

WEB COPY



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31-01-2025

CORAM

THE HONOURABLE MR JUSTICE P.B. BALAJI

OP Nos. 530 & 531 of 2017

& A.No.3818 of 2017

M/s.Chennai Metro Rail
Limited, Admin.Building, Chennai Metro Rail
Depot, Poonamalle High Road, Koyambedu,
Chennai-600 107.

Petitioner(s)

Vs

Transtunnelstroy Limited
4/1, Luganskaya Str, Moscow, 115583, Russia.
and another

Respondent(s)

For Petitioner(s):

Arjun Suresh
B.Kishore
Raghavendra Ross Divakar
R.Sinduja
M/s.Dua Associates
Palani Centre, No.32,
Venkatnarayana Road, T.Nagar,
Chennai-600 017.

For Respondent(s):

Mr.D. Balaraman

ORDER

Subsequent to the order being pronounced today i.e., 31.01.2025, the learned counsel for the respondent would submit that the bank guarantee has been furnished for 75% on the amount received and in view of the



decision in this original petition, it is likely that the petitioner may invoke the bank guarantee. Hence, he would seek for interim protection.

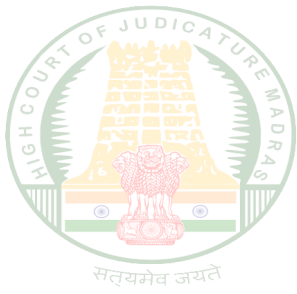
WEB COPY

2. In view of the above, the order dated 31.01.2025 is suspended for a period of two weeks.

31-01-2025

ata

**OP Nos. 530 & 531 of 2017
& A.No.3818 of 2017**



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.12.2024
Pronounced on : 31.01.2025

CORAM

THE HONOURABLE **MR.JUSTICE P.B.BALAJI**

O.P.Nos.530 & 531 of 2017

M/s.Chennai Metro Rail Limited,
Administration Building,
Chennai Metro Rail Depot,
Poonamalle High Road,
Koyambedu, Chennai – 600 107.

... Petitioner
in both OPs

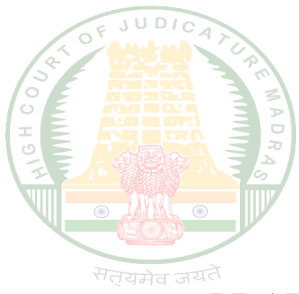
VS.

M/s.Transtunnelstroy – Afcons JV
Represented by Afcons Infrastructure Limited and
comrpmissing:

1.Transtunnelstroy Limited,
4/1 Luganskaya Str,
Moscow, 115583,
Russia.

2.Afcons Infrastructure Limited,
Afcons House,
16, Shah Industrial Estate,
Veera Desai Road, Azad Nagar (P.O),
Post Box No.11878, Andheri (W)
Mumbai – 400 053.

... Respondent in both
OPs.



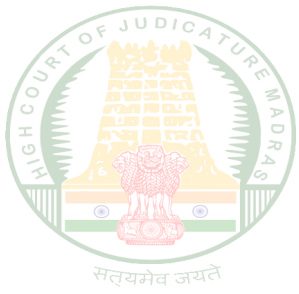
WEB COPY

PRAYER in O.P.No.530 of 2017: Arbitration Original Petition filed under Sections 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned award dated 03.06.2017 by the majority of the Arbitral Tribunal, insofar as it allows the claim of Rs.9,35,47,080/- with interest at 12% p.a from 09.04.2015, until the date of the impugned award and 14% p.a on the aforesaid sum (principal + interest) from the date of the impugned award until realization, by allowing this petition with costs throughout.

PRAYER in O.P.No.531 of 2017: Arbitration Original Petition filed under Sections 34 of the Arbitration and Conciliation Act, 1996, to set aside the impugned award dated 28.04.2017 by the majority of the Arbitral Tribunal, insofar as it allows the claim of Rs.4,81,36,049/- with interest at 12% p.a from 06.01.2015, until the date of the impugned award and 14% p.a on the aforesaid sum (principal + interest) from the date of the impugned award until realization, by allowing this petition with costs throughout.

For Petitioner : Mr.Yashodh Vardhan
Senior Counsel
for Mr.Arjun Suresh (O.P.No.530 of 2017)
Mr.Arjun Suresh (O.P.No.531 of 2017)

For Respondents : D.Balaraman (In both OPs.)



WEB COPY

COMMON ORDER

These Original Petitions are filed at the instance of the Chennai Metro Rail Limited (CMRL) which has suffered an award before the learned Arbitrator.

2.The brief facts relating to the above Original Petitions are as hereunder:

The petitioner was formed as a Special Purpose Vehicle with an equal 50% shareholding of the Central Government and State Government of Tamil Nadu. The petitioner invited tenders for design and construction of underground stations in the city of Chennai together with associated tunnels of Corridors 1 and 2 on a working basis. A Letter of Acceptance was issued by the petitioner to the respondent on 28.12.2010, followed by a Contract Agreement being executed on 31.01.2011, with a commencement date of 07.02.2011, for a total contract value of Rs.1566.81 and Rs.1031 crores. The execution of the work was to be completed within 50 months, on or before 07.04.2015. It is not in dispute that the contract was completed,



however not within the time contemplated under the Contract Agreement.

3. According to the petitioner, the contract was a fixed price contract subject to changes in costs which were permissible only when there is change in legislation. The respondents made a price adjustment claim under the Conditions of Particular Applications (CPA 32).

4. It is the specific case of the petitioner that the respondent was already paid with price variation in respect of labour component by adopting price variation formula under CPA 32 to the tune of Rs.166,21,76,679/- in O.P.No.130 of 2017 and Rs.130.07 crores in O.P.No.131 of 2017. However, the respondent, contending that the rates of minimum wages were revised with effect from 16.07.2014 vide G.O.(2D).No.27, Labour & Employment dated 18.06.2014, claimed additional costs. Initially, the respondents had made a claim, however the details of which are as follows:

<i>Amended statement of claims</i>			
In O.P.530 of 2017		In O.P.No.531 of 2017	
Local Daily	Rs.7,78,20,224/-	Local Daily	Rs.3,97,61,939/-
Local Monthly	Rs.1,73,20,056/-	Local Monthly	Rs.95,64,123/-
Labour Supply	Rs.4,76,75,753/-	Labour Supply	Rs.2,15,31,633/-
Total	Rs.14,28,16,033/-	Total	7,08,57,695/-

The respondents made their respective claims citing changes in law,

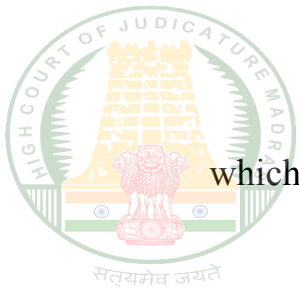


relating to revision of minimum wages payable.

WEB COPY

5.The defence raised by the petitioner was that the claims itself were not maintainable as it stood waived by the respondent under clause 20.1 of the General Conditions of Contract (GCC). That apart, according to the petitioner, the claims were not substantiated and on a proper reading of clauses 13.16.1 to 13.16.5 as amended by CPA 37, the respondent cannot claim additional costs, citing change in law, when the respondent has already benefited from price adjustment under CPA 32. However, the Arbitral Tribunal, in and by an award dated 03.06.2017, by a majority of 2:1 partly allowed the claims of the respondents. The said awards in favour of the respondent are under challenge in the above Original Petitions.

6.I have heard Mr.Yashodh Vardhan, learned Senior Counsel, for Mr.Arjun Suresh, learned counsel for the petitioner in O.P.No.530 of 2017, Mr.Arjun Suresh, learned counsel for the petitioner in O.P.531 of 2017 and Mr.D.Balaraman, learned counsel for the respondents in both the original petitions. I have also gone through the documents filed by way of typed set of papers and also the impugned award, besides considering the submissions advanced by the learned counsel on either side, including the decisions on

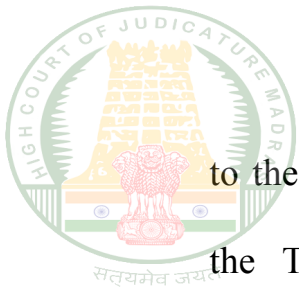


which reliance has been placed upon by the learned counsel on both sides.

WEB COPY

7.The learned Senior Counsel, Mr.Yashoth Vardhan and Mr.Arjun Suresh, appearing for the petitioners in the above Original Petitions would mainly attack the award on the ground of patent illegality under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 and being contrary to the public policy of India under Section 34(2)(b)(ii), besides also being contrary to Section 28(3) of the Arbitration and Conciliation Act, 1996. According to the learned counsel for the petitioners, they would primarily contend that the interpretation of the vital and relevant clauses 13.16.1 and 13.16.5 by the Arbitral Tribunal is neither a possible nor a plausible view and on the other hand, the interpretation given by the Tribunal is patently illegal and contrary to public policy.

8.Further, according to the learned counsel for the petitioners, the award has virtually rewritten the change in law, clause CPA 37 in the contract and has imposed revised commercial terms on the petitioners by awarding additional costs in view of the revision in minimum wages which has according to the petitioners resulted in unlawful and unjust enrichment



WEB COPY

to the respondent. The learned counsel for the petitioners would state that the Tribunal has ignored essential terms of contract and when the respondent had not even pleaded, leave alone prove that its performance was impacted because of the change in law, the Tribunal ought not to have awarded the claim citing change in law. Therefore, the award is patently illegal according to the petitioners. The learned counsel would also submit that the Tribunal has not given any reasons for holding that the claims were maintainable in the light of clause 20.1 of the GCC and on this ground also the award has to be set aside, being patently illegal.

9.The learned counsel for the petitioners relied on the following decisions in support of their contentions:

1.National Highways Authority of India Vs. M/s.ITD Cementation India Limited ((2015) 14 SCC 21).

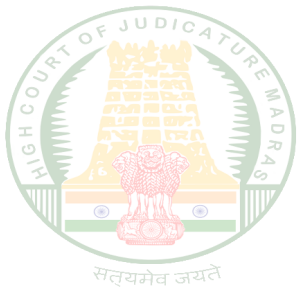
2.Union of India and Others Vs. Bharat Enterpricse (2023 SCC Online SC 369).

3.Trivenibai & Another Vs. Smt.Lilabai (AIR 1959 SC 6200).

4.Commissioner of Central Excise, Bhavnagar Vs. Saurashtra Chemicals Limited ((2007) 10 SCC 352).

5.Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India ((2019) 15 SCC 131).

6.Delhi Metro Rail Corporation Limited Vs. Delhi Airport Metro Express Private Limited ((2024) 6 SCC 357).



WEB COPY

10.Per contra, the learned counsel for the respondent, Mr.D.Balaraman, would support the findings of the Arbitral Tribunal and contend that in view of the mandate of Section 5 of the Arbitration and Conciliation Act, the award cannot be interfered with unless as provided in Section 34 of the Act. According to the learned counsel for the respondents, the petitioners had not mentioned specifically under which subsection of Section 34, the challenge to the award is being laid. In this regard, the learned counsel for the respondent relied on the following decisions:

1.Associate Builders Vs. Delhi Development Authority ((2015) 3 SCC 49).

2.Parsa Kente Collieries Limited Vs. Rajasthan Rajya Vidyut Utpadan Nigam Limited ((2019) 7 SCC 236).

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

4.National Highways Authority of India Vs. Hindustan Construction Company ((2024) 6 SCC 809).

11.Relying on the above decisions, the learned counsel for the respondents would state that if the Arbitral Tribunal has taken a particular view on the interpretation of a contract, the Court cannot sit over the same in appeal and over turn the findings of the Arbitrator as long as the construction of the contract by the Arbitrator is not something that no fair



WEB COPY

mindful or reasonable person could do. He would further state that the respondent was clearly entitled to additional costs due to change in law pertaining to the works as provided in clause 13.16.2. According to the respondent, proper interpretation of clauses 13.16.2 to 13.16.5 was that clause 13.16.5 allows additional costs only to the extent not covered by price variation formula and therefore, the respondent was entitled to claim additional costs in view of the change in law and therefore, such a view being rightly adopted by the Tribunal, no interference is warranted with the award.

12.I have carefully considered the submissions advanced by the learned counsel on either side.

13.The short question which arises in these Original Petitions is as to whether the change in law would enable the respondents to compensation under clause 13.16.5 adopting CPA 32 or change in law would entitle the respondents to compensation under clause 13.16.2 to 13.16.4 when CPA is not adopted. In fact, the learned counsel for the respondent would also raise an objection that this contention that has been argued before me was neither raised before the Arbitral Tribunal nor in the memorandum of grounds of



challenge to the award under Section 34 before this Court, but raised for the first time in the oral arguments. The primordial defence of the petitioners before the Tribunal was that when the respondents were already compensated for price variation adopting CPA 32, whether the petitioner was entitled to claim further additional costs owing to change in law in view of proper interpretation of CPA 37 (clause 13.16.1 to 13.16.5).

14. With regard to the lack of challenge, as contended by the learned counsel for the respondents, I have gone through the memorandum of grounds in both the original petitions. The substantial challenge to the award is only citing contravention of CPA 37 prohibiting the respondents from making any claim towards additional costs, once price variation formula in CPA 32 is already been adopted. Therefore, it may not be correct on the part of the learned counsel for the respondents to contend that such grounds were not taken in the original petitions. Relevant clauses in the GCC are reproduced hereunder:

<i>GCC – FIDIC Conditions</i>	
GCC 13.1 (b)	GCC 13.16
The Contract Price 13.1 <i>Unless otherwise stated in Part II</i>	<i><u>The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from changes in legislation of the Country, made after</u></i>



WEB COPY

(b) the Contract Price shall not be adjusted for changes in cost of labour, materials or other matters

the Base Date. Such legislation means any law, order, regulation or by-law having the force of law, including currency restrictions, which affects the Contractor in the performance of his obligations.

If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost resulting from such changes in legislation made after Base Date, the Contractor shall give notice to the Employer's Representative. After receipt of such notice the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 to agree or determine:

(a) any extension of time to which the Contractor is entitled under Sub-Clause 8.3, and

(b) the amount of such Cost, which shall be added to the Contract Price, and shall notify the Contractor, accordingly.

The modified clauses under CPA are as hereunder:

Modified clauses under CPA	
CPA 32 (Replaces Sub-clause 13.1 (b) of GCC)	CPA 37 (Replaces Sub-clause 13.16 of GCC)
13.1 (b) I) Price Variation Formula <u>(a) Prices payable to the Contractor, in accordance with the Contract shall be subject to adjustment during performance of Contract to reflect changes in cost of labour and material components and other inputs to the</u>	13.16.1 <i>The contract shall be governed by the laws for the time being in force in India</i> 13.16.2 <i>“Changes in law” means the occurrence or coming into force of any of the following, at any time after the base date.</i>



Modified clauses under CPA

Works, in accordance with the following general formula for each currency specified:

$$[P_n = a + b(L_n/L_o) + c(S_n/S_o) + d(C_n/C_o) \pm e(F_n/F_o)]$$

“**P_n**” is the adjustment factor to be applied to the estimated value of work done in a month, determined by the ER.

“**b**”, “**c**”, “**d**”, “**e**” are coefficients representing the estimated proportion of each cost element (**labour**, steel, cement and fuel) in the Works or section thereof, as specified in Appendix FT-1 of the Form of Tender in the Instructions to Tenderers (“ITT”)

“**L_n**”, “**S_n**”, “**C_n**” and “**F_n**” are the current cost indices or reference prices for month “n” determined to Item 38 of Appendix FT-1 of the Form of Tender in the ITT, applicable to each cost element.

“**L_o**”, “**S_o**”, “**C_o**” and “**F_o**” are the current cost indices or reference prices for month “n” determined to Item 38 of Appendix FT-1 of the Form of Tender in the ITT, applicable to each cost element.

1. Any new tax which is imposed after the due date of submission of tender and which impacts the performance of the contractor with increased cost or which results in extra financial gains to the contractor due to decreased cost in execution of works; and
2. Change in any law pertaining to work having the above said impact

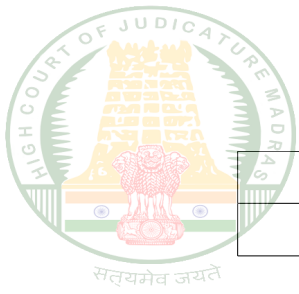
Then such **additional or reduced cost shall be certified** by the employers representative after examining records provided by the contractor and shall be paid by or credited to the employer,

subject to sub-clause 13.16.5 below

13.16.3 Any change in the rate of any existing tax will be considered a change in law , if so related to work.

13.16.4 Notwithstanding the forgoing, **such additional or reduced cost shall not be separately paid or credited, the same shall have been taken into account under any other clause under the contract.**

13.16.5 **If the price variation formula in CPA 32 is adopted by the contractor, then no addition or reduction in cost due to changes in law will be allowed except for changes to i) Customs Duties and ii) Excise Duties , iii) Output TN VAT** which shall be to the employers account , to the extent that it is not covered by the price variation formula.

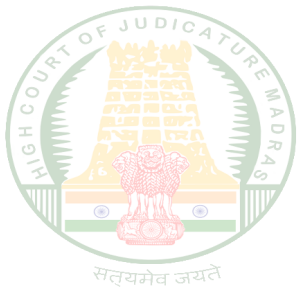


<i>Modified clauses under CPA</i>	

WEB COPY

15.It is not in dispute that CPA 32 was invoked and price adjustment claim was made by the respondents in both the cases. In terms of the amended CPA 37, if CPA 32 is adopted and price variation is claimed by the contractor, then no addition or reduction in costs due to changes in law will be allowed, except in three scenarios, namely i) changes in custom duties ii) changes in excise duties and iii) changes in output TN VAT. As seen from clause 13.1(b) of GCC, the contract price was not subject to adjustment in view of the changes in cost of labour, materials or other matters. However, under CPA 32, the parties agreed for providing price escalation on a particular formula being adopted.

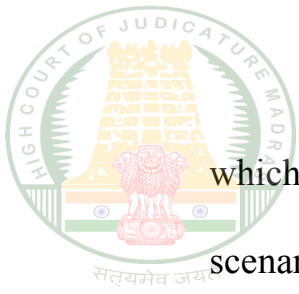
16.It is again not disputed that the respondents claimed substantial monies towards price escalation and the same was also paid by the petitioners. As rightly pointed out by the learned counsel for the petitioners, but for CPA 32, if parties were governed only by the original terms of GCC, then the respondent would not have become entitled to the price escalation amounts also.



WEB COPY

17.The moot question that is required to be dealt with and answered in these original petitions is as to whether the change in law would entitle the respondents to compensation under clause 13.16.5 (CPA 37), when CPA 32 had already been adopted. A plain reading of clause 13.16.5 shows that if the price variation formula in CPA 32 is adopted, then the respondent or the petitioner for that matter would not be entitled to any addition or reduction in the costs on account of changes in law/legislation. However, three exceptions have been carved out, namely customs duty, excise duty and output TN VAT which shall be to the account of the petitioner in these original petitions subject to not being covered by the price variation formula.

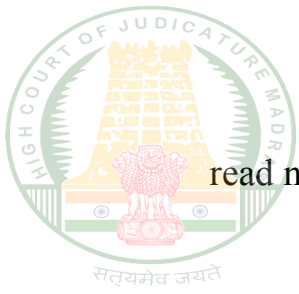
18.It is the case of the petitioners that CPA 37, post agreement replacing sub clause 13.16 of the GCC does not provide for additional costs for change in law and it is subject to application of two scenarios, namely if CPA 32 is applied, payment for change in law would be available only in respect of three events, namely change in customs duties, excise duties and output TN VAT. Secondly, when there is an unrestricted change in law



WEB COPY

which is subject to application of the first scenario, if applied, then second scenario would not be available. The Arbitral Tribunal has found that the modification of clause 13.16 of GCC vide CPA 37 was only to avoid duplication in payment. The Tribunal has failed to see that both CPA 32 and CPA 37 apply in different contexts, namely price escalation and change in law. Clause 13.16.4 takes care of double payment by clearly stating that additional or reduced costs shall not be separately paid if the same has already been taken into account under any other clauses under the contract.

19.A proper reading of CPA 37 would indicate that the respondent would be entitled to additional costs for change in law either under subsection 13.16.5 when CPA 32 has been adopted or under subsection 13.16.2 to 13.16.4 when CPA 32 is not adopted. In fact, clause 13.16.2 referring to changes in law sets out various scenarios, viz., coming into force of any new tax imposed on the due date, impacting the performance of the contractor and increasing the costs, resulting in extra financial gains to the contractor due to decreased costs, then such additional or reduced costs shall have to be certified by the petitioner's representative and shall be paid or credited, subject to clause 13.16.5. Clause 13.16.1 to 13.16.5 have to be

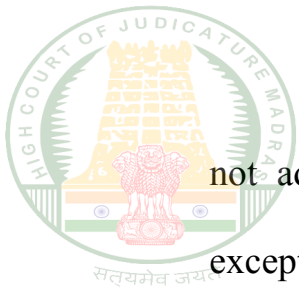


read not only harmoniously but together.

WEB COPY

20. Clause 13.16.2 is clearly subject to 13.16.5. Therefore, when price variation formula in CPA 32 is adopted, then the respondents cannot be entitled to claim any additional costs, unless there is a claim falling under the three exceptions, namely customs duty, excise duty and output TN VAT which also is again subject to the rider that it will be paid to the extent that it is not covered by the price variation formula. Therefore, the employment of the words in 13.16.5 that 'to the extent that it is not covered by the price variation formula' only reinforces that there would be no duplication in payment. The Tribunal has misread the clauses and erroneously proceeded to hold that clause 13.16 of GCC entitles the respondent for price adjustment because of change in legislation after the base date. However, the express modifications made by CPA 37, replacing sub clause 13.16 of GCC have not been factored or looked into by the Tribunal.

21. The omnibus entitlement for price adjustment under clause 13.16 was watered down in CPA 37 to a great extent, entitling the respondents to seek additional costs on account of change in law, only if the respondent has



WEB COPY

not adopted the price variation formula in CPA 32, unless under three exceptions carved out, namely customs duty, excise duty and output TNVAT. Therefore, the only possible interpretation that can be given to 13.16.5 is that if the contractor has already claimed the price variation invoking CPA 32 which provides for a formula, then the contractor cannot claim any additional costs citing change in law, except where the change in law is pertaining to customs duties, excise duties and TNVAT. However, this only possible and right interpretation of the clauses has not been adopted by the Tribunal and the Tribunal erroneously held that irrespective of being compensated under CPA 32, the respondents would still be entitled to claim additional costs due to change in law which is clearly patently illegal and the Tribunal erroneously held that there is a mandatory requirement for the price adjustment on account of change in law which is contrary to the terms and conditions, especially after the modifications ushered in by CPA 37. The interpretation of clause 13.16.5 by the Tribunal is not in consonance with Section 28(3) of the Arbitration and Conciliation Act and if the interpretation given by the Tribunal is accepted, then it would in fact amount to rewriting the contract, especially clause 13.16.5.



WEB COPY

22.Apparently, the Tribunal has not harmoniously read clauses 13.16.2 to 13.16.5 of CPA 37 which replaced 13.16 of the GCC. Therefore, the Tribunal, in my considered opinion, has ignored the vital material terms of contract and has violated the mandate of Section 28(3) of the Arbitration and Conciliation Act.

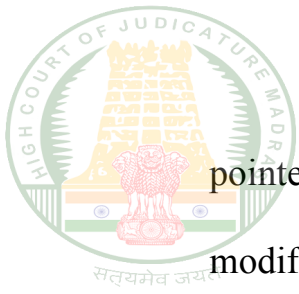
23.Yet another reason for the Tribunal to have taken such a view was clause 13.16.2.2, which according to the Tribunal, if the petitioner's argument was accepted then there would be no meaning to 13.16.2.2. Clause 13.16.2.2 provides for change in law pertaining to work having the above said impact i.e., there must be a change in law which has impacted the performance of the contractor because of increased costs which again has been clearly subjected to sub clause 13.16.5. Therefore, the interpretation arrived at by the Tribunal ignoring the specific clauses and the words employed thereunder has certainly resulted in the patently illegal award, ignoring the very contractual terms between the parties.

24.Even insofar as the Tribunal's reliance on clause 70.8 of the judgment of the Hon'ble Supreme Court in *National Highways Authority of India Vs. ITD Cementation India Limited* reported in (2015) 14 SCC 21, as



rightly pointed out by the learned counsel for the petitioners, clause 70.8 in the contract which is subject matter of the said judgment is not *pari materia* with sub clause 13.16.5 of CPA 37 and therefore, basing the award on the decision of the Hon'ble Supreme Court with this specific reference to clause 70.8 of the said judgment was clearly erroneous.

25. Yet another argument of the learned counsel for the petitioners which finds force is that the respondents have not even pleaded, leave alone proved that the change in law had impacted the performance. The claim statement filed by the respondents does not plead anything with regard to the revision in the minimum wages impacting the performance of the respondents. The petitioner in his statement of defence has specifically pleaded that the revision in minimum wages had no impact on the contract. Though while amending the claim statement on 08.10.2016, the respondents have averred that the amendment to minimum wages had an impact, it is not substantiated or proved by leading any evidence during the arbitral proceedings. The Tribunal has also not considered this aspect and rendered any finding that the increase in minimum wages had impacted the performance of the contract at the hands of the respondent. As rightly



pointed by the learned counsel for the petitioners, clause 13.16.2 as modified by CPA 37 entitles the contractor to additional costs owing to change in law only when such new tax imposed after the base date impacts the performance of the contractor with increased costs. Therefore, even assuming that the respondents were entitled to interpretation of the contract as understood by the Tribunal, even then without pleading and proving any impact and the consequences of such new tax on the contract, the respondent cannot succeed in its claim for additional costs.

26.I have already discussed the ratio laid down by the Hon'ble Supreme Court in *National Highways Authority of India's case*, and no doubt in the decisions relied on by the learned counsel for the respondent, the principles laid down are that the construction of terms of the contract are primarily for the Tribunal to decide and the Court while considering challenge to the award cannot sit in appeal over the findings. However, in all the decisions which have been relied on even by the learned counsel for the respondents, the Courts have always carved out an exception that if the Tribunal construes the contract in a manner that no fair minded or reasonable person would do, then the award is subject to inference under



Section 34 of the Arbitration and Conciliation Act.

WEB COPY

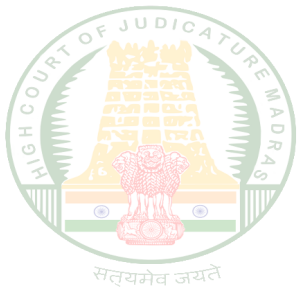
27. Yet another argument placed by the learned counsel for the petitioners is with reference to clause 20.1 of GCC which is extracted hereunder for easy reference.

“Procedure for 20.1 Claims

20.1 If the Contractor intends to claim any additional payment under any Clause of these Conditions or otherwise, the Contractor shall give notice to the Employer's Representative as soon as possible and in any event within 28 days of the start of the event giving rise to the claim.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Employer's Representative. Without admitting the Employer's liability the Employer's Representative shall, on receipt of such notice, inspect such records and may instruct the Contractor to keep further contemporary records. The Contractor shall permit the Employer's Representative to inspect all such records, and shall (if instructed) submit copies to the Employer's Representative.

Within 28 day of such notice, or such other time as may be agreed by the Employer's Representative, the Contractor shall send to the Employer's Representative an account, giving detailed particulars of the amount and basis of the claim. Where the event giving rise to the claim has a continuing effect, such account shall be considered as interim. The Contractor shall then, at such intervals as the Employer's Representative may reasonably require, send further interim accounts giving the accumulated



WEB COPY



amount of the claim and any further particulars. Where interim accounts are sent to the Employer's Representative, the Contractor shall send a final account within 28 days of the end of the effects resulting from the event."

28. Though the learned counsel for the respondents also relied on the decisions of the Hon'ble Supreme Court to fortify his contention that points which are not pressed at the time of arguments would have to be presumed to have been given up, having gone through the entire award, I am unable to countenance the said submission of the learned counsel for the respondents. It has been the consistent contention and argument of the respondent that in view of revised / amended 13.16 by CPA 37, the respondents cannot be entitled to any additional costs when price variation formula was already invoked under CPA 32. Therefore, I am unable to accept the argument of the learned counsel for the respondents that such argument has been taken before this Court for the first time and was not raised before the Arbitral Tribunal. I have already found that sufficient grounds have been raised in the memorandum of grounds for challenge in the Section 34 petition as well.

29. According to the petitioners, if the contractor i.e., the respondent



WEB COPY

intended to make any additional claim under any clause of GCC or otherwise, then the respondent was obligated to give a notice to the petitioners' representative within 28 days of the start of the event giving rise to the claim. It is also made clear that if the contractor fails to comply with the sub clause, then he shall not be entitled to additional payment. It is the specific contention of the petitioners that the Arbitral Tribunal has not adverted its attention to this issue. The amendment to minimum wages was introduced on 18.06.2015 with effect from 16.07.2014. Applying clause 20.1 of the GCC, the respondents ought to have made their claims within 28 days. Admittedly, the same was not done and thereby the last portion of clause 20.1 would kick in, disentitling the respondents from any additional payment.

30. In this regard, reliance has also been placed on the decision of the Hon'ble Supreme Court in *Union of India and Others Vs. Bharat Enterprise* reported 2023 SCC Online SC 369, where the Hon'ble Supreme Court has held that if there is a waiver clause in the contract, then it would be binding on the parties and the Tribunal cannot ignore the same. The ratio laid down by the Hon'ble Supreme Court would squarely apply to the facts of the



WEB COPY

present case. Even assuming the respondents were entitled to make a claim for additional costs owing to revision of the minimum wages by the legislature, then as required under clause 20.1 of GCC, the respondents ought to have notified the petitioner within 28 days, at least from 16.07.2014. However, the Tribunal contrary to the above clause, has observed in the award that the respondents had rightly notified the claim vide letter dated 19.09.2014, which admittedly is clearly beyond 28 days even from 16.07.2014. Therefore, even on this score the respondents could not have become entitled to any additional costs.

31. In view of the above and applying the ratio laid down by the Hon'ble Supreme Court in *Delhi Metro Rail Corporation Limited Vs. Delhi Airport Metro Express Private Limited's case*, when the interpretation of contract by the Tribunal has been unreasonable and not even a possible view is taken, then the award has to be held to be perverse. Further, the interpretation as provided by the Tribunal is not only unreasonable but also would frustrate the very clause 13.16.5 and therefore, the interpretation which is neither possible nor plausible cannot be sustained by this Court.

32. Even in *Ssangyong Engineering and Construction Company*



WEB COPY

Limited's case, the Hon'ble Supreme Court held that the true import of Section 28(3) of the Arbitration and Conciliation Act is that when the Arbitrator's view is not even a possible view to take and the Arbitrator wanders outside the contract and deals with matters not allotted to him, the Arbitrator commits an error of jurisdiction which is a ground for challenge under Section 34(2)-A. I have already found that the interpretation of 13.16.2 to 13.16.5 is not even a possible view, especially when such view would virtually amount to rewriting the contract terms itself.

33. Therefore, for all the above grounds, I find that the petitioners have indeed made out a case for interference with the award of the Arbitral Tribunal.

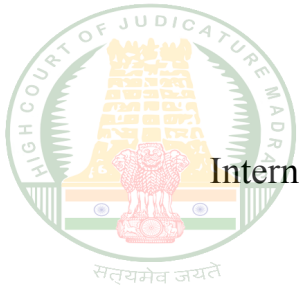
34. In fine, these Original Petitions are allowed and the award of the Arbitral Tribunal dated 03.06.2017 challenged in O.P.No.530 of 2017 and the award dated 28.04.2017 challenged in O.P.No.531 of 2017 are hereby set aside. However, there shall be no order as to costs.

31.01.2025

ata

Index : Yes / No

27/28



Internet : Yes / No



WEB COPY

P.B.BALAJI, J.,

ata

O.P.Nos.530 & 531 of 2017

31.01.2025