

HIGH COURT OF DELHI

**BENCH: JUSTICE VIBHU BAKHRU AND JUSTICE TARA VITASTA
GANJU**

DATE OF DECISION: APRIL 1, 2024

FAO (COMM) 11/2024

M/S PCC INFRASTRUCTURE PVT. LTD. ... Appellant

versus

AIRPORTS AUTHORITY OF INDIA ... Respondent

Legislation:

Section 34, 37(1)(c) of the Arbitration and Conciliation Act, 1996 (A&C Act)

Subject: Dispute related to the quantum of price variation in terms of a Contract between M/s PCC Infrastructure Pvt. Ltd. and Airports Authority of India regarding work at Mangalore International Airport.

Headnotes:

Appeal against Arbitral Award – Price Variation Dispute – Arbitration and Conciliation Act, 1996 – Appeal under Section 37(1)(c) against Commercial Court’s judgment upholding arbitral award – Dispute over price variation clause in construction contract – Tribunal and Court aligned in interpretation of clause, denying PCC’s claim – Appellant’s argument regarding application of specific price index for South Zone rejected – Tribunal found no ambiguity in application of All India Price Index as per clause – Held, arbitral award is plausible and no interference warranted under Section 34 of A&C Act – Appeal dismissed. [Paras 1-31]

Price Variation Formula in Construction Contract – Interpretation and Application – Clause 10CA of General Conditions of Contract – Dispute over price index application for calculating cement price variation – Appellant argued for specific zone-based price index – Tribunal applied All India Price Index as per contract, rejecting zone-specific index – Held, interpretation of Clause 10CA by Tribunal falls within its jurisdiction and is a plausible view – Court finds no reason to interfere under Section 34 of A&C Act. [Paras 15-31]

Judicial Review of Arbitral Awards – Scope and Limitation – Analysis of limited scope of interference with arbitral awards under Section 34 of Arbitration and Conciliation Act, 1996 – Tribunal's interpretation of contractual clauses and factual findings – Held, unless grounds for setting aside an arbitral award are established, interference not warranted – In present case, Tribunal's interpretation deemed plausible and within its jurisdiction – Appeal and application dismissed. [Paras 28-31]

Referred Cases:

- MSK Projects India (JV) Ltd. v. State of Rajasthan & Ors.: (2011) 10 SCC 573

Representing Advocates:

For the Appellant: Mr Ashok Gurnani and Mr Ankit Gupta, Advocate.

For the Respondent: Mr Digvijay Rai, Mr Archit Mishra, Advocates with Mr Vivek Gupta, AGM (Law) and Mr Ganga Kochar, Senior Manager (Law).

JUDGMENT

VIBHU BAKHRU, J

1. The appellant (hereafter *PCC*) has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *A&C Act*) impugning a judgment dated 31.07.2023 (hereafter *the impugned judgment*) passed by the learned Commercial Court in OMP(COMM) 3/2020 captioned *M/s PCC Infrastructure Pvt. Ltd. v. Airports Authority of India*. PCC had filed the aforesaid petition [OMP(COMM) 3/2020] under Section 34 of the A&C Act impugning an arbitral award dated 10.10.2019 (hereafter *the impugned award*) delivered by an Arbitral Tribunal comprising of a Sole Arbitrator.

2. The Arbitral Tribunal had rejected the claims raised by PCC. Aggrieved by the same, PCC had filed the aforementioned petition to set aside the impugned award. However, the learned Commercial Court found no ground to interfere with the impugned award.

3. The dispute between the parties, essentially, relate to the quantum of price variation in terms of the Contract between the parties.

FACTUAL BACKGROUND

4. The respondent (hereafter *AAI*) invited tenders for execution of the work captioned as “*Construction of part parallel taxi track for new Runway 06/24 at*

both sides and Provision of RESA of 240m x 90m for 06 Runway at Mangalore International Airport” (hereafter referred to as *the Work*).

5. PCC furnished its bid in response to the said notice. The bid was accepted and AAI issued a Letter of Award (LoA) dated 16.07.2014. The value of the work was negotiated by the parties at ₹33,98,28,840.50/- (Rupees Thirty-Three Crores Ninety-Eight Lacs Twenty-Eight Thousand Eight Hundred Forty and Fifty paise). The same was 15.61% below the estimated cost of ₹40,26,93,000/-. The Work was to be completed within a period of twenty months to be reckoned from the 15th day after the issuance of LoA. The stipulated date for commencement of the execution of the Work was 30.07.2014 and the same was to be completed on or before 29.03.2016.

6. The formal agreement between the parties (hereafter *the Agreement*) was entered into on 31.07.2014.

7. The Work could not be completed within the stipulated period and was extended by about nine months. The same was completed on 27.12.2016. The value of the Work done was ₹28,85,38,309/- (Rupees Twenty-Eight Crores Eighty-Five Lacs Thirty-Eight Thousand Three Hundred and Nine only), which was less than the value of the Work as negotiated.

8. There is no cavil that PCC was not responsible for the delay in execution of the Work and accordingly, the time for completing the Work was extended till 27.12.2016 (the date of actual completion of the works) without levy of any penalty or compensation.

9. Clause 10CA of the General Conditions of Contract (hereafter *GCC*), which form a part of the Agreement, provides for a formula for computing the variation in price in respect of cement, bitumen, and structural steel. PCC claims that applying the said formula, it computed price variation on account of cement at ₹83,12,140/- (Rupees EightyThree Lacs Twelve Thousand One Hundred and Forty) and submitted a price variation bill for the aforesaid amount. AAI computed the price variation in the negative by ₹1,10,90,368.48/- (Rupees One Crore Ten Lacs Ninety Thousand Three Hundred Sixty-Eight and Forty-Eight Paise). Accordingly, AAI recovered the said amount from PCC. PCC raised a dispute regarding the computation of price variation and made a claim of ₹1,94,02,508/- (₹1,10,90,368/- recovered by AAI plus ₹83,12,140/- claimed by the PCC) in respect of price indices of cement used in the execution of the Work.

10. By a letter dated 18.01.2018, the competent authority referred the said dispute to the Dispute Redressal Committee (DRC). On 31.07.2018, DRC communicated its decision dated 29.06.2018, to not accept PCC’s claim for price variation payment in respect of cement. The same was not acceptable to PCC and by a letter dated 08.09.2018, it declined to accept the DRC’s decision.

11. Thereafter, PCC invoked the Arbitration Clause by a letter dated 26.10.2018. The Sole Arbitrator was appointed on 19.11.2018 and entered reference.

PCC'S CLAIM

12. PCC filed the Statement of Claim before the Arbitral Tribunal raising three claims. The first being a claim on account of price variation due to increase in the cost of cement computed at ₹1,94,02,508/- (Claim No.1). The same included an amount of ₹1,10,90,368.48/- recovered by AAI. The second claim being for interest at the rate of 14% per annum from 27.05.2017 till the date of payment (Claim No.2). And, the third being a claim for cost of arbitration estimated at ₹10,00,000/- (Claim No.3). AAI also filed its Counterclaim for cost of arbitration quantified at ₹5,00,000/-.

13. The Arbitral Tribunal dismissed the Claims raised by PCC as well as the Counterclaim made by AAI.

14. As stated above, PCC filed an application under Section 34 of the A&C Act for setting aside the impugned award, which was dismissed by the impugned judgment.

THE DISPUTE

15. The dispute, essentially, relates to implementing the formula as set out in Clause 10CA of the GCC read with Schedule F. Clause 10CA of the GCC expressly provides that if after submission of the tender, the price of materials specified in Schedule F is increased or decreased beyond the price(s) prevailing at the time of the last stipulated date of receipt of tenders, the value of contract would be varied in accordance with the formula as provided.

16. The relevant extract of Clause 10CA of the GCC is set out below:

“...The increase / decrease in prices of cement, steel reinforcement and structural steel shall be determined by the Director General (Works), CPWD for Bitumen and other items provided in the Scheduled ‘F’ this shall be determined by the All India Wholesale Price Indices of materials as published by Economic Advisor to Government of India, Ministry of Commerce and Industry. Base price for cement, steel reinforcement and structural steel as issued under authority of the Director General (Works), CPWD applicable for Delhi including Noida, Gurgaon, Faridabad and Ghaziabad and for other palaces as issued under the authority of Zonal Chief Engineer, CPWD and base price of other materials issued by the concerned Zonal Chief Engineer, CPWD and base price of other materials issued by concerned Zonal Chief Engineer and base price of Bitumen shall be taken as basic price - excise issued at nearest delivery point of Govt. refinery, as indicated in Scheduled ‘F’ as valid on the last stipulated date of receipt of tender, including extension if any and for the period under consideration. In case price index of a particular material is not issued by Ministry of Commerce and Industry then the price index of nearest similar material as indicated in Schedule F shall be followed.

The amount of the contract shall accordingly be varied for all such materials worked out as per the formula given below for individual material:

$$V = P \times O \times \frac{CI - Clo}{Clo}$$

Where

V = variation in material cost i.e increase or decrease in the amount in rupees to be paid or received.

P= Base price of material as issued under authority of DG(W), CPWD or concerned Zonal Chief Engineer CPWD and for Bitumen base price shall be taken as basic price + excise issued at nearest delivery point of Govt. refinery as indicated in Schedule F valid at the time of the last stipulated date of receipt of tender including extension if any,

Q= Quantity of material brought at site for bonafide use in the works since previous bills

Clo = Price index for cement, steel reinforcement bars and structural steel as issued by the DG(W), CPWD as valid on the last stipulated date of receipt of tenders including extensions, if any. For Bitumen and other items, if any provided in Schedule F, All India Wholesale Price Index for the material as published by the Economic Advisor to Government of India, Ministry of Commerce and Industry as industry as valid on the last stipulated date of tenders including extensions, if any.

CI = Price index for cement, steel reinforcement bars and structural steel as issued under the authority of the DG(W), CPWD for period under consideration. For Bitumen and other items, if any, provided in Schedule F All India Wholesale Price Index for the material for the period under consideration as published by Economic Advisor to Government of India, Ministry of Industry and Commerce for period under consideration..."

17. PCC claimed that the price variation as per Clause 10CA of the GCC was required to be calculated on the basis of the base rate of cement as declared by the Chief Engineer, Central Public Works Department (CPWD), South Zone as on the date of submission of the tender. The increase or decrease in price was required to be determined in reference to the said base rate either as per the cost indices/prices of cement as notified by the Chief Engineer, CPWD, South Zone from time to time or prices/indices of cement covered under the All India Wholesale Price Index of materials published by the Economic Advisory to the Government of India, Ministry of Commerce and Industry. However, it claimed that the price indices issued by Director General, CPWD for Delhi NCR region was wholly inapplicable for calculating the price variation in terms of Clause 10CA of the GCC as the Work was to be executed in the South Zone.

18. AAI contested the said claim. According to AAI, the All India Wholesale Price Index was not relevant for calculating the price variation in respect of cement under Clause 10CA of the GCC. Additionally, it claimed that the All India Wholesale Price Index referred to by PCC were of series 2004-05 and were no longer relevant. It claimed that the All India Wholesale Price Index

data for series 201112 in respect of Ordinary Portland Cement also reflected a downward trend in 17 months out of 24 months starting from January 2015 to December 2016. AAI claimed that the price variation in respect of the cement under Clause 10CA of the GCC was required to be determined on the basis of All India Price Index published by Director General, CPWD. It claimed that the base rates for cement in March 2014 was ₹6500 per MT, as applicable for Delhi, Faridabad, Gurugram, Ghaziabad and Noida, which corresponded to All India Price Index of 116.07 as stated in the Memorandum dated 04.04.2014. It was submitted that the increase or decrease in the prices was to be determined on the basis of the All India Price Index of the same series (Base October 12 = 100).

THE IMPUGNED AWARD

19. The Arbitral Tribunal examined Clause 10CA of the GCC and held that there was no ambiguity in the description for determination of the price indices (CI and Clo) to be used for calculating the price variation as per the formula provided in Clause 10CA of the GCC. The Arbitral Tribunal further held that there was no material, which reflected that the PCC has raised any query in regard to the said formula or had raised any protest that the price variation was required to be based on the base price and index notified by the Zonal Chief Engineer, CPWD in respect of the said zone. The Arbitral Tribunal also noted that there was no dispute as to the calculation of the amount by AAI and the dispute was confined only to the question as to which index applies, whether the price index as per the memorandum issued by the Director General, CPWD as applicable to Delhi, Faridabad, Gurugram, Ghaziabad and Noida or the price as mentioned by the Zonal Chief Engineer, CPWD, South Zone or the All India Wholesale Index issued by the Economic Advisor to the Government of India, Ministry of Commerce and Industry, was applicable. Since the Arbitral Tribunal found that the language of Clause 10CA of the GCC was unambiguous, it dismissed the claims raised by PCC.

REASONS AND CONCLUSION

20. The controversy in the present case relates to the price index to be applied for determining the increase and decrease of the price of cement. There is no dispute that the base price of cement would be the price “*at the time of the last stipulated date for receipt of tender*”. Thus, the base price of cement as in March 2014 would be the relevant base price.

21. The base price of Ordinary Portland Cement as applicable in the State of Karnataka for operation of Clause 10CA of the GCC for the month of March 2014 was declared as ₹6300 per MT. The parties are *ad idem* as to the base price of cement, which is to be used in the formula as set out in Clause 10CA of the GCC. The dispute is confined to the index to be applied for determining the variation in the price of cement.

It is PCC’s case that the base price of cement for the purposes of Clause 10CA of the GCC is declared periodically. It claims that the price variation is

required to be determined on the basis of the base price of cement declared by CPWD for the State of Karnataka. Illustratively by a notice dated 18.05.2015, CPWD had declared the base price of cement for operation of Clause 10CA of the GCC in the State of Karnataka in the month of May 2015 as ₹7200 per MT. According to PCC, the index to be applied for the purposes of price variation in respect of the cement would thus, be the index computed on the basis of base price of cement in Karnataka in the month of March 2014, that is ₹6300, and the base price of cement in Karnataka in April 2015, that is ₹7200. Thus, according to PCC, 1.1428 (7200/6300) would be the applicable index for determining the price variation.

22. CPWD declares the base price of cement on a monthly basis for the purposes of calculating the increase and decrease in terms of Clause 10CA of the GCC as applicable to various contracts. Whilst there is no dispute that the prices of cement as declared in the given zone (in this case, for the State of Karnataka) are required to be used as base prices for the purposes of Clause 10CA of the GCC; AAI disputes that the index for determining the price variation is required to be calculated in the manner as claimed by PCC. AAI points out that although CPWD had declared the base price of cement in the State of Karnataka for each month for the purposes of Clause 10CA of the GCC, it had not notified the index for determining of the price variation for separate zones. AAI relies on the periodic memorandums issued by CPWD which also specify the All India Price Index. It also relies on the plain language of Clause 10CA of the GCC.

23. A plain reading of Clause 10CA of the GCC indicates that the increase and decrease in the price of cement is required to be determined “*by the Price indices issued by Director General (Works), CPWD*”.

The Clause also specifies that the same “*shall be determined by All India Wholesale Price Indices of materials as published by Economic Advisor to the Government of India, Ministry of Commerce and Industry*”. The said Clause also specifies that the base price of cement as issued under the authority of the Director General (Works), CPWD applicable for Delhi including Noida, Gurugram, Faridabad and Ghaziabad and for other places as issued by the authority of the Zonal Chief Engineer, CPWD would be applicable. The Director General, CPWD has not issued any price index for the South Zone. However, it has issued periodic memorandums setting out the All India Price Index. The said memorandums also set out the base price for cement and other material, which is applicable only for Delhi, Faridabad, Gurugram, Ghaziabad and Noida. According to PCC, this clearly indicates that the All India Price Index is based on the prices of cement as applicable to Delhi, Faridabad, Gurugram, Ghaziabad and Noida. PCC also claims that the All India Price Index as issued by Director General, CPWD is also applicable only to the said areas. However, this is a contentious issue.

24. At this stage, it is relevant to illustratively refer to one such memorandum issued by the Director General, CPWD for the purposes of Clause 10CA of the GCC, which also sets out the All India Price Index as applicable. The memorandum dated 04.04.2014 is set out below:

“OFFICE MEMORANDUM

DG/10 CA/10

ISSUED BY AUTHORITY OF DIRECTOR GENERAL, CPWD

NIRMAN BHAWAN, NEW DELHI

DATED:

04.04.2014

Subject : Indices for operation of clause 10-CA in contract forms PWD 7 & d for the month of March-2014

MEMORANDUM

Sr. No.	Material	<u>March – 2014</u>	
		<u>Base Price per MT</u>	<u>All India Price Index (Base Oct. 12=100)</u> 116.07
1.	Cement (OPC)	6500.00	
	Cement (PPC)	6400.00	
2.	Reinforcement Bars TMT50012MM		
i)	Primary Manufacturer	47250.00	88.63
ii)	Secondary Manufacturer	41000.00	93.08
3.	Structural Steel	46790.00	95.38

Note: The above indices are in accordance with O.M.No.DGW/CON/237 dtd 14/10/08, 237A dtd 31/12/2008, and amended time to time. These base prices are applicable for Delhi, Faridabad, Gurgaon, Ghaziabad and Noida.”

25. It is apparent from the above that, the memorandum as set out above, includes the base price of material including cement, which is applicable only for Delhi, Faridabad, Gurugram, Ghaziabad and Noida, as well as the All India Price Index as applicable for Clause 10CA of the GCC. If the Director General, CPWD had issued a separate memorandum confined to declaring the All India Price Index as applicable for different materials for the purposes of Clause 10CA of the GCC, perhaps there may have been no dispute or ambiguity regarding the applicable index. As noted above, PCC has construed the said memorandum and such other memorandums as specifying All India Price Index as applicable only in Delhi, Faridabad, Gurugram Ghaziabad and Noida. However, a careful reading of said memorandum indicates that the base prices as set out, are applicable only in Delhi, Faridabad, Gurugram, Ghaziabad and Noida and not the All India Price Index. There is no such qualification which confines the All India Price Index as disclosed in the said memorandum to any given zone. Thus, on a strict and a plain reading of Clause 10CA of the GCC, the calculation of price variation in terms of the formula under Clause 10CA of the GCC, by using the price index as declared by the Director General, CPWD, cannot be faulted.

26. Having stated the above, it is also relevant to state that PCC's contention that the entire price variation on account of cement is not captured by using the All India Price Index as declared by CPWD as the variation in price of cement in the South Zone do not co-relate with the All India Price Index may be correct. However, that is, the necessary consequence of applying Clause 10CA of the GCC as it is worded.

27. In view of the above, the learned Arbitrator had rejected PCC's calculation of price variation and had accepted AAI's contention in this regard. The learned Commercial Court had rightly refused to interfere with the impugned award given the limited scope of interference under Section 34 of the A&C Act.

28. The examination of an arbitral award under Section 34 of the A&C Act is confined to determining whether any of the grounds for setting aside the arbitral award are established.

29. It is trite law that the question regarding construction of a contract falls squarely within the jurisdiction of an arbitral tribunal.¹

30. If the view of the arbitral tribunal is a plausible one, the arbitral award cannot be interfered with. In the present case, we reject the contention that the Arbitral Tribunal's interpretation of Clause 10CA of the GCC and the variables to be used in the formula for calculating the price variation, is not a plausible view.

1 MSK Projects India (JV) Ltd. v. State of Rajasthan & Ors.: (2011) 10 SCC 573

31. In view of the above, we find no ground to interfere with the impugned order or the impugned award. The appeal is, accordingly, dismissed. Pending application also stands disposed of.

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