Somdatt Builders NCC NEC(JV) Vs National Highways Authority Of India & Ors

Civil Appeal No. 2058 Of 2012

Court: Supreme Court Of India

Date of Decision: Jan. 27, 2025

Acts Referred:
Arbitration and Conciliation Act, 1996 â€" Section 18, 34, 34(2)(b)(ii), 37

Hon'ble Judges: Abhay S. Oka, J; Ujjal Bhuyan, J

Bench: Division Bench

Advocate: Arvind Minocha, Rakesh Kharb, Mayank Kshirsagar, Anumita Verma, Parth Sarathi, Akhilesh Yadav, Dhanlaxmi Iyyer, Santosh Kumar

Final Decision: Allowed

Judgement

Ujjal Bhuyan, J

1. Heard learned counsel for the parties.

2. This civil appeal by special leave is directed against the judgment and order dated 17.11.2009 passed by the High Court of Delhi at New Delhi

(Ã¢â‚¬Ëœ High CourtÃ¢â‚¬â„¢) in FAO(OS) No. 427 of 2007 [National Highways Authority of India Vs. Som Datt Builders-NCC-NEC(JV)].

2.1. By the aforesaid judgment, the High Court allowed the appeal of the respondent-National Highways Authority of India Ã, (Ã¢â‚¬Ëœ respondentÃ¢â‚¬â„¢Ã,

orÃ, Ã¢â‚¬Ëœ NHAIÃ¢â‚¬â„¢Ã, hereinafter)Ã, underÃ, SectionÃ, 37Ã, ofÃ, the Arbitration and Conciliation Act, 1996 (briefly Ã¢â‚¬Ëœ the 1996 ActÃ¢â‚¬â„¢

hereinafter). It may be mentioned that respondent had challenged, by way of the aforesaid appeal, the judgment and order of the learned Single Judge

in OMP No. 316/2005 dated 29.08.2007 whereby the learned Single Judge dismissed the application filed by NHAI under Section 34 of the 1996 Act

for setting aside the award dated 03.06.2005 passed by the Arbitral Tribunal.

3. The matter relates to execution of a contract awarded by NHAI to the appellant regarding the worko f four laning and strengthening of the

existing two lane section between Km. 470.000 and Km. 38.000 on NH-2 (construction package II-B) near Kanpur in the State of Uttar

Pradesh under World Bank Loan Assistance.

4. At the outset, it would be apposite to advert to the relevant facts.

5. Following a process of open bid tender, the related contract was allotted by NHAI to the appellant vide the contract agreement dated 27.03.2002

who undertook to execute the work at the contract price of Rs. 4,961,183,599.00. Appellant is a joint venture of Somdatt Builders Pvt. Ltd., Nagarjuna

Construction Company and Navayug Engineering Company Limited having its principal place of business at East of Kailash, New Delhi.

6. A joint venture between Consulting Engineering Services (I) Ltd. and BECA International Consultants Ltd. was appointed by NHAI as the

Engineer of the project in terms of the contract agreement to supervise the construction work.

7. It was a unit rate contract comprising of a detailed Bill of Quantities (BOQ). The BOQ contained description of the items of the work to be

executed by the appellant as contractor and the estimated quantity of each item. The rates of each BOQ item were to be filled in by the contractor

(appellant).

8. The contract agreement provided for a mechanism of dispute resolution at the first instance through a Dispute Review Board (Ã¢â‚¬Ëœ DRB Ã¢â‚¬â„¢) prior

to the parties availing of their remedy by way of arbitration. A three-member panel of DRB was constituted comprising of one member appointed by

each of the two parties and the third member appointed by the aforesaid two members.

9. While executing the contract, a dispute arose between the parties in respect of item No. 7.07 of the BOQ which provided for reinforced earth

structure including soil reinforcing geogrid with all fixtures and accessories complete as per approved design and drawing of specialised firm and

matters connected therewith. The dispute was not really in respect of the nature of the work to be performed but was the consequence of the

geogrid/geotextile material exceeding the BOQ quantities in the contract. In essence, the dispute relates to power of the Engineer to revise the rates

given in the BOQ in the event of increase in actual quantities. This was contested by the appellant.

10. Appellant raised the aforesaid dispute before the DRB contending that the Engineer/Employer was intending wrongful application of Clause 52.2

of the Conditions of Particular Application (COPA) for downward revision of rates for BOQ item No. 7.07 (ii) of geogrid for quantity in excess of

BOQ quantity. DRB heard both the sides and deliberated upon the issue in detail. DRB vide its decision dated 15.03.2004 recommended that

quantities of geogrid required limited to the facia area provided in the BOQ have to be paid as per the BOQ rates.

11. Respondent NHAI was not satisfied with the aforesaid decision of DRB and invoked the arbitration clause in the contract agreement whereafter

the dispute was referred to arbitration before an Arbitral Tribunal comprising of three arbitrators: one arbitrator appointed by each of the two parties

and the third arbitrator appointed by the two arbitrators so appointed. It is on record that each of the arbitrators were technical experts conversant

with the nature of the contract. Arbitral Tribunal, by a majority of 2:1, passed the award dated 03.06.2005. Arbitral Tribunal held that the quantity of

geogrid given at the tender stage by NHAI was wrong. Therefore, the increase in quantity was a mere increase to meet the requirement for

completion of the RE wall work which was indicated by the RCC facia quantity at the tender stage. There was no change in the design but mere

increase in the quantity beyond the BOQ quantity which did not attract Clause 52.2. In this context, Arbitral Tribunal held that the Engineer does not

possess the power to revise the rates for additional quantity of geogrid required for actual execution of work as per the approved design. Upholding

the recommendations of DRB, Arbitral Tribunal held that variation in terms of Clause 51.1 was not established and directed NHAI to pay the

appellant for the actual quantity of geogrid required to be executed to complete the work of RE wall as per the approved design at the BOQ rate.

12. The aforesaid award dated 03.06.2005 was challenged by the respondent-NHAI under Section 34 of the 1996 Act which was heard and decided

by a learned Single Judge of the High Court. Learned Single Judge examined the contours of Clauses 51.1, 51.2, 52.1, 52.2, 52.3 and 55.1 and came to

the definite conclusion that there was no change in the design. The BOQ rate would apply since the matter was one of mere change in quantity. By

the judgment and order dated 29.08.2007, learned Single Judge of the High Court found no merit in the application filed by NHAI under Section 34 of

the 1996 Act and dismissed the same.

13. It was thereafter that NHAI as the appellant preferred the appeal before a Division Bench of the High Court under Section 37 of the 1996 Act.

The Division Bench examined the primary contention of NHAI that under the contractual terms, all variations in quantity beyond the tolerance limits

set out in the contract, whether arising as a result of issuance of instructions by the Engineer or arising even without the issuance of instructions, were

open to renegotiation of the rates by the Engineer. By the judgment and order dated 17.11.2009 (Ã¢â‚¬Ëœimpugned judgmentÃ¢â‚¬â„¢), Division Bench agreed

with the contention of NHAI and set aside the award of the Arbitral Tribunal as well as the order of the learned Single Judge.

14. Being aggrieved, the contractor (appellant) preferred the related special leave petition. On 14.12.2009, this Court had issued notice and passed an

interim order staying encashment of the bank guarantee subject to the appellant renewing it for a period of one year. Vide order dated 10.02.2012, this

Court granted leave and directed continuance of the interim order. Hence the civil appeal.

15. Contention of the appellant is that it is NHAI who had provided the wrong quantity in respect of item No. 7.07 of the BOQ on the basis of which

appellant had tendered. Upon approval of the design by the Engineer when the increased quantity became known in April, 2003, the Engineer held that

BOQ rate would be payable for the entire quantity which was not acceptable to NHAI. The increase in quantity was not as a result of any change in

the design or as a result of any instructions given by the Engineer. The enhancement in the quantity was necessitated because wrong information was

furnished by the respondent at the stage of tender itself. On dispute being raised, this position was accepted by the DRB and thereafter by the Arbitral

Tribunal. Application filed by the respondent under Section 34 of the 1996 Act for setting aside of the arbitral award was rightly rejected by the

learned Single Judge of the High Court. Division Bench of the High Court fell in error and committed a manifest mistake in overturning the technical

findings of the three authorities below while exercising limited jurisdiction under Section 37 of the 1996 Act.

16. Counter affidavit has been filed by respondent NHAI. Reliance has been placed on Clauses 51 and 52 of COPA. Clause 51 of COPA has two

parts: 51.1 and 51.2. Clause 51.1 covers instructed variations which includes any increase or decrease in the quantity of work. As per Clause 51.2, for

increase or decrease in quantity of any material, instructions of the Engineer are not required. A combined reading of Clauses 51.1 and 51.2 would

indicate that though increase or decrease in the quantity of any work may be without instructions but it nonetheless remains a variation. Once it is a

variation, Engineer has got the power to fix a new rate. This power is traceable to Clause 52.1, which does not make any distinction between

instructed variation or uninstructed variation; on the other hand, it provides that all variations referred to in Clause 51 are to be valued by the Engineer.

In case of instructed variation only, notice is required to be given in terms of the second proviso to Clause 52.2. If this be the position, view taken by

the Division Bench of the High Court is the correct one and calls for no interference.

17. Mr. Arvind Minocha, learned senior counsel for the appellant, at the outset submits that the core issue involved in this appeal is the justification or

otherwise of the decision of the Division Bench of the High Court upsetting concurrent findings of three authorities while exercising jurisdiction under

Section 37 of the 1996 Act. He submits that the dispute raised by the appellant was decided in its favour by the DRB comprising wholly of technical

experts. Arbitral Tribunal again comprising of technical persons passed the award in favour of the appellant by confirming the decision of the DRB.

When the respondent filed application under Section 34 of the 1996 Act for setting aside of the award, learned Single Judge of the High Court

dismissed the same and affirmed the award passed by the Arbitral Tribunal.

17.1. Learned senior counsel submits that scope of interference by the appellate court under Section 37 of the 1996 Act is extremely limited. None of

the grounds for invocation of jurisdiction under Section 37 of the 1996 Act were satisfied. Learned Single Judge while exercising jurisdiction under

Section 34 of the 1996 Act had repelled the challenge of the respondent to the arbitral award. View taken by the learned Single Judge is a plausible

view, if not the only possible view. Therefore, Division Bench committed a manifest error in setting aside the arbitral award as well as the order

passed by the learned Single Judge affirming the same.

17.2. Adverting to the facts of the case, learned senior counsel submits that the scope of the contract involved construction of 50 Kms. of road,

service roads on both sides, drains, 17 main bridges, 65 culverts and 20 under-passes. The 51 Kms. stretch of road included raised carriageway of

about 22 Kms. having Reinforced Concrete wall (RCC wall) on both sides for 9.5 Kms. and Reinforced Earth wall (RE wall) for about 12 Kms. with

concrete facia panels. After the award of work, the design of the wall was to be done by the appellant based on the design criteria given in the

contract with the approval of the Engineer appointed by the respondent. The item RE wall is mentioned at item No. 7.07 in the BOQ having three sub-

items:

(i) RCC facia wall on both sides,

(ii) filter media,

(iii) geogrid.

17.3. He submits that dispute in the present matter relates to the sub-item geogrid as the respondent had given a wrong estimate of the quantity in

respect of geogrid while correct quantities were given for the other two sub-items. This mistake was detected when the design was prepared by the

appellant and approved by the Engineer. When the quantity of material in respect of geogrid increased, the Engineer decided that the BOQ rate would

be applicable for the increased quantity of geogrid.

17.4. After the appellant commenced the work, the respondent was making the monthly payment for the said item as per the BOQ rate. After a new

Engineer was appointed by the respondent, it was decided that the rate for the increased quantity of geogrid should be renegotiated.

17.5. Thereafter, the matter was referred by the appellant to the DRB which decided in favour of the appellant. DRB held that variation in terms of

Clause 51.1 was not established and recommended payment of geogrid at the BOQ rate for the entire quantity.

17.6. Respondent did not accept the above recommendations of the DRB and invoked the arbitration clause in the contract. Arbitral Tribunal,

comprised wholly of technical persons, by a majority of 2:1 held that increase in the quantity of geogrid for erection of the RE wall as per the approved

design could not be termed as a variation in terms of Clause 51.1. Further holding that the Engineer did not have the power to revise the rate qua the

BOQ rate for the additional quantity of geogrid required for execution of the work as per the approved design, Arbitral Tribunal directed payment as

per the BOQ rate for the additional quantity.

17.7. In the application filed by the respondent under section 34 of the 1996 Act for setting aside of the arbitral award, the challenge centred around

Clauses 51 and 52 only. Learned Single Judge rejected the challenge of the respondent and upheld the arbitral award. After the award was confirmed

by the learned Single Judge under Section 34 of the 1996 Act, the Division Bench acting as the appellate court was not at all justified to overturn the

concurrent findings of three adjudicating fora while exercising extremely limited jurisdiction under Section 37 of the 1996 Act.

17.8. He further submits that the interpretation given by the Division Bench is not only contrary to Clause 51.1 and the proviso to Clause 52.2 but

renders those provisions completely otiose. Division Bench misdirected itself by stretching the meaning of the word variation by referring to dictionary

meanings whereas the said expression has to be understood in the context of the relevant clauses of the contract. Division Bench failed to appreciate

that in so far automatic increase in the quantity is concerned, the rate which is payable is the one as agreed in the BOQ. If any other rate is to be

fixed, the same can be considered only in case of instructed variation provided 14 days prior notice before commencement of the work is given which

was admittedly not done in the present case. In this connection he places reliance on a Delhi High Court judgment in the case of NHAI vs. M/s ITD

Cementation India Limited (2009) 113 DRJ 176.

17.9. On the limited scope of interference under Section 37 of the 1996 Act, learned senior counsel for the appellant has placed reliance on the

following decisions:

(i) S.V. Samudram Vs. State of Karnataka (2024) 3 SCC 623,

(ii) M/s. Hindustan Construction Company Ltd. Vs. M/s NHAI (2024) 2 SCC 613

(iii) Reliance Infrastructure Ltd. Vs. State of Goa (2024) 1 SCC 479

(iv) Konkan Railway Corporation Limited Vs. Chenab Bridge Project Undertaking (2023) 9 SCC 85

(v) M/s Larsen Air Conditioning and Refrigeration Company Vs Union of India 2023 INSC 708

(vi) MMTC Ltd. Vs. Vedanta Limited (2019) 4 SCC 163

(vii) MP Power Generation Company Ltd. Vs. Ansaldo Energia SPA (2018) 16 SCC 661

18. Per contra, Mr. Krishnan Venugopal, learned senior counsel appearing for NHAI submits that Division Bench of the High Court has rightly set

aside the arbitral award finding the same to be perverse.

18.1. He submits that the core issue involved in the present appeal is whether the arbitral award dated 03.06.2005 goes contrary to the only

interpretation of Clauses 51 and 52 of the General Conditions of Contract (GCC) read with COPA as contained in the contract dated 27.03.2002

executed between the parties.

18.2. Learned senior counsel submits that subject matter of the dispute relates to BOQ item No. 7.07 (II) i.e. geogrid. Due to change in design of the

RE wall, quantity of geogrid increased almost by 300 percent during execution. Since the twin conditions contemplated under Clause 52.2 were being

fulfilled i.e. overall quantity of geogrid executed by more than 25 percent from the estimated quantity and the cost of geogrid being more than 2

percent of the contract value, the rate for the additional quantity of geogrid was required to be reworked. Therefore, the present case is that of

instructed variation under Clause 51.1(a) for which the appellant was also notified on 28.10.2003 fulfilling the requirement of 14 daysÃ¢â‚¬â„¢ notice

contained in Clause 52.2.

18.3. Referring to the arbitral award, Mr. Venugopal submits that contrary to the evidence on record and contrary to the relevant clauses of the

contract, Arbitral Tribunal held that it was not a case of instructions issued by the Engineer but a case of automatic increase of quantity. Referring to

Clause 51.1(a), he submits that increase or decrease in quantity is also a variation and as per Clause 51.2, no instructions are required for such

increase or decrease of quantity though the same continues to be a variation.

18.4. Even assuming but not admitting that the Engineer did not issue any notice to the appellant then also, according to Mr. Venugopal, a bare reading

of Clause 52.2 would make it apparent that for a non-instructed variation, the condition of giving 14 daysÃ¢â‚¬â„¢ notice would not apply.

18.5. Learned senior counsel also submits that the contention of the appellant that the quantity of geogrid had increased due to negligence and wrong

mentioning of figures by the respondent is totally fallacious in as much as Clause 55.1 of the contract clarifies that the quantity set out in the contract

are the estimated quantities only.

18.6. He would therefore contend that this is not a case of plausible interpretation but a case of adopting an interpretation which is contrary to the only

possible interpretation of the contractual clauses. Arbitral Tribunal has rewritten the contract by ignoring the plain and simple language of the relevant

clauses and the partiesÃ¢â‚¬â„¢ intentions besides overlooking the evidence on record which is legally impermissible. All these aspects were raised by the

respondent in its application under Section 34 of the 1996 Act but the learned Single Judge failed to consider the same by placing reliance on a South

African judgment which is clearly distinguishable in the facts of the present case. Therefore, Division Bench of the High Court acting as the appellate

court under Section 37 of the 1996 Act rightly interfered in the matter by setting aside the arbitral award.

18.7. Learned senior counsel has placed reliance on the following decisions to buttress his submissions:

(i) Associate Builders Vs. DDA (2015) 3 SCC 49

(ii) Ssangyong Engineer and Construction Company Ltd. Vs. NHAI (2019) 15 SCC 131

(iii) PSA Sical Terminals Private Ltd. Vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin (2023) 15 SCC 781

18.8. Learned senior counsel further submits that the judgment in the case of NHAI Vs. M/s ITD Cementation India Limited, cited and relied upon by

the appellant, is not applicable to the facts of the present case. Firstly, the judgment is by a Single Bench whereas the impugned order has been passed

by a Division Bench which is also later in point of time. Secondly, the said judgment does not deal with the power of the Engineer to fix a new rate in

terms of Clause 52.

18.9. He finally submits that the present appeal is devoid of any merit and the same is therefore liable to be dismissed by this Court.

19. Submissions made by learned counsel for the parties have received the due consideration of the court.

20. At the outset, it would be relevant to advert to Clauses 51 and 52 of the GCC read with COPA. Clauses 51 and 52 are as under:

Alteration, Additions and Omissions 51.1 Variations (GCC)

The Engineer shall make any variation of the form, quality or quantity of works or any part thereof that may, in his opinion, be necessary and for the purpose, or if for

any other reason it shall, in his opinion, be appropriate, he shall have the authority to instruct the Contractor to do and the Contractor shall do any of the following:-

(a) increase or decrease the quantity of any work included in the Contract.

(b) omit any such work (but not if the omitted work is to be carried out by the Employer or by another contractor),

(c) change the character or quality or kind of any such work,

(d) change the levels, lines, position and dimensions of any part of the works,

(e) execute additional work of any kind necessary for the completion of the works, or

(f) change any specified sequence or timing of construction of any part of the works.

No such variation shall in any way vitiate or invalidate the Contract, but the effect, if any, of all such variations shall be valued in accordance with Clause 52.

Provided that where the issue of an instruction to vary the works is necessitated by some default of or breach of contract by the Contractor or for which he is

responsible, any additional cost attributable to such default shall be borne by the Contractor.

51.2 Instructions for Variations (GCC)

The Contractor shall not make any such variation without an instruction of the Engineer.

Provided that no instruction shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an instruction

given under this Clause, but is the result of the quantities exceeding or being less than those stated in the Bill of Quantities.

52.1 Valuation of Variations (GCC)

All variations referred to in Clause 51 and any additions to be Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of

this Clause referred to as Ã¢â‚¬Å“varied workÃ¢â‚¬), shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be

applicable. If the contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for

valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be

agreed upon between the Engineer and the Contractor. In the event of disagreement, the Engineer shall fix such rates or prices as are, in his opinion, appropriate and

shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional

rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

(COPA)

Where the Contract provides for the payment of the Contract Price in more than one currency, and varied work is valued at, or on the basis of, the rates and prices set

out in the Contract, payment for such varied work shall be made in the proportions of various currencies specified in the Appendix to Bid for payment of the Contract

Price. Where the Contract provides for payment of the Contract Price in more than one currency, and new rates or prices are agreed, fixed, or determined as stated

above, the amount or proportion payable in each of the applicable currencies shall be specified when the rates or prices are agreed, fixed, or determined, it being

understood that in specifying these amounts or proportions the Contractor and the Engineer (or, failing agreement, the Engineer) shall take into account the actual or

expected currencies of cost (and the proportions thereof) of the inputs of the varied work without regard to the proportions of various currencies specified in the

Appendix to Bid for payment of the Contract Price.

52.2 Power of Engineer to fix Rates (GCC)

Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the works or to any part thereof, is such that, in the opinion

of the Engineer, the rate or price contained in the Contract for any item of the works is, by reason of such varied work, rendered inappropriate or inapplicable, then,

after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor.

In the event of disagreement the Engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to

the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be

included in certificates issued in accordance with Clause 60.

(COPA)

Where the Contract provides for the payment of the Contract Price in more than one currency, the amount or proportion payable in each of the applicable currencies

shall be specified when the rates or prices are agreed, fixed or determined as stated above, it being understood that in specifying these amounts or proportions the

Contractor and the Engineer (or, failing agreement, the Engineer) shall take into account the actual or expected currencies of cost (and the proportions thereof) of the

inputs of the varied work without regard to the proportions of various currencies specified in the Appendix to Bid for payment of the Contract Price.

(GCC)

Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub-Clause 52.1 or under this Sub-Clause

unless, within 14 days of the date of such instruction and, other than in the case of omitted work, before the commencement of the varied work, notice shall have

been given either:

(a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price, or

(b) by the Engineer to the Contractor of his intention to vary a rate or price. (GCC)

(COPA)

Provided further that no change in the rate or price for any item contained in the Contract shall be considered unless such item accounts for an amount more than 2

percent of the Contract Price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of Quantities by more

than 25 percent.

52.3 Variations Exceeding 15 per cent (GCC)

If, on the issue of the Taking-Over Certificate for the whole of the works, it is found that as result of :

(a) all varied work valued under Sub-Clauses 52.1 and 52.2 and

(b) all adjustments upon measurement of the estimated quantities set out in Bill of Quantities, excluding provisional sums, dayworks and adjustments of price made

under Clause 70.

But not from any other cause, there have been additions to or deductions from Contract Price which taken together are in excess of 15 per cent of the Ã¢â‚¬Å“Effective

Contract PriceÃ¢â‚¬ (which for the purposes of this Sub-Clause shall mean Contract Price, excluding provisional sums and allowance for dayworks, if any) then and in

such event (subject to any action already taken under any of Sub-Clauses of this Clause), after due consultation by the Engineer with the Employer and the

Contractor, there shall be added to or deducted from Contract Price, such further sum as may be agreed between the Contractor and Engineer or, failing agreement,

determined by the Engineer having regard to the ContractorÃ¢â‚¬â„¢s site and general overhead costs of the Contract. The Engineer shall notify the Contractor of any

determination made under this Sub-Clause, with copy to the Employer. Such sum shall be based only on the amount by which such additions or deductions shall be

in excess of 15 per cent of the Effective Contract Price.

(COPA)

Where the Contract provides for the payment of the Contract Price in more than one currency, the amount or proportion payable in each of the applicable currencies

shall be specified when such further sum is agreed or determined, it being understood that in specifying these amounts or proportions the Contractor and the

Engineer (or, failing agreement, the Engineer) shall take into account the currencies (and the proportions thereof) in which the ContractorÃ¢â‚¬â„¢s site and general

overhead cost of the Contract were incurred without being bound by the proportions of various currencies specified in the Appendix to Bid payment of the Contract

Price.

21. DRB while rejecting the contention of NHAI was of the view that the design of geogrid is contingent to the height and area of facia panel within

the prescribed length mentioned in the BOQ and based on the parameters/specifications as prescribed in the agreement, there was no change in the

concept or design. Basically, the design submitted by the appellant was approved and accepted by the Engineer. Since the work was done as per the

valid approved design, plea taken by NHAI that there was a change of form in terms of the wall heights and length of RE wall could not be evidenced

by NHAI. After an in-depth analysis, DRB concluded that there was no change of form but only a working arrangement. The design having been

approved after the full knowledge of the Engineer that enhancement in quantity to a large extent was involved and accordingly, the matter was

referred by the Engineer for allocation of funds. Therefore, there was no variation as per Clause 51.1 or Clause 51.2 and hence payment as per the

BOQ rate should be made for the entire quantity. Though NHAI had contended that appellant had changed the form and varied the design, this could

not be proved in any way. Therefore, DRB held that variation in terms of Clause 51.1 could not be established. As such, DRB recommended that

quantities of geogrid required, limited to the facia area, should be paid as per the BOQ rates.

22. As already noticed, the DRB recommendations were not acceptable to NHAI which thereafter invoked the arbitration clause. Arbitral Tribunal

comprised of three arbitrators; one each appointed by the two parties who thereafter appointed the third arbitrator. All the three arbitrators were

technical experts. Arbitral Tribunal referred to Clause 67.1 of the GCC which says that recommendations of the DRB shall be binding on both parties

giving prompt effect to it until and unless the same is revised by the Arbitral Tribunal. Arbitral Tribunal, therefore, was of the view that NHAI should

have complied with the DRB recommendations which was subject to outcome of the arbitral award. However, NHAI failed to do so. Thereafter,

Arbitral Tribunal framed the core issue to be considered viz. whether as per the contract, Engineer has the right to revise the rate for additional

quantities of geogrid in excess of the BOQ quantities which are required for actual execution of the RE wall as per approved design. After thorough

examination of the rival claims, Arbitral Tribunal recorded the finding that the quantity of geogrid given at the tender stage which was part of the

responsibility of NHAI was found to be erroneous. Therefore, the increase in quantity was merely to meet the requirement for completion of the RE

wall which was indicated by the RCC facia quantity at the tender stage. NHAI had admitted the fact that the design evolved by the appellantÃ¢â‚¬â„¢s

consultant met the specified criteria. In other words, there was no change in the design and NHAI could not establish the same before the Arbitral

Tribunal which held as follows:

8.3 In a contract of the type in question which is an item rate contract based on the price schedule of provisional quantities the ultimate contract amount can be

ascertained when all the work done in terms of the contract is finally measured and the contract amount computation done on the. basis of the prices and rates set out

in the Bill of Quantities. The contract between the parties, therefore, is a frame work which determines the parties rights and obligations. The scope of work in this

case was indicated by RCC facia quantity as mentioned hereinbefore which determines the length of the RE Wall to be constructed for raised carriage way and the

quantity of other sub-item i.e. the geogrid quantity to be used is contingent to the facia quantity. Both the parties knew about the scope of work of RE Wall in this

manner and both knew that it was impossible to determine the ultimate contract amount before the completion of RE Wall work and if ultimate quantity exceeds the

BOQ quantity, it will be an automatic change and shall be paid at BOQ rate in such type of measurement contracts where the quantities are provisional and ultimate

quantities required for completion of the work are to be executed and paid as per the quoted rate.

8.4 The fact that ultimate measured amount of work performed is different from estimated quantity is irrelevant because both the parties contracted on the basis that

the ultimate quantity may increase or decrease.

22.1. On the above basis, Arbitral Tribunal concluded that the change in quantity did not constitute a variation so as to attract the provisions of Clause

52.2, further noting that this clause clearly provides that it would be applicable only in respect of varied work instructed to be done by the Engineer as

per Clause 51 and that the present was not a case where such instructions were required. While upholding the interpretation of the appellant of

Clauses 51 and 52, Arbitral Tribunal held that the Engineer does not possess the power to revise the rates for additional quantity of geogrid required

for actual execution of the work as per the approved design. Arbitral Tribunal upheld the recommendations of DRB and passed the following award:

Ã, (i) TheÃ, variationÃ, inÃ, termsÃ, ofÃ, ClauseÃ, 51.1Ã, isÃ, not established.

(ii) Claimant (NHAI) was directed to pay the Respondent (Som Datt Builders - NCC-NEC- JV) the actual quantity of geogrid required to be

executed to complete the work of RE wall as per the approved design at the BOQ rate.

23. DRB had recorded a finding of fact that there was no change in the concept or design. As a matter of fact, the design prepared and submitted by

the appellant was approved by the Engineer whereafter the related work was executed as per the approved design. On the basis of such finding of

fact, DRB interpreted Clauses 51 and 52 to hold that there was no instructed variation and, therefore, the excess quantity of geogrid required while

executing the work, limited to the facia area, should be paid as per the BOQ rates. Arbitral Tribunal reiterated the aforesaid finding of fact and

affirmed the interpretation given by the DRB. On that basis, Arbitral Tribunal concluded that the change in quantity did not constitute a variation so as

to attract the provisions of Clause 52.2. Arbitral Tribunal concurred with the DRB that the Engineer did not have the competence to revise the rates

for the additional quantity of geogrid required for execution of the work as per the approved design.

24. In the proceedings under Section 34 of the 1996 Act, learned Single Judge examined Clauses 51 and 52 in detail and thereafter opined that the

decision of the Arbitral Tribunal could not be faulted. Analysis of Clause 51.1 read with the other clauses would indicate that the variations referred

therein are instructed variations. In the present case, Clause 52 would not come into play since the same arises only in the case of instructed

variations. Learned Single Judge noted with approval the finding of the Arbitral Tribunal that the ultimate measured work performed was different

from the estimated quantity but the parties had contracted on the basis that such quantity may increase or decrease. There was no change in the

design in view of the clear admission of NHAI before the DRB that the design was reviewed and found according to the specified criteria and that

NHAI was unable to establish any change in the design. Learned Single Judge while exercising jurisdiction under Section 34 of the 1996 Act after

analysing Clauses 51 and 52 held that the Arbitral Tribunal had reached the conclusion that the second para of Clause 52.2, which mandates that the

said provision would be applicable only for varied work instructed to be done by the Engineer as per Clause 51, was not attracted to the facts of the

present case, and therefore, the Engineer did not give any notice of 14 days of his intention to vary the rate. Since the matter fell within the domain of

uninstructed variations, there was no need to give 14 daysÃ¢â‚¬â„¢ notice which is the requirement in the case of instructed variation.

24.1. Learned Single Judge also referred to a decision of the Appellate Division of the South African Court in Grinaker Construction (TVL) Ltd Vs.

Transvaal Provincial Administration 1982 (1) AD 78, where similar contractual clauses came up for interpretation. Learned Single Judge agreed with

the interpretation given by the South African Court that automatic increase or decrease in the quantity did not form part of the variation.

24.2. Learned Single Judge highlighted the aspect that the interpretation given to the aforesaid clauses was also the interpretation arrived at by the

DRB as also by the Arbitral Tribunal. The contractual clauses have been interpreted by technical people who were well conversant with the nature of

the dispute and for this reason also greater weight has to be given to such a view. Learned Single Judge held that once a contracted price is provided

and the quantities are held to be tentative, any increase or decrease in quantity must be governed by the same price. It is only in respect of any

instructed variation arising from the instruction of the Engineer on account of any additional work or less work that there can be some element of

renegotiation and determination in terms of Clauses 51 and 52 of the GCC. Therefore, learned Single Judge concurred with the view taken by the

Arbitral Tribunal which had affirmed the view of the DRB.

25. Learned Single Judge also reiterated the well-recognised principle in arbitration that the court exercising jurisdiction under Section 34 of the 1996

Act does not sit as a court of appeal over the decision of an arbitral tribunal, further reiterating the proposition that a contract has to be interpreted by

the arbitrator who is the chosen judge of the parties. So long as the view of the arbitrator is a plausible one though it may not be the only possible view,

there should be no interference by the court under Section 34 of the 1996 Act.

26. According to us, learned Single Judge had adopted the correct approach and had rightly declined to interfere with the award of the Arbitral

Tribunal affirming the decision of the DRB.

27. Let us now deal with the impugned order. Division Bench of the High Court exercising jurisdiction under Section 37 of the 1996 Act

acknowledged that primarily it was for the Arbitral Tribunal to interpret the contractual terms and if the interpretation given by the Arbitral Tribunal is

a plausible one, then the court would not interfere with the award merely because according to the court, another interpretation is preferable. Having

said that, Division Bench examined Clauses 51 and 52 of the contract. Instead of interpreting the aforesaid clauses in the contractual context, Division

Bench went into the dictionary meaning of the expression Ã¢â‚¬Ëœvariationâ€â„¢ and opined that variation would mean the difference between what is

provided for or contemplated in relation to the work under the contract and what is the final effect or outcome. Such variation or outcome may be or

may not be the result of an instruction given by the Engineer. It has further been observed that the instruction issued by the Engineer to the contractor

does not necessarily mean that the contractor should carry out a Ã¢â‚¬Ëœvariationâ€â„¢. It may relate to performance of one or more of the specific acts

enumerated in Clause 51.1. According to the Division Bench, variation in quantity, even when it is not a result of an instruction given under Clause

51.1 by the Engineer to the contractor does not cease to be a variation within the meaning of that expression used in Clause 51.1. Division Bench,

therefore, opined that there is no basis or underlying principle stated either by the Arbitral Tribunal or by the learned Single Judge that only if the

variation is the result of instruction given by the Engineer under Clause 51.1, rates and prices of the BOQ items in question would be open to

renegotiation and not otherwise; variation in quantity, even when it is not a result of an instruction given by the Engineer to the contractor under Clause

51.1, does not cease to be a Ã¢â‚¬Ëœvariationâ€â„¢ within the meaning of the expression used in Clause 51.1.

27.1. Division Bench disagreed with the observations of the Arbitral Tribunal as upheld by the learned Single Judge that even if there was error in

estimating the quantity of geogrid while preparing the BOQ, that by itself would not lead to the conclusion that NHAI cannot seek renegotiation of the

rates even if the actual quantity exceeds by over 300 percent. The contract does not provide that NHAI should suffer on account of the estimated

quantities mentioned in the BOQ turning out to be way off the mark when the contract is executed.

27.2. It was on the above basis, Division Bench held that there is no reason as to why variation in quantity beyond the limits set out in the contract,

whether instructed or not instructed, should not lead to renegotiation of the rates at the instance of either party. That would be the only fair, reasonable

and equitable way to work the contract.

27.3. Division Bench, therefore, held that interpretation of the contractual terms given by the Arbitral Tribunal and accepted by the learned Single

Judge cannot be accepted as a plausible interpretation. Division Bench observed that such interpretation is unreasonable and wholly implausible and

that the arbitral award is opposed to the public policy of India, shocking the conscience of the court. Therefore, the order of the learned Single Judge

as well as the arbitral award were set aside.

28. We are afraid we cannot accept such sweeping conclusions reached by the Division Bench. Interpretation given by the Division Bench to the plain

language of Clauses 51 and 52 is not at all a plausible one, not to speak of being the only possible interpretation and, therefore, committed a manifest

error in interfering with an arbitral award in a proceeding under Section 37 of the 1996 Act when the learned Single Judge did not find any justification

at all to interfere with the arbitral award within the limited scope under Section 34 of the 1996 Act. A closer look at Clauses 51 and 52 would clearly

show that the view taken by DRB and Arbitral Tribunal, both comprised of technical experts, is the correct one which was acknowledged by the

learned Single Judge.

29. As per Clause 51.1, Engineer has the competence to make any variation of the form, quality or quantity of works, either wholly or any part

thereof, if in his opinion, it is necessary to do so. In that event, Engineer has the authority to instruct the contractor to carry out the same and the

contractor shall in such event would be under an obligation to do what is contemplated in sub-clauses (a) to (f) thereunder, such as, increase or

decrease in the quantity of any work included in the contract, etc.. Clause 51.1 clarifies that such instructed variation shall not vitiate or invalidate the

contract, but such variation shall be valued in accordance with Clause 52. What Clause 51.2 indicates is that it is not open to the contractor to make

such variation without any instruction from the Engineer. Proviso to Clause 51.2 is relevant. It says that no instruction from the Engineer would be

required for the increase or decrease in the quantity of any work where such increase or decrease is not the result of any instruction given under

Clause 51.1 but is the result of the quantities exceeding or being less than those stated in the BOQ.

30. Clause 52.2, on the other hand, mentions that all variations referred to in Clause 51 (which means instructed variations) shall be valued at the rates

and prices in the contract, if in the opinion of the Engineer, the same is applicable. If the contract does not contain any rates or prices applicable to the

varied works, the rates and prices in the contract shall be used as the basis for valuation so far it may be reasonable. If this is not possible, then the

Engineer shall carry out the valuation after due consultation with the Employer and the contractor. The GCC proviso to Clause 52.2 says that no

varied work instructed to be done by the Engineer shall be valued under Clause 52.1 or under Clause 52.2 unless 14 daysÃ¢â‚¬â„¢ notice is given by either

of the parties.

31. The further proviso under COPA to Clause 52.2 says that no change in the rate or price for any item contained in the contract shall be considered

unless such item accounts for more than 2 percent of the contract price and the actual quantity of the work executed under the item exceeds or falls

short of the quantity set out in the BOQ by more than 25 percent.

32. The aforesaid provision is not a mandate for change in the rate or price for any item contained in the contract, if such item accounts for an amount

which is more than 2 percent of the contract price and the actual quantity of work executed under the item exceeds or falls short of the quantity set

out in the BOQ by more than 25 percent. Rather, it is an enabling provision which enables either of the parties to consider change in the rate or price

of any item mentioned in the contract, in the event, the above two conditions are fulfilled.

33. In so far Clause 51.1 is concerned, the variation contemplated thereunder relates to the form, quality or quantity of the works which in the opinion

of the Engineer is necessary. In the present case, there is a clear finding of fact by two authorities i.e. DRB and the Arbitral Tribunal, both comprised

of technical experts, that there is no variation either in the form or quality or quantity of the works. What actually happened is that at the time of

execution of the contract pertaining to the RE wall, the geogrid required turned out to be much more than the estimated figure given in item No. 7.7 of

the contract. It is in this backdrop that both the fact finding authorities held that there was no variation in terms of Clause 51.1 and that the Engineer

did not have the competence to renegotiate the price or rate of the geogrid for the excess quantity of geogrid required.

34. As already discussed above, this is clearly a plausible view. In fact, according to us, it is the correct interpretation of Clause 51 made by the DRB

and the Arbitral Tribunal. As such, learned Single Judge rightly declined to interfere with the award under Section 34 of the 1996 Act. If that be the

position, there was no justification at all for the Division Bench of the High Court to set aside the award under Section 37 of the 1996 Act.

35. Though learned counsel for the parties had cited a number of decisions at the time of hearing, it is not necessary to refer to and discuss each one

of them. However, reference to a few of the judgments would suffice.

36. In MMTC Ltd. Vs. Vedanta Ltd. (2019) 4 SCC 163, this Court held that as far as Section 34 is concerned, the position is well settled that the

court does not sit in appeal over an arbitral award and may interfere on merits only on the limited ground provided under Section 34(2)(b)(ii) i.e. if the

award is against the public policy of India. Even then, the interference would not entail a review on the merits of the dispute but would be limited to

situations where the findings of the arbitrator are arbitrary, capricious or perverse or when the conscience of the court is shocked or when the

illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible

view based on facts. As far as interference with an order made under Section 34 by the court under Section 37 is concerned, it has been held that

such interference under Section 37 cannot travel beyond the restrictions laid down under Section

34. In other words, the court cannot undertake an independent assessment of the merits of the award and must only ascertain that the exercise of

power by the court under Section 34 has not exceeded the scope of the provision.

37. What is public policy of India has been explained in Ssangyong Engineer and Construction Company Ltd .(supra). It means the fundamental

policy of Indian law. Violation of Indian statutes linked to public policy or public interest and disregarding orders of superior courts in India would be

regarded as being contrary to the fundamental policy of Indian law. It would also mean that the arbitral award is against basic notions of justice or

morality. An arbitral award can be set aside on the ground of patent illegality i.e. where the illegality goes to the root of the matter but re-appreciation

of evidence cannot be permitted under the ground of patent illegality.

38. In PSA Sical Terminals Private Ltd. (supra), this Court reiterating the well settled principles held as under:

40. It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and

reappreciate the evidence. The scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act. The interference would be so

warranted when the award is in violation of Ã¢â‚¬Å“public policy of IndiaÃ¢â‚¬, which has been held to mean Ã¢â‚¬Å“the fundamental policy of Indian lawÃ¢â‚¬. A judicial

intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Sections 18 and

34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict

with justice or morality is now to be understood as a conflict with the Ã¢â‚¬Å“most basic notions of morality or justiceÃ¢â‚¬. It is only such arbitral awards that shock the

conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award

and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference.

Equally, reappreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award.

41. A decision which is perverse, though would not be a ground for challenge under Ã¢â‚¬Å“public policy of IndiaÃ¢â‚¬, would certainly amount to a patent illegality

appearing on the face of the award. However, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be

perverse and liable to be set aside on the ground of patent illegality.

39. In Reliance Infrastructure Ltd. (supra), this Court referring to one of its earlier decisions in UHL Power Company Ltd. Vs. State of Himachal

Pradesh (2022) 4 SCC 116, held that scope of interference under Section 37 is all the more circumscribed keeping in view the limited scope of

interference with an arbitral award under Section 34 of the 1996 Act. As it is, the jurisdiction conferred on courts under Section 34 of the 1996 Act is

fairly narrow. Therefore, when it comes to scope of an appeal under Section 37 of the 1996 Act, jurisdiction of the appellate court in examining an

order passed under Section 34, either setting aside or refusing to set aside an arbitral award, is all the more circumscribed.

40. Again in M/s Larsen Air Conditioning and Refrigeration Company (supra), this Court reiterated the position that Section 37 of the 1996 Act grants

narrower scope to the appellate court to review the findings in an arbitral award if it has been upheld or substantially upheld under Section 34.

41. This Court in M/s. Hindustan Construction Company Ltd. (supra) declared that it is the settled jurisprudence of the courts in the country that

arbitral awards which contain reasons especially when they interpret contractual terms ought not to be interfered with lightly. An error in the

interpretation of contractual terms by an arbitrator is an error within his jurisdiction and would, therefore, not be a ground to interfere with an arbitral

award.

42. As already discussed above, the Arbitral Tribunal had interpreted Clause 51 in a reasonable manner based on the evidence on record. This

interpretation was affirmed by the learned Single Judge exercising jurisdiction under Section 34 of the 1996 Act. Therefore, Division Bench of the

High Court was not at all justified in setting aside the arbitral award exercising extremely limited jurisdiction under Section 37 of the 1996 Act by

merely using expressions like Ã¢â‚¬Ëœopposed to the public policy of IndiaÃ¢â‚¬â„¢, Ã¢â‚¬Ëœpatent illegalityÃ¢â‚¬â„¢ and Ã¢â‚¬Ëœshocking the conscience of the courtÃ¢â‚¬â„¢.

As reiterated by this Court in Reliance Infrastructure Ltd. (supra), it is necessary to remind the courts that a great deal of restraint is required to be

shown while examining the validity of an arbitral award when such an award has been upheld, wholly or substantially, under Section 34 of the 1996

Act. Frequent interference with arbitral awards would defeat the very purpose of the 1996 Act.

43. For all the aforesaid reasons, we are of the unhesitant view that the impugned order cannot be sustained. Accordingly, judgment and order dated

17.11.2009 passed by the Division Bench of the High Court is hereby set aside and the arbitral award dated 03.06.2005 is restored. Consequently the

appeal is allowed. However, there shall be no order as to cost.