2024:DHC:3452-DB

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 01.05.2024

\+ **FAO(OS) (COMM) 348/2019 & CM APPL. 16282/2019**

M/S JAIPRAKASH ASSOCIATES LIMITED ..... Appellant

versus

M/S IRCON INTERNATIONAL LIMITED ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Lovkesh Sawhney, Senior Advocate with Mr Rohit Kumar, Advocate

For the Respondent : Mr Dinesh Agnani, Senior Advocate with Ms Leena Tuteja and Ms Ishita Kadyan, Advocates

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MS JUSTICE TARA VITASTA GANJU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant – M/s Jaiprakash Associates Limited (hereafter *JAL*) has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgement dated 26.02.2019 (hereafter *the impugned judgment*) rendered by the learned Single Judge in O.M.P. No. 403/2010 titled *IRCON International Limited v. M/s Jaiprakash Associates Limited*. The respondent (hereafter *IRCON*) had filed the

aforesaid petition [O.M.P. No. 403/2010] under Section 34 of the A&C Act seeking the setting aside of an Arbitral Award dated 15.04.2010 (hereafter *the impugned award*) rendered by an Arbitral Tribunal comprising of a Sole Arbitrator.

2. The Arbitral Tribunal awarded an aggregate sum of ₹16.97 crores as reasonable expenditure incurred on "mobilization etc." The Arbitral Tribunal further awarded a simple interest at the rate of 12% per annum from the date of filing of the Statement of Claim till the date of impugned award quantified at ₹4.85 crores. In addition, the Arbitral Tribunal also awarded post award interest at the rate of 12% per annum on the awarded amount (₹21.82 crores) from the date of the impugned award till the date of payment. The counterclaims raised by IRCON were rejected. In proceedings under Section 34 of the A&C Act, the learned Single Judge modified the impugned award. The learned Single Judge deleted three items of unrealized costs accepted by the Arbitral Tribunal, being Maintenance of bank Guarantees amounting to ₹0.71 crores; Maintenance of Insurance policies of ₹0.03 crores; and interest liability on advance and corporate expenses amounting to ₹2.49 crores, on the ground that the same could not be considered as mobilization expenditure. Further, the learned Single Judge also rejected the claim for pre-award interest and reduced the post-award interest to 6% per annum as against 12% per annum awarded by the Arbitral Tribunal. The operative part of the impugned judgment records that the petition preferred by IRCON is disposed of "*by awarding a sum of Rs. 12.99*

crores to the contractor with interest @ 6% per annum from the date of the award i.e. 15th April, 2020 till date".

3. JAL contested the impugned judgment on several grounds including (a) that the learned Single Judge had erred in interfering with the impugned award on the ground that the items of financial costs were not covered as expenses relating to "mobilization etc.", which were payable in terms of the mutual agreement between the parties; (b) that the learned Single Judge had erred in modifying the impugned award by deleting the award on *pendente lite* interest; (c) that the learned Single Judge had erred in modifying the impugned award by reducing the rate of post-award interest; and (d) that the learned Single Judge had erroneously computed the awarded amount payable at ₹12.99 crores instead of ₹13.33 crores.

4. The principal controversy to be addressed is whether the impugned award could be interfered with to the aforesaid extent under Section 34 of the A&C Act.

FACTUAL CONTEXT

5. IRCON invited tenders for "construction of civil works including tunnels, bridges, earthwork etc. in Zone III (KM 134 to KM 142) of Laole Qazigund Section of Udhampur-Srinagar-Baramulla New B.G. Railway Line Project" (hereafter referred to as *the Project*). Pursuant to the aforesaid invitation, JAL (then known as Jaiprakash Industries Ltd.) furnished its bid on 21.12.2003, which was subsequently revised after

negotiations on 22.01.2004. IRCON issued a Letter of Acceptance and awarded the contract for executing the Project to JAL. Thereafter, the parties signed a formal agreement on 15.03.2004 (hereafter *the Agreement*). The Agreement was an Item Rate Contract entailing execution of different items of work required for completing the Project at the agreed rates. The contract value as on the base date was ₹168.46 crores.

6. The scope of work under the Agreement included construction of five tunnels, eleven bridges, culverts, earthworks etc. IRCON granted mobilization advance to JAL in terms of the General Conditions of Contract (hereafter *GCC*). Additionally, IRCON also extended a small amount towards machinery advance.

7. There was considerable delay in the progress of the works. Admittedly, JAL could only execute work worth ₹26.44 crores till the stipulated date of completion (that is, by 05.02.2007). JAL claimed that the delay was caused due to reasons attributable to IRCON including due to non-availability of work sites, non-availability of construction drawings in advance, inadequate security cover at site, amongst other reasons. Admittedly, correspondence was exchanged between the parties on several matters including the various hinderances and the reasons for the slow progress of the work.

8. On 12.01.2007, IRCON issued a seven days prior notice under Clause 89 of the GCC which entitled IRCON to terminate the Agreement owing to the default of the Contractor (JAL). In its letter,

IRCON, *inter alia*, stated that there was lack of earnestness on the part of JAL to complete the Project and to adhere to the construction programme. IRCON also alleged that JAL had not lived up to its commitments made at several meetings held between the officials / representatives of the parties.

9. JAL responded to the said notice by a letter dated 18.01.2007 enclosing therewith a note setting out the detailed reasons for the slow progress. It claimed that the reasons for delay as set out were not attributable to JAL and an extension of at least 840 (eight hundred and forty) days without levy of penalty was justified. JAL claimed that its tender was based on the Project being executed in accordance with the Construction Schedule, which formed part of the Agreement and the work sites as well as the Construction Drawings being available to JAL to match the Construction Programme. It claimed that execution of the Project was planned on the basis of round-the-clock operation but neither the sites nor Construction Drawings were made available to match the Construction Programme. Resultantly, the rates quoted by JAL were rendered "totally inadequate" and had resulted in heavy loss to JAL. JAL claimed that IRCON was required to compensate for the losses incurred by it. JAL also claimed that the escalation formula provided in the Agreement did not neutralize the increase in costs due to increase in price of various inputs such as cement, steel, HSD oil and labour.

10. JAL claimed that in the past forty years of its operation, it had successfully completed all works awarded to it and was keen to complete the contract provided that the time for doing so was extended by at least 840 days without penalty and subject to various conditions including providing encumbrance free land for all components of the work before 05.02.2007; ensuring adequate security cover to enable the work to be carried out in night shift also; ensuring that there are no militancy incidents; ensuring with the help of local administration that there is no incidence of stoppage of work or hinderance of work by local villagers; revision in the rates of various items of work; and revision of the escalation formula to neutralize financial impact due to increase in prices of various inputs.

11. IRCON responded by its letter dated 02.02.2007. It flagged two main issues, which were not in its control and were required to be resolved with Northern Railway. The issues being providing encumbrance free land and ensuring adequate security cover at the site. In this regard, IRCON stated that acquisition of land before 05.02.2007 was not possible due to various reasons, which were not in its control. Similarly, it was also not possible to provide the security arrangement as requested. The said questions involved consultation with Northern Railway as the Project was being executed for Northern Railway. IRCON stated that examination of the issues raised by JAL would take time and since the contract period was expiring, it was being extended by three months "*to keep the Contract alive and various options open*".

12. After examining the issues raised by JAL in its letter dated 18.01.2007, IRCON issued another letter dated 22.02.2007 stating that it was not possible to agree to the various conditions put forth by JAL. However, it acknowledged that JAL was entitled to extension of time for reasons, which were not attributable to JAL including any delay in acquisition of land and the prevailing security situation. IRCON proposed extension of time of twenty months (600 days) beyond the first extended date of 05.05.2007 on the existing terms and conditions of the Agreement and without levy of any liquidated damages. IRCON also proposed that in case JAL did not agree to the above extension, the contract could be foreclosed with immediate effect subject to the conditions that the unrecovered amount of advance would be refunded within a week of closing the contract. Joint measurement of the work would be carried out within a week and payment would be released to JAL. JAL would undertake to provide free access to the site to IRCON or any other agency appointed by IRCON for executing the balance work and would vacate the site within a reasonable time but prior to appointment of the new agency. And, the existing contract would be deemed to have been determined due to non-fulfillment of reciprocal promises without risk and costs but with a proviso of resolving the disputes regarding claims or counterclaims through the mechanism of arbitration provided in the Agreement.

13. IRCON requested JAL to give its acceptance to either of the two options as stated in the said letter.

14. JAL responded to the said letter on 01.03.2007. It did not agree to continue performing the Agreement on the same terms and conditions within the extended time of 600 days. However, it agreed to foreclose the contract *albeit* subject to certain conditions including that JAL be compensated for idling and under utilization of resources, the details of which it would provide subsequently. The payments made by IRCON would be adjusted against the compensation as claimed, and IRCON could make the balance payment within an agreed period. JAL also suggested that in case the parties were not able to arrive at an agreement with regard to the compensation, the matter would be referred to arbitration by a sole arbitrator to be mutually appointed by the parties or by a panel of three arbitrators, one to be appointed by each party and the third to be appointed by the nominated arbitrators.

15. In furtherance to the aforesaid correspondence, IRCON sent a letter dated 29.03.2007 indicating that the competent authority of IRCON had approved foreclosure of the Agreement with the following stipulations against the conditions as proposed by JAL in its letter dated 01.03.2007. The said letter included a tabular statement setting out the conditions as proposed by JAL and IRCON's counter proposal to the said conditions. The said tabular statement is set out below:

"SN	As proposed by JAL	IRCON's stand
1	IRCON does not insist upon immediate return of advance made by IRCON to JAL, which could not be adjusted/ recovered so far because of inadequate	JAL will work out the expenditure incurred by them on account of mobilization etc. and submit a reasonable claim within a period of 2 months from the

	progress of work for reasons beyond JAL's control despite substantial investment in deployment of resources and expenditure for execution of works. JAL is preparing details for the amount it considers to be its entitlement & towards compensation for idling/ underutilization of resources which will be submitted to you shortly. In case JAL and IRCON come to an agreement to the said compensation, the outstanding advance payment could be adjusted against it and the balance amount payable on either side could be squared up within an agreed period. However, in case no agreement is reached between IRCON and JAL on the aforesaid compensation, the matter could be referred to Arbitration under the Arbitration to be mutually agreed by JAL and IRCON or by 3 Arbitrators. In such situation (i.e. grant of Arbitrator) JAL will be agreeable to keep in force the BG for the outstanding advance payment till the matter is settled by Arbitrator.	date of foreclosure of the contract. The claims submitted by JJAL will be examined along with the counter claims of IRCON within 2 months from the date of submission of the claims and if the same are not resolved amicably, the dispute shall be referred to Arbitration as requested by JAL. The procedure for appointment of Arbitrator shall be as per Clause 90 of GCC. The request of JAL for not depositing the un-adjusted / un-recovered mobilization advances at this stage and instead covering it by a suitable BG including the interest amount thereon is agreed to. JAL will however submit the fresh BG or amend the existing BG suitably to cover the outstanding mobilization advances along with the interest thereon as per the details given in Annex-I and keep it valid alongwith interest accruable for the extended period till such time the Arbitration is concluded and the Arbitration award is published. The settlement of account in respect of Mobilization Advance will be carried out on publication of the award. No further extension of BGs will be allowed on publication of award by the Arbitrator. IRCON will be at liberty to encash the BG, if on publication of the award, the amount of unsettled / unadjusted

		advances is not deposited by JAL. Further IRCON will release the BGs submitted by JAL. If no amount is payable by JAL to IRCON as a result of award by the Arbitrators.
2	The work already done by JAL shall be jointly measured for finalization of payments including payment for extra items before the foreclosure of the contract.	The work already done by JAL shall be jointly measured for finalization of payment within two months of issue of this letter.
3	Jal shall furnish Performance Guarantee for an amount equal to 3% + 5% against retention money = 8% of the value of work done by JAL. BG shall be valid for a period of 12 months from the date of foreclosure of the contract OR date on which IRCON or any other agency commences the work whichever is earlier. JAL's existing Performance Guarantee and the Retention money available with IRCON shall be released by IRCON to JAL before foreclosure of the contract. The foreclosure of the contract will be deemed to be with the mutual consent of the parties without levy of any liquidated damages or claim by IRCON.	Accepted. Partly accepted. PBG shall be valid for a period of 12 months from the date of foreclosure of the contract. Existing PBG will be released after receipt of new PBG and fresh / additional BG for mobilization advance. The foreclosure of the contract will be deemed to be with the mutual consent of both the parties without levy of any liquidated damages and any risk & cost liability on JAL on account of getting the balance work executed by IRCON.

		IRCON however reserves its right to submit counter claims before the Arbitrator and also for mutual settlement of compensation stated above under item 1.
4	JAL will allow free access to the site of work to IRCON or any agency appointed by IRCON for carrying out remnant of work in a manner decided by IRCON without any objection by JAL. JAL will vacate the work site within a reasonable time after the foreclosure of the contract.	Noted JAL will vacate the site within one month of issue of this letter or by the time the new agency is fixed whichever is earlier."

16. JAL was requested to indicate its expectations to IRCON's counter proposal as set out in the tabular statement in order to take further necessary action for signing the supplementary agreement for foreclosure of the contract (hereafter *the Supplementary Agreement*). The letter further stated that till the Supplementary Agreement is signed, the said letter "*will be taken as a formal agreement and the date of foreclosure, for all purposes, will be taken as a date of issue of the letter*".

17. JAL accepted the counter proposal and signed the letter dated 29.03.2007 as a token of its acceptance and forwarded the same to IRCON under cover of its letter dated 30.03.2007.

18. Thereafter, JAL submitted a letter dated 29.05.2007 claiming an aggregate amount of ₹35.71 crores on account of delays not attributable to JAL.

19. IRCON rejected JAL's claim by its letter dated 23.07.2007 claiming that the same was unreasonable and also suggested that the parties refer the disputes to arbitration.

20. On 12.09.2007, JAL sought reference of the disputes to arbitration and on 03.10.2007, the Managing Director of IRCON appointed the learned Sole Arbitrator to adjudicate the disputes between the parties.

THE IMPUGNED AWARD

21. JAL filed its Statement of Claim before the Arbitral Tribunal raising several claims including a claim for a sum of ₹35.71 crores, which was modified to ₹35.33 crores during the course of the proceedings in conformity with the figures that were jointly verified by the committee (the Joint Committee) constituted by the Arbitral Tribunal. The other claims made by JAL were rejected and the examination was confined to the claim for expenditure incurred for executing the work relating to the Project. JAL claimed the entire expenditure incurred by it as reduced by an amount equivalent to the expenditure that could be apportioned to the work executed by it. The premise being that the proportion of the expenditure, which was fruitfully utilized for execution of the Project was assumed to be

covered against the payments made for the work done, and the balance was unrealized. JAL's claim for unrealized expenditure was based on the rationale that the expenditure incurred by it in respect of the Project was required to be apportioned over the value of the Project. Since part of the Project had been executed, the expenditure commensurate with the said part was recovered and was required to be reduced. Since work worth ₹25.64 crores was executed, the expenditure in proportion of the work done was reduced from the total expenditure.

22. IRCON sought to resist the claims, principally, on the ground that JAL was not entitled to claim any expenditure as the Agreement had been terminated under Clause 89 of the GCC, on account of defaults on the part of JAL. It claimed that the progress of the works was extremely slow on account of various reasons attributable to JAL including, not engaging efficient and competent supervisory staff; not deploying manpower; not deploying the requisite plant and machinery, non-setting up of repair workshop for plant and machinery and arranging sufficient spares. In addition, IRCON also claimed that the Agreement was liable to be determined as JAL had engaged three sub-contractors (M/s Bahu Fort Constructions Pvt. Ltd., M/s Bumi Developers (India) Pvt. Ltd., and M/s Vethesta Constructions Company Ltd.) without IRCON's permission. IRCON also contested JAL's quantification of the expenses claim.

23. IRCON also raised the following five counterclaims: Counter Claim no.1: Cost of rectification of pier of Bridge No. 121 – ₹35 lakh;

Counter Claim no.2: Cost of rectification of misaligned ribs – ₹22.50 lakh; Counter Claim no.3: Production loss due to slow progress – ₹2 crores; Counter Claim no.4: Amount of machinery advance– ₹1,28,32,757/-; and Counter Claim no.5: Cost of staff – ₹2.58 crores.

24. Counter Claim no. 4 regarding the amount of machinery advance was withdrawn during the course of the proceedings.

25. JAL countered IRCON's contention that the Agreement was terminated under Clause 89 of the GCC. It claimed that the letter dated 29.03.2007 embodied a separate agreement, which was required to be performed by parties on its own terms. It claimed that the role of the Arbitral Tribunal was confined to determining the reasonable amount payable to JAL and the counter claims raised by IRCON. JAL claimed that the letter dated 29.03.2007 recorded all terms of a Supplementary Agreement, which also included reference to arbitration.

26. The Arbitral Tribunal examined the rival contentions and rejected IRCON's stand that the Contract was terminated in terms of Clause 89 of the GCC. The Arbitral Tribunal held that IRCON's letter dated 29.03.2007 as accepted by JAL on 30.03.2007 constituted a 'Supplementary Agreement' as expressly provided in the said letter. The Arbitral Tribunal also concluded from the contents of the correspondence that IRCON, at the material time, was in agreement with JAL's contention that the delays in execution of the Project were for the reasons not attributable to JAL. IRCON had agreed to an

extension of 600 days without levy of liquidated damages expressly acknowledging that the delays were not attributable to JAL.

27. The Arbitral Tribunal also concluded that the foreclosure of the Agreement was by mutual consent of the parties and on the terms and conditions as set out in IRCON's letter dated 29.03.2007, which was accepted by JAL on 30.03.2007. The Arbitral Tribunal also rejected IRCON's contention (which was raised at the initial stage of the arbitral proceedings) that the foreclosure of the Agreement was in terms of Clause 88 of the GCC – which entitled IRCON to terminate the Agreement if, in its opinion, the cessation of work was necessary – principally for two reasons. First, that none of the correspondence referred to the said clause. And second, it was in variance with IRCON's stand that the Agreement was determined under Clause 89 of the GCC owing to the defaults of JAL.

28. The Arbitral Tribunal also rejected IRCON's stand that JAL had breached the terms of the Agreement by engaging three sub-contractors. The Arbitral Tribunal found that there was ample communication between the parties referring to the said sub-contractors, which indicated that IRCON was fully aware of engagement of sub-contractors. The Arbitral Tribunal noted that IRCON had counter-signed the certificate in respect of two of the sub-contractors. Additionally, IRCON had also issued a communication complaining regarding the performance of work by sub-contractors. Thus, establishing that IRCON was fully aware that JAL had engaged sub-

contractors, but had taken no steps for issuing any notice of default or treating such engagement as a breach of the Agreement on the part of JAL.

29. The Arbitral Tribunal confined its role to determining the reasonable amount in respect of the claims made by JAL and the counterclaims made by IRCON.

30. Insofar as the quantum of claim is concerned, JAL was willing to produce all vouchers and documents to support its claim for incurring the expenditure as claimed by it.

31. For the purposes of verification, the Arbitral Tribunal constituted a Joint Committee comprising of two members of JAL and two representatives of IRCON. The Joint Committee was required to verify the details of expenditure submitted by JAL and scrutinize the vouchers in support of the expenditure incurred by JAL. The report furnished by the Joint Committee indicates that its representatives met at the office of JAL on several dates and verified the records and vouchers for the total expenditure incurred under various heads on "mobilization etc." as per the Statement of Claim.

32. JAL claimed that it had incurred a total expenditure of ₹45,84,50,000/- on various heads. The Joint Committee after verification found certain typographical discrepancies. It also found that JAL had included expenditure incurred towards donation and penalties. After rectifying the discrepancies and removing the expenditure on

account of donation and penalties, the Joint Committee verified that JAL had incurred aggregating expenditure of ₹45.50 crores "*on mobilization etc*." relating to the Project. The details of the expenditure as verified by the Joint Committee and as set out in the Report are reproduced below:

"Sr. No. Heads — Amounts (Rs. Crores)

1.	Manpower	15.26
2.	Equipment (Owning cost for the total deployment period)	11.07
3.	Camp Construction	3.93
4.	Access Roads	3.03
5.	Electrical Installation	0.96
6.	Water Supply System	0.64
7.	Communication System	0.56
8.	Land lease and Compensation	0.86
9.	Rehandling of Steel from Nachlana Bridge to worksite	0.34
10.	Transportation of heavy equipment in knock down condition	0.11
11.	Civil works for construction Plants	0.50
12.	Maintenance of Bank Guarantees	1.81
13.	Maintenance of Insurance Policies	0.06
14.	Interest liability on Advance	6.37
		45.50 crore"

33. It is material to note that the report of Joint Committee was signed by all four members including the two representatives of IRCON.

34. The Arbitral Tribunal accepted the said report, however, reduced JAL's claim by accepting IRCON's statement to the effect that it was possible for JAL to complete work of a value of ₹41.99 crores (₹40.75

crores for tunneling work and ₹1.24 crores work for bridges). The Arbitral Tribunal proceeded to appropriate the expenditure as verified by the Joint Committee, over the cost of total work and the work that could possibly be done as against the work actually done (which was valued at ₹25.64 crores). Thus, the Arbitral Tribunal artificially increased the value of expenditure, which would have been realized if work valued at ₹41.99 crores (which according to IRCON could be executed) was done as against the work valued at ₹25.64 crores that was, in fact, done. The Arbitral Tribunal, thus, determined the unrealized amount of expenditure by reducing the verified expenditure by a figure of amount realized; which also factored in the amount that JAL could have realized. The realized amount of expenditure was determined by increasing expenditure chargeable to the Project by a factor of the work already done over work which ought to have been done. The said formula for calculating the claims, as stated in the impugned award is set out below:

> "(i) Realized amount = $\frac{\text{Expenditure chargeable to contract}}{41.99} \times 25.64$
>
> (ii) Claim = Unrealized amount = Expenditure chargeable to contract – realized amount"

35. Based on the aforesaid formula, the Arbitral Tribunal determined that JAL was entitled to an amount of ₹16.97 crores on account of expenditure incurred on "mobilization etc.".

36. JAL had also claimed 10% profits as the same were included in the rate of items but the said claim was rejected by the Arbitral Tribunal

as JAL's claim was required to be confined to expenditure on "mobilization etc.". However, the Arbitral Tribunal accepted JAL's claim for an additional 2.5% on account of corporate expenses as the said expenditure was considered reasonable. IRCON's contention that the said claim for corporate expenses was not admissible as the contract had been determined under Clause 89 of the GCC, was rejected.

37. The Arbitral Tribunal also held that the Supplementary Agreement was similar in some respects to determination of the Agreement under Clause 88 of the GCC and therefore, being guided by Clause 88(3) of the GCC, rejected JAL's claim for 10% of the profit.

38. JAL had also claimed interest at the rate of 12% per annum for the period from 29.05.2007 to the date of reference to arbitration being 30.10.2007; interest at the rate of 12% per annum compounded on monthly basis on the amounts as awarded including the pre-reference interest; and interest at the rate of 18% per annum on the awarded amounts plus pre-award interest under Section 31(7)(b) of the A&C Act; and costs for arbitration noting that the above claims had not been contested by IRCON.

39. The Arbitral Tribunal did not accept JAL's claim for a pre-reference interest and interest prior to filing of the Statement of Claim (which was filed on 28.11.2007). However, the Arbitral Tribunal awarded *pendente lite* interest at the rate of 12 % per annum from the date of filing of the Statement of Claim (28.11.2007) till the date of the impugned award (15.04.2010) computed at ₹4.85 crores. Additionally,

the Arbitral Tribunal also awarded post-award interest at the rate of 12% per annum on the total awarded amount including *pendente lite* interest (from the date of the impugned award till the date of payment). The Arbitral Tribunal rejected the counter claims and directed that costs of arbitration be borne by the parties in terms of Clause 90 of the GCC.

PROCEEDINGS UNDER SECTION 34 OF THE A&C ACT

40. IRCON applied for setting aside of the impugned award on several grounds. First, it claimed that the Arbitral Tribunal had erred in proceeding on the basis that no notice under Clause 89 of the GCC has been issued. It claimed that JAL had not disputed that the termination of the Agreement was under Clause 88 of the GCC. Second, it stated that there were certain inconsistencies in the impugned award. The Arbitral Tribunal had rejected the contention that the Agreement was terminated under Clause 88 of the GCC but also noted that the Supplementary Agreement had a lot of similarities with determination of Agreement under Clause 88 of the GCC. Third, it submitted that the amounts awarded were without any basis and in violation of the provisions of the Agreement. Fourth, it submitted that JAL had stated that it was preparing details in respect of the amount that it considers to be entitled to towards compensation for idling / under utilization of resources and had proposed that the same be paid by IRCON. However, the parties had accepted that "*JAL will work out the expenditure incurred by them on account of mobilization etc. and submit a reasonable claim within a period*…" It was submitted that the claims

made by it were not in conformity with the Agreement. IRCON claimed that the Arbitral Tribunal had erred in concluding that its role was only to arrive at a reasonable amount of claim submitted by JAL and to adjudicate the counterclaims of IRCON. Fifth, it stated that the Arbitral Tribunal had erred in concluding that the Supplementary Agreement was required to be read in context of Clause 57 of the GCC and Section 62 of the Contract Act, 1872. And lastly, that the amounts awarded by the Arbitral Tribunal were based only on presumption and on the basis that IRCON was responsible for the delays. IRCON also raised the grounds for contesting the rejection of its counterclaims.

41. The learned Single Judge found that the findings of the Arbitral Tribunal to the effect that (a) the foreclosure document (that is, IRCON's letter dated 29.03.2007) was a binding contract, and (b) the only issue for determination was the amount of expenditure that could be considered reasonable for being reimbursed, were justified. The learned Single Judge held that the said conclusion of the Arbitral Tribunal warranted no interference by the Court. The learned Single Judge accepted that all that was required to be considered by the Arbitral Tribunal was whether the amounts awarded were expenditure incurred by JAL on account of "mobilization etc." and "whether the same is reasonable".

42. The learned Single Judge did not accept IRCON's contention that the amounts awarded were without any basis. The Arbitral Tribunal had based its award on the report submitted by the Joint Committee and

the learned Single Judge found no fault with the same. However, the learned Single Judge faulted the Arbitral Tribunal for reimbursing the amounts under the heads of Maintenance of bank Guarantees; Maintenance of Insurance policies; Interest liability on Advances; and, Corporate Expenses. The learned Single Judge thus, confined the impugned award to a sum of ₹12.99 crores along with interest at the rate of 6% per annum from the date of the impugned award till the date of the impugned judgement. The relevant extract of the impugned judgment is set out below:

> "28. In order to determine the expenditure incurred by the contractor, the Ld. Arbitrator appointed a joint committee to verify the total expenditure incurred. The said committee confirmed the total expenditure as being Rs. 45.50 crores. The Ld. Arbitrator applies a formula to arrive at the reasonable expenditure to be reimbursed. He does this by applying the formula used by IRCON to show the cost of work that ought to have been done by the contractor. It is after applying this formula that the Arbitrator arrives at a figure of Rs. 16.95 crores as being the reasonable expenditure. The amounts determined are tabulated by the Ld. Arbitrator as under:

"Sr. No.	Heads of Expenditure	Total Expenditure	Expenditure chargeable to contract	Expenditure realized through the value of work	Unrealized portion of expenditure = Acceptable claims
1.	Manpower	15.26	15.26	9.31	5.95
2.	Equipment	40.33	11.07	6.75	4.32
3.	Camp Construction	3.93	1.72	1.05	0.67
4.	Access Roads	3.03	3.03	1.85	1.18
5.	Electrical installation	0.96	0.24	0.15	0.09

6.	Water Supply System	0.64	0.19	0.11	0.08
7.	Communication System	0.56	0.12	0.07	0.05
8.	Land lease and Compensation	0.86	0.86	0.52	0.34
9.	Re-handling of Steel from Nachnala bridge to work site	0.34	0.34	0.00	0.34
10.	Transportation of heavy equipment in knocked down condition	0.11	0.11	0.00	0.11
11.	Civil works for Construction Plants	0.50	0.50	0.30	0.20
12.	Maintenance of bank Guarantees	3.86	1.81	1.10	0.71
13.	Maintenance of Insurance policies	0.06	0.06	0.03	0.03
14.	Interest liability on Advances	6.37	6.37	3.88	2.49
		76.81	**41.68**	**25.12**	**16.56**
	Add 2.5% Corporate expenses which are considered reasonable				*0.41*
	Total				**16.97**

The conclusions given by the Arbitrator are based on the table extracted in the Report of the Committee and include various heads such as interest liability on advances, corporate expenses etc. The

question is whether all these amounts are liable to be awarded in favour of the contractor.

xx xx xxxx xxxx

30. The remaining amounts towards items 1 to 11 in the above table are awarded in favour of the contractor i.e. a sum of Rs. 12.99 crores. The loss of profits claim has been rightly rejected by the Arbitrator.

31. Thus, the O.M.P. is disposed of by awarding a sum of Rs. 12.99 crores to the contractor with interest @ 6% per annum from the date of award i.e. 15th April, 2010 till date. Parties are directed to work out the adjustments after taking into consideration the mobilization advance, equipment advance, and the interest thereon, payable by the contractor to IRCON. The exercise be completed within a period of 8 weeks from today. The Bank Guarantee of the contractor which is valid till 31st March 2019, may be encashed by IRCON and the adjustment of the accounts may be worked out accordingly within a period of four weeks."

REASONS & CONCLUSION

43. At the outset, it is necessary to note that IRCON has not appealed the impugned judgment. Thus, to the extent that IRCON's challenge was rejected by the learned Single Judge, the same is final. It is material to note that apart from the grounds as set out in the petition filed under Section 34 of the A&C Act, the learned counsel appearing for IRCON had also raised other objections before the learned Single Judge including that the calculations made by the Arbitral Tribunal were based on guess work and were not based on any evidence. None of the said

grounds were accepted by the learned Single Judge. The learned Single Judge has not faulted the Arbitral Tribunal for determining the unrealized expenditure by calculating the expenditure covered in respect of the work done by proportionately increasing the same to the quantum of work, which was possible to be done during the given period. Thus, the principal question that remains to be examined in this appeal is whether the decision of the Arbitral Tribunal to include expenditure on account of Maintenance of bank Guarantees; Maintenance of Insurance policies and Interest liability on Advances as payable under the foreclosure/Supplementary Agreement warranted any interference in proceedings under Section 34 of the A&C Act. As noted above, the learned Single Judge has crystalized the scope of examination to considering whether the expenditure on account of "mobilization etc." was reasonable. However, according to the learned Single Judge, the expenditure incurred on account of Maintenance of bank Guarantees; Maintenance of Insurance policies; Interest liability on Advances and Corporate Expenses could not constitute expenditure towards "mobilization etc." and therefore, the impugned award was confined to amounts awarded under other heads and quantified at ₹12.99 crores.

44. It is relevant to note that present arbitral proceedings commenced in the year 2007, that is prior to enactment of the Arbitration and Conciliation (Amendment) Act, 2015 coming into force. Thus, an arbitral award could be set aside only on the grounds as set out in Section 34 (2) of the A&C Act. The other grounds as set out in Section

34(2) of the A&C Act are inapplicable and therefore, the examination is required to be confined to determining whether the impugned award is in conflict of the public policy of India[1]

45. Explanation to Section 34(2) of the A&C Act is relevant as it clarifies the scope of an arbitral award being in conflict with the public policy of India. The said explanation is set out below:

> "Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—
>
> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
>
> (ii) it is in contravention with the fundamental policy of Indian law; or
>
> (iii) it is in conflict with the most basic notions of morality or justice.
>
> Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."[2]

46. There is no adjudication to the effect that the impugned award is affected by fraud or corruption or is in conflict with the most basic notions of morality and justice. It is also settled law that the question whether the arbitral award falls foul of the fundamental policy of Indian law would not entail a review on the merits of the dispute. This was

[1] Section 34(2)(b)(ii) of the Arbitration & Conciliation Act, 1996
[2] substituted by the Arbitration and Conciliation (Amendment) Act, 2015

expressly provided by substitution of the Explanation under Section 34(2) of the A&C Act and introducing Explanation 2 by the Arbitration and Conciliation (Amendment) Act, 2015. However, even prior to the substitution of the Explanation to Section 34(2) of the A&C Act, the Courts had in various decisions explained that the scope of interference on the ground of conflict with public policy was restricted and did not entail review on the merits of the disputes.

47. In view of the above, the key issue required to be examined is whether the inclusion of financial costs (Maintenance of bank Guarantees; Maintenance of Insurance policies and Interest liability on Advances) and portion of the Corporate Expenses, could be included as expenditure towards "mobilization etc.".

48. Expenditure towards mobilization would include all expenditure incurred for raising resources for execution of work at the site. It is not confined to expenditure incurred on manpower and equipment, and for preparation of the site alone. JAL was provided mobilization advance as well as advance against equipment and against bank guarantees. The amount received as advance was utilized for raising resources for executing the work relating to the Project. Similarly, the interest liability on advance incurred by JAL towards financial costs are a part of the expenditure incurred for garnering the necessary resources for executing the Project. The premium paid on insurance policies to cover risks in respect of resources raised is also an expenditure relating to the resources raised. We are unable to accept that the view of the Arbitral

Tribunal to include the aforesaid expenditure as covered within the expression "expenditure incurred on account of mobilization etc." is not a plausible view. The use of the expression "etc." also indicates that the intent of the parties was not to confine the expenditure to only the assets mobilized but to consider the expenditure, which in a wider sense, is incurred for mobilization of resources.

49. The learned Single Judge has proceeded on the assumption that financial expenditure is not a part of mobilization and has no nexus with mobilization of resources at site. However, there is no discussion in this regard. There was also no specific ground raised by IRCON that the expenditure under the heads of Maintenance of bank Guarantees, Interest on advances and Insurance Policies are not part of mobilization. It does not appear that any such specific contention was advanced on behalf of IRCON as the same does not find mention either in the impugned judgement or in the written submissions furnished by IRCON. However, that is not material considering that we do not find the view of the Arbitral Tribunal to include such expenses as attributable to mobilization resources for execution of the Project, as one that no reasonable person would accept. That being the standard under Section 34(2)(b)(ii) of the A&C Act, the decision of the learned Single Judge to reduce the amount awarded by excluding the amounts under the aforesaid heads of expenditure, is erroneous.

50. JAL had included a small fraction of expenditure incurred at the head office as well as 10% profit as part of its claim. The amount

included on account of 10% profit was rightly rejected by the Arbitral Tribunal and is not the subject matter of controversy in the present appeal. However, the Arbitral Tribunal had accepted a small fraction of the expenditure incurred at the corporate office as recoverable. The expenditure incurred by JAL at the corporate office or head office is not allocable to any particular project. The said expenditure is incurred for all its businesses which includes the Project. However, head office expenses and office overheads are in the nature of revenue expenditure. The Arbitral Tribunal had found that a small fraction of 2.5% of the expenditure could be considered as allocable towards head office expenses attributable to the Project. We are unable to accept that Arbitral Tribunal's view to consider such expenses as part of the expenses reasonably attributable to mobilizing for execution of the Project, is perverse or an impossible view. It is clearly a plausible view, if not the correct view.

51. We are unable to accept that the Arbitral Tribunal's view is in conflict with the public policy of India or falls foul with the fundamental policy of Indian law.

52. We also find that the decision of the learned Single Judge to delete the award of *pendente lite* interest and to reduce the post award interest from 12% per annum to 6% per annum is fundamentally flawed. It is settled law that in a proceeding under Section 34 of the A&C Act, the Court does not supplant its own view in place of that of the Arbitral Tribunal. The examination is confined to determining whether the

arbitral award is required to be set aside on the grounds as set out in Section 34 of the A&C Act. It is apparent that the learned Single Judge has rejected JAL's claim for pre award interest and has, accordingly, deleted the award in respect of *pendente lite* interest. However, there is no reason provided in the impugned judgment for rejecting the award of *pendente lite* interest. The learned Single Judge has also reduced the post-award interest. There is no reason provided in the impugned judgment for such reduction. It is also material to note that IRCON had not contested the award of interest as perverse or in conflict of the public policy of India.

53. In ***Reliance Cellulose Products Ltd v. Oil and Natural Gas Corporation Limited***[3], the Supreme Court had set aside the order passed by the High Court reducing the rate of interest from 18% to 10%. The Court had reiterated that the decision to award interest falls within the Arbitral Tribunal's discretion and unless it is found that the said discretion was exercised perversely, the interest rate could not be reduced. Accordingly, the Supreme Court upheld the pre-reference and *pendente lite* interest at the rate of 18% per annum as awarded by the Arbitral Tribunal.

54. It is also relevant to refer to the decision of the Supreme Court in ***Project Director, National Highways No. 45 E and 220 National Highways Authority of India v. M. Hakeem: (2021) 9 SCC 1***. In the said decision, the Supreme Court had explained that the scope of

[3] (2018) 9 SCC 266

Section 34 of the A&C Act does not entail re-adjudication of the disputes and therefore, the arbitral award cannot be modified. The examination under Section 34 of the A&C Act is limited to considering whether the arbitral award is liable to be set aside on the specified grounds. In the present case, as is apparent from the above, the learned Single Judge has modified the impugned award, which is not permissible.

55. In view of the above, the appeal is allowed. The impugned judgment is set aside. Pending application is also disposed of.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MAY 01, 2024
'gsr'