National Highways Authority Of India vs M/S Itd Cementation India Ltd on 24 April, 2015

Equivalent citations: AIRONLINE 2015 SC 518

Author: Uday Umesh Lalit

Bench: Uday Umesh Lalit, Dipak Misra

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9799 OF 2010

National Highways Authority of India …. Appellant

Vs.

M/s ITD Cementation India Limited …. Respondents

WITH

Civil Appeal No.9908/2011, Civil Appeal No. 9909/2011
Civil Appeal No.2488/2012, Civil Appeal No. 7066/2011
Civil Appeal No.3150/2012, Civil Appeal No. 686/2013
Civil Appeal No.4069/2013, Civil Appeal No. 5162/2012
Civil Appeal No.5661/2014, Civil Appeal No. 10586/2014
Civil Appeal No. 3913/15(@S.L.P. (C) No. 10014/2013)
Civil Appeal No.3914/15(@S.L.P. (C) No. 10701/2013)
Civil Appeal No.7373/2012 AND Civil Appeal No.6158/2013

JUDGMENT

Uday Umesh Lalit, J.

Leave granted in S.L.P (C) Nos. 10014 of 2013 and 10701 of 2013. A. Civil Appeal Nos. 9799 of 2010, 9908/2011, 9909/2011, 2488/2012, 7066/2011, 3150/2012, 686/2013, 4069/2013, 5162/2012 and 5661/2014, 10586/14, Civil Appeal @ from SLP © 10014/2013 and Civil Appeal @ from SLP © 10701 of 2013:

2. All these appeals by special leave raise identical questions and as such are being dealt with and considered by this common judgment. The learned counsel for the parties agreed that Civil Appeal No.9799 of 2010 be taken and was accordingly dealt with as the lead case.

CIVIL APPEAL NO. 9799 OF 2010

3. Civil Appeal No. 9799 of 2010, by Special Leave seeks to challenge the judgment and order dated 30.11.2007 passed by the Division Bench of the High Court of Delhi at New Delhi in FAO (OS) No.216 of 2007.

4. The dispute in question relates to the consequences of an additional amount of royalty payable by the respondent as a result of the notification for upward revision of royalty (Seignorage Fee as named in Tamil Nadu) on minor minerals. This additional royalty was imposed by the State of Tamil Nadu w.e.f. 01.11.2002. It is the plea of the appellant that the additional amount of fee was not liable to be paid to the respondent in view of certain clauses in the contract which provided for a formula of escalation, while according to the respondent the full amount had to be compensated.

5. A contact was awarded to the respondent by the appellant on 17.10.2001 for execution of work of widening of lanes and rehabilitation of the existing two lane carriageway of Vaniyambadi-Pallikonda section of NH-6 (from Km.49.00 to Km.100.00). The total value of the contract was appropriately Rs.183.71 crores. The parties adopted FIDIC form of Conditions of Contract with some changes made which are called Conditions of Particular Application (COPA, for short). In the invitation to tender forming part of the contact under Clause 13.4 it was agreed between the parties 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.
>
> 6. The aforesaid stipulation dealt with the impact and inclusion of duties, taxes and other levies, as of the date 28 days prior to the deadline for submission of bids and clarified that the same shall stand included in the rates and prices and the total bid price submitted by the Contractor. Any subsequent variation in Prices on account of variety of reasons or factors after such date was dealt with in Clauses 70 to 70.8 of the COPA and the relevant parts thereof are quoted hereunder:-
>
> Clause 70: Changes in Cost and Legislation Delete the text of Clause 70 in its entirety and substitute, therefore the following clauses 70.1 to 70.8.
>
> Sub-Clause 70.1 : Price Adjustment The amount payable to the Contractor and valued at base rates and prices pursuant to Sub-Clause 60.1 hereof shall be adjusted in respect of the rise or fall in the indexed cost of labour, Contractor's equipment, Plant

materials and other inputs to the Work, by the addition or subtraction of the amounts determined by the formulae prescribed in this Clause.

Sub-Clause 70.2: Other Changes in Cost To the extent that full compensation for any rise or fall in the 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 in cost.

Sub-Clause 70.3 :Adjustment Formulae Contact price shall be adjusted for increase or decrease in rates and price of labour, materials, Plant, machinery, equipment, spares, fuels and lubricants in accordance with the following principles and procedures as per formulae given below. The amount certified in each payment certificate shall be adjusted by applying, the respective price increase or decrease.

Price adjustment shall apply for work carried out within the stipulated time or extensions granted by the Employer and shall not apply for work carried out beyond the stipulated time. Price adjustment for reasons attributable to the Contractor, shall be paid in accordance with Sub-Clause 70.6;

Following expressions and meanings are assigned to the value of the work done during the period under consideration:

RI= Total value of work done during the period under consideration and payable in Indian Rupee currency, it would include the value of materials on which secured advance has been granted, if any, during the period, less the value of materials in respect of which the secured advance has been recovered , if any, during the period. This will exclude cost of work an items for which rates were fixed under variation Clauses (51 and 52) for which the escalation will be regulated as mutually agreed at the time of fixation of rate.

To the extent that full compensation for any rise or fall in indexed 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 be include amount to cover the contingency of such other rise or fall in costs.

(c) Price adjustment for various inputs into the works done shall be calculated as per formulae given below:

A) Variation of Price-Local Labour

……

……

B) Variation of Price-General Materials

The Contract Price will be subjected to adjustment on account of general variation of all materials other than specifically provided in Sub-

Clause 70.5 hereinafter. The adjustment will be made according to the formula given below:

V2=R1x (I-Io) x G Io Where, V2= Variation in price on account of general variation of prices of all materials other than specifically provided in Sub-Clause 70.5 hereinafter. Io = Base Cost Index corresponding to the Wholesale Price in India (for all commodities) for the price under consideration (Base 1993-94=100) released by the economic advisor, Ministry of Industry, Government of India, at the time specified in para (E) hereinafter.

I= Current Cost Index corresponding to the Wholesale Price in India (for all commodities) for the price under consideration (Base 1993-1994 =100) released by the same agency at the time specified in para (E) hereinafter. G= Factor of 0.15 (zero point one five) representing component of all material other than specifically provided elsewhere in the Contract Price. R1= Value of the work done during the period under consideration and payable in non-convertible Indian Rupee Currency at the base rates and prices as applicable under the Contact.

C) Variation of Price –POL .....

.....

Price Adjustment for plant and Equipment .....

..... Base, Current and Provisional Indices .....

.....

Price Adjustment .....

.....

The Adjustable Amount .....

.....

The Adjusted Amount .....

.....

Adjustment after Completion ....

Sub-Clause 70.4: Sources of Indices The sources of indices shall be those as mentioned in Sub-clause 70.3 of Section III Volume I of the Bid documents.

Sub-Clause 70.5: Increase or Decrease of Price of Specified Materials Increase or decrease of price of specified materials will be adjusted by either an addition to or a deduction to or a deduction from the Contract Prices. For the purpose of this Sub-Clause:

> "Specified materials" means the materials stated in Schedule 2 of Section VII of the Bidding Documents and required on the site for the execution and completion of the Permanent Works.
>
> "Basic Price" means the price for "Specified materials" indicated in Schedule 2 of Section VII of the Bidding Documents.
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> (ii) a) Adjustments to the Contract Price for Bitumen .....

.....

b) Adjustment to the Contract Price for Cement and Steel:

> .....
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> .....
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> Sub-Clause 70.6: Limit of Price Adjustment .....
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> .....
>
> Sub-Clause 70.7: Exemption from Price Adjustment ..... Sub-clause 70.8: Subsequent Legislation If, after the date 28 days prior to the closing date for submission of bids for the Contract there are changes to any National or State Statute, Ordinance, Decree or other Law or any regulation or by-law of any local or other duly constituted authority or the introduction of any such State Statute, Ordinance, Decree, Law, regulation or by-law in India or States of India which causes additional or reduced cost to the Contractor, other than under the preceding Sub-Clauses of this clauses in the execution of the contract, such additional or reduced cost shall, after due consultation with the Employer and the Contractor, be determined by the Engineer and shall be added to or deducted from the Contract Price and the Engineer shall notify the Contractor accordingly with a copy to the Employer. Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have been taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of Sub-Clauses 70.1 to 70.7 of this Clause.

7. The Government of Tamilnadu by issuing a notification under Section 15 of the Mines and Minerals (Regulation & Development) Act, 1957 (hereinafter referred to as 1957 Act), increased the seigniorage fee (which is synonymous with Royalty charges in other States) on stone, sand and earth to the tune of nearly 30% with effect from 1st November, 2002, i.e. after about one year from commencement of the Work. The respondent requested for Price Adjustment consequent to the increase in rates of Royalty under Sub-Clause 70.8 of COPA vide letter dated 28.12.2002. The request was rejected on 01.01.2003 on the ground that the increase in royalty charge cannot be paid separately as the same was already considered under the Price Adjustment formula being paid for general materials under Sub-Clause 70.3 of COPA. The matter was placed for reconsideration but the request was finally rejected on 06.09.2003 relying on NHAI's policy circular No.11041/21/02-Admn.III dated 01.09.2003.

8. It appears that in similar contracts with identical conditions requests for payment of increased royalty under Sub-Clause 70.8 were accepted and appropriate payments were made. However, during the course of audit, the payment made by the NHAI towards increase in Royalty charges was considered to be irregular by the Government auditors on the ground that no such separate payment was required to be made under Sub-clause 70.8 of COPA as payment was already made under the Price Adjustment formula for price increase. In the circumstances, the appellant on 03.09.2003 wrote to the Economic Advisor, Ministry of Commerce and Industry, Government of India seeking clarification and advice. Relevant portion of the letter dated 03.09.2003 is quoted hereunder:-

"Anand Bordia Member (Finance) NATIONAL HIGHWAYS Tel: 011-25074100 AUTHORITY OF INDIA 011-25074200 Ext.1612 (MINISTRY OF ROAD 011-25093506 TRANSPORT & HIGHWAYS) Fax:011-25074100 G-5 & 6, Sector-10, 011-25074200 Ext.2617 DWARKA, NEW DELHI-110045 E-mail: abordia@nhai.org D.O. NO.NHAI/11033/GM/2003-04 September 3, 2003 Dear Shri Nigam Sub: Wholesale Price Index

1. NHAI was set up by the National Highways Authority of India Act, 1988 to develop, maintain and manage the national highways and any other highways vested in, or entrusted to, it by the Government.

2. Incidental to this function, for the construction of highways, NHAI appoints highway construction contractors, selected by a process of competitive bidding. The bidding process involves the bidder quoting his delivery cost for predefined quantities of various inputs required for the highway construction. Since the period of execution is fairly long, to provide protection/neutralize price related impacts to the contractor/NHAI, certain mechanism has been incorporated in the contract. For example, to cover price impact arising out of or in consequence to any Legislation is provided as under:

(a) Sub-Clause 70.8 Subsequent Legislation.

....

3. We are enclosing herewith a copy of the extracts of the Contract document detailing the above provisos vide para 70.1 to 70.8

4. The issue for which clarification is required is the difference in opinion in the interpretation of the clause 70.8 on "Subsequent Legislation." The CAG Auditors while auditing NHAI have commented that since WPI is derived from the whole sale price data across the country and "price" is the derived composite reflection of all factors, whenever provision has been made for WPI based compensation for price escalation to the contractors, the benefit related "Subsequent Legislation" will be fully constrained by the last para (given in italics). They have opined that "price" will be deemed to have all factors including those with purely local impact, such as Entry tax, Octroi and Royalty.

5. It is felt that if CAG interpretation is accepted for implementation, the entire clause "Subsequent Legislation" will be hit and made entirely redundant as a tool to cover price risk.

6. CAG's office has raised objection in a specific case, details of which are narrated here below:

....

7. All these payments were claimed by the Contractor and paid by NHAI, as these arose on account of Tax obligations under enactments made or rates enhanced during the relevant period thereby entitled under the clause for subsequent legislations. We wish to stress the fact that these were imposed and enhanced by the States of Haryana and Rajasthan and relate to construction inputs which are not in the basket of items listed for the consideration of WPI.

CAG considered these reimbursements irregular for the reason that all such imposts would have had their effect/would have been already factored into WPI and WPI based indexation benefits were granted and given for all these very items under clauses 70.1 to 70.7 by way of the formula based price adjustments. Affording the benefit under "Subsequent Legislation" would amount to a double benefit. Hence they would automatically fail to come under the clause "Subsequent Legislation" by virtue of the restrictive proviso.

9. In view of the above, we will be grateful if you could clarify the following:

(a) Will the WPI assessment include or deemed to include such local factors as Octroi Entry Tax and Royalty introduced/enhanced in one state etc. on items mentioned in paragraph 6 of this letter such as earth, morram, aggregate, sand, stones etc. which it appears do not come under the items considered to work out WPI.

The WPI based compensation for price changes will create an imbalanced structure between two contractors, one operating within the locality subject to a local impost and another in an adjoining

area outside such an impost, if CAG auditors opinion is accepted. How can the WPI mechanism be used by NHAI to create an equitable structure?

You may recall that the Chairman NHAI Shri Santosh Nautiyal had spoken to you about this matter.

Kind Regards, Yours sincerely, Sd/-

(ANAND BORDIA) Shri Shrawan Nigam, Economic Advisor, Ministry of Commerce and Industry, (Dept of IP & P), 126-E, Udyog Bhawan, NEW DELHI -110001."

9. The response from the Economic Advisor to the Government of India was as under:

"Shrawan Nigam GOVERNMENT OF INDIA
Economic Advisor MINISTRY OF COMMERCE
Tel:23012721 & INDUSTRY
Fax:23793502 UDYOG BHAWAN,
Economic Advisor to NEW DELHI-110001
the Government of India

27th November, 2003

D.O. No. Ec.Ad 11(1)/2003/WPD

Dear Shri Bordia,

Kindly refer to your D.O. Letter No.NHAI/11033/GM/2003-04 dated the September 3, 2004, seeking clarifications on constituents of prices utilized for compilation of Wholesale Price Index. I may mention in this respect that in case of Minerals, ex-mine prices are used for compilation of WPI. Ex-mine prices correspond to Pit Mouth Value (PMV) of a mineral i.e. sale value of mineral at pithead. In case sales are effected on FOR or FOB or any other basis, pithead value is arrived at after deducting all the expenses incurred from mine to railway station or port or other point of sale, as the case may be. However taxes paid by the mine owners are not deducted to arrive at PMV. Thus, ex-mine price includes Royalty but are not likely to include octroi and entry tax.

Since none of the items mentioned in your letter, namely, Earth, Morram, Aggregate and Sand are included in the Commodity Basket of WPI, it is not possible to supply the Wholesale Price Indices of these items. However, the WPI for ALL, COMMODITIES and MINERALS from December 1995 to July 2001 are being enclosed for your appropriate use.

With regards, Yours sincerely, Sd/-

(Shrawan Nigam) Shri Anand Bordia, Member (Finance) National Highway Authority of India, Ministry of Road, Transport & Highways, G-5&6, Sector-10, Dwarka, NEW DELHI-110045."

10. In the aforesaid circumstances the dispute between the parties stood referred to Arbitral Tribunal. The respondent submitted its Statement of Claim claiming under Sub Clause 70.8 of COPA an amount of Rs.91,47,411/- allegedly due upto 31st January, 2005 towards reimbursement of

increase in Royalty (Seigniorage fee) on minerals i.e. aggregate, sand and earth (the items in issue) along with interest @ 12 per cent per annum compounded monthly on the sums found due from the date they became due till realization.

11. The Arbitral Tribunal comprising of three experienced Engineers who had retired from Govt. service Departments above the rank of Chief Engineer framed the following questions for determination:

> "1) Whether the increase in the rates of Royalty has caused additional cost to the Claimant and
>
> 2) Whether the increase in cost because of increase in the rates of Seigniorage Fee on materials like aggregate, sand and earth has been taken into account in the indexing of any inputs to the Price Adjustment Formula in Sub-Clause 70.3(B) relating to the General Materials." After going through the pleadings and evidence the Arbitral Tribunal unanimously found that the respondent had incurred additional cost because of the change in rates of Seigniorage fee pursuant to change in legislation and that the said increase in the rates had not been taken into account in the indexing of any inputs to the price adjustment formula in general materials and therefore the respondent would be entitled to be paid the additional cost incurred by. It was held as under:
>
> 21. We have thoroughly gone through the entire evidence adduced by the parties and gone through the relevant Contract provisions. We have also judiciously considered the rival contentions and arguments. We are inclined to agree with the contention of the claimant that the provision for cost escalation based on the agreed Price Adjustment Formulae and the Compensation for additional cost resulting from a subsequent legislation are two separate & specific stipulations, and the claimant is entitled to be compensated for any additional cost caused to it provided the same shall not have already been taken into account in the indexing of any inputs to the Price Adjustment Formulae in accordance with the provisions of Sub-

Clauses 70.1 to 70.7.

The other question now required to be answered by us is whether the additional cost because of change in the rates of Seigniorage fee has been taken into account in the indexing of any inputs to the Price Adjustment Formulae supra. We have examined the basket of materials whose cost variation is input in the estimation of the WPI. The minor minerals like earth, sand and aggregate used in highway construction works, do not find place in this basket. We are prepared to concede that the WPI is to an extent likely to indicate the rise or fall in the prices of these minor minerals also, but are not inclined to accept that the full impact of the additional cost of these specific materials because of a subsequent change in legislation can be said to be taken care of in the inputs to the WPI, especially when these materials do not find place in the basket of materials for working out the WPI. This conclusion is further reinforced by the fact that the WPI is a single index

applicable uniformly in all the states, the increase in Seigniorage fee can and does vary from state to state, depending upon the policies of the respective State Governments. Further, whereas the contact provisions relating to Price Adjustment as per Sub-Clauses 70.2 to 70.7 supra do not assure full compensation for rise or fall in prices, the additional cost on account of a subsequent legislation is stipulated to be paid in full.

23. We must state that but for the adult objection, the Respondent NHAI itself was of the opinion that this additional payment is admissible separately. The reference by the NHAI to Mr. Shravan Nigam, Economic Advisor, Ministry of Commerce and Industry, GOI vide Ex. R/4 clearly signifies this fact. The reply to this letter by Mr. Shravan Nigam annexed with Ex. R/4 also does not help us in arriving at any contrary conclusion.

Having answered the question, the Arbitral Tribunal rejected the contention of the respondent that it was unnecessary for it to prove actual incurring of such additional cost. The contention that the respondent would be entitled to the difference in the royalty payable on the material by a theoretical calculation based on the agreed quantities, even without proving that any such additional cost had been actually incurred was rejected. On the issue whether the respondent had produced any evidence to substantiate its claim that any such additional cost had been incurred, the Arbitral Tribunal found that the material placed on record was lacking in particulars and as such the quantification of the impact of change in the rates of royalty was left to be determined by the appellant.

12. The appellant being aggrieved by the Arbitral award made and published on 12.05.2006 filed OMP No.432 of 2006 in the High Court of Delhi which was dismissed by a Single Judge of the High Court vide judgment and order dated 14.05.2007. It was observed that the Arbitral Tribunal had found that the minerals in question did not find place in the basket of materials for working out the wholesale price index i.e. WPI, that the WPI would be applicable uniformly in all the States while the increase in Seigniorage Fee varied from State to State. It was concluded that the view taken by the Tribunal did not call for any interference. In the appeal, namely, FAO(OS) No.216 of 2007 preferred by the appellant, it was submitted that the interpretation placed by the Arbitral Tribunal upon the provisions of the agreement was erroneous and secondly that the award was imperfect inasmuch as it left the question of quantification of the amount undecided. While dealing with the first submission, the Division Bench of the High Court observed:

> “On the question of interpretation, the arbitrators noticed the relevant provisions and came to the conclusion that since the basket of materials whose cost variation is an input for filing the WPI did not include minor minerals like earth, sand and aggregate used in heavy construction works, the additional cost of those specific materials did not include the full impact of the subsequent change in legislation. The arbitrators noted that the WPI was a single index applicable uniformly in all the States while the increase in Seigniorage fee varied from State to State depending upon the policies of the respective State Governments. The arbitrators also held that while the contractual provisions related to price adjustment as per clauses 70.1 to 70.7, the additional cost on account of a subsequent legislation had to be paid in full. Suffice it to say that the

> arbitrators not only looked into the provisions of the contract but also examined the issue like whether minor minerals used for construction of highways were or were not included in the basket of materials whose cost variation is taken into consideration as an input in the assumption of the wholesale price index (WPI). Such being the position, simply because the interpretation placed by the arbitrators has not favoured one or the other party can be no reason for the Court to interfere under Section 34 of the Act with the award made on any such interpretation. It is fairly well settled by a long line of decisions rendered by the Supreme Court that a Court dealing with a petition under Section 34 of the Arbitration and Conciliation Act, 1996 does not sit in an appeal over the arbitral award." The Division Bench however agreed with the appellant on the second submission and remitted the matter to the Arbitral Tribunal on the limited issue of quantification of the amount.

13. In this appeal by special leave challenging the judgment and order passed by the Division Bench of the High Court, this Court at the interim stage had directed the arbitration proceedings to continue in terms of the order of the High Court. The Arbitral Tribunal by its award dated 07.05.2010 quantified the sum that the respondent was entitled to on account of increase in the rates at Rs.43,06,810/- and awarded interest @ 12% p.a. from the date of publication till realization. By order dated 15.11.2010 this Court directed the appellant to deposit sum of Rs.46 lakhs, being the amount so quantified. The amount has since then been deposited and stands invested in a fixed deposit.

14. Mr. Parag P. Tripathi learned Senior Advocate assisted by Ms. Monisha Handa, learned Advocate appeared for the appellant in the lead case. Ms. Indu Malhotra, learned Senior Advocate and Ms. Gunjan S. Jain, learned Advocate appeared for the appellants in the companion matters. It was submitted by them that WPI is a general or representative index of prices of all commodities and as such it would not and need not take all commodities into account. The parties having agreed to go by WPI Index, that Index alone must be considered irrespective of the fact whether prices of minor minerals in question were taken into account specifically while arriving at such Index. It was submitted that the award correctly observed in para 22 that "WPI is to an extent likely to indicate the rise or fall in the prices of these other minerals also" though minor minerals in question did not specifically find place in the commodity basket taken into account while determining WPI. The reason why Arbitral Tribunal was not inclined "to accept that the full impact of the additional cost of these materials because of subsequent change in legislation can be said to be taken care of by he inputs to the WPI" in the submission of the learned counsel, was perverse. It was submitted that the governing clause in the matter was Sub Clause 70.3 (B) and in terms thereof, the respondent would at best be entitled to factor of 0.15 i.e. 15% and not the amount in entirety as claimed. It was contended that the view taken by the Arbitral Tribunal ignored the provisions of Sub Clauses 70.1 to 70.3(B) and exclusion in Sub Clause 70.8 and the award so given in disregard of the terms of the contract stands vitiated being against public policy. Reference was placed on the decisions of this Court in McDormott International Inc. v. Burn Standard Co. Ltd.[1], ONGC Ltd. V. Western Geco International Ltd.[2] and ONGC Ltd. v. Saw Pipes[3].

15. Mr. George Thomas, learned Advocate appearing for the respondent in the lead case and some companion matters submitted that Sub-Clauses 70.1 to 70.7 of COPA deal with Price Adjustment in respect of rise or fall in the indexed cost of various inputs to the work due to market fluctuations while sub clause 70.8 specifically deals with cases concerning change in price due to subsequent legislative changes and that unlike the former category, in respect of cases in the latter category the additional cost on account of changes in subsequent legislation by virtue of sub clause 70.8 must be paid in full. Mr. P.H. Parekh learned Senior Advocate appearing for respondent in Civil Appeal No.4069 of 2013 and other companion matters, additionally submitted that but for the audit objection, the appellant itself was of the opinion that this additional payment was admissible separately. Reliance was placed on the letter dated 03.09.2003 addressed by the appellant to the Economic Advisor. Mr. Shyam Divan learned Senior Advocate appearing for respondent in Civil Appeal No.9909 of 2011 submitted that both parties understood the terms of the Contract in a particular manner, that the view taken by the Arbitral Tribunal was affirmed by the Single Judge and the Division Bench on independent assessment and such view being a plausible view no interference was called for. Mr. Vinay Navare, learned Advocate appearing for respondent in Civil Appeal No.3150 of 2012 and other learned Counsel adopted the submissions.

16. Since it was argued that the Arbitral Tribunal disregarded the material terms of the Contract while making its assessment and failed to consider the impact of sub clauses 70.1 to 70.3 (B) and exclusion in sub clause 70.8, the law on the point needs to be briefly adverted to. In Mc Dermott International Vs. Burn Standard Co. Ltd. (Supra) this Court held as under:-

> "112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See Pure Helium India (P) Ltd. v. ONGC [(2003) 8 SCC 593] and D.D. Sharma v. Union of India [(2004) 5 SCC 325]).
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> 113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

17. In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran[4], the Court held:

> "43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the

> High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator."

18. In Sumitomo Heavy Industries Ltd.. v. ONGC [5], it was held the Court held:

> "43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

19. In a recent decision in Associate Builders Vs. DDA[6] while discussing "the public policy of India" contained in Section 34(2) (b)

(ii) of the Arbitration Act, 1996 this Court dealt with each of the heads contained in Saw Pipes Judgment (Supra) in the light of three distinct and fundamental juristic principles added in ONGC Ltd. Vs. Western Geco. International Ltd. (Supra). "Patent-illegality" which is one of the heads contained in Saw Pipes judgment (Supra) was then elaborated and we quote paras 42 to 42.3:-

> 42. In the 1996 Act, this principle is substituted by the 'patent illegality' principle which, in turn, contains three sub heads:
>
> 42.1 (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature.This again is a really a contravention of Section 28(1)(a) of the Act, which reads as under:
>
> "28. Rules applicable to substance of dispute.— (1) Where the place of arbitration is situated in India,—
>
> (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;" 42.2 (b) a contravention of the Arbitration Act itself would be regarded as a patent illegality- for example if an arbitrator gives no reasons for an award in contravention of section 31(3) of the Act, such award will be liable to be set aside.

42.3(c) Equally, the third sub-head of patent illegality is really a contravention of Section 28 (3) of the Arbitration Act, which reads as under:

> "28. Rules applicable to substance of dispute.-
>
> (1) -- (2) * * * (3) In all case, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." This last contravention must be understood with a caveat. An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

20. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do.

21. We now turn to the reasoning given by the Arbitral Tribunal in paras 21 to 23 of the award, as quoted above. The award considers the impact of sub-clauses 70.1 to 70.7 and agrees with the contention that the provision for cost escalation based on the agreed price adjustment formulae falls in one compartment while the compensation for additional cost resulting from a subsequent legislation falls in a separate category. In other words, the contention that stands accepted was, that the escalation in price premised on fluctuation in market value of the inputs stands on one footing, while the additional cost resulting form the impact of any statute, decree, ordinance, law etc as referred to in sub-clause 70.8 stands on the other. Resultantly the governing clauses in the instant case were held not to be sub-clauses 70.1 to 70.7 but the substantive part of sub-clause 70.8. The award also considered whether minor minerals in question were or were not included in the basket of materials whose cost variation was taken into account as an input while arriving at WPI. It also considered that the WPI is an index applicable uniformly in all states while the increase in Seigniorage Fee would vary from state to state. It further dealt with the aspect that NHAI itself was of the opinion that the additional impact as a result of subsequent legislation was admissible separately, as signified by the letter dated 03.09.2003 to the Economic Advisor. In the backdrop of the law laid down by this court, the construction of the terms of the contract by the Arbitral Tribunal is completely consistent with the principles laid down by this court. Upon construing the terms and the material on record it concluded that the instant matter would be covered by substantive part of Sub-Clause 70.8 of COPA. It also noted that NHAI itself was of such opinion. The view so taken by the Arbitral Tribunal after considering the material on record and the terms of the contract is certainly a possible view, to say the least. We do not see any reason to interfere. The Division Bench in our considered view, was completely right and justified in dismissing the challenge.

22. We, therefore, dismiss Civil Appeal No. 9799 of 2010. The decretal amount which stands deposited be made over to the respondent along with the interest accrued thereon. No order as to costs.

Civil Appeal Nos. 9908/2011, 9909/2011, 2488/2012, 7066/2011, 3150/2012, 4069/2013, 5162/2012 and 5661/2014, 658/2013, 10586/14, Civil Appeal @ from SLP © 10014/2013 and Civil Appeal @ from SLP © 10701 of 2013:

23. In all these matters National Highway Authority of India is the appellant which had entered into contacts with respondents in each appeal and the issue involved is identical that is to say the entitlement of the concerned respondents to the additional amount payable as a result of upward revision in royalty payable in respect of minor minerals pursuant to subsequent legislation. The clauses in question are identical and in all these matters the High Court, whose orders are appealed against, had relied upon the judgment of the Division Bench of the High Court of Delhi in FAO (OS) No.216 OF 2007, which was under appeal in the lead matter i.e. Civil

24. Consequently, all these appeals are dismissed. The decretal amount, if deposited, be made over to the respondents along with interest accrued thereon. In some cases, money so deposited was allowed to be withdrawn on furnishing of Bank Guarantees. The Bank guarantees so furnished stand discharged. No order as to costs.

B. CIVIL APPEAL NO. 7373 OF 2012:

25. This appeal challenges the judgment and order dated 27.04.2012 passed by the High Court of Delhi at New Delhi in OMP 497 of 2006. Unlike all the aforesaid cases, the clauses in question are not identical and hence this matter is being dealt with separately.

The appellant awarded contract dated 30.08.2001 to the respondent for the work of six laning of NH-7 from KM 539 to KM 556 in the State of Karnataka, Contract Package No. NS-24/KN. Clause 13.3 of the contract pertained to Taxes and Other Levies which is set out hereinbelow :

> 13.3 All duties, taxes and other levies payable by the contractor under the contract, or for any other cause shall be included in the rates, prices and total Bid Price submitted by the bidder.

Clause 13.4 of the contract pertained to price adjustment and is set out hereinbelow:

> 13.4 The rates and prices quoted by the bidder are subject to adjustment during the performance of the Contract in accordance with the provisions of Clause 47 of the Conditions of Contract.
>
> Clause 32.1 of the contract pertaining to Early Warning was as under:

32.1 The contractor is to warn the Engineer at the earliest opportunity of specific likely events or circumstances that may adversely affect the quality of work, increase the Contract Price or delay the execution of works. The Engineer may require the Contractor to provide an estimate of the expected effect of the future even or circumstance on the Contract Price and Completion Date. The estimate is to be provided by the Contractor as soon as reasonable possible.

32.2 The Contractor shall cooperate with the Engineer in making and considering proposals for how the effect of such an event or circumstance can be avoided or reduced by anyone involved in the work and in carrying out any resulting instructions of the Engineer.

Clause 45 of the Contract pertaining to Tax was as follows: 45.1 The rates quoted by the Contractor shall be deemed to be inclusive of the sales and the other taxes the Contractor will have to pay for the performance of this Contract. The Employer will perform such duties in regard to the deduction of such taxes at sources as per applicable law.

Clause 47 of the contract pertained to Price Adjustment and is set out hereinbelow:

Price Adjustment This clause is applicable only for those projects with completion period of more that one year.

47.1 Contract Price shall be adjusted for increase or decrease in rates and prices of labour, materials, fuels and lubricants in accordance with the following principles and procedures and as per the formula given in the contract data:

a) The price adjustment shall apply for the work done from the start date given in the contract data upto the end of the initial intended completion date or extensions granted by the Engineer and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the contractor.

b)....

c) Following expressions and meanings are assigned to 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. It will exclude value for works executed under variations for which price adjustment will be worked separately based on the terms mutually agreed.

47.2 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 fall in costs.

27. In this case the disputes which have arisen between the parties were:

(i) With respect to a claim for reimbursement as a result of imposition of fresh "Cess" with effect from 29.01.2004 i.e. after the formal agreement was executed in 2001. The claim was subject matter of Arbitral Award dated 13.11.2006 which was affirmed by Single Judge and later by the Division Bench of the High Court vide judgments dated 02.07.2008 and 17.08.2009 respectively. The decision was accepted and the appellant paid to the respondent sum of Rs. 28,49,503 of 28.07.2010. We are not concerned with this issue.

(ii) We are concerned with the claim for reimbursement arising out of the enhancement of royalty payable in respect of minor minerals with effect from 02.06.2003 pursuant to amendment in the Karnataka Mine and Minerals Concession Rules, 1994. It was contended by the respondent that the increase in royalty charges by the legislation during the pendency of the contract could not have been anticipated or foreseen and therefore the same falls within the ambit of Clause 32.1 of the contract. The appellant submitted that in terms of express provision in sub-clause 45.1, it was incumbent upon the contractor to cover any such eventuality in respect of increase in taxes in the contract price itself at the time of bidding. Further, there being no subsequent legislation clause in the contract, the parties were clear that no additional cost would be awarded in case of rise of royalty due to change in legislation. The Arbitral Tribunal by award dated 18.06.2006, accepting the claim, awarded a sum of Rs.40,95,881/- towards royalty upto 27.02.2006 with interest @ 12%. This award was challenged by the Appellant by filing OMP No. 497 of 2006, which was dismissed by a Single Judge of the High Court on 27.04.2012 and that judgment is presently under challenge.

28. The award accepted that revision in royalty rates in respect of minor minerals by Government of Karnataka being subsequent to the contract would be covered under the expression 'future events' in clause 32.1 entitling the respondent to raise a claim. It was observed that there was no dispute between the parties that royalty was not included in WPI and that in other contracts the reimbursement towards additional costs incurred as a result of subsequent legislation was granted by relying on Sub Clause 70.8 or similar clauses. The High Court while affirming the view of the Arbitral Tribunal additionally relied upon the fact that claim as regards reimbursement on account of 'cess' was accepted by a separate award relying on very same submission, which view was affirmed by the High Court as stated hereinabove.

29. We have gone through the record and considered rival submissions. The view that as a result of upward variation in the rates of royalty pursuant to subsequent legislation, the matter would be covered by clause 32.1 is certainly a plausible view. While quoting the initial rates and prices, it would not have been in contemplation of a party as to the framework of any revision in rates of royalty at a future date. Clause 32.1 can be said to have covered such eventualities. We, therefore,

see no any error in the assessment and approach of the Arbitral Tribunal. The High Court, in our view, was right in dismissing the challenge. Consequently, this appeal fails and is dismissed. The decretal amount deposited and invested in a fixed deposit, pursuant to orders of this Court, was ordered to be released on furnishing of a bank guarantee by the respondent. The bank guarantee shall stand discharged. No order as to costs.

This appeal is directed against the judgment and order dated 13.02.2013 passed by the Division Bench of the High Court of Delhi at New Delhi dismissing FAO (OS) No.302 of 2012.

31. On 22.03.1999 the appellant awarded contract to the respondent for the work of four laning of NH24 from KM 27.643 to KM 48.638 and construction of Hapur Bypass at Ghaziabad, U.P. Clause 28.2 of the contract entered into between the parties pertained to royalties, which was as under:-

> Royalties 28.2 Except where otherwise stated, the Contractor shall pay all tonnage and other royalties, rent and other payments or compensation, if any, for getting stone, sand, gravel, clay or other materials required for Works.
>
> Clauses 70.1, 70.2 and 70.8 of Conditions of Particular Application (COPA) were identical as found in Civil Appeal 979 of 2010, dealt with earlier and as such they are not repeated here.

32. According to the respondent after the commencement of work, it was called upon vide letter dated 15.12.1999 by the District Authorities asking for payment of royalty on ordinary earth at the rate of Rs.4/- per cubic meter. Though it tried to convince them that ordinary earth was not a minor mineral and not liable to attract royalty, the Authorities insisted on such payment therefore the respondent deposited the requisite sum and wrote to the appellant to give appropriate benefit. The Government of India declared ordinary earth as minor mineral by issuing Notification dated 03.02.2000 as per Section 3 of 1957 Act.

33. The disputes between the parties were referred to the Arbitral Tribunal. We are concerned in the present appeal with Claim No.8 which was for refund of Royalty on ordinary earth amounting to Rs.70,65,039/- which was claimed on the ground that it was covered by Sub Clause 70.8 COPA. It was observed by the Arbitral Tribunal that after the commencement of 1957 Act it was not within the powers of UP State Government to have framed UP State Rules of 1963 and consequently such Rules were not binding on the Contractor. In its view, the imposition of royalty by the Government of UP vide notification dated 20.03.2001, being after the Central Government's notification dated 03.02.2000, for the first time validly created a liability to pay royalty. Any levy and collection prior to 03.02.2000 was without any legal sanction and therefore liable to be disregarded and since the liability was validly created after the contract was entered into, the matter was covered under Clause 70.8 of COPA.

34. The award dated 09.01.2012 thus accepted Claim No.8 in its entirety. This award was challenged by the appellant by filing OMP No.480 of 2012 in the High Court of Delhi, which was dismissed by a Single Judge of the High Court vide his order dated 18.05.2012. The matter was carried in appeal by

the appellant by filing FAO (OS) No.302 of 2012 before the Division Bench which was dismissed vide judgment and order dated 13.02.2013. While granting special leave to appeal this Court confined the matter to Claim No.8 alone and directed the appellant to furnish bank guarantee in the sum of Rs.70,65,039/-. The bank guarantee was accordingly furnished and is kept alive.

35. In support of the appeal, Ms. Indu Malhotra, learned Senior Advocate submitted that the royalty, at the time the contract was entered into, was payable at the rate of Rs. 4 per cent and the notification dated 20.03.2001 of the Government of UP maintained the same rate. The reasoning that prior to 03.02.2000 the State Government lacked competence and as such valid impact occurred for the first time vide notification dated 20.03.2001, in her submission was flawed and beyond the scope of the jurisdiction of the Arbitral Tribunal. On the other hand, it was submitted by the respondent that a demand letter from the District Collector was without the support of law and that the impost pursuant to notification of 20.3.2001 alone was valid and legal and as such it being after the contract was entered into, must qualify to be 'subsequent legislation'.

36. The question, therefore, is whether Claim No.8 is covered by Clause No.70.8 of COPA. In clause No.13.4 of the Invitation to Tender it was clearly stipulated in the contract that all duties, taxes and other levies payable by the contractor under the contract as of the date 28th days prior to the deadline for submission of bid shall be included in the rates and prices and the total bid price submitted by the bidder. The State Government, as a matter of fact, was levying royalty on ordinary earth and this situation was obtaining on such date. If the State Government lacked power to levy and collect such royalty prior to the notification dated 03.02.2000 whereby ordinary earth was brought under the definition of minor mineral, such ground may certainly entitle a party to lay requisite challenge before an appropriate forum. However, for the purposes of the contract such levy being an existing levy must be deemed to have been part of the rates or prices quoted. By notification dated 20.03.2001, the same rate was maintained and as such there was no change arising due to any subsequent legislation. In our view the matter was therefore completely outside the scope of Sub Clause 70.8 of COPA. The Arbitral Tribunal ought to have confined itself to the terms of the Contract and see if there was any variation for the purposes of Sub-Clause 70.8 of COPA. It went beyond its powers in holding that the existing levy as on the date the contract was entered into was without any authority in law and as such the imposition by notification dated 20.03.2001 created liability for the first time.

37. In our view, the Arbitral Tribunal went beyond the scope of the contract and it clearly exceeded its jurisdiction. We, therefore, set aside the award insofar as it allows Claim No. 8. Consequently, the appeal stands allowed. At the interim stage, this Court had directed the Appellant to deposit a sum of Rs.70,65,039/- which upon deposit was withdrawn by the Respondent on furnishing a bank guarantee. The appellant is entitled to encash that bank guarantee to recover the sum that was deposited. No order as to costs.

.....J (Dipak Misra) .....J. (Uday Umesh Lalit) New Delhi, April 24, 2015

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[1] (2006) 11 SCC 181

[2] (2014) 9 SCC 263
[3] (2003) 5 SCC 705
[4] (2012) 5 SCC 306

[5] (2010) 11 SCC 296
[6] (2015) 3 SCC 49
