observes that the section relevant to Section IX, at page 258 of Part 1(B) of contract. The Claimant has

contended that the Employer (i.e. Respondent) has nowhere specified that the said stretch will be handed over except the Kalisindh Bridge. The Claimant also contended that the bridge was within 20 km road stretch which was to be handed over immediately on commencement of work. The Claimant also contended that Kalisindh Bridge was critical being a long major bridge; he had planned to commence works at Kalisindh Bridge in January, 2006. The AT observes from clause 42.1 that the Employer will give so much site and the extent of portions of the site from time to time, in accordance with programme referred to in Clause 14 and also from the Schedule A - Section IX of contract which is "HANDING OVER OF SITE" (Clause 42.1 - Possession of site and Access thereto) that the entire site is to be handed over after 6 months of commencement of work. As such the AT finds that as per the Contract, the entire site, which includes Kalisindh Bridge shall be handed over to the Claimant after six months of commencement of work.

(iii) The Respondent has denied, vide para 2 on page 3 of its Statement of Defence that the stretch of NH-76 having Kalisindh bridge and its approaches was not handed over to the contractor till completion of the project and justified it by stating that how contractor could complete the work if the alleged portion of the site would not have been handed over to it and that possession of 25.3 km of stretch and access thereto was provided to the contractor in terms of clause 42.1 of the contract agreement vide letter dated 19.11.2003 (exhibit R-3). In other words the Respondent admits that the Kalisindh Bridge with its approaches was handed over to the Claimant. This is a contention contrary to its earlier contention that the Kalisindh bridge was not to be handed over as per the Contract.

(iv) In view of the findings at (i) and (ii) above the contentions made by the Respondent for non handing over of said bridge to the claimant are not found tenable and that in accordance with the various stipulations referred to (i) and (ii) herein above as per the contract, the Kalisindh bridge is to be handed over to the Claimant for the execution of this work."

29. The Kalisindh bridge was a part and parcel of the contract and in any event, there is no stipulation in the contract that toll has to be paid by the Contractor. If that was to be so, the stipulation had to be expressly provided. The same cannot be attempted to be read into or hidden in any manner. The liability for paying the toll is considerable and the Contractor could not have been expected to imagine that the toll would be required to be paid every time its vehicles pass through the very bridge which had to be repaired. Such a stipulation would run contrary to the very purpose of awarding the project itself. The finding of the Tribunal that the existing bridge is a part and parcel of the work to be executed by the Contractor does not deserve to be interfered with. The objections on this count are rejected.

30. The OMP is disposed of in the above terms.