

State of West Bengal Vs. Bharat Vanijya Eastern Pvt. Ltd.

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Court : Kolkata

Decided On : Jan-04-2017

Judge : Soumen Sen

Appellant : State of West Bengal

Respondent : Bharat Vanijya Eastern Pvt. Ltd.

Judgement :

IN THE HIGH COURT AT CALCUTTA ORDINARY ORIGINAL CIVIL JURISDICTION ORIGINAL SIDE BEFORE: THE HONBLE JUSTICE SOUMEN SEN A.P.No.1087 of 2011 STATE OF WEST BENGAL versus BHARAT VANIJYA EASTERN PVT.LTD.For the Petitioner : Mr.Jayanta Kr.

Mitra, Ld.

A.G., Mr.Paritosh Sinha, Ld.

AOR., Mr.Subhabrata Dutta, Adv.For the Respondent : Mr.Mr.Mr.Mr.Mr.Heard On : 29.09.2016, 17.11.2016, 24.11.2016, 08.12.2016, 16.12.2016, 19.12.2016, 23.12.2016 Judgment On : 4th January, 2017 Goutam Chakravortti, Sr.Adv., Pradip Kr.

Ghose, Sr.Adv., Dhruva Ghosh, Sr.Adv., Sarajit Mitra, Adv., Shayak Chakraborty, Adv.Soumen Sen, J.:- The employer assails the award in excess of Rs.15 crores inclusive of interest in respect of construction of Falkata Pundari Section of

NH31(Coochbehar) a Two-Lane At-Grade Highway in the State of West Bengal.

The respondent initially filed a suit in February, 2002 against the petitioner for a decree for Rs.20,72,36,567/-.

After the settlement of issues and filing of evidence on affidavit, the parties have agreed to have the disputes resolved through arbitration and accordingly an application was filed being G.A.No.3037 of 2008.

The said application along with the suit was disposed of by an order dated 11th September, 2008 appointing Justice Baboolal Jain (Retd.) sole Arbitrator in view of the agreement between the parties.

The Court, in exercise of its jurisdiction under Section 89 of the Code of Civil Procedure, 1908 disposed of the suit by referring the entire subject-matter of the suit including the issues framed by the Court to the sole arbitrator.

The award passed by the arbitrator is now under challenge.

The claim in the arbitration proceeding arose out of alleged breach of works contract.

The respondent was awarded a contract on 12th December, 1991 for construction of 22.89 K.M.of Highway along with the major and minor bridges, culverts with approaches, road works, pavements etc.under the contract package-II, realignment of NH-31 (Falakata - Pundibari Section) of the specification on terms and conditions and rates mentioned in the said contract.

The estimated value of the contract was Rs.7,76,50,500.

The modified terms of the contract provided that the respondent would be entitled to 36.25% above the schedule of rates mentioned in the tender.

The entire project was to be completed within three years from the date of its commencement.

Under the contract fully mechanised construction works were to be executed and the type of machinery to be used by the respondent were to be approved by the Engineer before the actual execution of the work.

Under the terms of the contract before the commencement of the work trial run of the said machinery to establish its capability to achieve the said works of the specifications and tolerance specified under the said contract were required to be made to the satisfaction of the said engineer.

The respondent accordingly brought the required machinery and equipment on or about December 8, 1991.

The trial run was made to the satisfaction of the engineer.

The bill of quantities of the said contract, inter alia, did not provide the rates for earth work by mechanical process as construction of embankment was varied work as defined in the said contract and the rates were, therefore, required to be determined according to Clause 51.1 Variations (General Conditions Vol-I). Pursuant to the terms of the agreement the respondent deposited with the petitioner a sum of Rs.5 lakhs by a fixed deposit receipt as performance security.

The petitioner also from time to time deducted a sum of Rs.8,13,553/- from running bills as security amount.

The respondent commenced work on and from 15th February, 1991 which included earth work for construction of embankment by mechanical process.

After the commencement of the work in or about December 13, 1991 and thereafter the respondent requested the petitioner to fix, determine or agree upon the rate or rates of the earth work for construction of embankment by mechanical process.

The petitioner, however, failed and neglected to determine the rates for the aforesaid work.

In the meantime, the respondent executed huge quantity of the said earth work which the petitioner refused to pay on the ground that the rates thereof were not

fixed.

In view of failure to release payment and agree upon the rate and/or rates for the said earth work, the respondent suspended the work.

The petitioner constituted an expert committee comprising of the Chief Engineer, PWD, Additional Chief Engineer (NH-1) and Superintendent Engineer (NH, Circle-3) to fix the rates for varied items of earth work and/or to correct/remove other discrepancy/anomaly in the bill of quantities.

On the basis of the representation made by the petitioner that the aforesaid issues would be resolved within a short time, the respondent resumed work on 26th December, 1992.

Since the expert committee had failed to fix and/or determine the rates, the respondent once again suspended the work from July 1, 1993.

In or about July 20, 1993 there was unprecedented flood in or around the work site causing complete inundation of the embankment and extensive damages thereto and other works already executed by the respondent.

The respondent gave notice of the aforesaid fact to the Chief Engineer as well as the petitioner.

During the suspension of the work the Chief Engineer of the petitioner, by a letter dated 8th March, 1995 communicated the respondent that the rates of the said earth works had been fixed by the Ministry of Surface Transport, Government of India by its letter dated 16th February, 1995 subject to the respondent giving the following undertaking: i) You will not prefer any claim for idle labour and hire charges of plants and machinery remaining idle or any other contingency arising thereafter during the idle periods.

ii) You agree to accept rectifications by mutual consent through exchange of letters in all items of work other than those of earthwork that crept in the specification/description of items of work in the bill of quantities of the tender agreement and you will not raise any claim upon rectification of the mistakes.

iii) You would resume the work within 2(two) weeks from the date of fiRs.payment made to you relating to the above said varied items of earthwork. The word You mentioned in the said letter dated March 8, 1995 refer to the claimant.

Pursuant to the said letter dated February 16, 1995 the claimant by its letter dated March 16, 1995, gave the required undertaking.

In terms of the said Memorandum of Understanding the claimant was required to complete the said works on or before 31st August, 1997.

In terms of the said undertaking dated March 8, 1995 and the said Memorandum of Understanding on April 5, 1995 the claimant resumed and continued to execute the said works.

On or about July, 1996, further flood inundated and submerged the worksite and vast adjacent areas causing extensive damage to the works already executed by the claimant, causing damage to the machinery and equipments mobilised for execution of the said works thereby preventing the claimant from executing the said works.

The said flood was caused by operation of forces of nature due to climatic conditions, which could not be foreseen and was not foreseeable by any experienced contractor including the claimant and the claimant could not be reasonably expected to and was unable to take precautions.

The claimant in terms of the said contract gave notice of the aforesaid facts to the said Engineer and to the petitioner.

The claimant alleged that they were prevented from commencing the said works until October 1996, when the work areas and the site became suitable for work.

The claimant alleged that the claimant was prevented from and unable to execute and complete the works till March 31, 2001.

The particulars of the breach alleged in the plaint which was treated as the statement of claim are:i) The petitioner has failed to hand over and give access to the sites to the claimant in due and proper time.

The petitioner released and handed over major parts of the worksites within August, 1997 and January, 2001.

ii) The petitioner failed to pay the compensation to the owners for land acquired by it for the said works causing serious commotion, disorder, riot and lawlessness at different worksites whereby the claimant encountered obstructions or conditions not foreseeable by any experienced contractor.

iii) The owners of the land and their accomplices caused extensive damages to the machineries deployed by the claimant for the execution of the works.

iv) The petitioner failed to provide and/or hand over clear sites by removing encroachment.

v) The petitioner has not only failed and neglected to pay for the works already executed by the claimant aggregating to a sum of Rs.2,38,15,675/- as on 2nd March, 1995 but has also failed to pay the full amounts of the Running Bills within 60 days from their respective dates of submission.

The respondent has wrongfully recovered a sum of Rs.54,50,973/- from the 26th, 27th and 28th Running Account Bills and a further sum of Rs.1,35,634 against the 25th Running Account Bill aggregating to a sum of Rs.55,86,607.

vi) The Chief Engineer of the petitioner caused undue delay in taking decisions resulting in interruptions and/or stoppage of the execution of the works.

vii) The respondent has failed to maintain law and order at and around the site of the work.

The claimant alleged that by March, 2001 within the extended time, it completed the work in all respect excepting certain minor works laying of 500 m.

of road embankment along both sides of TORS.River, laying of top layer of Bitumen Wearing CouRs.from 18 km.

to 22.89 km.

and about 50 m.

of earth embankment out of 22.89 km.

primarily due to the failure on the part of the petitioner to clear encroachments such as removal of the electricity and telephone poles, water mains and the standing trees and to make the said site free and favourable for execution of the said works.

The claimant on the basis of the aforesaid made the following claims: i) Loss and damages Rs.10,21,23,948/- ii) Repair and rectification Rs.36,09,983/- iii) Wrongful deduction from Running Account Bills Rs.55,86,670/- iv) Overhead expenses Rs.45,00,000/- v) Differential royalties Rs.35,60,180/- vi) Differential price of the bill of quantities Rs.22,09.653/- vii) Wrongful retention of security deposit and deduction of performance security from the Running Account Bills Rs.13,13,553/- viii) Conversion of materials Rs.12,50,000/- ix) Idle labour and idle machinery Rs.4,67,09,823/- x) Loss of profit Rs.93,41,965/- The total sum claimed in the arbitration proceeding was Rs.18,02.05,712/.

The arbitrator, however, has awarded a sum of Rs.15,39,05,071/- along with interest at the rate of 12% p.a. on and from 1st April, 2001 and Rs.35,00,000/towards costs.

The award is challenged primarily on the ground that the arbitrator has allowed various heads of claim without giving any reason.

The respondent in its letter dated 16th March, 1995 had given an undertaking that it would not claim idle charges but has done so in claim no.1.

The claim nos.9 and 10 for loss and damages and of profit are overlapping and should not have allowed.

The claim for idle men and machinery for the period of 1st March, 1997 to October 26, 2000 for the period of 492 days has been wrongfully allowed in part in spite of undertaking given by the claimant on 13th March, 1995.

The award for the idle machinery and labour in spite of undertaking is in conflict with the public policy of India.

Mr. Jayanta Kr.

Mitra, the learned Advocate General has submitted that the claim on account of damages was allowed without any supporting evidence or document.

The award would not show that the arbitrator has applied its mind at all.

The disclosure of mind of the arbitrator could only be gathered provided any reason is furnished in either allowing and/or disallowing any claim.

The arbitrator being an adjudicatory authority is required to apply its mind and the award shall state the reasons upon which it is based unless the parties have agreed that no reasons should be given or the award is an arbitral award under Section 30.

In the instant case, it is argued that having regard to the legislative mandate as enshrined in the 1996 Act, the arbitrator is obliged to give reasons as reasons are the links between the materials on which the certain conclusions are based and the actual conclusions.

It is argued that in the award, the claim of the claimant is equated to proof of the claim which obviously is a legal misconduct and an error apparent on the face of the award.

While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, however, if there was no evidence at all and if the arbitrator makes an award merely on the basis of the claim statement without anything more then the award is required to be held as invalid.

It is submitted that the arbitrator equated the claim of contractor to proof of the claim and virtually has allowed all the claims without any evidence at all.

Moreover, the claim No.(i) and (ix) are overlapping.

The learned Advocate General has drawn attention to Paragraphs 27 and 36 of the plaint and submits that if the averments of both the paragraphs are scrutinized along with the schedules annexed to the plaint giving particulars in support of the same it would be clear that except for change of nomenclature of heads of claim the said claims were made twice over and in fact the claim No.(ix) is already included in claim No.(i).The arbitration has allowed both the claims overlooking the nature of both the claims.The learned Advocate General was less critical in respect of claim No.(i) but more vocal in assailing the claim for Rs.4,67,09,823/- made on account of alleged loss and damage suffered on account of cost overrun due to failure of the petitioner to perform its obligation which was allowed in full.

It is submitted that it is merely a duplication of claim with no fresh evidence.

In this regard, the learned Advocate General has relied upon the following decisions:i) Som Datt Builders LTD.versus State of Kerala reported at (2009) 10 SCC259Paragraph 20-24; ii) State of Rajasthan & Anr.

versus Ferro Concrete Construction PVT.LTD.reported at (2009) 12 SCC1 iii) Bharat Coking Coal LTD.versus L.K.Ahuja reported at 2004 (5) SCC109 Paragraph 11; iv) Oil and Natural Gas Corporation LTD.versus Western Geco International LTD.reported at (2014) 9 SCC263Paragraph 38.

v) Associate Builders versus Delhi Development Authority reported at 2015 (3) SCC49 It is submitted that the award is patently illegal and lacks judicial approach.

The judicial approach is one of the tests required to be applied to find out if the award is arbitrary, extraneous or whimsical.

The judicial approach is a specie of the genus Fundamental Policy of Indian Law.

The learned Advocate General relying upon Oil and Natural Gas Corpn LTD.(supra) Paragraph 34 to 40 argued that having regard to the law laid down in the said judgment, the authority is required to act bona fide and deal with the subject in a fair, reasonable and objective manner and its decision should not be actuated by any extraneous consideration.

The Fundamental Policy of the Indian Law also recognizes the principle that if an award suffers from perversity or irrationality it should be held to be invalid.

A decision which is perverse or so irrational that no reasonable person would have arrived at the same would not be sustainable in a Court of law.

The decisions that fall short of its standards of reasonableness are open to challenge in a Court of law.

Even though the arbitral tribunal enjoys considerable latitude in making awards, on the grounds of irrationality, perversity, lack of judicial approach, unreasonableness, patent illegality and violation of the principles of natural justice an award can be challenged and interfered with.

To the same effect the decision of the Honble Supreme Court in McDermott International Inc.

versus Burn Standard Co.LTD.& ORS.reported at (2006) 11 SCC181 Centrotrade Minerals & Metals Inc.

versus Hindustan Copper LTD.reported at (2006) 11 SCC245and Associate Builders versus Delhi Development Authority reported at (2015) 3 SCC49was cited.

In the petition, although, it is alleged that there is a violation of the principles of natural justice, the learned Advocate General has fairly submitted that after going through the record of the proceedings before the Arbitrator, the said allegations are withdrawn and may be expunged from record.

The learned Advocate General has also filed an affidavit for expunging the said allegations from the petition.

This gesture of the learned Advocate General is appreciated.

Per contra, Mr.Goutam Chakravortti, the learned Senior Counsel appearing on behalf of the respondent-claimant submits that the arbitrator has applied its mind to each of the claims and disposed of the reference by a detailed reasoned award.

It is submitted that neither in the pleadings nor before the arbitrator any real challenge was thrown to the claim of the claimant.

The petitioner had virtually accepted the breaches and the arbitrator on the basis of both oral and documentary evidence passed the award.

The learned Senior Counsel has referred to Claim No.7 and submitted that although a sum of Rs.10,21,23,948/- was claimed on account of idle men and machinery for the period of closure between 1st March, 1997 and 26th October, 2000, the arbitrator did not allow the entire claim and has allowed only a sum of Rs.7,97,06,496/- and in so far as loss and damage on account of works re-executed by the claimant due to flood during July 1993 and 1996 a sum of Rs.25,00,000/- only was awarded.

The learned Senior Counsel has referred to the discussion in the award in relation to Issue No.7 and submits that the Arbitrator in deciding the aforesaid claims had taken into consideration the affidavit of evidence of the PW2, D.L.Agarwal and documents at pages 23 to 33 of the Annexure J. and page 34 and 35 as Annexure J. of the said affidavit.

The Arbitrator has taken into consideration that all those machineries were brought to the site and certified by the Executive Engineer.

It is submitted that the arbitrator, in fact, disallowed the claim for 108 days due to insufficiency of evidence and doubts as to the proof and maintainability of the claim.

The arbitrator also recorded that the oral and documentary evidence of the claimant had remained uncontroverted and unchallenged.

The learned Senior Counsel has also drawn attention to the documents referred to by the Arbitrator as well as the evidence taken into consideration in partly allowing the said claims. It was emphasized that no witness on behalf of the respondent was called to contradict the evidence of the claimant.

The learned Senior Counsel submits that the entitlement of the aforesaid claims cannot be disputed in view of Clause 12.2, Clause 20.4, Clause 40.1 and Clause 40.3 of the General Conditions of the contract.

The said Clauses are:- 12.2.

AdveRs.Physical Obstructions or Conditions If, however, during the execution of the Works the Contractor encounters physical obstructions or physical conditions, other than climatic conditions on the Site, which obstructions or conditions were, in his opinion, not foreseeable by an experienced contractor, the Contractor shall forthwith give notice thereof to the Engineer, with a copy to the Employer.

On receipt of such notice, the Engineer shall, if in his opinion such obstructions or conditions could not have been reasonably foreseen by an experienced contract, after due consultation with the Employer and the Contractor, determine: (a) any extension of time to which the Contractor is entitled under Clause 44, and (b) the amount of any costs which may have been incurred by the Contractor by reason of such obstructions or conditions having been encountered, which shall be added to the Contract Price.

and shall notify the Contractor accordingly, with a copy to the Employer.

Such determination shall take account of any instruction which the Engineer may issue to the Contractor in connection therewith, and any proper and reasonable measures acceptable to the Engineer which the Contractor may take in the absence of specific instructions from the Engineer.

20.4.

Employers Risks The Employers risks are: (a) war, hostilities (whether war be declared or not).invasion, act of foreign enemies.

(b) rebellioin, revolution, insurrection, or military or usurped power, or civil war, (c) ionising radiations, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or

nuclear component thereof, (d) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

(e) Riot, commotion or disorder, unless solely restricted to employees of the Contractor or of his Subcontractors and arising from the conduct of the Works, (f) Loss or damage due to the use or occupation by the Employer of any Section or part of the Permanent Works, except as may be provided for in the Contract, (g) Loss or damage to the extent that it is due to the design of the Works, other than any part of the design provided by the Contractor or for which the Contractor is responsible, (h) Any operation of the forces of nature against which an experienced contractor could not reasonably have been expected to take precautions.

40.1 Suspension of Work The Contractor shall, on the instructions of the Engineer, suspend the progress of the Works or any part thereof for such time and in such manner as the Engineer may consider necessary and shall, during such suspension, properly protect and secure the Works or such part thereof so far as is necessary in the opinion of the Engineer.

Unless such suspension is: (a) otherwise provided for in the Contract, or (b) necessary by reason of some default of or breach of contract by the Contractor or for which he is responsible, or (c) necessary by reason of climatic condition on the site or (d) necessary for the proper execution of the Works or for the safety of the Work or any part thereof (save to the extent that such necessity arises from any act or default by the Engineer or the Employer or from any of the risks defined in sub-Clause 20.4).

40.3 Suspension lasting more than 84 days If the progress of the Works or any part thereof is suspended on the written instructions of the Engineer and if permission to resume work is not given by the Engineer within a period of 84 days from the date of suspension then, unless such suspension is within paragraph (a), (b), (c) or (d) of Sub-Clause 40.1, the Contractor may give notice to the Engineer requiring permission, within 28 days from the receipt thereof, to proceed with the Works or that part thereof in regard to which progress is suspended, if within the said time, such permission is not granted, the Contractor may, but is not bound to, elect to treat the suspension, where it affects part only of

the Works, as an omission of such part under Clause 51 by giving a further notice to the Engineer to that effect, or where it affects the whole of the Works, treat the suspension as an event of default by the Employer and terminate his employment under the Contract in accordance with the provisions of SubClause 69.1, whereupon the provisions of Sub-Clause 69.2 and 69.3 shall apply. The argument of the petitioner that in view of the undertaking dated 8th March, 1995, the claimant would not be entitled beyond 31st August, 1997 is factually incorrect inasmuch as the petitioner did not raise such objection before the arbitrator.

The learned Senior Counsel has referred to Paragraphs 18 and 22 of the written statement filed by the petitioner submits that in view of such pleadings, the award allowing part of the aforesaid claims cannot be questioned in this proceeding.

In order to appreciate the said argument, Paragraphs 23 and 27 of the Plaint and Paragraph 18 and 22 of the Written Statement are given in the following table:23.

The defendant at the material 18.

With reference to Paragraph 23 times knew and had notice and of the plaint the defendant states knowledge that due to its breach that the defendant had no other and failure to perform the contract option than to extend the terms for and circumstances beyond its completion of the work till March, control, the claimant was prevented 2001 inasmuch as completion of from completing the said works in the project was extremely urgent all respects until March 31, 2001 and in due consideration thereof and the defendant accordingly, time was extended leaving all the unconditionally extended the time terms and conditions of the said to complete the same till March, contract intact.

2001. 27.

Due to the failure of the 22.

With reference to Paragraph 27 defendant mentioned in Paragraph of the plaint it is denied that there 21 hereof and the circumstances was any alleged failure on the part mentioned hereinabove, the of the defendant or that the claimant was unable to proceed claimant was unable to proceed with the execution of the said

with the execution of the said work works and the same were or that the said work was intermittently interrupted causing intermittently interrupted or that undue and long prolongation of the the works.

claimant incurred costs, Accordingly, the claimant charges and expenses or suffered was obliged and compelled to and any alleged loss and damages in in fact, kept its men and machinery the alleged sum or otherwise as mobilized during the entire period alleged or at all.

The defendant of such prolongation of the works states that earthwork may have until March 31, 2001.

By reason of been interrupted but other works premises the claimant was continued.

The defendant denies compelled to incur and incurred and disputes the factum, validity costs, charges and expenses and and/or propriety of the purported suffered loss and Rs.10,21,23,948/-.

damages in particulars as shown in Part - I of Particulars of Schedule J to the plaint.

The the said sum would appear from defendant further states that the Part-I of Schedule J annexed defendant hereto as part of the plaint.

damages for breach of contract by the defendant.

be held The responsible for prolongation of the claimant claims the said sum also works as cannot and the claimant the for claims idle of labour the and The machinery are absolutely frivolous, claimant also claims the said sum malafide, an afterthought and not of Rs.10,21,23,948/- in terms of tenable in law.

Clause 12.2, 40.2 and 42.2 of General Conditions of the said Contract.

The learned Senior Counsel has referred to the letters dated 13th January, 1998, 17th November, 1999, 2nd March, 2000, 10th April, 2000, and 18th July, 2000 also extracts of Cash Book and Ledger to justify the award allowed in favour of the

petitioner.

It is submitted that these are some of the documents out of the plethora of documents produced before the arbitrator which would justify the claim towards the idle labour and idle machinery beyond 31st August, 1997.

The learned Counsel has raised an objection with regard to the arguments made based on the letter dated 16th March, 1995 as a defence to the claim for idle charges on the ground that the said plea was neither taken as a defence in the written statement nor argued before the arbitrator.

It is submitted that grounds for setting aside an award must be taken within time prescribed under Section 34.

The grounds which are now being argued were not even mentioned in the ground for setting aside of the award.

New grounds containing new materials of fact cannot be introduced if the same was not originally raised in the arbitration proceeding for setting aside an award.

No further grounds can be added thereafter and grounds cannot be amended.

The right to introduce any ground beyond any period prescribed under Section 34 would stand automatically forfeited and no argument can be made on grounds that are not being included in the application for setting aside of the award.

In short, it is argued that new grounds containing new materials of fact cannot be introduced if the same was not raised either within the original period or extended period allowed under Section 34(3) of the Arbitration and Conciliation Act, 1996.

There is no question of even discretion after the relevant period is over.

In this regard, the respondent has relied upon a decision in State of Maharashtra versus Hindustan Construction Company LTD. reported at 2010(2) Arb.

LR1: 2010 (4) SCC518 It is submitted that in an adversarial nature of proceeding, it is not the duty or the obligation of the Court to investigate the matter on its own

and the argument advanced on behalf of the petitioner that under Section 34(2)(b) the Court can independently of the pleadings go into the question of public policy is contrary to law and not beyond the section demands.

The learned Senior Counsel, however, without prejudice to such objection has argued that if the pleadings are scrutinized it would appear that there has been no real challenge thrown to the award.

The learned Senior Counsel has referred to Paragraph 19 of the plaint and submits that the said paragraph expressly mentioned the letter dated 16th February, 1995 whereby the claimant was requested by the defendant to give an undertaking.

The claimant by its letter dated 16th March, 1995 gave the required undertaking.

The undertaking relates to rates of earth work at the site.

In paragraph 12 of the written statement, except relying on the letter of the Chief Engineer dated March 8, 1995, and the letter of Ministry of Surface Transport, Government of India dated 16th February, 1995, there is no averment that the undertaking given on 13th March, 1995 was to continue during the entire period of contract and the claimant was not entitled to claim any amount for idle labour and machinery.

The claimant served a notice under Section 80 of the Code of Civil Procedure, 1908 claiming compensation for idle machinery and labour but there is no reply to the same.

In paragraph 29 of the plaint, the claimant expressly claimed loss and damage of Rs.10,21,23,948/- with particulars. In Paragraph 22 of the written statement except a mere denial there is no averment that the claimant was not entitled to the costs incurred by the claimant for idle machinery and labour as is being contended at the hearing.

It is submitted that in the petition for setting aside, there is no mention that the claimant was not entitled to any amount for idle men and machinery, and an

entirely a new case is being made out at the hearing.

It is submitted that the Arbitrator under Issue No.7 dealing with Paragraphs 26, 27 and 28 of the plaint/statement of claim has recorded that the matter was exhaustibly argued and details of analysis of the idle men and machinery furnished are based on agreed rates.

The Arbitrator also considered and examined record, papers, pleadings, evidence and documents pertaining to the claim.

The Arbitrator has extensively set out all particulars of the document relied and referred to various documents including document Nos.PD181 and PD188 relating to the undertaking given by the claimant on 16th March, 1995.

It is submitted that the Arbitrator went through all the relevant documents disclosed by the claimant in several volumes and also considered the evidence of P.W.1 Mr.P.K.Bhadra and evidence of D.L.Agarwal and other witnesses for the claimant.

The Arbitrator also considered extensively the cross-examination of the said witnesses and gave a reasoned order in not allowing the costs incurred for the hire of machinery for the period from 22nd March, 1998 to 15th June, 1998 aggregating to 108 days as the arbitrator had some doubts as to the proof and maintainability of the claim in respect of those 108 days.

It is submitted that the Court cannot go into the question why the arbitrator has doubts as to the proof and maintainability in respect of those 108 days.

The arbitrator has exercised its discretion on the basis of its doubts and the Courts might not go into the question of his doubts.

The arbitrator has extensively referred to the documents and evidence given by the claimant and it would appear from such documents and evidence that the claimant, in fact, maintained idle labour and machinery during 492 days.

The claim of the claimant was reduced from Rs.10,21,23,948/to Rs.7,97,06,496/-.

The Arbitrator has given extensive reasons for his decision and the claimant is the only party aggrieved by this reduction.

The primary documents, namely, Cash Book and Ledger showing actual payment made in respect of machinery, labour, staffs salary, maintenance of camp, etc., were produced before the Arbitrator, and were considered and mentioned in the award.

The finding arrived at on examination of such documents is final and binding on the parties.

It is submitted that the Court would not go into the documentary and oral evidence led by the claimant to ascertain the correctness thereof.

In respect of the loss and damages on account of works re-executed by the claimant due to flood during July, 1993 and 1996, it is submitted that the particulars of such loss and damages suffered by the claimant were furnished in Schedule K to the plaint and under Clause 20(4)(h) of the Contract, the claimant is entitled to claim such amount.

The claimant in Paragraph 21 of the plaint made a specific claim on account of such loss and damage caused due to flood to which there was no effective denial in the written statement.

The arbitrator considered the oral evidence of Mr.P.K.Bhadra on behalf of the claimant and also the Chief and Cross-examination of the said witness before awarding a sum of Rs.25 lacs against a claim of Rs.36,09,083/-.

The claimant claimed a sum of Rs.45 lacs on account of loss and damage due to hindrance created by the Falakata Truck Owners Association.

In paragraph 30 of the plaint, the claimant claimed that due to the failure of the defendant to maintain law and order in and around the site, the claimant was obstructed and prevented from carrying on and/or transporting the materials to the work site by the Falakata Truck Owners Association.

The claimant had engaged trucks from its own source but the Falakata Truck Owners Association refused to allow the claimant to utilize trucks arranged by it.

The claimants positive case was that at the instance of the defendant State of West Bengal, the claimant was compelled to engage the trucks of the said Falakata Truck Owners Association at a much higher rate, as a result whereof, the cost of carriage of materials by the claimant increased and the claimant suffered loss and damage of Rs.45,00,000/- which would appear at Schedule L to the petition.

There could not be any dispute that the respondent faced obstruction during carriage of materials to the site as would appear from a letter dated 10th July, 2000 from the Chief Engineering to District Magistrate.

The defendant in Paragraph 25 of the written statement contended that the defendant is not liable for any obstruction faced by the claimant from carrying on or transporting the materials to the site by the Truck Owners Association.

There is a bald denial that the claimant had suffered any loss or damage in the sum of Rs.45,00,000/- or any other sum.

The defendant is not at all concerned with the carriage or transportation of the materials of the claimant.

Clause 12.02 of the contract of the petition expressly provides the amount of any costs which have been incurred by the contractor by reason of such obstructions or conditions having been encountered, which shall be added to the contract price and shall notify the contractor accordingly with a copy to the employer.

The Arbitrator recorded in the award that all papers, records and documents disclosed in the suit were placed before him.

P.W.1 Mr.P.K.Badhra filed his affidavit of evidence wherein he deposed before the learned Commissioner appointed by the Honble High Court and was extensively cross-examined.

It would appear from the said award that the Arbitrator considered the affidavit of Mr.P.K.Bhadra and also in detail considered the crossexamination of Mr.P.K.Bhadra by the learned Counsel.

The Arbitrator also observed that the affidavit of D.L.Agarwal dated 15th December, 2004 along with annexures was disclosed/tendered in evidence and marked as exhibits in the proceedings.

The cross-examination of Mr.P.K.Bhandra was also considered by the Arbitrator.

The Arbitrator considered in detail the relevant documents disclosed by the claimant and full particulars of the documents considered were set out in the award.

The Arbitrator further recorded that it is significant to mention that in the entire proceedings seven volumes of documents were disclosed by the parties.

The Arbitrator has set out the documents considered by him and also the evidence adduced by the claimant.

The Arbitrator after considering the evidence on the record held that the assessment of damage made by the claimant on estimate was to be allowed, but according to him a fair estimate would be Rs.40,00,000/- and not Rs.45,00,000/-.

It is submitted that the fair estimate as decided by the Arbitrator was not imaginary and without any supporting evidence.

The Arbitrator arrived at the estimate after considering the relevant record placed before him and after considering the evidence of Mr.P.K.Bhadra and Mr.D.L.Agarwal.

There is no denial by the petitioner that there was disturbances and hindrances created by the Falakata Truck Owners Association.

There is also no denial of the averment in the plaint that the at the instance of the then Government, the claimant/claimant was forced to hire the trucks of Falakata Truck Owners Association.

In paragraph 35 of the plaint of the petition a sum of Rs.4,67,09,823/- has been claimed by the claimant on the ground that the defendant having failed in its obligation under the contract, the execution and completion of the said contract was delayed and prolonged from 31st August, 1997 to 31st March, 2001.

By reason of such failure on behalf of the petitioner, the claimant was obliged and compelled to keep its men, machines and maintain its establishment at different work sites throughout the said period.

By reason of keeping such men and machines and maintaining the establishment, the claimant was compelled to incur a sum of RS.4,63,09,823/-, which it would not have incurred if the defendant had fulfilled its obligation under the contract and allowed the claimant to complete the work within the stipulated period.

This claim is for loss and damage on account of cost overrun due to failure of the defendant to perform its obligations under the terms of the contract and its breach.

The claim would also appear from Paragraph 35 of the plaint where it is stated that due to the breach of contract by the defendant and its failure to perform its obligations under the contract, the execution and completion of the said contract was delayed and prolonged from 31st August, 1997 to 31st March, 2001.

In Paragraph 30 of the written statement, there is a bald denial that the completion of the contract was delayed or prolonged by reason of any alleged breach of the contract by the defendant or its alleged failure to perform its obligations therein.

The claimant had calculated the loss and damages at 5% for three and half years of the total value of work executed, which is fair, reasonable and the usual basis for estimating and calculating cost overrun.

According to the Ministry of Road and Highways circular, Rs.50,00,00,000/- is at 10%.

calculation of overhead charges up to The Arbitrator is dealing with the claim for Rs.4,67,09,823/- has recorded that the completion of the said contract was delayed and prolonged from 31st August, 1997 to 31st March, 2001 due to the

failure of the defendant to discharge its obligation.

Affidavit of evidence was filed of the claimants fiRs.witness P.K.Bhadra who gave evidence regarding the claim for the said sum.

The Arbitrator in the award has observed that the defendant could not shake the testimony P.K.Bhadra during cross-examination with regard to the said claim.

It has also bee

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