(2017) AIRCC 1240

CALCUTTA HIGH COURT

Case No: A.P. No. 158 of 2012

State of West Bengal		APPELLANT
	Vs	
Afcons Pauling (India) Ltd.		RESPONDENT

Date of Decision: Feb. 3, 2017

Acts Referred:
Arbitration and Conciliation Act, 1996 - Section 31(7), Section 34(1)

Citation: (2017) AIRCC 1240

Hon'ble Judges: Soumen Sen, J.

Bench: Single Bench

Advocate: Mr. Samrat Sen, Sr. Advocate, Mr. Paritosh Sinha and Ms. Monali Bose, Advocates, for the State; Mr. Pratap Chatterjee, Mr. Dhruba Ghosh, Sr. Advocates, Mr. Bijan Majumder, Advocate, for the Respondent

Final Decision: Disposed Off

Judgement

Sl.

No.","Particulars of Claim as described in

the Statement of Claim","Claimed

Amount [Rs.]","Awarded Amount

[Rs.]

1.,"Claim for refund of amount due against

wrongful deduction of rebate from

provisional sums in contravention of the terms of the agreement","40,276/-","40,276/-

2.,"Claim for payment due as per Clause

70.1(4) of Special Conditions of

Contract considering proper linking

factor in respect of indices for cement

and steel","11,50,181/- [

Rs. 1,90,706/-

for cement and

(-) Rs. 40,525/-

for steel]","11,50,181/-

3.,"Claim for payment due as per Clause

70.1(4) of Special Conditions of

Contract adopting base price of bitumen

as contemplated in the settled terms of

the contract","24,75,340/-","24,75,340/-

4.,"Claim for release of amount withheld

against reimbursement of Sales Tax","86,990/-","86,990/-

5.,"Claim for payment due against increase in

value of work done consequent upon

sstatutory amendments after submission

of tender in terms of Clause 70.1 read

with Clause 70. 2 of the General

Conditions","26,69,877/-","24,11,734/-

6.,"Claim for payment of interest arising out of delay in making payment against the

Contractor''s draft that final account in

terms of Clause 60.8 of the Special

Conditions of Contract",Being accrued,"Rs.52,30,415.31/- as

Pre-reference and Rs.

43,87,229.36/- as

pendente lite interest

and further interest @

12% per annum till

payment

7.,Claim for cost of arbitration,As accrued,"5,71,565/-

,Total,"64,22,664/- (as

well as interest

of costs)","Rs.1,63,53,730.67 plus

interest @ 12% p.a.

from expiry of 90 days

of the award

the provisional sum because the offered rebate of 28% was applicable to all rates quoted in the Bill of Quantities which included the provisional,,,

sum also.,,,

8. The claimant had claimed, received and appropriated payment against IPC-79 by applying rebate on provisional sum without demur.",,,

9. The Arbitral Tribunal''s interpretation of Clause 60.9 is absolutely erroneous.,,,

10. The learned Senior Counsel has referred to the letter dated 12th March, 1992 of the respondent to show that the respondent has",,,

unequivocally agreed to grant 28% rebate over the rates quoted in the Bill of Quantities in the event the petitioner and its sister concerns are,,,

awarded all the four contracts aggregating to a sum of Rs. 171,57,82,878/-. The learned Senior Counsel has referred to Section 7 Volume 3 of",,,

the Tender Document which deals with work items refers to 9 Bills of which Bill No.9 is in respect of provisional sum. The said Bill No.9 is,,,

included in the Bill of Quantities. The arbitral tribunal according to the petitioner has erroneously proceeded on a communication dated 11th June,",,,

1999 and gave an award in respect of claim No.1 in favour of the respondent disregarding the said two aforesaid documents. It is submitted that,,,

on an erroneous interpretation of the clauses of the contract, the said sum was awarded in favour of the petitioner.",,,

11. In respect of claim No.2 by which the arbitral tribunal has allowed the claim for a sum of Rs. 11,50,181/- as per Clause 70.1(4) of Special",,,

Conditions of Contract considering proper linking factor in respect of indices for cement and steel it is argued that calculation of linking factor as,,,

adopted by the Arbitral Tribunal in respect of cost indices for cement and steel is dehors the contract. Clause 70.1 (4) SCC stipulates that base,,,

cost indices and current cost indices for Cement & Steel shall be index for Cement/Iron & Steel, as shown in the index numbers of Wholesale",,,

Prices in India Ã¯Â¿Â½ by Groups and Subgroups, released by the Office of Economic Advisor, Ministry of Industry, Govt. of India.",,,

12. The above stipulation makes it clear beyond any doubt that the applicable cost indices for Cement and Steels are the series, contained within",,,

wholesale price index series under the heads-Cement-Iron & Steel.,,,

13. From the price indices data supplied by the office of Economic Advisor, it is clear that there are different price index series -",,,

(a) For ""All Commodities"",",,,

(b) For "cement" and,",,,

(c) For "iron and steel".,,,

14. As per contract conditions, for cement, price index series under (b) and for Iron and Steel, series under (c) has to be adopted for price",,,

adjustment calculations.,,,

15. The Claimant insisted on adoption of price index series for ""All Commodities"" being (a) group above in respect of Cement and Iron & Steel by",,,

contending that ""All Commodities"" (WPI) includes manufactured goods, like Steel and Cement and as such petitioner/respondent cannot adopt any",,,

other indices in respect of Steel and Cement ignoring the recommended indices for manufactured goods like Steel and Cement falling within the,,,

category of ""All Commodities"" (WPI).",,,

16. Clause 70.1(2)(b) of contract specifically states that for general variation of prices of all materials other than those specifically provided in sub,,,

clause 70.1(4) [which relates to specified materials, bitumen, cement and steel as per contents of clause 70.1(4)], base cost indices and current",,,

cost indices shall be those corresponding to the wholesale price (for "All Commodities") i.e. "All Commodities" series contained within wholesale,,,

price index i.e. the series mentioned under (a) above.,,,

17. The three indices series appearing under wholesale price index have different fields of application under the contract conditions, namely,",,,

(i) "All Commodities" series Ã¯Â¿Â½,,,

It applies to all materials other than bitumen, cement and steel, specified materials under clause 70.1(4).",,,

(ii) Cement series Ã¯Â¿Â½,,,

It applies for cement, one of the specified materials under clause 70.1(4).",,,

(iii) Iron and steel series Ã¯Â¿Â½,,,

It applies for steel, one of the specified materials, under clause 70.1(4).",,,

18. The employer treated cement and steel under the applicable series, "cement", "iron and steel" of wholesale price index for calculation of price",,,

adjustments and allowed ''All Commodities'' series to take care of price variation of all materials other than Bitumen, cement & steel.",,,

19. In view thereof, the Arbitral Tribunal''s finding that cement and steel should be considered under the ''All Commodities'' series of wholesale",,,

price index is fallacious and illogical.,,,

20. It is a fundamental mathematical concept that for a particular series containing month-wise indices, for conversion of indices from certain base",,,

year series to earlier base year series, a linking factor needs to be calculated on the basis of the indices of the said series and such calculated linking",,,

factor correspondents to that particular series. Thus linking factory for one series cannot automatically apply to another series having different,,,

indices. Different series need separate calculations for determining linking factors applicable to each of them. One of the methods of calculation of,,,

linking factor is arithmetic conversion method which is followed by the Office of Economic Advisor as would be revealed from the contents of its,,,

letter dated May 09, 2005 which provides that ""the office of Economic Advisor has been using the arithmetic conversion method. According to",,,

this method, the linking factor for ''All Commodities'' index is 2.478 for conversion of indices from the base 1993-94 series to the earlier base",,,

1981-82 series"".",,,

21. The said letter further provides that ""the office of the Economic Advisor, does not, however, bring out linking factor for indices at disaggregate",,,

levels, because, the variations in the indices between two series can be attributed to price changes as well as changes in weights at the Group/Sub-",,,

group level. Users are advised to calculate the linking factor themselves"".",,,

22. Following the aforesaid clarification issued by the Office of Economic Advisor, the State calculated the linking factors for concerned series viz",,,

''the cement series''; ''iron and steel series'' of wholesale price index. As declared by the Office of the Economic Advisor, linking factor of 2.478 is",,,

applicable only for ''All Commodities'' series of wholesale price index and is not applicable for ''cement series'' and, ''iron & steel series''.",,,

23. Therefore, the State calculated linking factors for "cement" and "iron and steel" series following arithmetic conversion method applying the",,,

same on the month-wise indices under the involved series viz "cement" and "iron and steel" and found the linking factors to be 2.082 for "cement,,,

series" and 2.527 for "iron and steel series".,,,

24. The fact that the calculation of such linking factors for "cement" and "iron and steel" is correct would be corroborated by the fact that the same,,,

method of calculation when applied on the indices under "All Commodities" series yields linking factor for "All Commodities" series to be 2.478,",,,

which has been declared by the Office of the Economic Advisor to be the linking factor for "All Commodities" series of wholesale price index.,,,

25. Therefore, it leaves no doubt that in compliance with conditions and provisions of contract, the appropriate series, Cement series and iron and",,,

steel series of wholesale price index with correct linking factors (2.082 for cement, and 2.527 for iron and steel) have been adopted by the",,,

Employer in calculation of price adjustment amounts under price variation clause.,,,

26. In respect of Claim No.4 by the arbitral tribunal has allowed the claim for release of amount withheld for a sum of Rs. 86,990/- against",,,

reimbursement of Sales Tax.,,,

27. The Arbitrator has allowed the instant claim of the claimant in full and has awarded a sum of Rs. 86,990/- in favour of the claimant.",,,

28. The Petitioner refers to the extract of pre-bid meeting being clarification to the query No. 18 of the pre-bid meeting which entitles the Claimant,,,

for re-imbursement of Sales Tax, which states:-",,,

The Sales Tax on works contract need not be included in the tender amounts. It is required to be paid by the Contractor. The same will be re-",,,

imbursed by the employer on the basis of actual amount paid on production of satisfactory documentary evidence from the competent authority"".",,,

29. The learned Senior Counsel has laid much emphasis on the line ""on production of satisfactory documentary evidence from the competent",,,

authority"" which, according to the petitioner, makes it obligatory on Claimant"s part to submit the documentary evidences to the petitioner for",,,

claiming re-imbursement payments on account of Sales tax. Therefore, it was the bounden duty of Claimant to pursue the competent authority to",,,

get the requisite documentary evidences and submit the same to the petitioner for taking necessary action. The petitioner cannot in any way be,,,

blamed for non issuance of requisite final certificates as regards Sales Tax assessment by the competent authority. It is argued that the records,,,

would reveal that Claimant"s latest submission as regards Sales Tax Certificates, is a certificate issued by Assistant Commissioner, Commercial",,,

Tax, Suri Charge issued on 16.06.2000. The certificate reveals that issue of the certificate tax assessment has been made for an amount of Rs.",,,

42,54,276.00 (For S10 & S11) leaving assessment of a considerable amount as due.",,,

30. It is submitted that from record it would reveal that till date, reimbursement amount on this account has been made to the extent of Rs.",,,

1,20,04,199.00 (For S-10) Rs. 48,00,000.00 (for S-11) and Rs. 72,04,199.00 i.e. much in excess of assessment amount of Rs. 42,54,276.00.",,,

31. It is emphasized that tax deposit figures alone do not make the basis of reimbursement payment, because tax deposit in excess of assessment",,,

amount is refundable from the Tax authority which fact makes it imperative that reimbursement amount be kept limited to tax assessment amount.,,,

32. It is emphasized that failure on Claimant"s part to submit the documentary evidence from the competent authority as regards final assessment of,,,

Sales Tax figures even till date, is the sole reason of dead lock on the matter. Claimant is entitled for reimbursement of Sales Tax for the",,,

assessment amount only subject to deposit of such amount and records reveal that Claimant has already been paid in excess of assessment,,,

amount.,,,

33. The Arbitral Award in this regard is premature. No award could have been made under this heading of claim until and unless assessment had,,,

been completed by the Statutory Authorities. The Award is speculative. It may be pointed out that in the event the assessment ultimately carried,,,

out by the Statutory Authorities reveals the figures different from that award by the Arbitral Tribunal. There is no provision known to law for,,,

seeking modification or clarification thereof. It is respectfully submitted that the claim in respect of Claim No. 4 ought not to have been adjudicated,,,

until final assessment was completed by the Statutory Authorities.,,,

34. In respect of claim No.5 by which the arbitral tribunal has allowed the claim for a sum of Rs.26,69,877/- against increase in value of work",,,

done consequent upon Statutory amendments in terms of Clause 70.1 read with Clause 70. 2 of the General Conditions, it is submitted that the",,,

Arbitral Tribunal has failed to appreciate that the claimant has only submitted calculations along with the letter against the claim without submitting,,,

any documentary evidence of either the prevailing Sales Tax rates on different dates as shown in calculations or in the matter of purchase of,,,

materials/POL etc. by providing the valid purchase documents from which scrutiny of Sales Tax elements on the cost of materials could be,,,

exercised. The Claimant"s instant claim relates to Sales Tax variation only and the claimed increase in Sales Tax on purchased materials can only,,,

be verified from valid purchase documents of such materials, not from theoretical calculations.",,,

35. Moreover, the reading of minute details of clause 70.2 under which the Claimant sought to substantiate the instant claim will reveal that clause",,,

70.2 covers cases other than the ones envisaged by clause 70.1. Under sub clause 70.1, Claimant have been paid price adjustment on account of",,,

variation of prices on all materials including cement and steel which, as reflection of variation in market prices from time to time, takes into account",,,

the effects of all prevailing taxes and their variations from time to time including effects of Sales Taxes, as market price of all materials are inclusive",,,

of all types of prevailing taxes. Wholesale price index obtained on market survey with its series """All Commodities""", ""cement"" and ""Iron & Steel""",,, includes the effect of all types of taxes in their published indices on the basis of which price adjustments have been paid to Claimant as per price,,,

adjustment formulae provided in the contract. Therefore, it can be said that effect of variation in Sales Tax rate, if at all, has been duly",,,

compensated under the provision of clause 70.1 of contract and therefore, for variation in Sales Tax rate, clause 70.2 has no applicability at all.",,,

36. The Arbitral Tribunal by allowing the instant claim in favour of the claimant has caused double payment to the claimant on the same claim. The,,,

Arbitral Award clearly offends public policy as the same would result in unjust enrichment to the claim. The same apart from being in breach of,,,

fundamental policy of Indian Law is also opposed to justice and royalty and in this regard reference was made to the judgment of the Hon''ble,,,

Supreme Court in Associate Builders v. Delhi Development Authority reported at (2015) 3 SCC 49.,,,

37. The awarding of post-reference interest is questioned on the ground that the Courts have on several occasions, particularly when the State or",,,

an instrumentality of the State is concerned, reduced the rate of interest awarded by the arbitrators to a reasonable figure. It is submitted that this",,,

Hon''ble Court may also reduce the rate of interest.,,,

38. Reliance was placed in this connection on the following judgements:-,,,

(i) Mcdermott International Inc. v. Burn Standard Co. Ltd. reported at (2006) 11 SCC 181;,,,

(ii) Rajasthan State Road Transport Corporation v. Indag Rubber Ltd. reported at (2006) 7 SCC 700;,,,

(iii) Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy & anr. reported at (2007) 2 SCC 720.,,,

39. The award in so far as it allowed such claims is so unfair and unreasonable that it would shock the conscience of the Court. Arbitral Award,,,

being opposed to the public policy is required to be adjudged void.,,,

40. In the aforesaid circumstances, it is submitted that the arbitral award may be set aside.",,,

41. Per contra, Mr. Pratap Chatterjee, learned Senior Counsel appearing on behalf of the respondent/claimant submits that the parameter",,,

applicable for interference with the award are singularly missing inasmuch as it appears from the award itself that the arbitrators who are expert in,,,

the field have on assumption of the evidence has allowed the claim. It is submitted that construction of a contract and/or a clause in a contract is,,,

within the exclusive jurisdiction of the arbitrator and unless it is shown that the arbitrator has exceeded his jurisdiction an award cannot be,,,

challenged.,,,

42. It is submitted that the Bill No.9 relates to provisional sums and the said expression itself shows that there is uncertainty about the execution of,,,

the complete work and as such, it cannot be said that when the offer was given the benefit of rebate even extends to such uncertain items of work.",,,

The attention of the Court is drawn to the reliance placed by the Arbitral Tribunal of a communication made by the engineer to the employer that,,,

rebate on provisional sum not considered"".",,,

43. In dealing with the issue of linking factors in respect of indices for cement and steel, it is submitted that during the 8th hearing, both parties were",,,

directed to submit their respective calculations of linking factor between two sets of indices as it would be helpful for the Tribunal to arrive at a,,,

definite finding. It is submitted that the Arbitral Tribunal on consideration of the materials produced by the parties, observed that the logic behind",,,

the manner of calculation of the linking factor as adopted by the respondent is unacceptable. The Arbitral Tribunal has relied open the letter of the,,,

Office of Economic Advisor which states that linking factor for cement and steel (which is neither included within """All Commodities""" in the",,,

contract nor by the Economic Advisor before April, 2000) cannot be readily determined. The Arbitral Tribunal, according to the learned senior",,,

counsel, has adopted one mode of calculation of the linking factor over the other calculation and it cannot be said that the approach of the Arbitral",,, Tribunal in accepting the basis of the calculation offered by the claimant/respondent is unreasonable or irrational. The Arbitral Tribunal according to,,,

Mr. Chatterjee has taken into consideration the calculations of the respective parties submitted on 9th and 10th hearing and has observed that,,,

since the work had commenced on 23rd March, 1993 and continued up to 31st December, 1999, the index numbers for steel and cement with",,,

base 1981-82 = 100 had to be applied for computation of escalation amount beyond March, 1994 by adopting some mechanism which would",,,

convert the index price published by the Economic Advisor with base 1993-94 = 100 to the index price with base 1981-82 = 100. The,,,

observation of the arbitral tribunal that the Economic Advisor had published a factor called the linking factor for the purpose for converting the,,,

index of ""All Commodities"" from base 1993-94 to base 1981-82 but it had not laid down any such factor in case of ''cement or iron and steel"",,,

rather the office of the Economic Advisor had avoided to propose to check or even verify such linking factor for ''cement, iron and steel'' is relied",,,

upon to sustain the award. The Tribunal appears to have on such consideration and relying upon the Economic Advisor''s letter of 9th may, 2005",,,

addressed to the project director of the petitioner in which it was stated that the said office of the Economic Advisor, does not, however, bring out",,,

the linking factor for indices at disaggregate levels, because the variations in the indices between two series can be attributed to price changes as",,,

well as changes in weights at the group/sub-group level and the users were advised to calculate the linking factor themselves accepted the uniform,,,

linking factor of 2.478 for cement and steel as adopted by the claimant. The Arbitral Tribunal relied upon the documents being Exhibit-C 15 which,,,

goes to show that ""All Commodities"" consists of ""Primary Articles"", ""POL Products"" and ""Manufactured Products"". Under the head of",,,

Manufactured Products"", the commodities ''Cement and Iron and Steel'' appear. The Tribunal noticed that the Economic Advisor''s clarification",,, letter dated 9th May, 2005 where it was stated that a variation in the indices between two series can be attributed to price changes as well as",,,

changes in weight at the group/sub-group level which in other words means that the variations of indices between two series is a function of price,,,

changes and changes in weights. Therefore, to link the indices of two series one has to know the price changes as well as changes in weights at the",,,

group/sub-group level for the individual commodity. However, none of the above information is available or has been disclosed by the Economic",,,

Advisor in respect of the iron, steel or cement and as such, the linking factor at disaggregate levels cannot be brought out in absence of the",,,

aforesaid parameters. The explanation of the petitioner was not accepted on the ground that the petitioner did not consider any of the parameters,,,

while evaluating the alleged linking factors for cement and steel. ""All Commodities"" included 447 items with base 1981-82 and 435 items with base",,,

1993-94. The manufactured products (which includes steel and cement) 334 items were considered with base 1981-82 whereas 380 have been,,,

considered with base 1993-94 which factors were not considered by the petitioner. Mr. Chatterjee, submits that the aforesaid observation of the",,,

tribunal is based on reading of the relevant circulars and having regard to the fact that, it is a possible view, the Court shall not substitute its view for",,,

that of the arbitrator. The Tribunal recorded that it faced insurmountable difficulties in determining the linking factor at disaggregate levels and the,,,

Tribunal was left with no other alternative but to accept one linking factor which has been furnished by the authority and on that basis, the Tribunal",,,

accepted the uniform linking factor of 2.478 for cement and steel as shown and adopted by the claimants for calculation.,,,

44. In dealing with the submission made with regard to duplication of claims as alleged to have been made under Claim No.5, it is submitted that",,,

there is no dispute that there has been an increase in the value of the work done consequent upon statutory amendments after submission of tender.,,, It is submitted that the arbitral tribunal has taken into consideration that there had been changes in the indirect tax structures compared to those as,,,

prevalent 28 days prior to submission of tender, as a consequence whereof the claimant had to bear additional tax liability for purchase of",,,

materials, that is, general items, cement and lubricant oil at higher rates. It is submitted that the Tribunal has taken into consideration the",,,

comparative table giving details of such changes compared to those as were existing 28 days prior to tender along with relevant,,,

circulars/notifications affecting such changes and on such consideration of such materials have allowed the said claim in full. The argument of the,,,

respondent that the claimant"s calculations are "theoretical", and not backed by "valid purchase documents on such materials" were not accepted",,,

by the tribunal as the said claim was made in terms of Clause 70.2 of General Conditions of Contract. The claimant appears to have calculated the,,,

amount payable of purchases on the basis of percentage provided in the Price Variation formula in the contract under three heads, namely, (i)",,,

Cement, (ii) POL and (iii) all other materials, and have calculated the Sales Tax Variations on the basis of such quantities, with those of Central",,,

Water Commission guidelines and Indian Standard Code for rate analysis. The tribunal having applied its mind to the said claim, the award",,,

allowing such said claim does not call for any interference.,,,

45. Mr. Chatterjee submits that insofar as granting of interest is concerned it is the discretion of the arbitral tribunal and unless it is perverse of,,,

contrary to public policy the Court shall not interfere with the discretion exercised by the Arbitrator.,,,

46. Let me first consider the argument made with regard to the refund of a sum of Rs. 40,276/- allegedly deducted towards rebate from the",,,

provisional sums in contravention of the terms of the agreement.,,,

47. Bill of Quantities is the name given to a detailed statement of the different items of the work, labour and materials which it is estimated will be",,,

required for the proposed work. The bills are prepared with the object of giving a full description of every item of permanent work entailed in the,,,

contemplated project, and the quantities of each item to be deduced from as measured off the drawings. The purpose of Bills of Quantities is to put",,,

into words every obligation of service which will be required in carrying out the building project. In Bills of Quantities, it is common to find items",,,

like ""PC"" (prime cost or provisional sum). The term ''prime cost'' or ''provisional sum'' as given, to be used in building and engineering contracts,",,,

because of the difficulty in describing accurately at the time the contract is entered into every article to be used in the building or work. Reasons for,,,

dealing with work in this way may be that the work in question is provisional in character at the time of contract, either because it may not be",,,

carried out at all, as because an element of selection by the employer or their architect is involved. A provision is frequently inserted in building",,,

contracts that the builder shall provide a sum either for contingencies, such as extras, or, on the other hand, to pay for some contemplated work,",,,

the exact nature of which has not yet been defined, at the date of the contract. Such sums are generally referred to as provisional.",,,

48. A useful description of ""provisional sums"" was given by May LJ in Midland Expressway Ltd v. Carillion Construction Ltd., (2006) 107",,,

Con. L.R. 235:-,,,

The term ''provisional sum'' is generally well understood in the construction industry. It is used in pricing construction contracts to refer either to",,,

work which is truly provisional, in the sense that it may or may not be carried out at all, or to work whose content is undefined, so that the parties",,,

decide not to try to price it accurately when they enter into their contract. A provisional sum is usually included as a round figure guess. It is,,,

included mathematically in the original contract price but the parties do not expect the initial round figure to be paid without adjustment. The,,,

contract usually provides expressly how it is to be dealt with. A common clause in substance provides for the provisional sum to be omitted and an,,, appropriate valuation of the work actually carried out to be substituted for it. In this general sense, the term ''provisional sum'' is close to a term of",,,

art but its precise meaning and effect depends on the terms of the individual contract."" (See Keating on Construction Contraction Contracts, 10th",,,

Edition, Hudson''s Building and Engineering Contracts, 13th Edition, Emden''s Building Contracts And Practise, 9th Edition)",,,

49. The Tribunal has proceeded on the basis that the rebate was not offered by the claimant on provisional sums inasmuch as a contract sum does,,,

not include the provisional sums. The Tribunal has overlooked the fact that the tender documents unmistakably has specified the nature of the work,,,

with the unit rate for each items of the contemplated work. While accepting the tender the Chief Engineer made the observation that if all the four,,,

contract packages (S8, S9, S10 & S11) are awarded to APIL and/or AFCONS, a rebate of 28.00% will be applicable on all the rates quoted in",,,

the bill of quantities of the said four contract package. The emphasis is on the rates as opposed to the quantities. Mr. Chatterjee tried to impress,,,

upon this Court that even if the items and rates are mentioned the respondent is not aware of the actual quantities and at the time of execution of,,,

the work it may be more or less and as such the rebate could not extend to such unspecified quantities.,,,

50. I have gone through the tender document and the nature of the provisional work. There cannot be any doubt that the rebate of 28% is,,,

applicable to all the work items as mentioned in Clause B of the tender document. In fact, Clause B relates to work items under which the bill of",,,

quantities with reference to bill numbers are mentioned. Bill No.9 relates to provisional sums. It is composite offer which clearly stipulates that if the,,,

respondents were to get all the four contracts then they would be required to give rebate of 28% on all the rates quoted in the bill of quantities. In,,,

my view the finding of the Arbitrator allowing the claim for rebate is contrary to the terms of the contract. The Arbitrators clearly have ignored the,,, Clause relating to rebates in the tender document and the conditions on the basis of which the four contracts were awarded to the petitioner. The,,,

overlooking and/or non-consideration of the said clause has resulted in a perverse finding. In such circumstances, the claim on account of wrongful",,,

deduction of rebate is disallowed.,,,

51. Insofar as the linking factor is concerned the Arbitrators have given a detailed reasoning. The arbitrators upon considerations of calculations,,,

based on relevant circulars with regard to the price changes and changes in vats have accepted one view over the other. The parties are not in,,,

disagreement that the claimant is entitled to differential payment consequent upon price variations in cement and iron and steel, that is to say, the",,,

entitlement of the claimant to claim for payment under Clause 70.1(4) of the Special Conditions of Contract considering proper linking factor in,,,

respect of indices for cement and steel but the disagreement appears to be the index numbers applicable in the given case having regard to certain,,,

circulars disclosed by the petitioner prior to the Economic Advisor''s clarification letter of 9th May, 2005 giving separate index numbers for cement",,,

and steel and also ""All Commodities"". The petitioner complained that when the index numbers for the relevant years for cement and steel are",,,

separately available notwithstanding the fact that cement and steel are also included under the omnibus ""All Commodities"", the arbitral tribunal",,,

should have accepted the calculation made by the petitioner following the index numbers of cement and steel based on the available data published,,,

by the Government of India Ministry of Industry on 6th May, 2005. Although one perhaps could argue that on the basis of the maxim Generalia",,,

Specialibus non derogant and Generalibus Specialia derogant that is to say if a special provision is made on a certain matter, the matter is excluded",,,

from the general provision but having regard to the informality attached to the said proceeding and having regard to the fact that the arbitrator has,,,

considered the Economic Advisor''s letter of 9th May, 2005 addressed to the Project Director of the petitioner in which it was clarified that the",,, variation in the indices between two series can be attributed to price changes as well as changes in weight at the group/sub-group level and the,,,

users were advised to calculate the linking factor themselves, it cannot perhaps be said that the acceptance of the calculation made by the",,,

respondent with regard to the linking factors for Cement and Steel as submitted by the claimant for calculation of the amount due was unreasonable,,,

or perverse or arbitrary. The arbitrator has relied upon the base 1993-94 being the period when the contract was awarded. The arbitrator has,,,

considered the letter dated 9th May, 2005 and construed the said letter to mean that the variation of variation of indices between two series is a",,,

function of ""price change"" and ""changes in weight"". Therefore, to link the indices of two series one has to know the "price changes" as well as the",,,

"changes in weights" at the group/sub-group level for that individual commodity. The arbitrator has taken into consideration the fact that the work,,,

had commenced on 23rd March, 1993 and continued upto 31st December, 1999 and the index numbers for steel and cement with base 1981-82",,,

= 100 had to be applied for computation of escalation amount beyond March, 1994 by adopting a mechanism which would convert the index",,,

numbers published by the Economic Advisor with base 1993-94 = 100 to the index numbers with base 1981-82 = 100 and applied the uniform,,,

linking factor of 2.478 for cement and steel on the basis of the clarification letter dated 9th May, 2005. The calculation of the claimant was found",,,

to be more appropriate on the basis of the parameters indicated above.,,,

52. The aforesaid maxims are referred in view of the argument made by Mr. Sen that when there is already a circular which clearly indicates the,,,

prices of the cement and iron steel, the omnibus circular under which cement and iron steel are also included requires to be discarded and/or",,,

disregarded. However, the Arbitrator has given an explanation and reason for accepting the calculation made available by the claimant and having",,,

regard to the complexity involved in the matter, this Court is inclined to accept the findings of the Arbitrator in favour of the claimant. The Court",,, cannot enter into the mental process of the Arbitrator nor is exercising its appellate jurisdiction unless the award is perverse arbitrary, capricious",,,

and/or unreasonable the Court cannot interfere. When a Court is applying the public policy test to an arbitration award, it does not act as a Court",,,

of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the,,,

arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based",,,

on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it",,,

is found that the arbitrator''s approach is not arbitrary or capricious then he is the last word on facts.,,,

(emphasis added),,,

53. Even in a civil trial, a finding of fact is not to be reversed unless it can be established that the trial Judge made a palpable and overriding error",,,

which means an error that gives rise to the reasonable belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way",,,

that it affected his conclusion or an obvious deficiency in the trial Judge''s finding of fact that affects the outcome of the trial. The Court in this,,,

jurisdiction, however, is not exercising such sweeping power. It is settled law that where a finding is based on no evidence or an arbitral tribunal",,,

takes into account something irrelevant to the decision which it arrives at or includes vital evidence in arriving at its decision. Such decision would,,,

necessarily be perverse and on those grounds, an award can be set aside.",,,

54. The attack on this score is really an attack on the substance of the award which the arbitrators have decided on due consideration of materials,,,

and evidence adduced by the parties. The jurisdiction of the Court in interfering with an award has been pithily stated in Mt. Aftab Begam v.,,,

Haji Abdul Majid Khan reported at AIR 1924 All 800 in the following words:-,,,

They may be right, they may be wrong, it is no business of the court. Judges cannot be reminded too often that an arbitrator in substance, ousts",,, the jurisdiction of the Court, except for the purpose of controlling the arbitrators and preventing misconduct, and for regulating the procedure after",,,

the award. So far as the hearing of the merits is concerned and the decision contained in the award, the court has nothing to say, good, bad or",,,

indifferent. It has no right to review it or to consider itÃ¯Â¿Â½.."""",,,

55. Although the above decision was rendered in the context of the old 1940 Act but the said decision is equally and more effectively applicable,,,

under the 1996 Act. The Court is not hearing an appeal from the award. The recent decision of the Hon''ble Supreme Court in Associated,,,

Builders (supra) has also recognised the same principle. I do not find any of the grounds on the basis of which the said finding of the Arbitrator,,,

could be disturbed.,,,

56. On the issue of sales tax the claimant has produced the challans to show that the claimant has paid the amount towards sales tax although it is,,,

recorded in the award that the petitioner has disputed the re-imbursibility of the amount deposited towards the sales tax. What I could gather from,,,

the argument made by the parties is that it may so happen that the respondent has paid for the sales tax but at the time of assessment the,,,

respondent might have received some refund. The Tribunal accepted the production of the Challans as a satisfactory proof of payment and held,,,

that there is no condition in the contract to produce the final assessment for reimbursement of sales tax on works contract that the claimant has paid,,,

the sales tax could not be disputed on the basis of the evidence an award has been passed. This Court is not inclined to interfere with the award,,,

passed by the Arbitrator allowing refund of sales tax.,,,

57. The Arbitral Tribunal has considered Clause 70.2 of the General Conditions of Contract which permits the claimant to claim revision of,,,

contract price on account of added cost of execution arising out of statutory changes after 28 days prior to the latest date of submission of tender.,,,

The Tribunal on examination of the documents found changes in the indirect tax structure compared to those as was prevailing 28 days prior to,,, submission of tender as a consequence whereof the claimant had to bear additional tax liability for purchase of materials, namely, general items,",,,

cement and lubricate oil at higher rates. The tribunal has noticed the changes in the indirect tax structure since 11th April, 1994 till 1st May, 1997.",,,

The claimant produced the relevant circulars and a comparative table showing changes that had taken place over a period of time. It is perhaps not,,,

in dispute the claimant had been requesting the engineer to determine the added cost of execution arising out of such changes in legislation in terms,,,

of the aforesaid clause and the relevant letters were produced and marked as exhibits in the said proceeding. The respondent appears to have,,,

denied the claim on the ground of failure to furnish certificate from competent authority regard payment of taxes. The petitioner, however, appears",,,

to have not disputed the method of calculation of sales tax on various materials submitted by the claimant on 11th April, 2011. On a query raised",,,

by the tribunal with regard to the calculation of taxes claimed to have been paid by the claimant in view of subsequent legislations, the claimant",,,

explained the basis of the calculation of taxes which is recorded in the award and which reads:-,,,

On query from the learned AT regarding the submission marked as C-36, Mr. Mukhopadhyay appearing for the Claimant explained that the basic",,,

value of materials consumed as adopted in the said compilation C-36 are assessed from the certified value of IPCs and the quantum of cement,,,

assessed bill wise for payment of escalation in terms of the contract earlier, duly agreed by and between the parties. He refers to the document",,,

disclosed and marked C-21, the pages 58 & 59. According to him the entire basis of the calculation is founded on the agreed and certified figures",,,

of work done as per IPCs and the consumption of cement appearing at those pages 58 & 59 which is certified by the Engineer on 16/09/2006. So,,,

far as other materials and lubricant is concerned the value of the said material are also derived applying the agreed coefficients on the agreed value,,, of turnover, for other materials and POL and relying on good engineering practise adopted by Ministry of Irrigation Government of India, River",,,

Valley Project (C-36). The claimant had adopted 20% of POL cost in its calculation for deriving the cost of lubricant. Whereas, as per",,,

Government of India norms, ""20% to 25% refer page 5 of submission dated 14/3/2011 (C-36) of the cost of fuel might be provided for the",,,

purpose of cost of lubricant depending upon the type of equipment.""",,,

58. The tribunal also found that the said stand of the claimant is also supported by the provisions IS 11590:1995 wherein the cost of lubricant can,,,

be taken as 25% to 30% of the cost of fuel depending upon the type of equipment.,,,

59. The tribunal was of the view that the insistence for the production of certificate is not required under the contract and on that ground the,,,

payment cannot be withheld. The contention of the petitioner that the claimant"s calculations are theoretical and not backed by valid purchase,,,

document on such materials was negative in paragraph 16 of the award dealing with the said claim which reads:-,,,

16. So far as we can see, the claimant, in order to substantiate a monetary claim under this head has derived the value of purchases on the basis of",,,

percentages provided in the Price Variation formula in the contract (70.1(1) of the special conditions) under three heads, that is, (i) Cement, (ii)",,,

POL and (iii) all other materials, and have calculated the Sales Tax variations on the basis of such quantities, with those of Central Water",,,

Commission guidelines (Vol. II, 1981) and Indian Standard Code 11590-1995 (for POL only) for rate analysis. We find this approach",,,

satisfactory and not "theoretical" as contended by the respondent, inasmuch as it makes use of an express contract provision to arrive at the cost",,,

of materials.""",,,

60. The tribunal, however, did not allow the entire amount as claimed but recalculated the amount and passed an award for a reduced sum. It",,,

cannot be said that the finding of the tribunal is perverse or arbitrary or suffers from any non-application of mind. The principle on which I have,,, declined to interfere with the previous claims, on the same principle, I refuse to accept the submission made on behalf of the petitioner to interfere",,,

with the award.,,,

61. However, insofar as the claim for payment of interest is concerned, I think an interference is called for as discretion has not been properly",,,

exercised by the Tribunal inasmuch as no reason has been given for allowing such exorbitant rate of interest. While this Court cannot interfere with,,,

the pre-reference interest as it is emanating from the contract itself but for the post-reference period the Court can in appropriate case if it appears,,,

to the court that such rate of interest is unreasonable and exorbitant reduce and/or modify the rate of interest. The purpose of granting interest is to,,,

compensate the petitioner for not being able to utilize the fund wrongfully denied. In view of the commercial nature of the transaction, in my view, it",,,

should be reduced to 10% per annum on and from 30th March, 2007 till 13th September, 2011.",,,

62. The award stands modified to the above extent.,,,

63. The application for setting aside succeeds in part.,,,

64. AP No.158 of 2012 is disposed of, however, without any order as to costs.",,,

65. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.",,,