IN THE MATTER OF ARBITRATION UNDER THE RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE

ICC CASE NO. 26834/HTG

BETWEEN

SOJITZ-L&T CONSORTIUM

Claimant

-AND-

DEDICATED FREIGHT CORRIDOR CORPORATION OF INDIA LIMITED

Respondent

Index of Legal Authorities on behalf of the Respondent

For Respondent
AKS Partners

2018 SCC OnLine Del 8327 : (2018) 169 DRJ 384 (DB)

In the High Court of Delhi at New Delhi

(BEFORE S. RAVINDRA BHAT AND A.K. CHAWLA, JJ.)

National Highways Authority of India ..... Appellant

Ms. Gunjan Sinha Jain, Advocate.

Versus

M/s. Prakash Atlanta (JV) ..... Respondent

Mr. Dayan Krishnan, Sr. Adv. with Mr. Chirag. M. Shroff, Ms. Neha Sangwan, Ms. Aakashi Lodha and Mr. Sanjeevi Seshadri, Advocates.

FAO(OS) (COMM) 1/2017 & C.M. Appl. 114/2017

Decided on April 11, 2018, [Reserved on : 04.04.2018]

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.:— This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") questions the decision of a learned Single Judge, rejecting the appellant's objections/petition under Section 34. The petition had challenged an arbitral award, dated 30.01.2015 (and the corrected award dated 07.11.2015). The appellant is described for convenience as "NHAI" and the respondent is hereafter referred to variously as "the Claimant" or "Prakash".

2. The relevant facts, briefly are that NHAI entered into an agreement dated 10.08.2001 with Atlanta (JV), the Contractor for the construction of segment of Lucknow Bypass, as a part of the East-West Corridor, connecting NH-25 and NH-28 via NH-56 passing through Lucknow city in the State of Uttar Pradesh [Contract Package No. EW-15/UP.] This became the subject matter of disputes on various issues, that were urged at various points of time; they were referred to three separate arbitration tribunals (AT). The awards in question were rendered by a three member tribunal (AT-I) comprising of M/s. Prafulla Kumar, the Presiding Arbitrator, V. Murahari Reddy and V.K. Shrotriya. The subject matter of AT-I were five claims by Prakash, i.e. (i) loss of overheads and expected profit (Rs. 28,35,92,995/-) loss due to reduced productivity from machinery and equipment deployed (Rs. 11,34,37,204), loss of bonus expected (Rs. 9,52,82,544), loss due to additional expenditure incurred in executing the work during the extended period over and above the price adjustment relief received under the terms of the Contract on account of abnormal increase in the prices of inputs (Rs. 35,28,00,000) in Claim No. 1 (totaling to Rs. 84,51,12,743); (ii) Extension of time for completion of work in Claim No. 2; (iii) claim seeking payment of cost of earth work in foundation

and below ground level in reinforced earth structure in Claim No. 3; (iv) claim seeking past Interest (@ 12%) pendente lite and future (@ 18%) in Claim No. 4; and (v) cost of arbitral proceedings in Claim No. 5.

3. The second AT (AT-II) was presided over by Mr. S.C. Gupta and with Mr. S.K. Jain and Mr. V.K. Shrotriya. They dealt with the counter-claims of NHAI relating to disputes regarding variation items. The third AT (AT-III) was presided over by Justice A.M. Ahmadi (Retd), former Chief Justice of India; it dealt with certain other claims and counter-claims and gave an Award in original on 05.08.2014 which was corrected subsequently by an Award dated 13.09.2014. One portion of that Award is the subject matter of challenge in O.M.P. 103/2015 filed by Prakash.

4. The first challenge to AT-I's award by NHAI was that the AT-I acted in error in rejecting its counter-claims. The learned Single Judge noticed that not a single ground of challenge was laid on that aspect, in the petition under Section 34, preferred by NHAI to rejection of its counter-claims, by the AT. The grounds related to the acceptance of Prakash's Claim Nos. 1.1, 1.2 and 2 to 4. The learned Single Judge noted that the counter claim was for recovery of Rs. 15.88 crores claimed by NHAI towards liquidated damages. It was held that the AT noted that the date of commencement of the work was 30.08.2001 and the scheduled date of its completion was 25.08.2004. The work was not completed within the scheduled completion date and a final extension of time ("EOT") was granted up to 15.11.2006. Prakash terminated the contract on 14.03.2008 and NHAI on 23.03.2008. NHAI raised a counter-claim initially before the third AT presided over by Justice Ahmadi (Retd) but later raised them before the AT presided over by Shri Prafulla Kumar as it was thought that the EOT and LD were inter-related issues. The AT permitted it to do so. The learned Single Judge also noticed this and held that:

> *"the AT took into account the fact that NHAI's Engineer recommended the EOT till 31 January, 2008 and this was recorded in the minutes of the meeting held on 26 November, 2007. The record further showed that PAJV had committed to complete the Railway span within six to eight months from the date of the approval of the CRS. There was no comment on the said time frame by the NHAI or the Engineer. According to the AT, this led to the inference that the EOT was up to 31 January, 2008. In the above circumstances, the claim of the NHAI for LD from 15 November, 2006 does not appear to be justified.*
>
> *21. Learned counsel for NHAI was unable to point out any glaring error in the reasoning or conclusion of the AT which would attract any of the grounds under Section 34 of the Act in order to persuade this Court to interfere with the Award of the AT rejecting the NHAI's*

counter-claim. Indeed, if the work proceeded with NHAI not terminating the contract after 15 November, 2006 and ultimately terminating it only on 23 March, 2008, the claim for LD from 15 November, 2006 for delayed completion does not appear to be justified.

22. Consequently, this Court finds no error in the impugned Award insofar as it rejects the counter-claim of NHAI."

5. Before this court, Ms. Gunjan Jain Sinha reiterated the grounds urged in support of the appeal, with respect to rejection of NHAI's counter claim, urging that the learned Single Judge erred in not holding that the AT acted contrary to the record. However, this court is of opinion that the ET granted by NHAI, which resulted in extension of period of performance, and the subsequent termination of contract by NHAI, precludes a further inquiry into the matter. This court finds no patent or manifest illegality or unreasonableness in the findings of the AT, which could have justified interference under Section 34 of the Act. As a court of appeal, the Division Bench merely cures the errors if any rarely, usually only if a legal facet or glaring inference escapes scrutiny in the court of first instance. Barring such few exceptions, the court cannot substitute its opinion. For these reasons, the rejection of NHAI's counter claim does not call for interference.

6. Claim 1.1 pertains to loss of overheads and expected profits. In this claim Prakash had sought Rs. 43,20,96,967; the AT in its award granted Rs. 16,60,76,299; Claim 1.2 was for loss due to reduced productivity from machinery and equipment deployed (Rs. 17,28,38,796/- was claimed; the AT awarded Rs. 6,29,33,007). Prakash claimed loss of overheads and expected profits at 25% of the total cost which amounted to 33.33% of the basic cost for the stipulated 36 months plus the additional period of 42.5 months up to 14.03.2008. The AT awarded loss of overheads and profits for 35.17 months till 04.08.2007. AT held that there could not be any claim for profit since it had to be earned by the Contractor by doing work.

7. NHAI had urged that the AT gave no basis for arbitrarily granting the loss of profits and there was no material to support such an Award. On this aspect, the learned Single Judge held as follows:

"26. A perusal of para 7.4.1(iv) of the impugned Award reveals that the AT did not accept PAJV's claim of 33.33% of the basic cost of material and labour. It was noted that industrial norm was 20 to 21% of the basic cost which amounted to 17% of the overall cost. The AT then decided to follow the norms laid down in the Ministry of Road Transport and Highways ("MORTH') Standard Data Book for Analysis of Rates, published by the Indian Roads Congress in 2003. It discussed the norms laid down therein, applied those norms and, thereafter, computed the sum payable to PAJV. There is a detailed

calculation forming part of the Award itself in para 7.4.1 (v) & (vi).

27. The Court is unable to discern any glaring error committed by the AT in coming to the above conclusion. It appears to be based on the correct interpretation of the clauses of the contract and also based on the norms set by the MORTH itself. The Award of Claim 1.1 to the above extent cannot, therefore, be said to be perverse, calling for any interference.

28. Even as regards Claim 1.2 which was for loss due to reduced production from the equipment deployed, the AT has discussed the issue at great length. It has gone by the records of the case. As already noticed, only 50% of the claim amount was awarded by the AT for loss due to reduced productivity from the machinery and equipment deployed. Here, again, the learned counsel for the Petitioner has not been able to point out any glaring error that would persuade the Court to interfere with the impugned Award."

8. For Claims 2 to 4 and the order dated 05.04.2010 passed by the AT rejecting NHAI's preliminary objections raised by NHAI-to Claim No. 3 (preferred by Prakash), the learned Single Judge after considering the pleadings, stated that "*no ground has either been pleaded in the petition nor urged during arguments. Even otherwise, having perused the said order, the Court is unable to find any material error which would warrant interference under Section 34 of the Act*."

9. The learned Single Judge then considered O.M.P. No. 103 of 2015 by Prakash against the Award dated 13.09.2004 passed by the AT only to the extent that it had permitted NHAI to retain the amount of performance bank guarantee ("PBG") with interest for adjustment against any other claims of NHAI against Prakash which may be held to be payable in any other Award. The learned Single Judge noted the submissions of Prakash (referred to as "PAJV" in the impugned order) that since NHAI's challenge to the award,

"no grievance would be left for PAJV since there is no amount due to NHAI arising out of the contract in question and the amount of the PBG would have to be released."

10. It is argued by Ms. Gunjan Jain Sinha that the AT, instead of arriving at definite findings of fact on the important issues such as whether at all extension was granted by the Engineer and approved by the it, whether the amount claimed was not overlapping with the amount claimed before AT-III, completely abdicated that role and proceeded on the basis of mere conjectures and surmises. She argued that the AT proceeded to allow the claim for the period 29.08.2004 till 04.08.2007 i.e. 35.17 months in a most laconic manner and held that all the events on the basis of which the claim was predicated, were "compensation events", though there was no reference to any

contractual clauses or determination on them being compensation events otherwise in law. This fact itself demonstrates total non-application of mind and appreciation of facts without any evidence whatsoever to support.

11. Ms. Sinha argued that besides the erroneous rejection of counter claims (of NHAI) and the findings regarding extension of time, the award was also untenable in so far as it granted claims on the merits, to Prakash. She urged that the AT fell into error in granting amounts that overlapped in respect of claims that were *sub judice* before other ATs and in respect of one of which an adverse award was suffered. She elaborated on this aspect, drawing notice of the court to the submission that the subject matter of another reference was variation and claims pertaining to it; those were, however, also claimed in the present arbitral proceedings, the content of which were the claims under the contract and the extended period. She also urged, in addition, that the award had clearly rejected the claim for loss of profit; however, quite contrary to that finding, amounts were granted to Prakash, in regard to loss of profits in the broad overhead claims. This was a plain and patent error on the face of the record.

12. Mr. Dayan Krishna, learned senior counsel for Prakash, the claimant, urged that the question of overlapping of claims and duplication of amounts is an argument based on a misreading of the award. The counsel relied on Para 7.3 and Para 7.4 of the AT's findings, which addressed both the issue of overheads and the question of what claims were within the jurisdiction of other arbitral tribunals. He urged that with regard to the rest of the arguments, this court, sitting in appeal should not interfere with the decision of the learned Single Judge who considered the pleadings, the award on the merits having regard to the arbitral records and the evidence led before the AT.

13. The court, at the outset, recollects that it is asked to consider, from an appellate perch as it were, whether the limited oversight of an award by an arbitral tribunal can be interfered with. Even in the case of appeal from a regular civil cause in the first instance, well-defined boundaries constrain an appellate court. The latter cannot upset findings of fact or law, unless the court of first instance omits to consider relevant and material facts or provisions of law; or renders findings that are plainly contrary to the statute or binding authorities or its findings on an appreciation of those factors are manifestly unreasonable, or it refused to exercise jurisdiction or oversteps it. If all the findings are within the bounds of law and based on relevant findings and facts, merely because the appellate court prefers an alternative view of facts or law, would be insufficient for it to substitute that view. In the present case, we remind ourselves that the court of first instance was severely constrained from rendering factual findings;

its jurisdiction was limited to discerning, from the award whether it was patently erroneous, or contrary to fundamental policy of India, or was based on patently unreasonable findings. None of these elements were made out on the merits of the case; this court finds none that were overlooked or were erroneously upheld by the learned Single Judge, who considered all submissions and grounds of challenge.

14. As regards the argument that duplication of amounts has resulted as a consequence of claims entertained and adjudicated by the AT (AT-I), the submission is, in this court's opinion, misconceived. The AT considered what was before it and what was before the other ATs. It also quantified the amounts payable *under the contract*, i.e. in terms of the agreement and the works agreed by the parties pursuant to the contract, to Prakash. The delineation of these claims (including contractual claims made for the extended period) are clearly and expressly delineated in the award. The other ATs dealt with the merits of the variation claims, counter claims on other items, etc. There is consequently no merit in this argument.

15. The next head of challenge to the impugned judgment is in respect of the loss of profit element in the overhead claim. Facially, the award rejects loss of profits for the extended period; however, it awards a loss of profit element under the overheads claim. This court notices that the justification for the grant of the “loss of profit” element as a part of the broader overhead claims, is the AT's reliance upon norms prescribed and applied in the Ministry of Road Transport and Highway's Standard Data Book for analysis of rates published by the Indian Roads Congress which is widely accepted in the field of highway constructions. The AT awarded overheads @ 11.82% by applying those standards, which included a flat “loss of profit” element. In view of this circumstance, having regard to the further fact that the AT was comprised of members agreed upon mutually, who appear to have domain expertise in the field of construction and highway contracts, this court is of opinion that the award does not disclose any error.

16. In view of the foregoing reasons, this court holds that the impugned judgment does not disclose any error or infirmity, calling for interference. The appeal has to fail and is, therefore, dismissed without order on costs.

O.M.P. (COMM) 201/2018

National Highways Authority of India v. Patel - KNR

2018 SCC OnLine Del 9089

In the High Court of Delhi at New Delhi
(BEFORE VIBHU BAKHRU, J.)

National Highways Authority of India ..... Petitioner
v.
Patel - KNR (JV) ..... Respondent

O.M.P. (COMM) 201/2018 & IA No. 6331/2018
Decided on May 14, 2018

Advocates who appeared in this case:

For the Petitioner: Ms. Pinky Anand, ASG with Dr. Maurya Vinay Chandra, Mr. Sumit Tekriwal and Ms. Manisha Samanta.

For the Respondent: Dr. Amit George, Mr. Rishabh Dheer and Mr. Swaroop George.

The Judgment of the Court was delivered by

VIBHU BAKHRU, J.:— The petitioner (NHAI) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 27.12.2017 (hereafter 'the impugned award') to the extent that the respondent's claims have been sustained (except an award of Rs. 5,05,465/- made against a claim of painting of antiglare and pedestrian guard railing).

2. The impugned award was rendered in the context of disputes that had arisen between the parties with respect to the 'Contract Agreement' dated 17.10.2001 (hereafter 'the Agreement') and was delivered by the Arbitral Tribunal comprising of three arbitrators, namely, Sh. S.C. Sharma (Presiding), Sh. M.K. Aggarwal and Sh. P.V. Rama Raju (hereafter 'the Arbitral Tribunal').

3. The Arbitral Tribunal has awarded an aggregate sum of Rs. 24,49,55,742/- in favour of the respondent (hereafter 'Patel'). The said amount comprises of (i) Rs. 4,98,54,212/- on account of the balance payment due as per the certification of the Engineer (Claim No. 1); (ii) Rs. 5,05,465/- on account of payment due for painting of antiglare coating on pedestrian guard railing (Claim No. 3); (iii) Rs. 4,11,45,930/- for payment on account of the idling of plant and machinery (Claim No. 8); (iv) Rs. 1,57,59,300/- on account of overhead expenses during the extended period of the contract (Claim No. 9); (v) Rs. 92,25,364/- as escalation for mild steel (Claim No. 12); and (vi) Rs. 12,84,65,471/- as interest for the period 18.10.2008 to the date of the award computed at the rate of 12% per annum and future interest at the rate of 10% per annum (Claim No. 14). NHAI has contested the awards made against each claim other than the award of Rs. 5,05,465/- against Claim No. 3.

4. Briefly stated, the relevant facts necessary to address the controversy are as under:-

4.1 NHAI is a statutory body constituted under Section 3 of the National Highways Authority of India Act, 1988. Patel is a Joint Venture formed between M/s Patel Engineering Ltd. and M/s KNR Constructions Ltd. by Joint Venture Agreement dated 12.06.2001.

4.2 On 17.10.2001, NHAI invited bids for the work of widening to four lanes and rehabilitation of existing two lane carriageway of Krishnagiri - Vaniyambadi Section of National Highway-46 (NH-46) from km 0.00 to km 49.00 (hereafter 'the works').

4.3 On 18.06.2001, Patel submitted its bids pursuant to the aforesaid invitation. Thereafter, on 20.09.2001, NHAI awarded the contract and issued a Letter of Acceptance (LOA) accepting the bid at the contract price of Rs. 163,49,53,505/- (after deducting a rebate of 16.70% offered by the respondent).

4.4 On 17.10.2001, NHAI and Patel entered into a Contract Agreement ('the Agreement') for execution of the works. The period stipulated for completion of the works was thirty months from commencement of the works - that is, thirty months from 21.11.2001 - and the works were to be completed by 20.05.2004.

4.5 The execution of the works was delayed and was finally completed by 31.03.2005. In the meantime, NHAI extended the time for completion of the works till 31.03.2005 pursuant to a letter dated 30.03.2004 sent by Patel. Thereafter, on 24.06.2005, the Engineer issued the 'Taking-Over Certificate'.

4.6 On completion of the works, Patel - by a letter dated 23.06.2008 - submitted its final statement for an amount of Rs. 185,60,78,542/-.

4.7 On 21.06.2008 and 23.06.2008, meetings were held and the Engineer certified the final statement in two parts: Final Statement I for an amount of Rs. 6,01,08,801/- for all the works by letter dated 10.07.2008 and Final Statement II for an amount of Rs. 41,82,67,054/- which contained disputed items. On 23.07.2008, the said disputed items were referred to the Engineer in terms of Clause 67.1 of GCC and by letter dated 17.10.2008, the claims against the said items were rejected.

4.8 On 18.10.2008, Patel invoked the arbitration for the disputed items in Final Statement II as per Clause 67.1 of GCC and appointed Sh. P.V. Rama Raju as its nominee arbitrator. On 02.02.2009, NHAI released an amount of Rs. 1,00,08,054/- against Final Statement-I but failed and neglected to make the balance payment of Rs. 5,01,00,747/-.

4.9 On 02.05.2012, NHAI appointed Sh. Mahesh Chandra as its nominee arbitrator for adjudication of disputes relating to non payment of the balance amount covered under Final Statement I and Final Statement II. Both the arbitrators appointed Sh. S.C. Sharma as the Presiding Arbitrator.

4.10 Patel filed its Statement of Claims before the Arbitral Tribunal in respect of fifteen different claims including claims regarding the delay in completion of the works due to failure on part of NHAI to perform its reciprocal obligations.NHAI filed its Statement of Defence contesting the claims made by the petitioner. NHAI, *inter alia*, claimed that the respondent failed to mobilize adequate machinery, material and manpower and such failure compounded with mismanagement that resulted in delay/completion of the works.

5. The Agreement was a unit rate contract. The bidding documents contained detailed 'Bill of Documents' (hereafter 'BOQ') containing the items of work with the estimated quantities of each item to be executed by Patel. The parties adopted the terms and conditions of the contract as contained in the General Conditions of Contract (GCC) and Special Conditions of Contract (SCC). These terms are based on *FIDIC Contract* 4th Edition in 1987 with certain Conditions of Particular Application (COPA) amending the FIDIC and GCC.

Reasoning and Conclusion

6. Ms. Pinky Anand, learned ASG had contested the impugned award on several grounds. Dr. Amit George countered the said submissions. The rival contentions have been considered while discussing the claims awarded in favour of Patel.

Re: Claim No. 1, Release of payments against certification of the Engineer.

7. The Engineer had certified a statement - Final Statement No-I for a sum of Rs. 6,01,08,801/- as per Clause 60 of the GCC vide his letter dated 10.07.2008. NHAI had released a sum of Rs. 1,00,08,054/- on 02.02.2009 but had withheld the balance

amount. In this context, the petitioner claimed that a sum of Rs. 5,01,00,747/- was payable as the sum has been certified by the Engineer.

8. Ms. Pinky Anand submitted that the aforesaid certified amount also included an amount payable on account of the Seigniorage fee. She submitted that NHAI had not provided any proof of having paid the enhanced seigniorage fee and, thus, the said amount included in the Final Statement No-I could not be awarded. She also referred to the decision of the Division Bench of this Court in *National Highways Authority of India* v. *ITD Cementation India Ltd.*, 2008 (100) DRJ 431 in support of her contention.

9. Dr. Amit George, learned counsel appearing for Patel objected to the said contention being advanced at this stage. He submitted that NHAI had not contested the amount certified by the Engineer on any such ground.

10. It is seen that the only contention advanced by NHAI in respect of Claim No. 1 was that it was beyond the scope of Clause 52.2 of GCC as modified by COPA. NHAI contended that the rates as prescribed under the BOQ have to be adopted unless the two conditions as specified under Clause 52.2 of GCC have been met. The first being that the item must account for more than 5% of the Contract Price and the second is that the work executed under the item exceeds or falls short of quantity specified in the BOQ by more than 25%. NHAI had claimed that for determining whether the item accounted for more than 5% of the Contract Price, the rate and quantity as specified in the BOQ were to be considered and not the actual work done.

11. This contention was rejected by the Arbitral Tribunal. It is relevant to state that no such contention has been advanced before this Court to assail the conclusion of the Arbitral Tribunal in this regard. NHAI has now raised a new issue that the certified amount includes certain amounts on account of the seigniorage fee for which Patel was required to produce proof of payments. Clearly, NHAI cannot be permitted to raise fresh disputes at this stage. The learned counsel appearing for NHAI was asked to point out whether this issue had been raised in the Statement of Defence and she fairly conceded that this defence had not been taken in the Statement of Defence. Plainly, if NHAI had raised any such defence, Patel would have the opportunity to produce the material to address such objections. Since NHAI had chosen not to challenge the certification of the Engineer on this ground, it cannot be permitted to raise such contention at this stage. Thus, no interference with the impugned award is warranted in regard to the award for the balance amount due against Final Statement-I certified by the Engineer.

Re: Claim Nos. 8 and 9

Introduction

12. Patel had claimed a sum of Rs. 19,20,57,109/- on account of idling of plant and machinery and a sum of Rs. 4,12,00,000/- on account of the additional overhead expenses incurred during the extended period of contract. As noticed above, the Agreement was entered into on 17.10.2001 and the date of commencement of the works was stipulated to be 21.11.2001. The execution of the works was delayed for various reasons, which Patel claimed were attributable to NHAI. The works were finally completed on 31.03.2005. Although, NHAI extended the time for completion of the works, it did not grant any compensation for the same. Patel claimed that due to delay in the contract, it had to retain its resources including plant and machinery at site till the completion of the works and this resulted in Patel incurring additional cost. It is in this context, Patel claimed that it was entitled to costs for idling and under utilization of machinery and equipment. Similarly, Patel had claimed additional cost due to overhead expenses incurred during the extended period, which were quantified at Rs. 4,12,00,000/-.

13. The aforesaid claims were contested by NHAI on several grounds including denying that there was any delay in handing over of site. NHAI also claimed that in

terms of the Agreement, Patel was required to take all necessary steps so that the encumbrances and hindrances on the existing stretches could be cleared and for this, the BOQ included a specific item - BOQ Item No. 1.02, which was required to be executed as per Clause 110 of the Technical Specifications. NHAI claimed that Patel had failed to execute Item No. 1.02 of the BOQ and had been unable to clear the site or any encumbrances and, thus, any delay on that ground was attributable solely to Patel and not to NHAI. NHAI also claimed that Patel had adequate stretches of road to maintain the progress of work.

14. The Arbitral Tribunal found that there was a delay of 10 months and 11 days in completion of the works inasmuch as the works were completed on 31.03.2005, instead of the stipulated date of the completion of 20.05.2004. The Arbitral Tribunal relied on the letter dated 05.11.2004 of the Supervision Consultant, which indicated that 50.112 kms of unobstructed work was to be handed over within a period of six months but only 20.28 kms stretch was handed over to Patel. Further, this stretch was also divided into separate stretches over the entire length and each section handed over ranged from 0.045 kms to 2.2 kms instead of the minimum 5 kms. The Arbitral Tribunal had concluded that the delay in handing over of the unobstructed site had resulted in prolongation of the contract and, therefore, Patel was entitled to cost towards deployment of additional resources over the extended period of time in terms of Clause 42.2 of GCC.

Submissions

15. Ms. Pinky Anand had assailed the impugned award, essentially, on two grounds. First, she submitted that the Arbitral Tribunal had erred in not appreciating that the delay in handing over the unobstructed site could not be attributed to NHAI. She submitted that the site had been handed over within the stipulated time and it was Patel's obligation to remove all the hindrances, encroachments and to shift the utilities and the same was also the part of the BOQ item (BOQ Item No. 1.02). Further in terms of Clause 110 of the Tender Specifications, no such claim could be made.

16. Second, she contended that the amount awarded was without any sufficient evidence and, therefore, was unsustainable. She contended that the Arbitral Tribunal had merely applied the analysis of rates as per the Standard Data Book for Analysis of Rates (First Revision) (hereafter 'MOST Standard Data Book') without Patel adducing any evidence of having incurred such expenditure or suffering any such loss. She further stated that the MOST Standard Data Book was a privileged document and could not be relied upon in the arbitral proceedings. She referred to the decision of the Division Bench of this Court in *National Highways Authority of India* v. *ITD Cementation India Ltd.* (supra) and the decision of UK High Court in *Costain Limited* v. *Charles Haswell & Partners Limited*, (2009) EWHC 3140 (TCC) in support of her contention. She drew the attention of this Court to the relevant extract of the said decision, which is relied upon by her and is set out below:—

> "184. But a claim for damages on account of delays to construction work is rather different. There, in order to recover substantial damages, the contractor needs to show what losses he has incurred as a result of the prolongation of the activity in question. Those losses will include the increased and additional costs of carrying out the delayed activity itself as well as the additional costs caused to other site activities as a result of the delaying event. But the contractor will not recover the general site overheads of carrying out all the activities on site as a matter of course unless he can establish that the delaying event to one activity in fact impacted on all the other site activities. Simply because the delaying event itself is on the critical path does not mean that in point of fact it impacted on any other site activity save for those immediately following and dependent upon the activities in question."

17. Dr. Amit George countered the aforesaid submissions. He submitted that insofar as the BOQ Item No. 1.02 is concerned, the same only relates to coordination with other agencies for removal of hindrances. Admittedly, Patel was paid for the said works and, therefore, there could be no dispute that Patel had performed its obligation. He further relied upon Clause 5.2.2 of the Conditions of Particular Application (COPA) and submitted that the order precedence of the documents was specified in Clause 5.2.2 of COPA and the provisions of GCC would take precedence over the provisions of the Technical Specifications. He submitted that thus the provisions of Clause 42.2 of GCC would override Clause 110.1 of the Technical Specifications. He further stated that Clause 110.1 of the Technical Specifications must be read with BOQ item no. 1.02, which only requires Patel to coordinate with the concerned agencies.

18. He further submitted that the delay was not only on account of cutting of trees and shifting of utilities but also for the reason that NHAI had not completed the acquisition of the entire site. He submitted that the payment for acquisition of land in certain stretches had not been made to villagers and, therefore, they had obstructed any activity on their land. He submitted that, on 01.08.2003, a total stretch of 15.42 kms was not available as the compensation had not been paid. The said land was made available during the period 01.11.2003 to June, 2004. The acquisition regarding this stretch was also challenged by the occupants of the said land. He referred to the decision of a Coordinate Bench of this Court in *National Highways Authority of India* v. *Bridge & Roof Co. Ltd.*: O.M.P. 1203/2013, decided on 18.04.2017, wherein the Court had declined to interfere in an award upholding the view that Clause 42.2 of GCC would override Clause 110 of the Technical Specifications and that mere notional handing over of land on which it was not possible to execute any works, was not envisaged by the contract. He also referred to the decision of the Division Bench of this Court in *NHAI* v. *Hindustan Construction Co. Ltd.*, 2017 (5) Arb. LR 258 (Delhi) (DB), wherein the Court had held that the responsibility of the contractor was limited to coordinating with the service provider and not to ensure removal of encroachment. He also referred to the decision of a Coordinate Bench of this Court in *National Highways Authority of India* v. *R.N. Shetty*, 2014 (3) ARBLR 46 (Delhi) in support of his aforesaid contentions.

19. Insofar as the quantification of damages is concerned, Dr. George referred to the written submissions. He submitted that Patel provided extensive evidence as to the quantification of the claim. In particular, Patel had provided details of the deployment of the machinery. The same were part of the Monthly Progress Report (MPR) submitted by the Engineer. *Reasoning & Conclusion regarding Claim nos. 8 and 9*

20. The first and foremost question to be addressed is whether the Arbitral Tribunal had erred in concluding that Patel was entitled to damages for the delay in handing over the unobstructed site. Undisputedly, the execution of the works was delayed for a period of 10 months and 11 days as found by the Arbitral Tribunal. It is also relevant to note that the time for execution of the works was extended without levy of any compensation. Although, NHAI had contended before the Arbitral Tribunal that the delay was attributable to Patel, this is not the contention, which was advanced on behalf of NHAI in this Court. Ms. Anand has contended that although the delay may have been caused due to removal of obstructions or on account of unobstructed site not being available to Patel; however, in terms of Clause 110.1 of the Technical Specifications, no compensation for the same was payable by NHAI and, therefore, the Arbitral Tribunal had erred in awarding damages.

21. Before the Arbitral Tribunal, Patel had submitted that the delay in completion of the works was on several counts including delay in handing over of drawings; delay in handing over of site; delay in removal of utilities (which work was entrusted to other

agencies); delay in frequent change of supervision consultant; additional work and delay in taking decisions.

22. In terms of Schedule - III to the Agreement, the site was to be handed over in a phased manner as set out below:—

"i) At Commencement	Stretch of 5 Km.
ii) After 2 months from commencement	Stretch of 10 Km.
iii) After 4 months from commencement	Stretch of 10 Km.
iv) After 6 months from commencement	Remaining stretches of 25.112 Km of the project road."

23. It is important to note that Patel's case is that although the site was handed over on paper; however, in fact, the site was not available for execution of the works for several reasons. First of all, the acquisition of the entire stretch of land was not complete. Patel had sent a letter dated 01.08.2003 pointing out that, as on 01.01.2003, only 11.285 kms in 26 bits along LHS and 9.555 kms in 22 bits along RHS could not be worked out due to various reasons including non-payment of compensation to the land owners and non-payment of compensation for the buildings, wells, etc. NHAI was also informed that villagers had obstructed the work at Barugur by-pass (4.5 kms) and Natrampally by-pass (0.6 kms). Patel claimed that the temples and other structures could not be shifted as NHAI had not located an alternate site. Patel had also relied upon the reports of Engineer - including a letter dated 10.06.2004 - indicating that only partial fronts were available with it for execution of the works.

24. The Arbitral Tribunal had considered the extensive pleadings and the evidence produced and had relied upon the letter dated 05.11.2004 of Supervision Consultant, which indicated that as on June, 2002, only 20.28 kms of the site had been handed over instead of 50.112 kms. Further, the site that was handed over was divided into several stretches over the entire land and the length of each section ranged between 0.045 kms to 2.2 kms as against minimum of 5 kms. The said report also indicated that 11.75 kms was obstructed at the time of handing over of the complete stretch of 50.112 kms on 27.03.2002 and the phase clearance of the obstruction was done from May, 2003 to June, 2004.

25. The fact, that the acquisition of the complete stretch of site was not complete inasmuch as compensation for stretches of land had not been disbursed, was not seriously disputed. Even before this Court, Ms. Anand had contended that the delay on this count had been compensated by Patel by accelerating the progress of works.

26. Patel had also produced material to indicate that there were other obstructions on the site including temples, building, wells and other structures which had not been removed.

27. The Arbitral Tribunal had considered the material and rendered an unequivocal finding that there was delay in handing over of the unobstructed site and that had resulted in prolongation of the contract. The relevant extract of the impugned award is set out below:—

> "9.27 Having gone through the pleadings and documents and considering the respective submissions of the parties and judgments referred to by them, we find that:
>
> (i) The Supervision Consultant had analyzed the delay events in its letter dated 05-11-2004 (Exhibit RD-37) and stated that that the total length of continuous unobstructed work fronts of 50.112 km was to be handed over within 6 months (June 2002) whereas only20.28 km was handed over in divided stretches spread over the entire length. As per the Supervision Consultant's analysis the length in each section handed over ranged from

0.045 km to 2.2km as against minimum of 5 km. The total length of 50.089 km was handed over for construction over a period 30 months. As per the Respondent's admission, stretches aggregating to 11.75km were obstructed at the time of handing over the complete stretch of 50.112 km on 27.03.2002. The phased clearance of obstructions was done from May 2003 to June 2004 (Exhibit:RD-31)

(ii) Thus, the AT is of the view that there was delay in handing over of the unobstructed site resulting in prolongation of the Contract and therefore, the Claimant is entitled to cost towards deployment of the additional resources over the extended period in terms of Clause 42.2 of the Contract. As the handing over of unobstructed site was spread over the 30 months period there was no possibility of completing the work in 30 months. The Respondent has granted extension of time up to 31.03.2005. The Contract provides for any extension of time only if there is no default or breach of the Contract by the Contractor. Hence, the Claimant's entitlement to cost towards deployment of its resources and additional overheads over the extended period up to 31.03.2005 is justified. The progress achieved till May 2004 was 80.27% (p 438RD-31), hence about 20% work remained to be completed in the extended period. Considering the quantum of balance work, additional cost of Rs. 19.20 crore on account of deployment of the machinery in the extended period appeared to be very high and the claim requires to be modified as discussed below."

28. The finding that there was delay in handing over of the unobstructed site resulting in prolongation of the Contract, is a finding of fact, which is based on sufficient material and, therefore, is not amenable to judicial review under Section 34 of the Act. The Supreme Court of India, in the case of *Associated Builders* v. *Delhi Development Authority*, (2015) 3 SCC 49, has authoritatively held that an arbitral tribunal is the final adjudicator of facts and unless the conclusion is found to be perverse, it cannot be interfered with.

29. In view of the above, the Arbitral Tribunal had concluded that Patel was entitled to cost towards deployment of the additional resources over the extended period in terms of Clause 42.2 of the GCC. Thus, the next question to be addressed is whether the Arbitral Tribunal had erred in holding so.

30. Clauses 42.1 and 42.2 of the GCC are relevant and are set out below:—

"GCC Clause 42.1: Possession of Site and Access Thereto (GCC)

Save insofar as the Contract may prescribe:

(a) the extent of portions of the Site of which the Contractor is to be given possession from time to time.

(b) the order in which such portions shall be made available to the Contractor, and, subject to any requirement in the Contract as to the order in which the Works shall be executed, the Employer will, with the Engineer's notice to commence the works, give to the Contractor possession of

(c) so much of the Site, and

(d) such access as, in accordance with the Contract, is to be provided by the Employer as may be required to enable the contractor to commence and proceed with the execution of the Works in accordance with the programme referred to in Clause 14, if any, and otherwise in accordance with such reasonable proposals as the Contractor shall, by notice to the Engineer with a copy to the Employer, make. The Employer will, from time to time as the Works proceed, give to the Contractor possession of such further portions of the Site as may be required to enable the Contractor to proceed with the execution of the Works with due dispatch in accordance with such programme

or proposals, as the case may be.

Clause 42.2: Failure to Give Possession (GCC)

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

(a) any extension of time to which the contractor entitled Under Clause 44, and

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

31. Thus, undisputedly, in terms of Clause 42.2 of the GCC, Patel would be entitled to compensation for delay in handing over of the site.

32. The contention that Patel was responsible for removal of obstruction and was precluded from raising any claims by virtue of Clause 110.1 of the Technical Specifications, is unpersuasive.

33. The BOQ item no. 1.02, which was relied upon on behalf of NHAI, reads as under:—

"1.02 Co-ordinating with respective service providers/Authorities for cutting trees, shifting of utilities removal of all encroachments etc. as per Technical Specification Clause 110."

34. As is apparent from the above, Patel's responsibility was limited to coordinating with the respective service providers for cutting of trees, shifting of utilities and removal of encroachments as per Clause 110 of the Technical Specifications; and not to execute the work regarding cutting of trees or shifting of utilities. There is no dispute that Patel had performed its obligations and had also been paid for the same. NHAI had not found any fault with Patel in this regard. Therefore, reference to BOQ item no. 1.02 is of little assistance to NHAI.

35. Clause 110.1 of the Technical Specifications - which was relied upon by NHAI to contend that no compensation was payable to Patel - reads as under:—

"The Contractor shall be responsible to coordinate with service provider/concerned authorities for for cutting of trees, shifting of utilities and removal of encroachments etc. and making the site unencumbered from the project construction area required for completion of work. This shall include initial and frequent follow up meetings/discussions with each involved service provider/concerned authorities. The contractor will not be entitled to any additional compensation for the delay in cutting of trees, shifting of utilities and removal of encroachments by the service provider/concerned authorities. The expenses incurred for cutting of trees and shifting of utilities as required by the respective departments shall be made by the Employer. The information contained in the Bid Documents concerning the public utility services such as water, sewer, power transmission lines, telephone lines and oil/gas pipelines, OFC cables etc may not be exhaustive and it shall be the responsibility of the Contractor to ascertained the utilities that are likely to be affected by works through site investigations and collection of information from the concerned utility owners."

36. The contention, that Patel was not entitled to any compensation for the delay in terms of Clause 110.1 of the Technical Specifications, is unpersuasive for several reasons. First of all, the delay in availability of the site to Patel included the delay on the part of NHAI to complete the acquisition of the site. The delay in disbursal of compensation to the land occupants/owners was clearly outside the scope of Clause 110.1 of the Technical Specifications. Further, there was also delay in shifting of the temples and other buildings and Patel had alleged that the same was on failure of NHAI to provide an alternate site. This is also not covered under Clause 110.1 of the

Technical Specifications. Secondly, the contention, that Clause 110.1 of the Technical Specifications must be read in the context of BOQ item no. 1.02 and not for the delays that are not attributable to the contractor in performance of the said BOQ item, is also persuasive.

37. More importantly, Clause 5.2.2 of COPA clearly provided that GCC would take precedence over Technical Specifications. In the present case, Clause 42.1 of GCC specifically provided that the possession and access to the site would be provided to the contractor for execution of the works. Clause 42.2 of GCC further provided that any delay giving possession of the site in accordance with the terms of sub-clause 42.1 of GCC would require the Engineer to grant extension and determine the cost to be added to the contract price.

38. In the present case, the Arbitral Tribunal had relied upon Clause 42.2 of GCC to hold that Patel would be entitled to further damages. This Court is of the view that no interference with this conclusion is warranted.

39. Insofar as the contention that MOST Standard Data Book was a privileged document is concerned, no such contention was raised before the Arbitral Tribunal, therefore, NHAI cannot be permitted to raise such disputes at this stage.

40. The next issue raised by NHAI was with regard to quantification of the amounts awarded. It was contended on behalf of the petitioner that such quantification is without any evidence and, therefore, cannot be sustained. It was earnestly contended that the Arbitral Tribunal had based his decisions solely on the MOST Standard Data Book without Patel providing any evidence. It was submitted that the MOST Standard Data Book is a privileged document and proceeds on certain assumptions and it was incumbent upon Patel to provide evidence to show that the said assumptions hold good in its case.

41. The aforesaid contention is un-merited, as Patel had produced sufficient evidence before the Arbitral Tribunal to establish the quantification of the loss suffered by it. First of all, Patel had produced the list of machinery that was available at site during the extended period. This was also a part of the MPRs submitted by the Engineer. Although, the hire charges for the said machinery were computed on the basis of the MOST Standard Data Book, detailed analysis of the same was submitted by Patel (submitted in CD No. 8 and further explained in CD No. 10). Patel had computed the charges for the machinery during the entire period of execution of the works at Rs. 66,19,66,611/-.This was on the basis of BOQ quantities. It had reduced the hire charges computed as per BOQ quantities, which were computed at Rs. 33,55,90,094/-, accordingly, it was claimed that Rs. 32,63,76,773/- was the actual loss suffered. However, Patel had restricted its claim only to Rs. 19,20,57,109/-, which was the additional cost incurred during the extended period and the additional cost incurred during the original contract period was ignored.

42. The Arbitral Tribunal had further reduced the aforesaid amount on the basis of the value of the work done. The Arbitral Tribunal determined that about 20.75% of the total work was executed between 21.05.2004 to 31.03.2005 (the extended period), which worked out to Rs. 31,51,85,994/-. From the aforesaid sum, the Arbitral Tribunal had reduced the additional work of Rs. 3,03,68,275/- and, thus, determined that during the extended period, the work of the value of Rs. 31,51,85,994 of the BOQ quantities was executed. Since the hire charges for BOQ quantities was computed at Rs. 33,55,90,094/- for the entire contract value of Rs. 163,49,53,505/-, the Arbitral Tribunal applied the same proportion to the works done during the extended period and, accordingly, determined additional cost for the machinery during the extended period at Rs. 6,46,95,000/-. From the aforesaid charges, the charges for the particular machinery that demobilized (value of which was computed to be Rs. 1,81,82,208/-) was reduced. Thus, the hire charges for the machinery during the extended period was

computed at Rs. 4,65,12,792/-. This was further adjusted downward for inflation at the rate of 5% and a sum of Rs. 4,11,45,930/- was found payable.

43. It is apparent from the above that the said determination is based on empirical data as to the machinery available at site and the quantum of work done during the extended period. The value of cost of such machinery has been applied on the standards as specified. This Court finds no infirmity with the approach of the Arbitral Tribunal. Standard formula for determination of damages can be adopted, as a measure of damages provided that there is sufficient evidence to apply those formulas. In the present case, the empirical data as to the machinery available at site and the work done was available and, therefore, the same has been used by the Arbitral Tribunal for computing the additional cost incurred during the extended period. The contention that the Arbitral Tribunal had erred in using MOST Standard Data Book for assuming the hire charges as a measure of cost of the said machinery is not persuasive. It is also admitted that NHAI had not produced any material to show that the cost determined on hire charges was an unreasonable measure in the facts of the present case. Thus, this Court finds no ground to interfere with the quantum of damages as awarded on account of idling of plant and machinery.

44. Similarly, this Court also finds no ground to interfere with the award of overhead charges. Patel had produced its balance sheet for overheads at site showing that the sum of Rs. 7,43,86,684/- had been spent during the period of 12 months. Since, the extended period was only 284 days, the proportionate overhead expenditure was computed at Rs. 5,78,79,094/-. Patel had submitted copies of the profit and loss account and the balance sheet for the work during the entire period of the contract that is, for the original period of the contract as well as the extended period. The accounts indicated that the total overhead charges incurred during the entire length of the contract was Rs. 17,07,14,045/- [Rs. 42,58,589/- (2001-2002), Rs. 2,48,18,855/- (2002-2003), Rs. 6,72,49,737/- (2003-2004) & Rs. 7,43,86,864/- (2004-2005)]. On the aforesaid basis, Patel had contended that an amount of Rs. 19,71,74,721/- was incurred as overhead expenses after accounting for head office overheads as 10% of the site expenses. Patel also pointed out that as per the MOST Standard Data Book, 8% of the contract value was considered as reasonable in respect of contracts, which are above Rs. 50 crores and, thus, a sum of Rs. 13,07,96,280/- was expected to be incurred as overhead expenses. Reducing the same from the sum of Rs. 19,71,74,721/-, Patel contended that the sum of Rs. 6,63,78,441/- was reasonable but had restricted its claim to Rs. 4,12,00,000/-. The Arbitral Tribunal did not accept the aforesaid quantification and restricted the amount to only 5% of the balance works executed during the extended period (31,51,85,994 × 0.05 = Rs. 1,57,59,300/-).

45. This is not a case where Patel had not provided the necessary data for substantiating its claim; however, the Arbitral Tribunal had restricted the same only to 5% of the balance works executed. Thus, NHAI's contention that Patel had not provided data for substantiating its claim is erroneous and, thus, this Court finds it difficult to accept that any interference with the impugned award is warranted.

Re: Claim No. 12

46. The Arbitral Tribunal has awarded a sum of Rs. 92,25,364/- on account of payment in escalation of Mild Steel. Patel had claimed the aforesaid amount in terms of Clause 70.5(ii)(b) of COPA, which expressly provided that the contract price would be subject to account of variation in cost of cement and steel based on the formula specified therein. The formula was based on index price of iron and steel, as shown in the index principles of whole sale prices in India released by the Office of Economic Advisory, Ministry of Industry.

47. Sub-clause 70.5 of COPA specifically provided that variation in price of specified materials would be payable as per the formulae specified. The opening words of sub-

clause 70.5 of COPA are set out below:

> "Sub-Clause 70.5: Increase or Decrease of Price of Specified Materials i) Increase or decrease of price of specified materials will be adjusted by either an addition 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."

48. There is no dispute that Mild Steel was a specified item in Schedule 2 of Section VII and, thus, in terms of Clause 70.5(ii)(b) - which provides for the formula for variation in price of steel - was payable.

49. It is also relevant to note that NHAI had paid the escalation in price of Mild Steel upto the 34th Interim Payment Certificate (IPC). This amount aggregated to Rs. 17,04,061/-. Patel had claimed a further amount of Rs. 75,21,303/-. There was no dispute as to the computation of the escalation payable; however, instead of payment of the said amount, NHAI had also recovered the escalation paid earlier.

50. NHAI had resisted this claim on the ground that escalation formula could not be applied to items made of mild steel. The said contention was rejected, as the Arbitral Tribunal found that mild steel was brought at site and incorporated in the permanent works.

51. This Court finds no infirmity with the aforesaid view.

Re: Interest

52. The Arbitral Tribunal has awarded pre award interest at the rate of 12% per annum. Ms. Anand, learned ASG has contended that the levy of such interest was unreasonable given the extraordinary pre award period. This contention is bereft of any merit and the pre award interest cannot be interfered with.

53. In view of the above, the petition is unmerited and is, accordingly, dismissed. The pending application is also disposed of.

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 04.03.2009
% Judgment delivered on: 20.03.2009

\+ **FAO(OS)No.389 OF 2008**

M/s. Sudhir Bros. ..... Appellant
Through: Mr. Harish Malhotra, Senior Advocate with Mr. Vipul Gupta, Advocate

versus

Delhi Development Authority & Ors. ....Respondents
Through: Mr. S.M. Chopra, Advocate

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE VIPIN SANGHI

1.	Whether the Reporters of local papers may be allowed to see the judgment?	No
2.	To be referred to Reporter or not?	Yes
3.	Whether the judgment should be reported in the Digest?	Yes

VIPIN SANGHI, J.

1. The appellant challenges the judgment of the learned Single Judge dated 16.07.2008 in C.S.(OS) No.2312/2006 and I.A. No.170/2008, whereby the learned Single Judge has decided the objections to the arbitral award dated 11.11.2006 made by Sh. V.D. Tiwari, sole arbitrator. The contract had been awarded to the appellant for construction of 234 LIG dwelling units at Pitam Pura Pocket-W Poorvi including internal services vide agreement No.23/EE/CDI/80-81. The stipulated date of start of the work was

16.01.1981 and the time of completion was 12 months. However, the work could not be completed by 15.01.1982 (the stipulated date of completion) and the contract spilled over into extra time. Disputes arose between the parties, which were referred to arbitration of the learned arbitrator Mr. V.D. Tiwari by this Court vide order dated 08.12.2005. The appellant was the claimant before the arbitrator. By the impugned judgment the learned Single Judge has set aside the award in respect of claim No.7, counter claim No.2 and varied the rate of interest awarded for a certain period, and deleted the interest awarded for certain other period. The appeal, as filed, impugns the findings of the learned Single Judge on claim No.7 and the denial of interest as aforesaid. At the time of argument learned counsel for the appellant has, however, restricted his submissions only to challenge the setting aside of the award on claim No.7.

2. Under claim No.7 the appellant/ claimant had claimed 35% over the quoted rates on the amount of work executed after the stipulated date of completion. One of the primary issues before the learned arbitrator was to determine as to which of the parties was responsible for the delay. The learned arbitrator came to a finding of fact that it was the respondent DDA who was wholly responsible for the prolongation of the contract. Founded upon the said delay, the appellant had raised various claims, including claim No.7 for Rs.21,36,403/-. The learned arbitrator arrived at a finding that the claim was admissible for an amount of Rs.3,54,396/-.

3. Before the learned Single Judge it was contended by the respondent DDA that the award on claim No.7 was not justified, as it was based on no evidence. It was contended that in the absence of proof of payment or loss, the arbitrator could not have calculated escalation or increased construction cost for the prolonged period on some arbitrary method. Reliance was placed on the decision of this Court in *"**Kochar Construction Co. v. Union of India & Anr.**"* 1994(1) Arb. LR 269 as well as the decision of this Court in "***Hindustan Construction Corporation v. Delhi Development Authority & Anr.***" 2002(3) Arb. LR 235 (Delhi).

4. On the other hand, the appellant while resisting the objection had contended that various documents on record of the learned arbitrator establish that at the relevant time the appellant had demanded escalation in cost of construction. The arbitrator had noticed that during the extended period the DDA itself was awarding contracts at rates which were 45% above the appellant's quoted rates. It was also contended that the arbitrator also took note of the continuous price rise and CPWD cost index while awarding the sum of Rs.3.54,396/-.

5. The learned Single Judge set aside the award on claim No.7 and the reasoning of the learned Single Judge is to be found in paragraphs 17 to 19 of the impugned judgment, which read as follows:

> "17. So far as Claim No.7 is concerned, the contractor had demanded 35% of the total value of the original contract as escalated

construction costs over and above the cost of materials and labour admissible to it under clause 10-C. The Arbitrator relied upon a decision of this court reported as Metro Industries Electrical Vs. DDA AIR 1980 Delhi 266. The DDA's contentions, on the other hand, were that in the absence of any proper evidence of higher cost of construction, the Arbitrator could not have followed or adopted same cost analysis and awarded 25% escalation. It relies upon the Division Bench's judgment of this court in Kochar Construction and a subsequent decision in Hindustan Construction Corporation.

18. In Kocher Construction, the question was whether a claim for escalation of costs allowed by the Arbitrator was justified. The Arbitrator had accepted a cost analysis submitted to him by the claimant. The Court held that mere reliance on a cost analysis would be insufficient to establish that such cost had in fact been incurred. The decision in Hindustan Construction, on the other hand, turned upon on the tenability of the contractor's claim for escalation of costs under clause 10-C.

19. In the present case, no doubt the Contractor/claimant wrote certain letters which have been adverted to in the previous part of this judgment. Yet , this court is of the opinion that the findings of the arbitrator on this head cannot be sustained. What the Contractor really claiming is a head of compensation or damages even though styling it as escalation. One cannot be unmindful of the fact that the contract negotiated between the parties factored the eventually of extension of contract and the consideration payable. If the contractor had intended that extension was acceptable only on the condition of payment of stipulated additional compensation, he should have made such reservation in terms of Section 55 of the Contract Act. The second and more substantial aspect here is that the contractor - claimant made no attempt to prove such damages and merely relied upon letters addressed to the DDA. A mere demand cannot be justified for grant of escalation

> particularly when the claim for such additional consideration is disputed. If the Contractor wanted to establish its entitlement to such additional amounts, the mode of proving it could not have been any different than in respect of other claims. Therefore, the methodology and approach adopted by the arbitrator in awarding such 25% amount working to Rs.3,54,396/- is unsustainable; it is also contrary to the Division Bench ruling in Kochar Construction. This part of the award, therefore, cannot be sustained."

6. The submission of learned counsel for the appellant is that the learned Single Judge had failed to appreciate that the arbitrator had categorically recorded a finding that the work had been delayed for a period of more than 40 months, as the same could not be completed till it was ultimately terminated on 25.07.1984 and that the delay was attributable to the respondent alone. He submits that the appellant had sent various communications demanding escalation and referred to Exs.P-1, P-8, C-25, C-30 and C-46 in this regard, which had also been referred to in the award. He submits that the finding of learned Single Judge that the appellant had not made any reservations in terms of Section 55 of the Contract Act is, therefore, incorrect. He further submits that the claimant-appellant had placed the CPWD cost index as well as evidence of tenders accepted by DDA according to which there was escalation in rates by 55% and 45%, respectively. He submits that the claimant, as is evident from the award, had claimed escalation ranging from 25% to 42% and the learned arbitrator had made a conservative award by restricting the increase to 25%, even though there was sufficient evidence on record that the increase had

been at least 45% to 55%, even as per undeniable documentary evidence. Learned counsel for the respondent, on the other hand, has sought to support the judgment of the learned Single Judge.

7. Before we proceed to consider the submissions of learned counsels for the parties, it would be appropriate to set out in extenso the award made by the learned arbitrator on claim No.7. The same reads as follows:

> "11.0 CLAIM NO.7: CLAIMANTS CLAIM 35% OVER THE QUOTED RATES ON THE AMOUNT OF WORK EXECUTED AFTER THE STIPULATED DATE OF COMPLETION
>
> 11.1 The claimants submitted that the tenders for the work were invited by the respondents giving twelve months as the time of completion and they had quoted their rates keeping inv view that the time was of essence of the contract as mentioned by the respondents in clause 2 of the contract. They also stated that the quoted contract rates were applicable for this stipulated period only. They then submitted that there had been a continuous rise in the prices with the passage of time and because of the contract spilling into extra time due to defaults of the respondents only, they had to suffer heavy losses. They further submitted that there were two aspects to reach the conclusion on this issue. First of this was the C.P.W.D. Cost Index which is sanctioned by the department every year keeping in view the market prices of the key building materials prevailing at the time of sanction. The data concerning variation in the C.P.W.D. Cost Index for the related period had already been placed by them on record and that this data clearly showed that there had been an increase of over 50% in costs since the time their tender was accepted. The second aspect was the

rates at which the respondents themselves were accepting tenders from time to time and in this regard also they had filed clear evidence that the respondents in the year 1982 were accepting tenders at rates which were nearly 45% above their quoted rates. In this connection, they referred to their Annexure F at pages 220 to 230 of their Book B. The claimants further submitted that notices were served on the respondents seeking enhancement of their contract rates vide their Exhibits P-1, P-8, C-25, C-35 and C-46. The details of the claim were furnished by them in their Statement of Facts and Annexure F. The claimants then pleaded that the entire delays in the execution of the work were on the part of the respondents by way of non supply of stipulated materials in time, delayed supply of drawings, delayed availability of part site and delayed monthly payments and that it was the respondents only who had pushed them in the grip of the rising market. They also stressed that though the stipulated date of completion expired on 15.1.1982, they were making the claim only from March 1982 as per details of the calculations filed by them. The claimants referred to citation AIR 1980 Delhi 266 of Delhi High Court (Metro Electrical Vs. D.D.A.) and provided a copy of the same for record. They also laid reliance on exhibits C-72 and C-74.

11.2 The respondents denied the claim emphasizing that the rates once quoted by the claimants were applicable throughout the contract period and also thereafter. They also stressed that the claimants were accepting the running payments made to them without any fuss. Moreover, the delays in the execution of the work were also on account of the defaults of the claimants and for this reason also they were not entitled for any rate revision. The respondents then referred to clause 10(c) of the contract and stated that any escalation that could be admissible to the claimants had to be related to this clause of the contract and nothing more could be allowed. They further pleaded that since the S.E. had granted extension of time with levy of full compensation, escalation under clause 10(c) also was not payable to the claimants beyond the stipulated contract period. The respondents also argued that the claimants

had collected most of the materials required for the work in the stipulated period of contract over which secured advance was paid to them and hence the question of paying higher rate on the cost of materials did not arise.

11.3 AWARD

11.3.1. I have heard both the parties at length on this issue and have carefully considered the arguments put up by them in the matter and have also studied the evidence filed and cited by the parties. It has already been observed earlier that the delays due to which the contract period spilled into extra time were solely attributable to the respondents. The claimants had thus been put in the grip of the rising prices in the market due to defaults on the part of the respondents. There is no provision in the contract that the claimants will have to carry out the work at their quoted rates beyond the stipulated contract period even if the defaults lay with the respondents. The claimants had sought extra rates varying from 25% to 42% above their quoted rates for the work done beyond the stipulated contract period in various letters filed by them. The revision of rates sought by the claimant appears to be justified when compared to the upward change seen in the C.P.W.D Cost Index in the same period as also on the basis of the tenders that had been accepted by the respondents in that period. I do not find the applicability of clause 10 (c) beyond the stipulated contract period. This point was considered and decided by the Delhi high Court in its judgment in the case of Metro Electrical Vs. DDA. Hence the respondents cannot take recourse to this clause to deny the claim as has been done by them. Moreover, clause 10 (c) relates to statutory increase in wages of labour and cost of material and does not bring into its ambit the escalation in construction costs in the prolonged period of the contract on account of the delays attributable to the other party. The acceptance of running payments does not debar the claimants from getting the revised rates, specially when they were projecting their claim for revision in rates through their letters in the extended period.

> 11.3.2. The calculations submitted by the claimants in support of their claimed amount show that the claim is for work done by them after they were paid the running bill in the month of March 1982. The net amount on which the rate revision has been sought by the claimants has been worked out by them to be RS.21,36,403/=. This figure had been arrived at by the claimants taking into account the secured advance paid by the respondents on the material that had been collected by the claimants prior to seeking revision of the rates. The respondents have not contested these calculations while denying the claim. This amount however will undergo a change due to certain items of work claimed by the claimants as work done in claim no. 1 but disallowed in the award for that claim. This disallowed amount works out to RS 1,18,819/= and this has to be retrenched from the total amount of work done as projected by the claimants. The claimants have also erred in not allowing for the cost of materials issued by the respondents at fixed cost which is also required to be adjusted from the work done figure; this amount has been assessed to be RS 6,00,000/= on proportionate basis. The claimants are therefore entitled to receive rate revision on a sum of RS 14,17,584/= only and not on the sum of RS 21,36,403/= as claimed by them. The claimants had projected a price rise of 25% in the initial stages and then had raised this figure to 35% to 42% over rates quoted by them. I therefore grant them enhanced rates only at 25% above instead of 35% above their quoted rates claimed by them later and on which basis the claim has been made now. The amount admissible to claimants works out to RS 3,54,396/= only and I award this sum to the claimants."

8. In the light of the aforesaid award, in our view, it cannot be said that the appellant had not put the respondent to notice with regard to the preservation of its right to claim escalation/compensation in terms of Section 55 of the Contract Act. The learned arbitrator has

recorded that notices had been served on the respondent seeking enhancement in their contract rates vide Exs.P-1, P-8, C-25, C-35 and C-46. He further recorded that the appellant-claimant had sought extra rates varying from 25% to 42% above their quoted rates for the work done beyond the stipulated contract period in various letters filed by them. It was not the respondents' case in their objections, that these findings of fact were contrary to the record. Consequently, we are of the view that the finding of the learned Single Judge that reservation in terms of Section 55 of the Contract Act was not made by the appellant for claiming escalation or compensation (whatever may it be called) for executing the work during the extended period of contract, is not correct.

9. We are also of the view that the learned Single Judge has erred in concluding that the claimant had made no attempt to prove the damages claimed to have been suffered, and that the claimant had merely relied upon letters addressed to DDA raising a demand for extra rates. It is not as if the claimant had merely relied upon its own communications to claim escalation/damages. It is evident that the claimant had placed on record, by way of evidence, the CPWD cost index, which showed escalation to the extent of 55% in the cost. The claimant also placed on record before the learned Arbitrator other contracts awarded by the DDA during the relevant period, which showed increase in rates by 45%. It cannot be said that there was no evidence before the learned arbitrator in support of claim No.7. The sufficiency of evidence before the arbitrator is not for the Court to

judge. The arbitrator is not bound by strict rules of evidence. So long as there is cogent evidence presented before the arbitrator, it is not for the Court to judge its sufficiency. Of course, if relevant evidence is altogether ignored or wholly irrelevant evidence is considered, it would be a case of misconduct on the part of the arbitrator.

10. In the light of the aforesaid evidence in the form of CPWD cost index and other contracts entered into by the DDA during the extended period, it cannot be said that there was no cogent material or evidence before the arbitrator to support the claim of the appellant. The learned arbitrator had restricted the award to grant of escalation to the extent of 25% only, which was the lowest escalation demanded by the appellant in the various communications above referred to.

11. The decision ***Kochar Construction Co.*** (supra) is clearly distinguishable and has no application in the facts of this case. As noted by the learned Single Judge, ***Kochar Construction Co.*** (supra) was a case where a claim of escalation of cost was allowed by the arbitrator merely by accepting the cost analysis submitted by the claimant. That is not the position in the present case. As aforesaid, cogent evidence had been led before the arbitrator to justify the claim for escalation/compensation during the extended period of contract, which has been considered by the learned arbitrator.

12. Consequently, in our view, the judgment of the learned Single Judge on claim No.7 cannot be sustained. Accordingly, we allow the present appeal. The award of the sole arbitrator on claim No.7 is

restored. The rest of the judgment of the learned Single Judge is affirmed, leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

(MUKUL MUDGAL)
JUDGE

March 20, 2009
rsk

Neutral Citation Number: [2016] EWHC 607 (TCC)

Case No: HT-2016-000060

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 18th March 2016

Before :

THE HON. MRS JUSTICE CARR DBE

Between :

J MURPHY & SONS LTD	**Claimant**
- and -	
BECKTON ENERGY LTD	**Defendant**

(Transcript of the Handed Down Judgment of
WordWave International Limited
Trading as DTI
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Stephen Dennison Q.C., Mr Christopher Lewis, Miss Felicity Dynes (instructed by **Fenwick Elliott LLP**) for the **Claimant**
Mr Justin Mort Q.C. (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing date: 16th March 2016

Judgment
As Approved by the Court

If this Judgment has been emailed to you it is to be treated as 'read-only'.
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The Hon. Mrs Justice Carr DBE :

Introduction

1. This a claim brought under Part 8 of the Civil Procedure Rules by the Claimant contractor ("Murphy") against the Defendant employer ("Beckton") for declaratory relief. The proceedings relate to a threatened call on an "on-demand" performance bond ("the Bond") by Beckton. Pursuant to a written contract between the parties dated 14th March 2013 ("the Contract"), on 25th February 2016 Beckton gave Murphy 23 days' written notice of its intention to make a demand under the Bond in respect of its claim for liquidated damages in the sum of £8,274,000 which Beckton contends are due to it from Murphy. The notice thus expires on 19th March 2016. Murphy issued its claim on 9th March 2016, and the matter has proceeded on an expedited basis as a matter of urgency. Save where otherwise expressly stated, all references below to Sub-Clauses are references to clauses in the conditions of the Contract.

2. Murphy seeks a declaration that, until there has been an agreement or determination by the Engineer appointed under the Contract in accordance with Sub-Clause 3.5 of the amount (if any) which Beckton is entitled to be paid by Murphy in respect of liquidated damages, Murphy is not obliged to pay any liquidated damages to Beckton. Murphy contends that such an agreement or determination is a pre-requisite for any entitlement on the part of Beckton to claim liquidated damages.

3. The Engineer appointed under the Contract is Mr Christopher Turner of Capita Symonds ("the Engineer"). There has been no agreement or determination by him in respect of liquidated damages (under Sub-Clauses 2.5 and 3.5), although Beckton has requested such a determination in the light of these proceedings. The first question raised for my determination is one of pure contractual construction of two clauses in the Contract in particular, namely Sub-Clauses 8.7 and 2.5.

4. Beckton disputes that its entitlement is subject to or in any way dependent on the process in Sub-Clauses 2.5 and 3.5 of the Contract.

5. Murphy also seeks injunctive relief against Beckton preventing it from making a demand on the Bond in respect of its claim for liquidated damages until there has been agreement or determination by the Engineer and further notice pursuant to Sub-Clause 4.2.5 of the Contract. This raises the second question for my determination (if Murphy succeeds on the first question), namely whether or not a call on the Bond by Beckton would be fraudulent (assuming that Murphy were to succeed in its claim for declaratory relief). Consequent upon the outcome of that decision would be the question of whether or not the granting of injunctive relief would in any event be appropriate.

6. Murphy says that a call on the Bond gives rise to a risk of damage to its commercial reputation, standing and creditworthiness, and would be something that might well need to be disclosed in future tenders. Against that, Beckton says that it will suffer dire consequences if it is not able to make a call on the Bond, by 23rd March 2016 at the very latest. The works the subject of the Contract are 409 days late. The project has been funded on the basis that all relevant parties provided, upfront, the funding required to take it through to the point of Taking-Over. Through a facilities agreement lenders committed a term loan facility of up to some £53million and a

VAT facility of up to £2million. Beckton's shareholders committed a total of some £17million through a combination of loan notes and new ordinary share capital. Notwithstanding that the Taking-Over Date (as defined in the Contract) has not yet occurred, the first repayment to lenders was due on 30th September 2015, which Beckton has paid, and is due every six months thereafter. Beckton refrained from enforcing its entitlement to recover liquidated damages, whilst nonetheless meeting project costs including finance costs, to assist completion. However, and despite going to great lengths to maintain liquidity without the benefit of delay damages, Beckton has now exhausted all possible sources of committed funding and needs payment of delay damages. The net position for Beckton as at 31st March 2016 will be an indebtedness of some £1.4million and rising. Beckton is also required to file its audited financial statements for the year ending 30th June 2015 by the (already extended) date of 30th April 2016. Without payment under the Bond, Beckton does not believe that its auditors will be able to give an unqualified opinion as to its solvency, which would have grave consequences for Beckton, being a default event under the facilities agreement and damaging to Beckton's credit status. Beckton points to the fact that Murphy's consolidated balance sheet as at 31st December 2014 recorded cash assets of over £74million.

7. Murphy's claims, whilst related, are at the same time separate and discrete. The claim for declaratory relief is made by reference to Beckton's right to recover delay damages; the claim for injunctive relief turns on Beckton's right to call on the Bond.

8. The scope and nature of the issues for my potential determination became clear (and narrower) as the hearing proceeded. They can now be distilled as follows :

   a) Whether or not Beckton is entitled to recover payment of liquidated damages from Murphy under Sub-Clause 8.7 without agreement or determination by the Engineer of Beckton's entitlement to liquidated damages under Sub-Clauses 2.5 and 3.5 ("Issue 1");

   b) Whether or not, if Murphy succeeds on Issue 1, a call by Beckton on the Bond would be fraudulent ("Issue 2");
   c) If so, whether or not injunctive relief should be granted as sought by Murphy ("Issue 3").

9. By the close of the hearing, and at my suggestion, the parties were agreed that a determination of Issue 3 would or might be premature and that an appropriate way forward would be for me to deliver first my decision on Issues 1 and 2. In the event that Murphy's claims on Issues 1 and 2 were to fail, I would proceed to dismiss the claim for injunctive relief. In the event that Murphy were to succeed, then the parties could consider their respective positions on the question of injunctive relief accordingly.

10. Evidence has been served as follows :

   a) For Murphy : a short statement of Mr John Murphy, Murphy's company secretary and in-house solicitor, dated 9th March 2016;

   b) For Beckton : two statements of Mr Philip Reinheimer-Jones, a director of Beckton, dated 15th March 2016, the first a lengthy and detailed one.

The Contract

11. The Contract was dated 14th March 2013 and related to the design, procurement, construction, start-up, testing and commissioning of a Combined Heat and Intelligent Power Plant at Beckton, East London ("the Plant"). It was based on FIDIC Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant and for Building and Engineering Works designed by the Contractor First Edition 1999 ("the FIDIC Yellow Book"). Pursuant to the Contract Murphy obtained the Bond with Zurich Insurance Public Limited Company (Bond Number 63650/0413/1177).

12. There were two principal elements to the Plant : a Generating Set which generates electricity fuelled by bioliquid, and Turbo Expanders which generate electricity through the expansion of high pressure gas in the pressure reduction stream of a National Grid gas distribution network. Heat from the Generating Set is used to pre-heat the gas prior to the reduction in its pressure. The intention is that all electricity be from renewable energy sources.

13. Sub-Clause 2.5 of the Contract provided as follows :

> "*2.5 Employer's Claims*
>
> *If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], or for other services requested by the Contractor.*
>
> *The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.*
>
> *The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine i) the amount (if any) which the Employer is entitled to be paid by the Contractor and/or ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].*
>
> *This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall be entitled to set off against or make any deduction from an amount*

certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause."

14. Sub-Clause 3.5 provided as follows :

> "*3.5 Determinations*
>
> *3.5.1 Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.*
>
> *3.5.2 Without prejudice to either Party's right to refer any matter to adjudication and/or litigation in accordance with Clause 20 [Claims, Disputes and Litigation] each Party shall give effect to any such agreement and/or determination…*"

15. By Sub-Clause 20 a similar regime involving the Engineer applied to claims by Murphy against Beckton.

16. By Sub-Clause 4.2 Murphy was obliged to obtain an on-demand performance bond in a prescribed form. Sub-Clauses 4.2.5 and 4.2.6 provided :

> "*4 The Contractor…*
>
> *4.2 Performance Security…*
>
> *4.2.5 The Employer shall give …23 days' prior written notice to the Contractor of its intention to make a demand under the [Bond] stating the breach the Contractor has committed, during which period and without prejudice to the Employer's entitlement and discretion to claim under the relevant Performance Security at the expiry of the said 23 days, the Contractor may seek to remedy the relevant default and/or breach… .*
>
> *4.2.6 If and to the extent i) the Employer was not entitled to make a claim under the Performance Security and/or ii) amounts recovered under any claim under the Performance Security exceed the entitlements and/or otherwise exceed the losses suffered and recoverable by the Employer under the Contract, the Employer shall be liable for and reimburse the Contractor such excess amounts*."

17. Sub-Clause 4.2 is substantially different to the equivalent clause in the FIDIC Yellow Book. In that equivalent clause, the relevant failure to pay on the part of the contractor triggering the employer's right to call on the Bond is linked expressly to Sub-Clause 2.5. Thus the contractor's failure has to be a failure to pay an amount due "*as either agreed by the Contractor or determined under Sub-Clause 2.5*". Here all reference to agreement or determination under Sub-Clause 2.5 was removed. As will be apparent below, there is the same absence of any reference to Sub-Clause 2.5 in Sub-Clause 8.7.

18. Sub-Clause 8.2 provided :

> "*8.2 Time for Completion*
>
> *The Contractor shall i) achieve the ROC Accreditation Milestone by the ROC Accreditation Date and ii) complete the whole of the Works within the Time for Completion for the Works, including :*
>
> *a) achieving the passing of the Tests on Completion, and*
>
> *b) completing all work which is stated in the Contract as being required for the Works to be considered to be completed for the purposes of taking-over under Sub-Clause 10.1 [Taking Over of the Works and Sections]*."

19. The ROC Accreditation Milestone was defined as the granting by OFGEM of Renewables Obligation ("RO") accreditation in accordance with the Renewables Obligation Order 2009 based on the completion of such procedures and tests in relation to the plant as constituted, at the time they were taken, the usual industry standards and practices for commissioning that type of plant in order to demonstrate that the plant is capable of commercial operation for which Beckton was awarded Renewables Obligation Certificates ("ROCs"), Renewable Energy Guarantees of Origin and/or Levy Exemption Certificates by OFGEM. The ROC Accreditation Date was defined as the date by which Murphy was to achieve the ROC Accreditation Milestone which should be before the Taking-Over date and no later than 2nd November 2014 (subject to any extension under Sub-Clause 8.4). Time for Completion of the Works was 31st January 2015 (subject to any extension under Sub-Clause 8.4).

20. Sub-Clause 8.7 addressed delay damages so far as material as follows :

> "*8.7 Delay Damages and Bonus*
>
> *8.7.1 If the Contractor fails to :*
>
> *a) achieve the ROC Acceditation Milestone by the ROC Accreditation Date the Contractor shall pay or allow to the Employer liquidated damages for such delay at the daily rate of £4,000 for each day commencing from the ROC Accreditation Date until the earlier of the*

> *achievement of i) the ROC Accreditation Milestone or ii) 31 March 2015; and*
>
> *b) achieve the ROC Accreditation Milestone by the ROC Eligibility Change Date the Contractor shall pay or allow to the Employer a Bullet Payment; and*
>
> *c) achieve the Taking-Over Date for the Works within the Time for Completion, the Contractor shall pay or allow to the Employer liquidated damages for delay. Such liquidated damages shall be payable at the daily rate of £23,000 for each day after the Time for Completion for the Works up to and including the Taking-Over Date for the Works…*
>
> *8.7.4 Delay damages due pursuant to this Sub-Clause 8.7 shall be deducted from the next applicable Notified Sum following the end of the month in which such delay occurred or where no such Notified Sum is applicable or is disputed, shall be payable within 30 days of the end of the week in which such delay occurred.*"

21. "*Notified Sum*" is defined in Sub-Clause 14.6 which addresses interim payments. Like Sub-Clauses 4.2 and 8.7, Sub-Clause 14.6 is not in the terms of the standard equivalent clause in the FIDIC Yellow Book. In the FIDIC Yellow Book the Contractor shall issue to the Employer for interim payment purposes a certificate "*which shall state the amount which the Engineer fairly determines to be due, with supporting particulars*". Here the Notified Sum is simply the sum specified by Murphy (in a valid statement). There is no reference to any involvement on the part of the Engineer. Beckton pays that sum unless it issues a Pay Less Notice as prescribed, in which case it pays the lesser sum.

22. As is apparent below, Beckton relies on the fact that the wording as agreed between the parties in Sub-Clause 8.7 is to be contrasted with the wording in FIDIC Yellow Book which states in terms that the obligation to pay delay damages is "*subject to Sub-Clause 2.5*".

23. As for the Bond, the procedure for making a call on the Bond is as follows :

> "*3.1 The Employer may from time to time make a written demand (signed by two directors of the Employer) upon the Bond Provider stating:*
>
> *(a) that the Contractor has committed a breach of any provision in the Contract ... including particulars of such breach and/or an Insolvency Event has occurred; and*
>
> *(b) the amount claimed by the Employer as a consequence of such breach… and/or Insolvency Event.*"

24. The maximum amount payable under the Bond up to and including the date being 3 months after the Taking-Over Date is £7,565,303.60 for any breach by Murphy or an Insolvency Event prior to the Taking-Over Date or for any breach by Murphy or an Insolvency Event after the Taking-Over Date is £2,522,101.20.

25. According to Mr Reinheimer-Jones, as was communicated to Murphy before the Contract was agreed and common knowledge to both parties at the time, Beckton's lender required, on a non-negotiable basis, that any claim on the Bond should not be subject to any kind of restriction or procedure that would give rise to delay in payment under the Bond. It wanted the security of a conventional on-demand bond.

The wider dispute

26. Beckton contends that :

    a) Murphy failed to achieve the ROC Accreditation Milestone and to achieve the Taking Over Date by the above dates as required by Sub-Clause 8.2 of the Contract;

    b) Murphy's claims for extensions have not been granted by the Engineer on the basis that Murphy had not demonstrated that any event or circumstances giving rise to a claim for extension of time or payment had occurred.

27. Thus it is said that Murphy is in breach of its obligations under Sub-Clause 8.2.

28. Murphy disputes Beckton's entitlement to any liquidated damages. It says that it has suffered significant delays on the project and requested extensions of time, in particular in August 2014, February 2015, September 2015, November 2015 and December 2015. It disagrees with the position adopted by the Engineer. Amongst other things, it contends that Murphy is entitled to an extension of time and that Beckton is deemed to have taken over parts of the Works in accordance with Sub-Clause 10.2 of the Contract. These are matters hotly contested by Beckton.

29. This wider dispute is of course not part of the current proceedings, but is the relevant context in which the narrower issues arise.

The relevant correspondence

30. By letter dated 23rd December 2014 Beckton notified Murphy of its entitlement to delay damages following Murphy's failure to achieve the ROC Accreditation Milestone on the ROC Accreditation Date. It stated that its letter "*constitute[d] notice and particulars of such entitlement in accordance with clause 2.5 of the EPC Contract*". It went on to say that Beckton currently intended to defer its right to claim, set-off or otherwise deduct such liquidated damages until such time as it determined.

31. By letter dated 12th January 2015 Murphy responded to acknowledge receipt "*without prejudice to any of [its] rights under the…Contract and in particular [its]*

entitlements to extensions of time and any other defences [it might] have in relation to any future claim [Beckton might] make in respect of liquidated damages."

32. By letter dated 31st March 2015 Beckton notified Murphy of its alleged entitlement to delay damages due to Murphy's failure to complete the works within the Time for Completion, namely 31st January 2015. Again, Beckton stated that its letter "*constitute[d] notice and particulars of such entitlement in accordance with clause 2.5 of the ...Contract*". It also again went on to say that it currently intended to defer its right to claim, set-off or otherwise deduct such liquidated damages until such time as it determined.

33. By letter of 25th January 2016 Beckton wrote to Murphy "*further to the reservation of rights letters dated 23 December 2014 and 31 March 2015*". It notified Murphy of the cessation of such deferral and required Murphy to pay the damages accrued to that date in accordance with Sub-Clause 8.7.4. The sums of £592,000 and £7,682,000 were said to be payable within 30 days. Murphy did not make such payment. By letter dated 22nd February 2016 Murphy contended that it was entitled to a Taking-Over Certificate for a large part of the Works pursuant to Sub-Clause 10.2.2. Even if delay damages are due, which Murphy denies, the amount of any such damages falls to be reduced significantly. On 8th March 2016 Murphy asked the Engineer to issue a Taking-Over Certificate accordingly.

34. By letter dated 25th February 2016 Beckton notified Murphy pursuant to Sub-Clause 4.2.5 of its intention to make a demand under the Performance Bond. The breach identified was breach on the part of Murphy in failing to pay liquidated damages within 30 days as required by Sub-Clause 8.7.4. On the same day it also notified its intention to deduct further delay damages for the month of January 2016 from the next payment application.

Preliminary objections by Beckton

35. Beckton submits that I should dismiss the claim for declaratory relief as a matter of principle without more. There is no basis for urgency and the truncated procedure that has been adopted is not appropriate for resolution of the issues between the parties. There is a complicated background, not all of which is before the Court, against which Murphy now seeks a final ruling on issues of importance in its favour. Further, it is only when all avenues of appeal have been exhausted that there would be a basis for Murphy's contention that the fraud exception applied (addressed in more detail below) (see *Wuhan Guoyo Logistics Group Co Ltd and anr v Emporiki Bank of Greece SA* [2014] BLR 119) ("*Wuhan*"). Thus, even if I were to deliver my judgment before 19th March 2016, such judgment would not assist Murphy in seeking to prevent Beckton from making a call on the Bond, since there could be further onward appeal and Beckton would be entitled to persist in its honest belief that there had been a relevant breach on the part of Murphy entitling it to make a call on the Bond.

36. Despite these submissions, the parties were able to argue the issues of contractual construction out before me without apparent hindrance. Beckton put in full evidence, even though it indicated that it had been obliged to do so in haste and the evidence might be incomplete. Given the nature of the exercise to be carried out, it seems to me that the scope for factual evidence is very limited. As to the exact provenance of the disputed clauses in the Contract, it was common ground that Sub-Clauses 4.2 and

8.7.4 were not in the standard wording of the FIDIC Yellow Book (whereas Sub-Clauses 2.5 and 3.5 were). To that extent at least they were chosen specifically by the parties and bespoke. There is urgency so far as the related question of Beckton's threatened call on the Bond, the challenge to which by Murphy rests on its claim for declaratory relief.

37. In all the circumstances, I decline to dismiss the claim for declaratory relief on procedural grounds and proceed to consider the issues substantively.

Issue 1

The rival submissions

38. Murphy submits as follows :

a) Beckton's position is that it considers itself entitled to payment (of liquidated damages) under Sub-Clause 8.7. Clause 2.5 is very widely drafted. This is not one of the two exceptions listed. Therefore Sub-Clause 2.5 applies;

b) As a matter of fact, Beckton did give notice pursuant to Sub-Clause 2.5 (and expressly referred to Sub-Clause 2.5 in doing so): see its letters dated 23rd December 2014 and 31st March 2015;

c) However, there has been no agreement or determination by the Engineer under Sub-Clause 3.5 of "*the amount (if any) which the Employer is entitled to be paid by the Contractor*";

d) It follows that Beckton is not entitled to set off against or make a deduction from an amount certified in a Payment Certificate or to otherwise claim against Murphy. In respect of the sums set out in Beckton's letter dated 25th January 2016 (i.e. the liquidated damages of £8,274,000), Beckton is not seeking to make a set off or deduction, but it is seeking "*to otherwise claim*" those sums from Murphy, as that letter makes clear.

39. Murphy submits that there is nothing to be gained from Sub-Clause 4.2 for the purpose of construing Sub-Clauses 2.5 and 8.7. Sub-Clause 4.2 deals with the Bond, affecting Beckton's lender. Sub-Clauses 2.5 and 8.7 deal with the parties' rights inter se.

40. Murphy suggests that Sub-Clause 2.5 is an important safeguard in circumstances such as the present, where the contractor asserts that it is entitled to a Taking-Over Certificate, the effect of which would be to reduce dramatically any sum to which Beckton might be entitled by way of delay damages. All that Murphy seeks is for Beckton to honour the scheme agreed between the parties. The Contract contains checks and balances through the role of the Engineer. In terms of a right to payment by Murphy to Beckton, Sub-Clause 8.7 is a significant, if not the most significant, clause in the Contract. One would expect there to be clear words if its provisions were to be outside the regime in Sub-Clause 2.5. Sub-Clause 2.5 would be otiose in effect, and there would be a very different balance of risk under the Contract.

41. Beckton relies on Sub-Clause 8.7. Murphy shall pay or allow to Beckton liquidated damages for delays to the ROC Accreditation Milestone and to the completion of the whole of the works at the rates set out therein. The delay damages shall be deducted from the next applicable Notified Sum following the end of the month in which the delay occurred, or where no such Notified Sum is applicable or is disputed, shall be payable within 30 days of the end of the week in which such delay occurred. The obligation to pay delay damages arises independently of Sub-Clauses 2.5 and 3.5 and is not contingent upon an Engineer's determination. Murphy is in breach of that obligation. Beckton's notice under Sub-Clause 4.2.5 refers to that breach and the breach of Sub-Clause 8.2. It is valid and unaffected by the absence of any determination from the Engineer.

42. In more detail, Beckton points to the fact that the deduction to be made or sum paid in Sub-Clause 8.7 is not subject to some further analysis or process such as that set out in Sub-Clause 2.5. There is a conflict between Sub-Clause 2.5 and Sub-Clause 8.7. The court should read the two clauses in such a way as to give effect to both, if it can fairly do so. The court should take into account :

a) The fact that Sub-Clause 8.7 was drafted specifically by the parties for the purposes of the Contract. Clause 2.5 is simply taken unamended from the FIDIC Yellow Book. Clause 8.7 should be given greater weight (see *Homburg v Agrosin (The Starsin)* [2003] UKHL 12 at paragraph 11). The deletion of the words "*subject to sub-clause 2.5*" from Clause 8.7 means that prima facie that parties did not intend Sub-Clause 8.7 to be subject to Sub-Clause 2.5;

b) Sub-Clause 8.7 specifically addresses liquidated damages;

c) At the time of agreeing the Contract the lender required immediately enforceable security against Murphy's performance, as was known to both parties;

d) Sub-Clause 2.5 is unreliable, referring as it does to "*Payment Certificate*", whereas the mechanism in Sub-Clause 8.7 refers to deduction from the Notified Sum;

e) Sub-Clause 2.5 is permissive only. Nothing in it purports to prevent Beckton from enforcing liquidated damages under Sub-Clause 8.7.

Analysis

43. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court does so essentially as one unitary exercise by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the

document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. Agreements should be read as a whole and construed so far as possible to avoid inconsistencies between different parts on the assumption that the parties had intended to express their intentions in a coherent and consistent way. One expects provisions to complement each other. Only in the case of a clear and irreconcilable discrepancy would it be necessary to resort to the contractual order of precedence to resolve it.

44. On the face of it, Sub-Clause 2.5 is in the widest of terms. It provides for a clear procedure which applies "*[i]f*" Beckton considers itself to be entitled to "*any*" payment under "*any*" Clause of the conditions "*or otherwise in connection with the Contract*". This can be said to be the position here : Beckton considers itself to be entitled to payment under Sub-Clause 8.7 which speaks in terms of Murphy being obliged to "*pay*" and of sums being "*payable*" by Murphy. Whether or not the obligation to pay delay damages under Sub-Clause 8.7 arises independently of Sub-Clauses 2.5 and 3.5, it remains the case that Beckton considers itself to be entitled to a payment under a clause of the conditions in the Contract.

45. The width of Sub-Clause 2.5 was emphasised in *NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd* [2015] UKPC 37. There the question under consideration was whether or not a claim to set-off or cross-claim by the employer fell within the scope of an identical clause to Sub-Clause 2.5. Lord Neuberger said this at paragraph 40 :

> "*...More generally, it seems to the Board that the structure of clause 2.5 is such that it applies to any claims which the Employer wishes to raise. First, "any payment under any clause of these Conditions or otherwise in connection with the Contract" are words of very wide scope indeed. Secondly, the clause makes it clear that, if the Employer wishes to raise such a claim, it must do so promptly and in a particularised form : that seems to follow from the linking of the Engineer's role to the notice and particulars. Thirdly, the purpose of the final part of the clause is to emphasise that, where the Employer has failed to raise a claim as required by the earlier part of the clause, the back door of set-off or cross-claims is as firmly shut to it as the front door of an originating claim.*"

46. Moreover, there are two express exceptions agreed in Sub-Clause 2.5, neither of which touch on payments of delay damages. And Beckton's project manager, Mr Tony Taylor, appears to have believed that Sub-Clauses 2.5 and 3.5 were relevant to delay damages in his letters to Murphy of 23rd December 2014 and 31st March 2015.

47. However, on more careful analysis, I have come to the conclusion that on a proper construction the right to liquidated damages under Clause 8.7 is not subject to the mechanism set out in Sub-Clauses 2.5 and 3.5. The fact that Beckton's letters of 23rd December 2014 and 31st March 2015 referred to compliance with Sub-Clause 2.5 is forensically a fair and obvious point for Murphy to rely on, but nevertheless not a point of substance in terms of construing the Contract objectively or in any way determinative. There is no suggestion of any relevant waiver, estoppel or election.

48. In Sub-Clause 8.7 the words "*subject to Clause 2.5*" qualifying Murphy's payment obligations do not appear, whereas in the equivalent standard clause in the FIDIC Yellow Book they do. Objectively assessed on the facts here, this selected deviation from the standard form is consistent with the parties' intention being not to make Beckton's right to claim delay damages subject in any way to Clauses 2.5 and 3.5. I accept that this is only context and certainly by no means determinative of the issue in Beckton's favour. I also bear in mind the comments of Christopher Clarke J (as he then was) in *Mopani Copper Mines plc v Millennium Underwriting Limited* [2008] EWHC 1331 (Comm). To the extent that recourse to deleted words is permissible, care must be taken as to what inferences, if any, may properly be drawn. Here of course, the position is that the parties chose to agree a clause wholly different from the standard wording and one which excluded any reference to Sub-Clause 2.5. It is relevant background at least.

49. Sub-Clause 8.7 sets out a self-contained regime for the trigger and payment of delay damages. It does not suggest that there is an additional regime, such as that contained in Clauses 2.5 and 3.5, to be imported. The obligation to pay in Sub-Clause 8.7.1 is unqualified. The amount due is clearly fixed in Sub-Clause 8.7.1. The time for deduction or payment is also clearly fixed by Sub-Clause 8.7.4. If the payment of damages were to be subject to Sub-Clause 2.5, then the provisions relating to both the sum of and time for payment provided for in Sub-Clause 8.7 could not apply. There would be open-endedness : for example, there is no set timeframe within which the Engineer is obliged to reach a determination under Sub-Clause 3.5. At most it could be said that the Engineer could not unreasonably delay his determination (by reference to Sub-Clause 1.3).

50. There are three important and substantive inconsistencies between Sub-Clauses 2.5 and 8.7.4 :

a) Sub-Clause 2.5 speaks of the amount agreed or determined by the Engineer as being included as a deduction in the Contract Price and Payment Certificates. Sub-Clause 8.7.4 on the other hand provides that delay damages due pursuant to Sub-Clause 8.7 shall be deduced from the next applicable Notified Sum. The Notified Sum (being a statement by Murphy) is a very different animal from a Payment Certificate (issued by an engineer);

b) Sub-Clause 2.5 contains no timetable for agreement or determination by the Engineer. Sub-Clause 8.7.4 provides for a precise, fixed and inflexible timetable. The interposition of Clause 2.5 into Sub-Clause 8.7.4 would cut right across this important part of Sub-Clause 8.7. Murphy struggled to overcome this difficulty. It was forced to suggest that the purpose of Sub-Clause 8.7.4 was simply to identify the earliest date for deduction of liquidated damages. I find this unconvincing. Ignoring the question of whether or not the word "shall" is permissive or not, the right to deduct is, if not mandatory, at least absolute on its face;

c) By Sub-Clauses 2.5 and 3.5 the amount payable, if any, to Beckton is left to the determination of the Engineer as to what is "*fair in*

accordance with the Contract, taking due regard of all relevant circumstances". Sub-Clause 8.7 fixes precisely the sums payable.

51. These inconsistencies can all be resolved by construing Sub-Clause 8.7 as providing for an independent regime that is not subject to Sub-Clause 2.5. This seems to me to be a proper reading of Sub-Clause 8.7 when read against the relevant background and in the context of the Contract as a whole, and accurately to reflect what the parties are to be taken to have intended to agree.

52. Such an approach is supported by the fact that Clause 2.5 appears not to have been properly thought out in the full context of the Contract (viz the reference to Payment Certificates not the Notified Sum). Whether or not such errors diminish the substance of the Clause, they undermine the weight to be attached to it, suggesting objectively that the parties did not consider it specifically in full context. Putting this point another way, Clause 2.5 addresses the situation where the giving of notice makes sense contractually. But Sub-Clause 8.7 does not envisage the giving of notice by Beckton. It speaks simply in Sub-Clause 8.7.4 of deductions being made from the next applicable Notified Sum (or payment by Murphy where no such Notified Sum is applicable or is disputed) without more.

53. It is also supported by a consideration of the many other sub-clauses in the Contract which would entitle Beckton to make a claim under and be appropriate as the subject of Sub-Clause 2.5. I refer by way of example to Sub-Clauses 4.8.1, 4.18.3, 11.4, 7.5.2, 7.6, 8.6, 11.4 and 15.4. The tensions that exist between Sub-Clause 2.5 and Clause 8.7.4 do not exist in these other clauses.

54. There is interplay between Sub-Clauses 8.7.4 and 4.2. Thus, when inviting the Court to consider the importance and applicability of the safeguarding procedure invoked by Murphy under Sub-Clause 2.5 to claims for delay damages, Murphy points to the draconian consequences of a related call on the Bond. As explained under Issue 2 below, the terms of Sub-Clause 4.2 can be said to lend support for my construction of Sub-Clause 8.7.4. But for present purposes I do not need to rely on the terms of Sub-Clause 4.2 in this regard. Murphy suggests that they are to be disregarded. But it is at least important to confirm that there is no inconsistency between them and my construction of Sub-Clause 8.7.4. On the contrary, there is total consistency.

55. I do not consider that my conclusion amounts to a "re-writing" of Sub-Clause 2.5. The issue here is not one of drafting but rather meaning, specifically the effect of Sub-Clause 8.7 and whether, properly construing Sub-Clause 8.7, it is subject to or operates outside the regime in Sub-Clause 2.5. Additionally, it can be said conversely that Murphy's construction involves a "re-writing" of Sub-Clause 8.7.4.

56. For these reasons, I conclude that Beckton is entitled to recover payment of liquidated damages from Murphy under Sub-Clause 8.7 without agreement or determination by the Engineer of Beckton's entitlement to liquidated damages under Sub-Clauses 2.5 and 3.5.

57. For the sake of completeness, even if I were to accept Murphy's position on construction, it seems to me that the declaratory relief sought goes too far. For the reasons set out below, Sub-Clauses 2.5 and 3.5 do not create liabilities as such. They constitute a mechanism for resolving what is or is not payable consequent upon a

claim by Beckton. The more appropriate declaration would have been that Beckton's claim for liquidated damages would fall to be determined in accordance with and subject to Sub-Clauses 2.5 and 3.5.

Issue 2

58. It follows from my conclusion on Issue 1 that a decision on Issue 2 is unnecessary. Out of deference to the arguments raised, however, I address them, albeit briefly. What follows is thus based on the premise that my conclusion on Issue 1 is wrong.

59. The Bond is a conventional "on-demand" bond. The purpose of such a bond is to act as security for Murphy's performance. All that is required to trigger payment under the Bond (after notice as stated in Sub-Clause 4.2.5) is a written demand signed by two directors stating that Murphy had committed a breach of the Contract, with particulars, and the amount claimed by Beckton as a consequence of such breach. If it subsequently turns out that Beckton was wrong either as to the principle of breach or the sum claimed, then it is liable for and must reimburse Murphy for any excess amounts claimed. There is no requirement for any proof of the validity of Beckton's claim, let alone an inquiry into its correctness.

60. There is nothing in the Contract to say that Murphy's liability for delay damages was conditional on determination by the Engineer under Clauses 2.5 and 3.5. On the facts here the parties expressly rejected the standard FIDIC Yellow Book form of wording which expressly restricted the employer's right to calling on the Bond only when the Engineer had made a determination. That is relevant factual matrix (see for example *Mottram Consultants Ltd v Bernard Sunley & Sons* [1975] 2 Lloyd's Rep 197 at 209). On the evidence, the relevant factual background known to both parties at the relevant time was Beckton's lender's insistence on unrestricted on-demand bond. On the contrary, the only restriction is that contained in Sub-Clause 4.2.5, namely that Beckton is required to give notice as there prescribed. This was effectively common ground.

61. Murphy contends however that, were it to have obtained declaratory relief as sought, then it would follow that any subsequent claim by Beckton on the Bond prior to any agreement or determination by the Engineer would engage the fraud exception. Beckton would know that it would be asserting a claim to which it had no entitlement. It is crucial to understand that the breach relied on by Beckton for the purpose of the call on the Bond is a failure by Murphy to pay the liquidated damages within the 30 day period as required by Sub-Clause 8.7.4. The procedure in Sub-Clause 8.7.4 is a necessary condition to entitlement. If it is right that there is a requirement to put a claim to delay damages to the Engineer and there has been no determination by the Engineer, then it follows that Beckton could not have an honest belief that it could make a call on the Bond. Reliance is placed on *Wuhan.*

62. The fundamental flaw in Murphy's approach is to confuse liability on the part of Murphy to pay delay damages under Clause 8.7 with the agreed mechanism for resolution of the parties' dispute in Sub-Clauses 2.5 and 3.5 which leads to enforcement. That this is the effect of Sub-Clause 2.5 is well demonstrated by the fact that it speaks of a belief on the part of Beckton in an entitlement. Thus Beckton must believe that a liability has already arisen independently and earlier.

63. The fact that there was such an outstanding process does not mean that Murphy has no liability to account for delay damages. The trigger for a performance bond is belief on the part of the drawing party in its entitlement, not such entitlement having been subject to a final determination giving rise to a payment obligation. It is implicit in the nature of a performance bond that, in the absence of some clear words to a different effect, when the bond is called, there will at some stage in the future be an "accounting" between the parties to the main contract in the sense that their rights and obligations will be determined finally at some future date. Indeed this is what is expressly envisaged in Sub-Clause 4.2.6.

64. Thus a requirement to follow the procedure in Clauses 2.5 and 3.5 was not a condition of liability on the part of Murphy for delay damages, but rather a condition of subsequent enforcement (assuming for present purposes that my conclusion on Issue 1 is wrong). It is not that the obligation accrues on the Engineer's determination. The obligation accrues under Sub-Clause 8.4. What then follows is a determination of what the obligation is for enforcement purposes. The effect of Murphy's position is falsely to make the Engineer's determination a precondition of liability. As was pointed out for Beckton, if the matter went on from a determination by the Engineer to adjudication or litigation, it would be no defence to a claim for delay damages that the Engineer had previously rejected such a claim.

65. Thus once the interplay and respective roles of Clause 8.7.4 and Clause 2.5 are understood, even on the assumption, contrary to my finding, that Clause 2.5 bites on Sub-Clause 8.7.4, the fraud exception is not engaged.

66. In these circumstances, even without agreement or determination of the Engineer under Sub-Clauses 2.5 and 3.5 Beckton can in good faith assert breach on the part of Murphy for delay and claim a sum of delay damages as a consequence of such breach for the purpose of Clause 3 of the Bond (assuming of course that Beckton holds the belief that there is such a liability and consequent loss). If subsequently there is an overpayment as a result, the position is rectified under Sub-Clause 4.2.6.

67. For these reasons, I would have concluded on Issue 2 that it would not be fraudulent for Beckton to make a call on the Bond in the absence of agreement or determination by the Engineer under Sub-Clauses 2.5 and 3.5.

68. Against this background, as identified above, the claim for injunctive relief falls away.

Conclusion

69. For these reasons, I dismiss the claims for declaratory and injunctive relief. I invite the parties to draw up an order accordingly and to agree all consequential matters, including costs, so far as possible.

ITEM NO.12 COURT NO.1 SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

SUO MOTU WRIT PETITION (CIVIL) No(s).3/2020

IN RE : COGNIZANCE FOR EXTENSION OF LIMITATION

Date : 23-03-2020 This petition was taken up suo motu for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE L. NAGESWARA RAO
HON'BLE MR. JUSTICE SURYA KANT

By Courts Motion

COUNSEL PRESENT

Mr. Tushar Mehta, SG
Ms. Swati Ghildiyal, Adv.
Mr. Ankur Talwar, Adv.
Mr. G.S. Makkar, Adv.
Mr. Raj Bahadur, Adv.
Mr. B.V. Balaram Das, AOR

Mr. Dushyant Dave, Sr. Adv.

UPON hearing the counsel the Court made the following
O R D E R

This Court has taken *Suo Motu* cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 Virus and resultant difficulties that may be faced by litigants across the country in filing their petitions/applications/suits/ appeals/all other proceedings within the period of limitation prescribed under the general law of limitation or under Special Laws (both Central and/or State).

To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such

proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.

We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.

This order may be brought to the notice of all High Courts for being communicated to all subordinate Courts/Tribunals within their respective jurisdiction.

Issue notice to all the Registrars General of the High Courts, returnable in four weeks.

(SANJAY KUMAR-II) (MUKESH NASA) (INDU KUMARI POKHRIYAL)
ASTT. REGISTRAR-cum-PS COURT MASTER ASSISTANT REGISTRAR

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Miscellaneous Application No. 665 of 2021
In SMW(C) No. 3 of 2020

IN RE: COGNIZANCE FOR EXTENSION OF LIMITATION

O R D E R

1. Due to the outbreak of COVID-19 pandemic in March, 2020, this Court took *Suo Motu* cognizance of the difficulties that might be faced by the litigants in filing petitions/ applications/ suits/ appeals/ all other proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State). On 23.03.2020, this Court directed extension of the period of limitation in all proceedings before the Courts/Tribunals including this Court w.e.f. 15.03.2020 till further orders.

2. Considering the reduction in prevalence of COVID-19 virus and normalcy being restored, the following order was passed in the *Suo Motu* proceedings on 08.03.2021:

> *"1. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 15.03.2021.*

2. In cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall apply.

3. The period from 15.03.2020 till 14.03.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

4. The Government of India shall amend the guidelines for containment zones, to state.

"Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements."

3. Thereafter, there was a second surge in COVID-19 cases which had a devastating and debilitating effect. The Supreme Court Advocates on Record Association (SCAORA) intervened in the *Suo Motu* proceedings by filing Miscellaneous Application No.665 of 2021 seeking restoration of the order dated 23.03.2020. Acceding to the request made by SCAORA, this Court passed the following order on 27.04.2021:

"We also take judicial notice of the fact that the steep rise in COVID-19 Virus cases is not limited to Delhi alone but it has engulfed the entire nation. The extraordinary situation caused by the sudden and second outburst of COVID-19 Virus, thus, requires extraordinary measures to minimize the hardship of litigant–public in all the states. We, therefore, restore the order dated 23rd March, 2020 and in continuation of the order dated 8th March, 2021 direct that the period(s) of limitation, as prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, whether condonable or not, shall stand extended till further orders.

It is further clarified that the period from 14th March, 2021 till further orders shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

We have passed this order in exercise of our powers under Article 142 read with Article 141 of the Constitution of India. Hence it shall be a binding order within the meaning of Article 141 on all Courts/Tribunals and Authorities."

4. In spite of all the uncertainties about another wave of the deadly COVID-19 virus, it is imminent that the order dated 08.03.2021 is restored as the situation is near normal.

5. We have heard learned Attorney General for India, Mr. Vikas

Singh, learned Senior Counsel for the Election Commission of India, Mr. Shivaji M. Jadhav, learned counsel for the SCAORA and other learned Advocates. There is consensus that there is no requirement for continuance of the initial order passed by this Court on 23.03.2020 and relaxation of the period of limitation need not be continued any further. The contention of Mr. Vikas Singh is that the order dated 08.03.2021 can be restored, subject to a modification. He submitted that paragraph No.2 of the order dated 08.03.2021 provides that the limitation period of 90 days will start from 15.03.2021 notwithstanding the actual balance of period of limitation in cases where limitation has expired between 15.03.2020 and 14.03.2021. According to him, the period of limitation prior to 15.03.2020 has to be taken into account and only the balance period of limitation should be made available for the purpose of filing cases.

6. The order dated 23.03.2020 was passed in view of the extraordinary health crisis. On 08.03.2021, the order dated 23.03.2020 was brought to an end, permitting the relaxation of period of limitation between 15.03.2020 and 14.03.2021. While doing so, it was made clear that the period of limitation would start from 15.03.2021. As the said order dated 08.03.2021 was only a one-time measure, in view of the pandemic, we are not inclined to modify the conditions contained in the order dated 08.03.2021.

7. The learned Attorney General for India stated that paragraph

No.4 of the order dated 08.03.2021 should be continued as there are certain containment zones in some States even today.

8. Therefore, we dispose of the M.A. No.665 of 2021 with the following directions: -

I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.

II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.

III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of

proceedings.

IV. The Government of India shall amend the guidelines for containment zones, to state.

“Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements.”

.....CJI.
[N. V. RAMANA]

.....J.
[L. NAGESWARA RAO]

.....J.
[SURYA KANT]

New Delhi,
September 23, 2021.

ITEM NO.301 Court 1 (Video Conferencing) SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Miscellaneous Application No.665/2021 in SMW(C) No.3/2020

IN RE COGNIZANCE FOR EXTENSION OF LIMITATION Petitioner(s)

VERSUS

XXXX Respondent(s)

IA No. 55865/2021 - APPLICATION FOR PERMISSION
IA No. 116735/2021 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 80945/2021 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 90588/2021 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 65908/2021 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 55869/2021 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 83300/2021 - CLARIFICATION/DIRECTION
IA No. 80949/2021 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 68800/2021 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 68797/2021 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 80992/2021 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 80989/2021 - INTERVENTION APPLICATION
IA No. 116732/2021 - INTERVENTION APPLICATION
IA No. 90585/2021 - INTERVENTION APPLICATION
IA No. 83297/2021 - INTERVENTION APPLICATION
IA No. 55867/2021 - INTERVENTION/IMPLEADMENT
IA No. 65905/2021 - INTERVENTION/IMPLEADMENT)

Date : 23-09-2021 This application was called on for hearing today.

CORAM :
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE L. NAGESWARA RAO
HON'BLE MR. JUSTICE SURYA KANT

For Appearing parties

For UOI Mr. K.K. Venugopal, AG
Mr. B.V. Balaram Das, AOR

For applicant(s) Mr. Shivaji M. Jadhav, Adv.
Mr. Manoj K. Mishra, Adv.
Dr. Joseph S. Aristotle, Adv.
Ms. Diksha Rai, Adv.
Mr. Nikhil Jain, Adv.

	Mr. Atulesh Kumar, Adv. Dr. Aman Hingorani, Adv. Ms. Anzu Varkey, Adv. Mr. Sachin Sharma, Adv. Mr. Aljo Joseph, Adv. Mr. Varinder Kumar Sharma, Adv. Mr. Abhinav Ramkrishna, AOR
For State of A.P.	Mr. S. Niranjan Reddy, Sr.Adv. Mr. Mahfooz Ahsan Nazki, AOR Mr. Polanki Gowtham, Adv. Mr. Shaik Mohamad Haneef, Adv. Mr. T. Vijaya Bhaskar Reddy, Adv. Mr. Amitabh Sinha, Adv. Mr. K.V. Girish Chowdary, Adv.
For Patna High Court	Mr. P.H. Parekh, Sr.Adv. Mr. Sameer Parekh, Adv. Mr. Kshatrashal Raj, Adv. Ms. Tanya Chaudhry, Adv. Ms. Pratyusha Priyadarshini, Adv. Ms. Nitika Pandey, Adv.
For Registrar General,High Court of Meghalaya	Mr. Soumya Chakraborty, Sr.Adv. Mr. Sanjai Kumar Pathak, Adv. Ms. Shashi Pathak, Adv.
For Election Commission of India	Mr. Vikas Singh, Sr.Adv. Mr. Amit Sharma, Adv. Mr. Dipesh Sinha, Adv. Ms. Pallavi Barua, Adv. Mr. Prateek Kumar, Adv. Mr. Ashok Nijhawan, Adv. Mr. Aman Bhalla, Adv. Ms. Anindita Mitra, AOR Mr. Pawan Reley, Adv. Mr. Akshay Lodhi, Adv. Mr. Vinod Sharma, AOR Mr. Joydip Roy, Adv. Mr. Sajal Awasthi, Adv. Mr. Binod Kumar Singh, Adv. Mr. Parijat Som, Adv.
For High Court of Allahabad	Mr. Yashvardhan, Adv. Mr. Apoorv Shukla, Adv. Ms. Smita Kant, Adv. Ms. Ishita Farsaiya, Adv. Ms. Prabhleen Kaur, Adv. Ms. Kritika Nagpal, Adv.

	Ms. Bhavya Bhatia, Adv.
For High Court of M.P.	Mr. Arjun Garg, AOR Mr. Aakash Nandolia, Adv. Ms. Sagun Srivastava, Adv.
	Ms. Sunieta Ojha, AOR
For Gauhati High Court	Mr. P. I. Jose, AOR Mr. Prashant K. Sharma, Adv. Mr. Jenis V. Francis, Adv.
For State of Meghalaya	Mr. Avijit Mani Tripathi, Adv. Mr. T.K. Nayak, Adv.
	Mr. Sahil Tagotra, AOR
For Bombay & Gujarat High Court	Mr. A.P. Mayee, Adv.
	M/S. Vkc Law Offices, AOR
	Mr. Mukesh K. Giri, AOR
For Calcutta High Court	Mr. Kunal Chatterji, AOR Ms. Maitrayee Banerjee, Adv.
For Arunachal Pradesh	Mr. Abhimanyu Tewari, Adv. Ms. Eliza Bar, Adv.
For High Court of Chhattisgarh	Mr. Apoorv Kurup, Adv. Ms. Nidhi Mittal, Adv.
For High Court of Delhi	Ms. Binu Tamta, Adv. Mr. Dhruv Tamta, Adv.
	Ms. Pratibha Jain, AOR
	Mr. Sanjai Kumar Pathak, AOR
	Mr. Divyakant Lahoti, AOR Mr. Parikshit Ahuja, Adv. Ms. Praveena Bisht, Adv. Ms. Madhur Jhavar, Adv. Ms. Vindhya Mehra, Adv. Mr. Kartik Lahoti, Adv. Mr. Rahul Maheshwari, Adv. Ms. Shivangi Malhotra, Adv.
For High Court of Jharkhand	Mr. Tapesh Kumar Singh, AOR Mr. Aditya Pratap Singh, Adv. Mrs. L. Bhaswati Singh, Adv.

Mr. Aditya Narayan Das, Adv.

Ms. Uttara Babbar, AOR
Mr. Manan Bansal, Adv.

UPON hearing the counsel the Court made the following

O R D E R

We dispose of the M.A. No.665 of 2021 with the following directions: -

I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.

II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.

III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and

(c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

IV. The Government of India shall amend the guidelines for containment zones, to state.

> **"Regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements."**

As a sequel to disposal of MA No.665/2021, pending interlocutory applications, including the applications for intervention/impleadment, also stand disposed of.

(SATISH KUMAR YADAV)
DEPUTY REGISTRAR

(R.S. NARAYANAN)
COURT MASTER (NSH)

(Signed reportable order is placed on the file)

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

MISCELLANEOUS APPLICATION NO. 21 OF 2022
IN
MISCELLANEOUS APPLICATION NO. 665 OF 2021
IN
SUO MOTU WRIT PETITION (C) NO. 3 OF 2020

IN RE: COGNIZANCE FOR EXTENSION OF LIMITATION

WITH

MISCELLANEOUS APPLICATION NO.29 OF 2022

IN
MISCELLANEOUS APPLICATION NO. 665 OF 2021

IN
SUO MOTU WRIT PETITION (C) NO. 3 OF 2020

Order

1. In March, 2020, this Court took Suo Motu cognizance of the difficulties that might be faced by the litigants in filing petitions/ applications/ suits/ appeals/ all other quasi proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State) due to the outbreak of the COVID-19 pandemic.

2. On 23.03.2020, this Court directed extension of the period of limitation in all proceedings before Courts/Tribunals including this Court w.e.f. 15.03.2020 till further orders. On 08.03.2021, the order dated 23.03.2020 was brought to an end, permitting the relaxation of period of limitation between 15.03.2020 and 14.03.2021. While doing so, it was made clear that the period of limitation would start from 15.03.2021.

3. Thereafter, due to a second surge in COVID-19 cases, the Supreme Court Advocates on Record Association (SCAORA) intervened in the Suo Motu proceedings by filing Miscellaneous Application No. 665 of 2021 seeking restoration of the order dated 23.03.2020 relaxing limitation. The aforesaid Miscellaneous Application No.665 of 2021 was disposed of by this Court *vide* Order dated 23.09.2021, wherein this Court extended the period of limitation in all proceedings before the Courts/Tribunals including this Court w.e.f 15.03.2020 till 02.10.2021.

4. The present Miscellaneous Application has been filed by the Supreme Court Advocates-on-Record Association in the context of the spread of the new variant of the COVID-19 and the drastic surge in the number of COVID cases across the country.

Considering the prevailing conditions, the applicants are seeking the following:

i. allow the present application by restoring the order dated 23.03.2020 passed by this Hon'ble Court in Suo Motu Writ Petition (C) NO. 3 of 2020 ; and
ii. allow the present application by restoring the order dated 27.04.2021 passed by this Hon'ble Court in M.A. no. 665 of 2021 in Suo Motu Writ Petition (C) NO. 3 of 2020; and
iii. pass such other order or orders as this Hon'ble Court may deem fit and proper.

5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:

I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

9. As prayed for by learned Senior Counsel, M.A. No. 29 of 2022 is dismissed as withdrawn.

.....CJI.
(N.V. RAMANA)

.....J.
(L. NAGESWARA RAO)

.....J.
(SURYA KANT)

New Delhi
January 10, 2022