

. * IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment pronounced on : July 08, 2014

+ O.M.P. 633/2012

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

**Through Mr.Sandeep Sethi, Sr. Adv. with
Mr.Vikas Goel, Mr.Abhishek
Kumar & Ms.Medha Shah, Adv.**

versus

M/S HCC LTD

..... Respondent

**Through Dr.A.M.Singhvi, Sr.Adv. and
Mr.Rajiv Nayar, Sr.Adv. with
Mr.Arnav Kumar, Ms.Malavika Lal
& Mr.Ruk Rai, Adv.**

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. The present petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award dated 16th March, 2012 received by the petitioner on 19th March, 2012.

2. Brief facts of the case are that the petitioner invited bids for the work of construction of Allahabad Bypass Project-Construction of road from km. 158 to Km. 198 (except Ganga Bridge) Package ABP-2 (hereinafter referred to as "the Contract"). The respondent amongst others submitted its bid for execution and completion of

works and the petitioner awarded the work in respect of project through respondent vide Contract Agreement dated 2nd June, 2004. The total contract value was Rs. 446.99 crores. The joint venture of M/s BCEOM-LASA (JV) was appointed as the Engineer is to supervise the contract work.

3. The contract was a unit rate contract and contained the detailed documents “Bills of quantity” containing the items of work to be executed by the contractor and also the estimated quantities of each item to be executed by the contractor. The rates against each item were to be filed in by the Bidders/Contractors. The parties adopted the terms and conditions of the contract as contained in General Conditions of Contract (GCC), the Special conditions of contract wherever provided, as contained in conditions of particular applications (COPA) were to override the GCC.

4. The work under the contract was to be executed within the period of 30 months from the date of commencement of the work in terms of clause 43 of GCC. The work was extended on accounts of the defaults which parties allege against each other and the period of the contract had to be extended in accordance with the provisions of contract and extension of time was to be granted for completion of work. The Claimant/ respondent vide its letter dated 15th December, 2006 and subsequent letters applied for overall extension of time of 1209 days. However, the Engineer after considering all the factors granted on overall extra time of 1027 days to the respondent for completion of work. Eventually the work was actually completed in

1027 days, i.e. on 30th September, 2009 though the work on Main Carriage Way was substantially completed on 21st May, 2009.

5. The Engineer had after review and consideration of the events of delays had made his determination and recommended the extension of time to the respondent. The respondent after review of engineers assessment had approved and accepted the final determination of the Engineer. As per the over all approved extension of time, the date for completion of whole of the works was extended from 9th December, 2006 till 30th September, 2009. All the works under the contract have also been completed by the said date and completion/taking over certificates have also been issued. Hence there is no dispute on this aspect.

6. Consequent to the delays and extended stay in the project site, the claimant had submitted the claims to the Engineers for the payment of additional costs which he considered to be due and payable in terms of applicable conditions of contract for a sum of Rs.83.81 crores for the extended period from 1st May, 2008 to 30th September, 2009. The additional costs claimed for the first period is called as dispute No.8 and for the next period is called 8A.

7. The Engineer had not made his determination of the additional costs and hence the claimant had sought the intervention of employer for settlement of disputes. Since the employer had also not settled the disputes, the disputes were referred to DRB. The DRB had disposed Dispute No.8 by suggesting that the dispute can be referred back to Engineer. Being aggrieved with the DRB's decision, the

claimant issued notice of intention to commence Arbitration on Dispute No.8. On Dispute No.8A, the DRB could not issue its recommendation within the stipulated time and asked for extension, however claimant issued notice of his intention to refer the dispute to arbitration. The respondent intimated the Tribunal that the respondent and claimant have decided to refer the Dispute No.8A as an extension to Dispute No.8 to the existing Arbitral Tribunal. This is how the Dispute No.8 and 8A stands placed before the Arbitral Tribunal.

8. The respondent's submissions before the Arbitral Tribunal were that as per the terms of the contract, the respondent submitted base program for the Contract and mobilized men, machinery and other resources required to complete the work as per the program, however, the Petitioner and the Engineer were not fully prepared to fulfill their contractual obligations.

The respondent further contended before the tribunal that since the beginning of the work there has been so much delay and disruption in the progress of the work. The respondent raised various grounds of delay in its statement of claim such as delay in handing over unencumbered possession of land, delay due to stoppage of work by locals, belated addition and deletion of structures resulting to disruption etc.

The respondent further contended before the tribunal that on account of various delays, the work could not be completed on time and all these delays were attributable to the petitioner and hence the

respondent had to incur additional costs beyond what had already been paid in accordance with the provisions of the contract. It was contended that while approving the respondent's application for interim Extension of Time ("**EOT**"), the Engineer's representative had admitted that the respondent was entitled to costs.

The Respondent placed reliance on various clauses of the contract and Section 55 of the Indian Contract Act, 1872 while raising the claims on account of delays. The respondent also contended before the arbitral tribunal that the Petitioner has allegedly already accepted its liability and dispute is only relating to the quantum of compensation payable to respondent. The respondent further submitted that the construction was delayed due to events which were not attributable to the respondent and due to non-fulfillment of contractual obligations by the petitioner and the Engineer. Accordingly, the respondent was forced to stay at site for the extended duration with all his manpower, equipments and the labour deployed for the completion of the work. Furthermore, due to the extended stay, the respondent had to fund the project from external borrowings and also incurred additional costs for the materials over and above the compensation provided by the price adjustment formula. The respondent claimed vide claim No.8 an amount of Rs. 83.81 crores towards the additional cost allegedly incurred in various heads for executing the work for the extended period of the contract from 9th December, 2006 to 30th April, 2008.

The respondent filed a separate claim No. 8A claiming an amount of Rs 107.31 crores for the extended period from 1st May

2008 to 30th September 2009 on the same grounds on which claim No.8 was raised.

9. On the other hand, the submissions of the petitioner before the Arbitral Tribunal were that the claims raised by the respondent were a time barred as the cause of action for alleged under utilization of resources arose in the beginning of the contract period i.e. 2004, however, the first letter for claiming such amount against the aforesaid underutilization resources was sent by the respondent only in July, 2008 i.e. after lapse of more than 4 years.

It was submitted by the petitioner that the respondent did not establish on any occasion that deployment of resources during the original stipulated period was in accordance with Clause 14.1 of the Contract. Even the program submitted by the respondent pursuant to Clause 14.1 was a defective one and approval thereof by the Engineer did not relieve respondent of its obligation under the contract. It was also submitted that the respondent was mobilizing and maintaining resources only to the extent of availability of work and no extra deployment was made. The letters from the Engineer significantly established the fact that the respondent has contributed to the delay in the execution of the work by way of unsatisfactory and slow progress in the available work fronts due to poor deployment of resources. It was further contended by the petitioner that giving the land free from encumbrance was not even a contractual requirement and as per Technical Specification 110 of MOST, the Contractor was to bear the responsibility to coordinate with service provides for

removal of hindrance at the site. The Claimant/respondent had to bear the risk associated with the removal of encumbrances and nothing was payable to him on account of delay arising therefrom.

10. It is also submitted by the petitioner that the respondent had failed to produce any cogent evidence or adequate proof to prove and substantiate the entitlement of huge sums raised in the aforesaid claims. As per clause 11.1 of GCC, the respondent was required to inspect the construction site and it was deemed to have obtained all necessary information before entering into any contract with the petitioner, which means that the respondent was very well aware about the risks and contingencies including the factors of delay before entering into the contract with the petitioner. Also vide GCC Clause 12.2, the respondent was under an obligation to give notice of any physical obstruction which was not foreseeable by an experienced Contractor. The claims raised by the respondent were merely based on imaginative figures and not actual figures. Further, no proof was placed on record to substantiate such figures which is a basic legal necessity before raising any such claim.

11. In accordance with Standard Data Book only 8% of overhead could have been paid to the respondent. The actual overhead expenditure in the original contract period was only to the extent of the work executed. The cost of overheads in the original period were compensated by the payments made therein for work executed and in the same manner the cost of overhead in the extended period was also covered and nothing extra was payable as claimed by the

respondent. There was no evidence on record to substantiate that all the required equipments were ever deployed at the site during the original contract period. In fact, the Engineer's regular correspondence during the execution of the contract clearly showed the fact that the progress of the work was unsatisfactory due to inadequate labour, equipment, management on the part of the respondent. Even the documents submitted by the respondent suffered from various discrepancies which were never rectified by the respondent.

12. The majority arbitrators held that the petitioner had approved the EOT through the Engineer in its first interim EOT application and finally in the 5th interim EOT application till 30th September, 2009. It was also held that it was apparent that EOT submitted by the respondent was on account of delays/defaults of the petitioner. The majority arbitrator further held that there were some delays on the part of respondent still it was the duty of the Engineer to assess whether the delays are of critical nature. It was further held that if there is prolongation of contract, escalation on account of increase in price of materials would be a claim distinct from the claim for idle machinery, tools and tackle for which the contractor may claim compensation on account of depreciation or interest on blocked capital. It was further held that a loss of profit earning capacity of the particular contractor organization affected due to its being retained longer on the contract in question without any corresponding increase in monetary benefit earned and without being free to move elsewhere

to earn the profit which otherwise it might have earned shall be a ground for compensation. It was held that it is beyond any reasonable doubt that the party suffering from failure of the other party is entitled to all additional costs incurred in the extended period of contract.

13. The majority arbitrators awarded the following amounts against each claim raised by the respondent:

(i) Additional overhead costs in the extended period:

Rs.2729.42 lacs for the period from 9th December, 2006 to 30th April, 2008 and Rs.2688.5 lacs for the period from 1st May, 2008 to 30th September, 2009.

(ii) Additional costs on account of extended stay of plant and equipment at site:

Rs.2902.95 lacs for the period from 9th December, 2006 to 30th April, 2008 and Rs.1414.53 lacs for the period from 1st May, 2008 to 30th September, 2009.

(iii) Additional costs towards uncovered compensation in cement costs in the extended period:

Nil amount.

(iv) Additional costs towards uncovered compensation in steel costs in the extended period:

Nil amount.

(v) Additional costs towards uncovered compensation in labour costs:

Rs.160.85 lacs for the period from 9th December, 2006 to 30th April, 2008 and Rs.55.36 lacs for the period from 1st May, 2008 to 30th September, 2009.

(vi) Additional costs towards uncovered compensation in POL costs:

Rs.806.49 lacs for the period from 9th December, 2006 to 30th April, 2008 and Rs.248.37 lacs for the period from 1st May, 2008 to 30th September, 2009.

(vii) Additional costs towards financing charges:

Rs.976.28 lacs for the period from 9th December, 2006 to 30th April, 2008 and Rs.392.70 lacs for the period from 1st May, 2008 to 30th September, 2009.

(viii) Loss of earning capacity and profits:

Rs.2262.95 lacs for the period from 9th December, 2006 to 30th September, 2009.

(ix) Additional costs due to increase in price of material used in guide bund works:

Rs.612.36 lacs for the period from 9th December, 2006 to 30th September, 2009.

14. The majority arbitrators further awarded interest @ 12% per annum compounded monthly allegedly as per clause 60.8 on accounts awarded by them under the claims from 4th August, 2008 (Claim No.8) and 2nd June, 2009 (Claim No.8A) respectively i.e. 42 days after the submission of the claims to the Engineer.

15. The findings of the minority arbitrator are that the parties have agreed and signed the contract which is inclusive of price adjustment clause 70 and have not pointed out any modification in the pre-bid meeting. As such parties to the contract cannot question the in house complete remedies/mechanism for additional costs as provided in the contract document. It was held that the plea of majority award vide para 11.4(e) that tender is of a take it or leave it basis and tender shall be treated as non-responsive and conditional

does not well, as the bidder during pre-bid meeting, could have raised any inconsistencies or vagueness in terms of contract.

16. Considering the entire sequence of events and EOT applications submitted by the respondent from time to time, EOT determination by Engineer in consultation with respondent, the learned minority concluded that although the Engineer had cited many references where delay was shown attributable to the respondent, but since EOT was determined by the Engineer under Clause 44 and concurrent delays by the respondent was not quantified, therefore nothing could be made out. Therefore, the minority observed that extension of contract period from 9th December, 2006 to 30th September, 2009 was on account of delays of the petitioner/Engineer. It was further observed by the learned minority Arbitrator that some documents placed before the Arbitral Tribunal can be categorized as general, but bulk of document shows definite slow progress by the respondent. However, due to default held that as per Clause 6.4, 12.2 and 42.2, EOT not always result in additional 'cost' as the word in these clauses is extension of time and 'costs'. He further observed that as per this provision every EOT does not result into 'cost' and similarly 'costs' can be added to contract price even without EOT. As such the respondent is entitled for only 'costs' as defined in the contract. The respondent has not quantified idling of machinery and equipment in the original time of completion.

17. He further held that the word 'costs' has been defined properly under clause 1.1 (g)(i) of GCC and means all expenditure properly incurred or to be incurred, whether on or off the site, cost also include overhead and other charges properly allocable thereto but does not include any allowance for profit.

18. In view of the award passed on 16th March, 2012, the petitioner has filed the objections under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the said arbitral award.

19. The matter came up for hearing when Mr. Sandeep Sethi, learned Senior counsel appeared on behalf of the petitioner and Dr. Abhishek Manu Singhvi, learned senior counsel appeared on behalf of the respondent and have made their submissions.

20. Mr. Sethi, learned Senior counsel for the petitioner has raised the challenge to the award dated 16th March, 2012 rendered by the Majority of the Arbitral Tribunal by making his submissions to the following effect:

- a) Firstly, Mr. Sethi argued that the award dated 16th March, 2012 passed by the majority of the Arbitral Tribunal is against public policy in as much as the award purports to grant additional costs as per the terms of the contract document dated 2nd June, 2004 but in effect grants the substantial damages under the head of the costs which was never contemplated under the contract or bid document. It has been argued by Mr. Sethi that the mere reading of findings relating to claims 8 and 8 A which were granted by the learned majority of the Arbitral Tribunal

were towards the additional costs. However, as per Mr. Sethi, far from granting merely the element of the cost which has been defined in clause 1.1 (g) of the contract agreement, the majority of the Arbitral Tribunal proceeded to grant not merely the costs which are based on the actual expenditure or to be incurred but also proceeded to grant the hypothetical claims like financing charges or element of the expected profit or loss of earning capacity which was specifically excluded from the purview of the costs or additional costs. As per Mr. Sethi, learned Senior counsel such rewriting of the contract by inclusion of hypothetical damages under the head of the costs or additional costs is clearly impermissible and the majority of the Arbitral Tribunal while granting claim 8 and 8 A to the extent of the loss of the profits and financing charges and all other claims which are unsupported by the documentary evidence has acted beyond the purview of the contract and position in law warranting interference under the provisions of Section 34 of the Act.

- b) Secondly, Mr. Sethi argued that the claim no. 8 and 8 A comprised of the grant of the additional costs incurred on account of onsite or offsite overhead expenses in the extended period, retention of contractors equipments, towards uncovered compensation in cement costs, steel costs, labour costs, POL costs etc. As per Mr. Sethi, in so far as the uncovered compensation in cement costs, steel costs, labour costs and in POL costs in an extended period is concerned, the said claims

are merely based on the rise or fall in the prices of the cement, steel, labour and POL and the said claims are thus governed by the price adjustment or price variation clause as per clause 70 of the contract agreement. It has been further argued by Mr. Sethi, learned senior counsel that the majority of the arbitral tribunal awards the said sums of additional costs towards uncovered compensation without demarcating the costs actually incurred by the respondent on the cement, labour costs, steel and POL as against the escalated costs which is on account of the increase in the price of the said items.

- c) Mr. Sethi, taking his submission forward argued that the costs to the extent of full compensation of rise and fall in the prices of the labour and inputs etc is clearly governed by the price adjustment formula provided under the contract agreement as per clause 70 and the said formula cannot be overridden in the extended period of the contract merely at the whims of the contractor. As per Mr. Sethi, Arbitral Tribunal failing to appreciate the said submissions and granting the full amount of uncovered compensation on account of the rise and fall in the prices of the inputs and labour clearly acted beyond its domain as the said escalation other than price adjustment formula was never contemplated in the contract agreement originally as per clause 70 and if it was never payable originally can also not become payable in an extended period, when no indicator to this effect is available in the contract agreement. Mr. Sethi argued that such an escalation was surely not covered under

the head of the additional costs or for that matter costs under the contract agreement.

Mr. Sethi also countered argument of the respondent's counsel by urging that the argument that the clause 70.3 is not applicable to the extended period of the contract is also not meritorious in view of his submissions recorded herein and the same cannot be accepted. It has been argued by Mr. Sethi that there exists no ambiguity in clause 70 of the contract agreement and thus the doctrine of contra-proferentem has no applicability in the instant case and learned arbitral tribunal has clearly travelled beyond the contract agreement warranting interference of this court.

In order to substantiate his submission, Mr. Sethi relied upon the judgment passed in the case of ***N.J. Devani Builders P Ltd v. Indian Farmers Fertilizers Cooperative Ltd***, 2013 (1) Arb. L. R 218 (Del) (DB), wherein it has been held by this Court that once the parties have chosen particular formulae for price adjustment, they cannot ask for anything over and above what is admissible as per formulae and it is perfectly lawful to restrict the price adjustment.

- d) Thirdly, Mr. Sethi argued that the part of the claims relating to costs of the retention of the plant and machinery at the site and also the costs for mobilizing the resources are also unsupported by the contemporaneous evidence. It has been argued by Mr. Sethi as per the clauses of the contract

agreement, there is a requirement for determination of the costs by the Engineer to see the contemporaneous documents evidencing the incurring of the said costs. In the absence of the Engineer determining the said costs, it was the duty of the learned arbitral tribunal to ascertain each and every records maintained by the respondent. As per Mr. Sethi, Arbitral Tribunal has failed undertake the said exercise and as such the award by the majority to extent it awards the additional costs on overheads and stay of the plant and machinery at the site is against the provisions of the contract and is unsupported by the evidence.

Mr. Sethi, in order to substantiate his submission relied upon the judgment of the Supreme Court decided in the case of ***Numaligarh Refinery Ltd v. Daelim Industrial Co. Ltd***, (2007) 8 SCC 466, wherein it was observed that the award which suffers from the lack of the evidence in support of the awarded sum is vitiated and as such can be interfered with by the courts under the provisions of Section 34 of the Act.

- e) Fourthly, Mr. Sethi has explained his first submission in detail by arguing that the contract agreement provided for the payment of the costs as per clause 1.1(g) of the contract agreement. The claims before the arbitral tribunal also related to the additional costs as per the claim 8 and 8 A of the respondent. The findings of the arbitral tribunal in so far as the grant of the profit element and earning capacity is concerned though discusses the provisions relating to damages under the

provisions of Section 73 of the contract Act but grants the same under the head of the additional costs. Rather, the finding of the arbitral tribunal at the paragraph 11.10.4 clearly states that loss of profit element and financing charges are additional costs and are payable under the agreement for the extended period. It has been argued by Mr. Sethi, learned Senior counsel, that the grant of the profit element or expected earning capacity and financing charges under the head of the additional costs which are neither the actual or proper expenditure incurred or to be incurred by the contractor is clearly misconstruing the provisions of the costs or additional costs as provided in various clauses and sub-clause 6.4, 12.2, 40.2, 42.2, 44.1, 44.3 and 53 of the contract agreement during the extended period. It has been argued by Mr. Sethi, that the word “costs” have same meaning throughout the agreement and for that reason has been explicitly defined under clause 1.1 (g) of the agreement. The said definition of the costs excludes specifically the allowance of the profit. Under these circumstances, the grant of the profit element or financial charges by the majority of the arbitral tribunal under the head of the “costs to be added to the contract price” are clearly falling under the head of express exclusion from the scope and ambit of the costs.

Thus, the Arbitral Tribunal not merely acted contrary to the express wordings of the agreement but chose to rewrite the contract by awarding the profits and financial charges which are excluded from the purview of the costs. As per Mr. Sethi, the

said profit element and financial charges are not costs but damages, however, the Arbitral Tribunal cannot camouflage it under the head of the costs.

For the assessment of the damages as such, there had to be claims, answers, determination on the question of the entitlement of the damages under the contract agreement of the present nature and thereafter quantification. Once, the said enquiries are missing from the award of the Arbitral Tribunal, the grant of the simplicitor loss of profit and financing charges under the head of the costs to be added in the contract price by simply believing the stand of the respondent without any evidence is a clear infirmity in the award and the award so far as the grant of the loss of the profit due to the prolongation of the execution and financing charges is required to be interfered with as the said aspects are not costs to be added to be contract price in view of the definition of the costs provided in the contract and the Arbitral Tribunal clearly acted beyond the authority emanating from the contract.

- f) Fifthly, Mr. Sethi argued that the Arbitral Tribunal failed to appreciate that Overhead charges were only as a matter of reimbursement and not amount available in the hand of the respondent, unlike Profit. Therefore, there was no delayed recovery of overhead which can entail into any such financial charges. It has been argued that the award for Rs.13.68 crores has been made without any evidence and hence is contrary to

the law for grant of damages. It is argued that the arbitral tribunal after having allowed the claim for financial charges could not have allowed the claim for loss of profit,

In this context the judgment passed by Supreme Court passed in the case of ***State of Rajasthan vs. Ferro Concrete;*** (2009) 12 SCC 1 has been relied upon where it has been held that if there is no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement merely on the basis of the claim statement without anything more, it has to be held that award on that account would be invalid.

- g) Sixthly, Mr. Sethi argued that majority of the arbitral tribunal wrongfully allowed loss of profit to the tune of Rs.22.63 crores, which claim is not sustainable in view of the contract clauses and also in law in view of the submissions advanced above. It is submitted by the learned senior counsel for the petitioner that loss of profit is only sustainable in case of illegal breach of contract and not prolongation of the contract. Reliance in this regard has been placed on the case of ***Delhi Jal Board Vs. Subhash Pipes Ltd.***, 2005 (2) Arb.L.R 213 (Del) and ***Bharat Engineering Vs. DDA***, 2006 (suppl.) Arb. L.R. 129 (Del).

The Supreme Court's judgment in the case of ***Bharat Coking Coal Ltd. vs. L.K. Ahuja***; (2004) 5 SCC 109 was relied wherein it was held that after award of escalation and other claims, a claim for loss of profit was not tenable.

- h) Seventhly, Mr. Sethi argued that the Arbitral Tribunal erroneously awarded the additional overhead and Plant &

machinery allegedly incurred during extended period without evidence of actual loss suffered and without accounting for delays attributable to the Contractor/Respondent. This has been explained by Mr. Sethi by highlighting the following pointers:

- During the extended period, Claimant did work to the tune of Rs. 226 crores and the total claim awarded to the Claimant for the said period is Rs. 152 crores. This is over and above Rs. 226 crores paid by the petitioner to the respondent for the work done.
- As against the Claim of Rs. 152 crores awarded by Majority Award, minority awarded Rs. 73 crores restricts the loss of overhead on the basis of average percentage of Overheads (17.67%) allowable as per MOST for different type of works excluding variation and escalation. Whereas majority awarded Overheads 25% based on the certificate of a chartered accountant. The said grant of Overheads at 25 % is unjust.
- The majority of the Arbitral Tribunal did not take note of the delays caused by the Claimant which was evidenced by 120 letters placed on record. Arbitral Tribunal was guided by the fact that extension of time was granted by the petitioner till 30th September, 2009 which was found to be sufficient to burden the petitioner with huge claims. In the letter dated 15th March, 2011 that the Engineer had stated that *“since the delay is on account of default of*

the Employer as well as the Contractor, EOT may be approved with no prolongation cost.”

- The Arbitral Tribunal ought to have bifurcated the delays attributable to the claimant from those attributable to the petitioner while awarding the claim.
- There was vast difference in the amount of overhead allegedly incurred by the Claimant for the period covered by Claim 8 and Claim 8A i.e. 21% and 41% respectively. This shows that the amount claimed by the Claimant were highly inflated, unjust arbitrary and without any basis.
- The Arbitral Tribunal wrongly considered value of work done during expended period as Rs. 295.58 crore against actual value of Rs.226.29 crores. This led to wrong calculation of amount of damage.

For all these reasons, as per the learned Senior counsel for the petitioner, the claim of the respondent on the aspect of additional costs towards overheads is unsustainable.

- i) Eighthly, it has been argued by Mr. Sethi that the claim for the additional cost towards the Guide bund was erroneously awarded by the arbitral tribunal as the same was not maintainable by way of operation of clause 70 of the contract agreement. Further, the Arbitral Tribunal did not take into the consideration the undertaking given by the respondent vide its letter dated 20th January, 2006. The respondent had undertaken that they will not claim any extra amount towards the above stated work and would only be entitled to BOQ rates.

In view of the same, the said claim was not maintainable and wrongly granted by the Arbitral Tribunal.

- j) Lastly, it has been argued that interest allowed at 12% p.a. compounded monthly is excessive and bad in law. It is submitted that past or pendente lite Interest cannot be allowed on compensation/damage awarded by Court.

Reliance is placed on the judgment of Supreme Court in ***State of Rajasthan vs. Ferro Concrete***, (2009) 12 SCC 1 wherein it has been held that interest can be paid on damages only if there is stipulation in the contract or written notice to that effect was given. The court further held that award of interest @ 9% is the reasonable one.

Likewise the Supreme Court in ***State of Haryana vs. SL Arora***, (2010) 3 SCC 690 held that interest on interest (compound interest) is payable only if there is provision in the contract else only simple interest can be awarded by the Arbitral Tribunal under Section 31 of the Act. Arbitral Tribunal has wrongfully awarded compound interest @ 12% taking shelter under clause 60.8. The reference made to Clause 60.8 is misconceived as the said clause is not applicable in the present case. It deals with time of payment and interest payable to the contractor on the amount due under interim payment certificate issued by the Engineer. The said provision by no stretch of imagination can be extended to payment of interest on a claim of damages. There was no agreement between the parties to pay compound interest on damages.

Accordingly, learned senior counsel for the petitioner submitted that the interest granted is also required to be interfered with by this court.

21. In the light of the aforementioned submissions advanced by the learned senior counsel for the petitioner and the grounds raised in the petition, it has been urged that this Court should set aside award dated 16th March, 2012 passed by the majority of the Arbitral Tribunal under the provisions of Section 34 of the Act by holding that the said award is against the public policy and passed by the arbitral tribunal contrary to the express terms of the contract.

22. Per contra Dr. Singhvi, learned Senior counsel appearing on behalf of the respondents has made his submissions which can be outlined in the following manner :

a) Firstly, Dr Singhvi argued that the claim 8 and 8 A as determined by the majority of the arbitral tribunal comprised of the costs incurred by the respondent on account of various delays occasioned due to the fault of petitioners which resulted in the extension of time in the completion of the contract. Dr. Singhvi argued that the delay has occasioned on applicability of the clauses 6.4, 12.2, 40.2 and 42.2 of the contract agreement and in each of such clauses, the engineer has the right to determine the costs which shall be added to the contract price. Dr. Singhvi argued that the extensions were duly applied by the respondent and the same were approved by the petitioner as well as the engineer. The Arbitral Tribunal also considered the voluminous

records of the matter and the submissions advanced by the parties and observed that the delay has been done on count of the default of the petitioner and as such the costs are required to be added in the contract price. Such costs as per Dr. Singhvi, are rightfully granted by the Arbitral Tribunal in relation to the various claims raised by the respondent.

- b) Dr. Singhvi argued that the challenge raised by the petitioner so far as it relates to the lack of evidence or contemporaneous documents in relation to overheads and overstay of the plant and machinery and financial charges has already been dealt with and adjudicated by the Arbitral Tribunal after appreciating the material available on record. This court while deciding the objections under the provisions of Section 34 of the Act is not acting as a Court of appeal and thus will not reappreciate the evidence which has already been done by the Arbitral Tribunal in order to take a different view in the matter. It has been argued that it is the domain of the arbitral tribunal to determine the quantum of the evidence and as such this court should not indulge into the fact whether there was less or more evidence available before the Tribunal, once there was material available supporting the claim and the same has been appreciated by the Arbitral Tribunal.

Dr. Singhvi, learned Senior counsel argued that the challenge raised by the petitioner to the award dated 16th March, 2012 does not fall within the permissible scope of the enquiry of

the courts deciding the objections under the provisions of Section 34 of the Act.

In order to substantiate his submission, Dr. Singhvi cited the following judgments:

- i) **Steel Authority of India Limited v. Gupta Brothers Steel Tubes Limited;** (2009) 10 SCC 63
- ii) **Sumitomo Heavy Industries Ltd. Vs. Oil and Natural Gas Corporation Ltd.;** 2010(11) SCC 296
- iii) **State of U.P. v. Allied Constructions;** (2003) 7 SCC 396

In view of the aforementioned authorities, it has been argued by Dr. Singhvi, that the entire challenge of the petitioner is based on either re-agitating the same controversy or calling upon this court to reappreciate the evidence or raising the new pleas which were never raised before the Arbitral Tribunal, all of which is impermissible under the provisions of Section 34 of the Act. Thus, on this very ground itself, the challenge of the petitioner is required to be dismissed.

- c) Dr. Singhvi, learned Senior counsel argued that so far the challenge raised by the petitioner in relation to recovery of uncovered compensation in relation to rise and fall of the cost are concerned on the ground of applicability of Clause 70 of the contract agreement, the said ground cannot be entertained by this court due to manifold reasons which have been narrated by Dr. Singhvi in the following manner:

- This Court in the judgment of **National Highway Authority of India Vs. M/s. Oriental Structural Engineers Pvt. Ltd. –**

Gammon India Ltd. – Joint Venture, FAO (OS) No. 461 of 2012 has held that under the above clauses the contractor is entitled to the costs in actual. A Special Leave Petition filed by the Petitioner being SLP (C) No.19536 of 2013 stood dismissed on 8th July, 2013. The interpretation of the Arbitrators in the present regard cannot be faulted. The application of Clause 70 was clearly put in issue by the petitioner in the appeal in ground IV & V and the appeal having been dismissed, the petitioner cannot be allowed to raise the same issue in the present petition which acts as resjudicata. Grounds IV & V are reproduced as follows:

“IV. That due to various reasons of delay and in accordance with the provisions of sub-clause 6.4, 12.2, 40.2, 42.2, 44.1, 44.3 and 53 of COPA, the additional extension of time had already been accorded by the competent authority of the Appellant and the amount of any cost which might have been incurred by the Respondent due to the above sub clauses which were to be added to the price have also been paid and/or are being paid for the extended time approved for final extension of time as per the escalation formulae as laid down in sub-clause 70 of COPA. The Appellant thus requested the Engineer to submit its views and the Engineer accordingly submitted the same view vide its letter dated September 26, 2008. Therefore, any amount claimed as compensation for delay other than escalation does not and cannot arise in the facts and circumstances of the case.

V. That the Engineer had assured that when final extension of time is approved, relevant contemporary records and other details and

particulars submitted by the Respondent, the Engineer will determine the additional cost after which the Engineer had evaluated and/or opened that no compensation on account of delay other than escalation can arise. Thus, the Respondent's claim on account of delay is not only false, absurd, malafide but also dehors the provisions of the contract between the parties. It is submitted that other than escalation, no other claim lodged by the Respondent is justified and/or can be sustained in the eyes of law and therefore the escalation based on price index has already been paid and/or is being paid to the Respondent. All expenses incurred by the Respondent within the realm of the contractual provisions have been duly paid in accordance with the contractual arrangement as mentioned above along with the desired escalation has also been paid under sub-clause 70 and apart from that, no other sum is due and payable by the present Appellant to the Respondent."

In view of the same, the petitioner is now foreclosed from raising the same issue before this Court in the present petition. The particular part of the said judgment in ***Oriental Structure's*** case (Supra) is reproduced as below:

"9. The Tribunal had noted that the highway which was the subject matter of the contract was split into three sections; the possession of the site was given on different dates for the three sections. During the progress of work impediments occurred and extensions of time has been given for all three sections. Salaries, wages, overhead expenses, proportionate corporate overheads were claimed by the claimant. Fixed machinery cost based on actual deployment was also claimed on pro-rata basis. The calculation made by the claimant in computing the

cost was verified by the monthly reports submitted by him and verified and forwarded to the Engineer of the respondent. MORTH method was applied in computation of this claim. This was noted to be a reasonable and appropriate method which methodology is even otherwise not the subject matter of challenge. The factual delays and consequent extension of time recommended by the Engineer of the respondent were noted in detail by the Arbitral Tribunal. Relevant would it be to state that the initial dates of completion of Section-I was enlarged by the respondent up to 30.10.2007; for completion of Section-II it was enlarged up to 03.4.2007 and for Section -III it was extended up to 03.4.2007. All these extensions stood approved by the respondent. The Arbitral Tribunal had in fact noted seven reasons for the delays which included belated possession of site; delay in issue of construction drawings and their revision; delay due to adverse law and order condition including terrorist attacks; delay due to strike, delay due to additional work. These facts are not disputed. The Tribunal had also noted that climatic and weather condition which would delay the work could not be attributable to the respondent but to provide an encumbrance free site and designs/drawing at appropriate time was definitely the responsibility of the respondent; similarly terrorist attack, law and order condition also fell under the respondent risk list. These delays were attributed to the respondent. The Tribunal had noted that compensation for delays could be worked out in favour of the claimant in terms of the definition of "cost" to be determined under sub clause 6.4, 12.2, 42.2 in terms of its definition as contained in sub-clause 1.1(g)(i) of the contract conditions. Clause 6.4 dealt with delay and cost of delay of drawings; Clause 12.2 dealt with unforeseeable physical obstructions or conditions and so also

Clause 42.2 which dealt with failure on the part of the respondent to give possession of the site to the claimant. All these clauses envisaged additional costs to be awarded to the contractor. The Arbitral Tribunal has noted with caution that the claimant is not entitled to claim loss of profit and cost compensation for delay is alone to be considered.”

- Thus the application of Clause 70 of the Contract does not act as a bar to the application of Clauses 6.4, 12.2, 40.2 and 42.2. Once it is established by evidence before the Tribunal that the respondent had invoked the said clauses in their application for extension of time, the Court cannot interfere with the extent of the evidence. The issue raised by the Petitioner in respect of application of Clause 70 in contra distinction with Clause 6.4, 12.2, 40.2 & 42.2 as having an overriding effect deserves to be rejected.
- The plain interpretation of the above Clause would show that only where full compensation for rise and fall is not covered by any other Clause of the Contract, the price adjustment Clause mentioned in Clause 70.2 shall be applicable. In the present case, the respondent is claiming full compensation and actual rise and fall as per Clause 6.4, 12.2, 40.2 and 42.2 of the Contract. Thus, Clause 70.2 stands on its own footing while preserving the right of the contractor to claim actual rise and fall under Clauses 6.4, 12.2, 40.2 and 42.2 of the Contract being the “full compensation” where the Employer is at fault. If the Employer is not at fault then only clause 70.2 would be applicable.

- Clause 70.2 does not use the words “only”, “shall not be payable except”, or any other exclusionary expression to oust the jurisdiction of the Arbitral Tribunal, but in fact provides jurisdiction to the Tribunal as mentioned in the Clause. Where a person is entitled to any compensation as per any other Clauses of the Contract, Clause 70.2 would have no play.
- The said Clause can merely be construed as a “price adjustment clause”. A totally distinct and a separate cause of action for the contractor/respondent exists in the Contract to avail of “additional costs” in case there is a breach by the Employer. For that purpose specific Clauses of the contract have been incorporated namely Clauses 6.4, 12.2, 40.2 and 42.2.
- The Arbitral Tribunal in fact has interpreted two sets of Clauses i.e. Clauses 6.4, 12.2, 40.2 and 42.2 on one hand and Clause 70 on the other as providing separate and distinct rights to the parties. In this regard the respondent relied upon the findings of the Arbitral Tribunal at Para 11.4.6 and 11.4.7 which are as follows:

“11.4.6 The clause 44 of GCC titled Extension of Time for Completion stipulates as follows:

“In the event of

(a) The amount or nature of extra or additional work, or

- (b) *Any cause of delay referred to in these conditions, or*
- (c) *Exceptionally adverse climatic conditions, or*
- (d) *Any delay, impediment or prevention by the Employer, or*
- (e) *Other special circumstances which may occur, other than through a default of or breach of contract by the Contractor or for which he is responsible,*

being such as fairly to entitle the Contract to an extension of Time for Completion of the Works, or any Section or part thereof, the Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly, with a copy to the Employer.”

Of the above conditions, the items relevant for the issue under consideration would be item No.(b) and (d). These items contemplate extension of time for any cause of delay referred in the conditions of contract and the delay on account of the impediments or prevention by the Employer respectively.

From the clauses mentioned above, the Clauses 6.4 and 12.2 of GCC would fall in the category of Item (b) of Clause 44.1 and the Clause 42.2 of GCC would fall in the category of item (c). All these clauses have a similar conditions attached to them, which are as follows:

- a) *Any extension of time to which the Contractor is entitled under Clause 44, and*

b) *The amount of such costs, which shall be added to the Contract Price.*

Therefore, it is abundantly clear that, if the time for completion of the works is extended under Clause 44.1 of GCC for the reasons given in the Clauses 6.4, 12.2 and 42.2 of GCC, the Contractor shall be entitled to seek the additional cost which he may be forced to incur for completion of the works.

11.4.7. ... In accordance with the above Clauses the Contractor would be compensated for the changes in the costs of the inputs to the works by the agreed formulae. Such compensation paid may not be actual compensation, but the Contractor cannot seek additional payment on the ground that the escalation formula does not compensate for the actual rise or fall. The parties would be bound by the said formulae.

However, if the Contract period is extended for the reasons under the clauses cited above, i.e. 6.4, 12.2 and 42.2, then the Contractor shall have the entitlement to seek for the actual additional cost incurred by him other than what would be compensated by the contractual mechanism.”

Further at Para 11.13.6.1, 11.13.6.2, 11.13.7.1 and 11.13.7.2 of the Award, the Arbitral Tribunal has come to the following conclusion:

“As per Clause 70 of CoPA, the Contractor shall not be entitled for the actual rise or fall in the costs of inputs to the works. The Clause 70.2 clearly stipulates that the price adjustment formulae would not compensate the Claimant for the actual rise or fall in the inputs to the works. The Claimant has to provide for such

uncovered variation in the costs in the rates and prices. The prohibition in Clause 70 is by way of disclaimer provision.

However, the Contract period is extended for the delay and defaults of the Respondent, the Claimant would not be expected to absorb such additional cost. The disclaimer provision cannot be made use by the Respondent to take advantage to deny the Claimant of his dues permissible under the Contract and law. Due to the extended period of Contract for a longer period than envisaged at the time of submission of tender, the Claimant was subjected to additional costs. The Contract specifically provides that the Contractor/ Claimant shall be entitled for the additional cost in the extended period.”

The above interpretation of the said clauses given by the Arbitral Tribunal is an interpretation arrived at after harmoniously construing all the clauses of the Contract. The interpretation of the Arbitral Tribunal is very much a plausible interpretation and cannot be interfered with by the Court while exercising its powers under Section 34 of the Act.

- Under Clauses 6.4, 12.2, 40.2 and 42.2 of the Contract, costs are required to be “added” to the contract price. However, Clause 70.2 only talks of contract price to be “adjusted”. The definition of “Contract Price” in Clause 1.1 (e) (i), does not consider the costs to be “added” to such Contract Price but only considers the tendered amount as the “Contract Price”. The “adjustment” of the Contract Price is distinct from “addition of

costs” to Contract Price inasmuch as the latter entitles the Respondent to an amount over and above the Contract Price. Clause 70.2 only deals with adjustment of the tendered price if there is no Clause supporting full compensation to be provided to the Contract in Clauses 6.4, 12.2, 40.2 and 42.2 which deal with addition of costs. The two sets of Clauses therefore furnish the respondent with separate and independent right and there is no overlap between the two.

- The distinction between additional costs & price adjustment is also evident from Clause 70.8 of COPA which clearly holds that in case indexed amounts are paid, then additional costs shall not be paid in cases of exigent circumstances like charge of statute, decree or law. Thus, there is a clear distinction between “additional costs” to be added to the contract price provided for in Clause 6.4, 12.2, 40.2 and 42.2 of GCC and adjustment to “Indexed costs” or “Contract Price” provided for in Clause 70.1 – 70.7 of COPA. Further, the disqualification of additional costs provided for in Clause 70.8 of COPA is purposefully missing or absent in Clause 6.4, 12.2, 40.2 and 42.2 of GCC, which clarifies that these clause shall have an overriding effect.
- As detailed above, the respondent had applied to the Engineer along with the extension of time for additional cost on actual basis under Clauses 6.4, 12.2, 40.2 and 42.2 which were being considered by the Engineer. At no point did the petitioner before the Engineer took the argument that such claims of the respondent deserve to be calculated only on the basis of Clause

70.2. When the Engineer did not decide the additional cost, the respondent approached the Dispute Resolution Board (DRB) who also did not reject the respondent's claims but only directed that the Engineer must rule upon these additional costs expeditiously. Since the respondent was not satisfied with the decision of the DRB, it applied to the Arbitral Tribunal for such cost.

- In fact, the Engineer granted the extensions under Clauses 6.4, 12.2, 40.2 and 42.2. Thus, the petitioner cannot now improve on his case by referring to Clause 70 for defending the claims granted by the Arbitral Tribunal in favour of the respondent on the basis of the above said Clauses. The interpretation of the Engineer, the DRB and the Arbitral Tribunal who are expert bodies under the contract, cannot be ignored. Thus, the interpretation of the Arbitral Tribunal in this regard is proper and need not be interfered with.
- It is also settled law that where there is ambiguity or doubt in the words of an exclusion clause, then those words are construed against the party putting forth the document, and in favour of the other party by applying the principle of *contra proferentum*. The agreement between petitioner and respondent is a standard FIDIC contract drafted by NHAI itself. NHAI being the draftsman of the document cannot be allowed to take advantage of the ambiguity therein and hence, the ambiguity must be interpreted against NHAI (drafter).

In view of the aforementioned reasons, as per Dr. Singhvi, learned Senior counsel, clause 70 has no applicability in respect of the claim relating to recovery of uncovered compensation for rise and fall in costs of the inputs like cement, steel, labour, POL and others and the said clause 70 cannot be pressed into service in order to obviate the claim for the additional costs which is distinct right recognised under the contract agreement. Thus, the petitioner's challenge deserves to be rejected.

d) Dr. Singhvi, learned Senior counsel has argued that the challenge by the petitioner on the additional costs on account of overhead and stay of plant and machinery is also not maintainable due to following reasons:

- Clause 70 which relates to price adjustment clause in relation to rise and fall of the prices of the inputs have no applicability in cases of overheads and stay of the plant and machinery.
- The challenge by the petitioner that there exist no contemporaneous documents in support of the instant claim has been dealt with by the arbitral tribunal after appreciating the material available on record to the said effect.
- The chance to examine such documents and evidence maintained by the respondent was also available to the engineer who made no determination on the claims presented by the respondent. Likewise was the position with the DRB. The arbitral tribunal on the contrary has evaluated

the evidence and the material available on record and made a fair assessment of the claims by applying the formula applicable to Ministry of Road and Surface Transport while assessing the claim on the aspect of overheads and over stay of the plant and machinery. The similar assessment was made by the tribunal in the case of **NHAI v. Oriental Structural** (supra) which has been affirmed by the Division Bench of this Court and thus this Court should not adopt a different view in the matter.

In view of the aforementioned reasons, Dr. Singhvi urged that this Court should not consider interfering with the award made by the arbitral tribunal on the instant claim on the additional costs on account of overhead and stay of plant and machinery mentioned in the Award in view of the vague challenge raised by the petitioner.

- e) Dr. Singhvi, learned Senior counsel has further argued that the petitioner's challenge on the claim relating to the loss of profits and financial charges is unsustainable due to several reasons which are:
- The submission of the petitioner that the definition of costs excludes the element of the profit and thus loss of profits are not recoverable under the contract agreement was not raised earlier by the petitioner before the Arbitral Tribunal and the petitioner is thus estopped from raising such plea before this court as the same falls outside the scope of the provisions of the Section 34 of the Act.

- The Arbitral Tribunal has fairly arrived at the conclusion that the loss of the profits are included within the purview of the additional costs by interpreting various provisions of the agreement and after considering the authorities on the subject and thus the said view cannot be faulted with by the petitioner when it is the petitioner who is guilty of the defaults resulting into the delay in the execution of the works. The arbitral tribunal also considered the judgment of the Supreme Court in the case of ***Bharat Coking Coal Ltd v. L.K. Ahuja***, (2004) 5 SCC 109 and observed rightly that it is not unusual for the contractor to claim loss of the profits and earning capacity and the said reasoning cannot be upset by this Court when the said compensation on the count of breach by the employer is recoverable under the contract.
- Clause 1.1(g) of the Contract merely defines “cost” as *means all expenditure properly incurred or to be incurred, whether on or off the Site, including overhead and other charges properly allocable thereto but does not include any allowance for profit.*

The said definition does not in any way exclude or bar or prohibit the grant of loss of profit as damages where there is a breach on part of the Employer under Section 73 of the Contract Act. Merely because “costs” can be granted by the Engineer in Clauses 6.4, 12.2, 40.2 and 42.2, does not mean that “loss of profit” stands excluded from the jurisdiction of the Arbitrator and cannot be so granted

especially where the breach is by the Employers. The submission made by the Respondent before the Arbitral Tribunal in respect of loss of profits has been recorded at Page 50 of the Arbitral Award. The relevant portion of the same reads as follows:

“5. Loss of earning capacity/ opportunity and profit:

The Respondent has failed to distinguish between “rate” and “cost”. On cost, when element of profit is added, the quoted rate comes. It is well settled that a Contractor works for “gain”. For executing any contract, if the Contractor is paid only the “cost”, no Contractor will come for executing any work under the contract. The rate includes five elements viz., cost of materials, cost of labour, cost of hired charges of machinery, cost of overhead and element of profit. So far as the definition of cost is concerned as per agreement, it includes first four elements and element of profit when added that becomes payable rate to the Contractor. There cannot be any contract without the element of profit. The Respondent have wrongly construed that the decision of Hon’ble Supreme Court in Bharat Coking coal Vs. L.K. Ahuja, wherein it was categorically held that, it is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of compensation of work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilized the same for some other business in which he could have earned profit. Accordingly, the Claimant has justified his claim by disclosing the copy of the agreement and LOA pertaining to Assam road project which is of the same nature and magnitude as that of the instant work under adjudication.”

- Claim for loss of profit is the loss occasioned to the Contractor on account of the reduction in the profit margin caused by prolongation of the contract or on account of the profit the Contractor could not earn during the extended period by having been unable to deploy its resources and manpower in some other project due to prolongation of the current contract. In view of the aforementioned reasons, as per Dr. Singhvi, the challenge related to the claim of loss of profit is required to be rejected.
- So far as the claim for the financial charges are concerned, the petitioner has not challenged in its statement of the defence that the said claim is barred by virtue of clause 70 of the contract agreement. In any case, the claim relating to financial charges is not based on the rise and fall of the prices in inputs and thus by no stretch of imagination clause 70 would apply to the financial charges.
- Whereas, the claim for financing charges is the cost incurred by the Contractor on account of the actual charges paid to banks and other financial institutions due to the prolongation of the contract. The claim for financing charges is the additional cost incurred by the Contractor due to delay in recovery of the payments on the one side and incurring of interest on loans for the extended period on the other. Whereas, claim for loss of profit is the revenue which the Contractor could have reasonably earned during the

extended period. Thus, the two heads and claims are not overlapping.

In view of the aforementioned reasons, as per Dr. Singhvi, the challenge to the claims relating to the recovery of the loss of the profit and financial charges laid by the petitioner is required to be dismissed.

- f) Dr. Singhvi, learned Senior counsel argued that the petitioner's challenge to the claim for recovery of the additional costs for the increase in the price of guide bund works is also frivolous in nature in as much as neither the ambit of Clause 70 covers the specialized materials like Gabion Boxes, GI Pipes and Geo textiles used for the guide bund works nor the said clause 70 bars the additional costs incurred by the respondent on account of the breaches committed by the petitioner.

It has been argued by Dr. Singhvi that the arbitral tribunal has categorically rejected the submission of the petitioner that price escalation includes the costs for purchasing the guide bund works and the same is not required to be interfered with by the court.

- g) Dr. Singhvi, learned Senior counsel has argued that the grant of the compound interest by the Arbitral Tribunal is completely justifiable in view of Clause 60.8 of the agreement. It has been argued by Dr. Singhvi that this Court in the case of ***National Highways Authority of India v. ITD Cementation India Pvt. Ltd.*** in OMP 23/2007 and 27/2010 has approved the grant of the compounded interest by way of applicability of Clause 60.8 of the contract agreement and this Court should also adopt the

similar view and no reasons exist for departing from the said view.

It has been further argued by Dr. Singhvi that the contention of the petitioner that Clause 60.8 would be applicable only to interim payment certificate is misreading of the said clause. If the tribunal is invested with the jurisdiction to grant the interest, no prohibition on such power can be inferred in the absence of the any express stipulation in the contract barring such payment.

It is argued that the contention of the petitioner that the interest on the grant of the damages is not granted from the date of the claim but should be granted from the date of the award of such damages is also misplaced in as much as the respondent's claims are not confined to the damages alone but are more in the nature of the costs. In such a case, the Tribunal has rightly granted compounded interest from the date of the making of the claim and the said view taken by the Arbitral Tribunal is not to be interfered with.

It is lastly argued that the judgment of the Supreme Court in the case of ***State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd*** (supra) does not aid the case of the petitioner in as much as even one applies the said judgment, still on the expiry of 42 days from the claims so made before the Engineer, if the engineer had failed to rule upon the said payment, the claim on the loss of profit becomes payable and as such the interest component is still applicable. Thus, the arbitral

tribunal's award in this regard for ruling that the payment of the interest has to be made from 2nd June, 2009 in respect of Dispute 8 A is appropriate and does not call for any interference.

23. In view of the aforementioned submissions, it is prayed by the learned senior counsel for the respondent that the challenge raised by the petitioner to the various claims awarded by the learned arbitral tribunal in its award dated 16th March, 2012 be dismissed and the award may be upheld by this court.

24. I have gone through the petition filed by the petitioner under Section 34 of the Act along the Award dated 16th March, 2012 and records filed by both the parties in the instant proceedings. I have also given my careful consideration to the submissions advanced by the learned counsel for the parties appearing at the bar as well as the written submissions filed by the parties. Now, I shall proceed to evaluate the claim wise challenge raised by the petitioner alongside the response of the respondent in order to ascertain as to whether any of the claims awarded by the arbitral tribunal in its award dated 16th March, 2012 calls for interference of this Court as per the provisions of Section 34 of the Act or not.

25. **DESCRIPTION OF THE CONTRACT**

❖ Date of Contract	02.06.2004
❖ Scope of work	Construction of Allahabad Bypass Project- Construction of road from Km. 158 to Km.198 (except Ganga Bridge) Package ABP-2
❖ Contract Amount	Rs.446.9 crores

- ❖ Stipulated period of completion 30 months
- ❖ Original date of completion 8.12.2006
- ❖ Extension of time was granted till:30.09.2009 (Actual Completion date)
- ❖ Work done in the extended period -Approx. Rs. 226 crores

26. The total amount awarded about Rs. 152 crores by majority award and approx. 73 crores was awarded as per minority award.

27. Claim wise amount awarded by the Arbitral Tribunal is as under :

Claim 8 (from 9th December, 2006 to 30th April, 2008) and Claim 8A (from 1st May, 2008 to 30th September, 2009)	Majority Award Dt 16.3.2012 (Page 3/index 4)	Minority Award Dt 16.3.2012 (Page 177/index 4)
Additional overhead costs in the extended period	Rs.2729.42 lacs and Rs.2688.5 lacs, respectively	Rs.2650.00 lacs and Rs.1414.00 lacs, respectively
Additional costs on account of extended stay of plant and equipment at site	Rs.2902.95 lacs and Rs.1414.53 lacs, respectively	Rs.2177.21 lacs and Rs.1060.90 lacs, respectively
Additional costs towards uncovered compensation in cement costs in the extended period	Nil	Nil
Additional costs towards uncovered compensation in steel costs in the extended period	Nil	Nil
Additional costs towards uncovered compensation in labour costs	Rs.160.85 lacs and Rs.55.36 lacs, respectively	Nil
Additional costs towards	Rs.806.49 lacs	Nil

uncovered compensation in POL costs	and Rs.248.37 lacs, respectively	
Additional costs towards financing charges	Rs.976.28 lacs and Rs.392.70 lacs, respectively	Nil
Loss of earning capacity and profits	Rs.2262.95 lacs for the entire period, respectively	Nil
Additional costs due to increase in price of material used in guide bund works	Rs.612.36 lacs for the entire period	Same

28. The award comprises of two disputes under the head dispute 8 and 8A and both the disputes contained the claims under various heads which were stated to be relating to the payment of the additional costs on account of the extension of the period under the contract beyond the original completion date which was 8th December, 2006 i.e. 30 months from the date of commencement of the work. Thus, Dispute 8 related to the payment of the cost for the extended period from 9th February, 2006 to 30th April, 2008. Likewise, Dispute 8 A pertained to the payment of the additional costs and profits for the extended period from 1st May, 2008 to 30th September, 2009. In that sense, Dispute 8 and 8 A pertained to more or less similar claims but only for the extension granted for the different periods.

29. Upon careful reading of the award rendered by the majority of the arbitral tribunal, it can be seen that the Arbitral Tribunal first recorded the elaborated submissions advanced by the counsel for the respective parties on each of the claims and thereafter framed

certain questions which as per the Arbitral Tribunal would have sufficiently answered the submissions advanced by the learned counsel for the parties. Under the said heads of the questions, the Arbitral Tribunal proceeded to evaluate the provisions of the contract and thereafter proceeded to award claims as deemed appropriate by the tribunal. In the analysis of the conditions of the contract under the head (b), the Arbitral Tribunal proceeded to examine clause 5.1, clause 14.1 of GCC and COPA, clause 6.4, clause 12.2, clause 42.2, clause 44 of GCC, clause 70.2 and 70.3 of GCC, clause 110.2, clause 47.1 of GCC, and clause 1.1 (g) of the contract by reproducing them and thereafter construing to mean that the combined effect of the said clauses is that if the contract works are delayed due to the defaults of the Employer and the contract period is extended, there shall be liability for additional cost to be paid to contractor by the Employer in the likewise manner as the contractor is liable to liquidated damages under clause 47.1 with certain differences as narrated in para 11.4.11 in the findings arrived therein. Thus, the arbitral tribunal deduced in point (b) that the additional cost is something akin to compensatory damages which is aimed at compensating the contractor just like liquidated damages. As per tribunal, the said additional cost is payable whenever there is a default by the Employer which resulted into the extensions granted by the Employer and may be claimed from the Engineer after asking for the assessment and in case there is any dispute to the said assessment of the costs, then the matter may be referred to DRB.

30. By deducing the concept of the additional cost from the collective reading of the provisions of the contract, the arbitral tribunal proceeded to advert to facts by arriving at the conclusions as to who was the responsible for the defaults which resulted in to the extension of the time beyond the completion period under the contract by answering points c to g. Thereafter, in point h), Arbitral Tribunal compared the concept of additional cost vis a vis the legal principle of the grant of compensatory damages payable under the Indian Contract Act and proceeded to observe that the additional cost as stated under the agreement is akin to the compensatory damages as per the provisions of Section 55 and 73 of the Indian Contract Act. By doing so, the learned arbitral tribunal interpreted the term additional costs broadly by making it elastic enough to cover within its ambit all the spheres of compensatory damages including loss of profits etc. The effect of the said broad interpretation of the expression “additional cost” by the Arbitral Tribunal is that the Arbitral Tribunal arrived at the finding that as the additional costs is contractually payable under the various provisions of the contract, the loss of profits and anticipation of profits which may be the component of the compensatory damages (which as per the arbitral tribunal is covered within the meaning of the expression additional costs) becomes payable as a matter of natural consequence under the contractual mechanism. The learned arbitral tribunal further observed that the additional costs payable under the contractual mechanism would include the payment towards escalation which is rise and fall in the prices which may not be compensated otherwise through contractual

mechanism, loss of profits or loss of earning capacity. By doing this, the principle of compensatory damages has been imported into the expression “cost” which has been defined under the contract and observation is made that the said additional cost is payable in the extended period of the contract. The said finding has been arrived by the Arbitral Tribunal in the following words:

“The Tribunal has considered each and every aspect of the arguments made by both the parties on this issue. In the first place, the AT notes the Respondent is generally in agreement with the settled legal position brought out by the Claimant. However, the Respondent’s line of argument is that since the Claimant has also contributed delays, the Claimant is not entitled to compensation. The Claimant is also generally in agreement with the case laws cited by the Respondent. But Claimants arguments is that in the instant case, the Claimant was willing and capable to performing the Contract and there was no contributory delays on his part. On the above limited divergent views, the Tribunal refers to the AT’s analysis at point c & d, which undoubtedly suggests that there was quantified, credible and admitted evidence to show that the period of contract was extended on account of Respondent’s delays and there was no contributory delays on the part of Claimant. On this backdrop, the Tribunal would like to record hereunder as to what is the legal position with regard to the delay in completion of the works and its consequences in terms of Contract and law.

The second part of Section 55 of the Contract Act 1872, which is applicable to the present contract clearly and categorically, states and provides as under.

“Effect of such failure when time is not essential.

If it was not the intention of the parties that time should be of the essence of the contract does not become

avoidable by the failure to do such thing at or before the specified time, but the promises is entitled to compensation from the promisor for any loss occasioned to him by such failure.”

The present Contract is not a Contract which is voidable on expiry of the stipulated Contract period. The aforesaid section clearly provides that the party who has been compelled to incur loss due to the failure of the other party is entitled for compensation. Here the party which is responsible for its failure to fulfill its contractual obligations is the Respondent as per the analysis of AT Point c and d). Further the Contract also contemplates that if he fails to fulfill his obligations, then he is liable to pay the additional cost to the Claimant.

Tribunal would like to record the following which is a settled position of law dealing with the consequences of delays in completion of the works in the extended period of Contract through number of the Judgments of the High Courts and Supreme Court and other authorities.

Generally the parties would be bound by terms agreed upon in contract, but in the event one of the parties to contract is unable to fulfil its obligations under contract which has a direct bearing on work to be executed by other party, Arbitrator is vested with authority to compensate second party for extra costs incurred by him as a result of failure of first party to live up to its obligations.

Because of prolongation of the Contract due to the fault of the part of one party, the other party is made to incur the additional expenditure on extra cost of labour, staff, overhead expenses, plant and machinery, opportunity being lost to move to some other projects in hand and earn revenue, additional cost of materials which may not be compensated by the Contract mechanism etc.

If there is prolongation of the contract, escalation on account of increase in price of materials would be a claim distinct than the claim for idle machinery, tools and tackles for which

the contractor may claim compensation on account of depreciation or interest on blocked capital.

It is not unusual for the Contractors to claim loss of profit arising out of diminution in turnover on account of delay in a matter of completion of work. In that event the Contractor should establish that had it received the amount in terms of the Contract, the Contractor could have utilized the same for some other business in which the Contractor could have earned profit. Unless such a plea is raised and established, the claims for loss of opportunity could not be granted.

A loss of profit earning capacity of the particular contract organization affected, due to its being retained longer on the contract in question without any corresponding increase in the monetary benefit earned and without being free to move elsewhere to earn the profit which it otherwise might do, shall be ground for compensation.

In view of the above settled position of law, it is beyond any reasonable doubt that the party suffering from the failure of the other party is entitled to all the additional costs incurred in the extended period of Contract.

9.1.17 As per Clause 6.4 of Contract, if there is delay in issue of drawings which affect the progress of works and the Claimant suffers delay and/or incurs costs, then the Engineer shall, after due consultation with the Employer and the Contractor, determine extension of time under Clause 44.1 and the additional cost for such delays.

9.1.18 In terms of Clause 12.2 of Contract, during the execution of the works, if the Claimant encounters physical obstructions or physical conditions, other than climatic conditions and suffers delay and/or incurs costs then the Engineer shall, after due consultation with the Employer and the Contractor, determine extension of time under Clause 44.1 and the additional cost for such delays.

9.1.20 In terms of Clause 42.2 of Contract if the Claimant suffers delay and/or incurs costs from failure on the part of the Respondent to give possession of site, the

Engineer shall, after due consultation with the Employer and the Contractor, determine extension of time under Clause 44.1 and the additional cost for such delays.”

31. Therefore by mixing up the term “cost” as defined in the contract by calling it additional cost with that of the compensatory damages, the arbitral tribunal arrived at the finding that the additional costs are payable on each and every delay which may occur on account of default of the employer who is the petitioner in the instant case. This finding of broadly interpreting the additional costs to cover compensatory damages became the basis for awarding different claims under several heads.

32. Accordingly, the award therefore has to be looked into after carefully perusing the provisions of the contract along with the applicable law. This is due to the reason that I find in the latter part of the discussion in the present judgment that not merely some claims are awarded on account of wrong interpretation of the provisions of the contract but also by applying the wrong principles of law upon the same which renders the award of the claims as perverse on mere reading of plain definition of the provisions of the contract and application of the provisions of law. Thus, it is essential to first examine the interplay between the clauses of the agreement and thereafter I shall start with the discussion on the respective claim. This is also the reason that I am not inclined to accept the submission advanced by Dr. Singhvi that the present award does not warrant relook as it is merely reappreciation of the evidence of the material already produced before the Arbitral Tribunal which is no ground to

interfere neither do the wrong interpretation of the provisions of the contract. Accordingly, the decisions relied upon by Dr. Singhvi relating to the non interference in cases of reappraise of the material or reagitating the case are not really applicable to the present case in the light of my discussion. On the contrary, I find in latter part of the discussion that the grant of the some claims are falling within the scope of interference as they could not have been granted by the plain definition of the expression costs under the contract and exclusion of the profit elements from the purview of the costs and consequently, thus are also based on the wrong application of the legal principles governing the grant of damages which cannot be awarded when the contract does not permit in relation to certain events.

33. At this stage, I would also like to discuss the decision in the case of ***National Highways Authority of India v. Oriental Structural Engineers*** (supra) passed in FAO 461/2012 decided on 30th January, 2013. As per Dr. Singhvi, the present case is covered within the ambit of the ***Oriental Structure's*** (supra) as similar submissions were advanced in the said case and the court did not interfere in the said case and the findings of the Division Bench were also affirmed by the Supreme Court by dismissing the SLP. I find that the case of ***Oriental Structural's*** case (supra) is distinguishable from the present case due to the following reasons :

- In the case of ***Oriental Structural*** (supra), the Division Bench very clearly in the judgment noted number of times that the

Arbitral Tribunal did not grant the loss of the profits to the claimant and what has been granted by Arbitral Tribunal is clearly the element of the costs as defined under clause 1.1 (g) of the agreement. This can be seen from the observations of Division Bench reproduced as under:

“It had endorsed the finding of the Arbitral Tribunal that claimant was not justified to claim loss of profit and the said claim had been specifically negated; what had been awarded under Claim No.2 was only the “cost” for delay; it was noted that the evidence adduced before the Arbitral Tribunal has been discussed at length by the Arbitral Tribunal and accordingly no interference was called for”

“The Arbitral Tribunal has noted with caution that the claimant is not entitled to claim loss of profit and cost compensation for delay is alone to be considered”

“In the present case claim for loss of profit has been specifically rejected by the Arbitral Tribunal; he being conscious of the fact that under Claim No.2 he only award “cost” as defined in sub-clause 1.1(g)(i) of the contract conditions which meant “all expenditure properly incurred or to be incurred, whether on or off the site.””

In sharp contradistinction to the aforementioned position noted by Division Bench in the case of ***Oriental Structural*** (supra), in the instant case, the majority of the arbitral tribunal granted the loss of profits which as per the plain definition of the ‘costs’ may not be covered within the ambit of the costs to be added to the contract price. Thus, the decision of the non interference taken by the Division Bench in the case of ***Oriental Structural*** (supra) cannot be applied to the instant case where

the factual situation is different and Division Bench itself approved the finding on non grant of the loss of profit and only grant of the compensation costs for delay.

- Dr. Singhvi, learned Senior counsel for the respondent in order to substantiate his submission that the judgment in the case of ***Oriental Structural*** (supra) is applicable has also relied upon the grounds of appeal wherein the argument relating to the applicability of the escalation clause 70 of the GCC was raised in order to state that no other escalation is payable in addition to the price adjustment formula provided in the said condition. It has been argued that since the petitioner herein has raised the said argument in the grounds of appeal in FAO 461/2012, the decision thereon dated 30th January, 2013 not interfering with the award should be considered as decision on the said contention. I do not find merit in the said contention of Dr. Singhvi in as much as it is well settled principle of law that the judgment is a precedent for the proposition of law emerging therefrom and not the one which can be logically inferred as a matter of consequence. The order of Division Bench in ***Oriental Structure's*** case (supra) does not record the said submission of applicability of the price adjustment formula, neither does it discuss the law on the subject nor anywhere answers the said ground as raised by the petitioner. Under these circumstances, the case of ***Oriental Structural*** (supra) does not come in the way of this court to consider the applicability of the provisions of

clause 70 of GCC in relation to the claims pertaining to the uncovered compensation and consider the effect of the said clause on the claims.

In view of the above, the judgment of the ***Oriental Structural*** (supra) is clearly distinguishable to the facts of the present case and does not aid the case of the respondent seeking non interference with the award by applying the ratio of the said case.

I also do not agree with the submission of the learned counsel for the respondent that the plea of the definition of the costs as well as the applicability of the clause 70 is raised for the first time before this Court. This is due to the reason that the said clauses find mention in the analysis of the clauses relating to the contract done by the majority award. In addition thereto, the decision of the minority award is based on the applicability of clause 1.1(g) and clause 70 of the GCC and thus, the contention of the learned counsel for the respondent cannot be accepted. I shall now proceed to discuss the interplay between the various clauses of the agreement.

34. As the decisions on several claims raised by the respondent rest on the import of the expression additional cost, it would be wise to first ascertain the meaning of the expression 'cost' or 'additional costs' as provided in the contract in order to ascertain the correctness of the interpretation accorded by the Arbitral Tribunal.

35. The expression 'cost' has been defined under the clause 1.1 (g) which clearly provides that the costs means all expenditure properly incurred or to be incurred whether on or off the site including overhead and other charges properly allocable thereto but does not include any allowance for profit. Thus, the expression cost as defined under the contract condition 1.1 (g) means all the expenditure properly incurred or to be incurred on or off the site with certain inclusions of overheads and allocable charges and not including the allowance of profits.

36. The question now arises as to whether the Arbitral Tribunal was correct in deducing that the concept of the additional costs akin to compensatory damages upon the fair reading of the provisions relating to extension of the time including clauses 6.4, 12.2, 42.2 of the agreement especially when the expression cost is defined under the agreement. The another aspect which falls for consideration is the effect of the applicability of clause 70 on the claims pertaining to the uncovered compensation qua rise and fall in the prices of inputs. In order to find out the answers to the questions, one has to have a closer look to the relevant provisions of the contract which formed the basis of the arbitral tribunal's analysis in point (b) and furthermore the ultimate thrust of the grant of the claims by the arbitral tribunal. The said clauses of the agreement are reproduced as under :

a) Clause 1.1 (g):

“(g) (i) “cost” means all expenditure properly incurred or to be incurred, whether on or off the Site, including overhead and

other charges properly allocable thereto but does not include any allowance for profit.

(ii) “day” means calendar day.

(iii) “foreign currency” means a currency of a country other than that in which the Works are to be located.

(iv) “writing” means any hand-written, type-written, or printed communication including telex, cable and facsimile transmission.

b) Clause 1.1 (e) :

(i) “Contract Price” means the sum stated in the Letter of Acceptance as payable to the Contractor for the execution and completion of the Works and the remedying of any defects therein in accordance with the provisions of the Contract.

(ii) “Retention Money” means the aggregate of all monies retained by the Employer pursuant to Sub-Clause 60.2(a)

(iii) “Interim Payment Certificate” means any certificate of payment issued by the Engineer other than the Final Payment Certificate.

(iv) “Final payment Certificate” means the certificate of payment issued by the Engineer pursuant to sub-clause 60.8.

c) Clause 6.4 :

As per Clause 6.4 of Contract, if there is delay in issue of drawings which affect the progress of works and the Claimant suffers delay and/or incurs costs, then the Engineer shall, after due consultation with the Employer and the Contractor, determine extension of time under Clause 44.1 and the additional cost for such delays.

d) Clause 12.2 :

In terms of Clause 12.2 of Contract, during the execution of the works, if the Claimant encounters physical obstructions or physical conditions, other than climatic conditions and suffers

delay and/or incurs costs then the Engineer shall, after due consultation with the Employer and the Contractor, determine extension of time under Clause 44.1 and the additional cost for such delays.

e) Clause 42.2 :

In terms of Clause 42.2 of Contract if the Claimant suffers delay and/or incurs costs from failure on the part of the Respondent to give possession of site, the Engineer shall, after due consultation with the Employer and the Contractor, determine extension of time under Clause 44.1 and the additional cost for such delays.

f) Clause 44 :

44.1 In the event of :

- (a) the amount or nature of extra or additional work,
- (b) any cause of delay referred to in these Conditions,
- (c) exceptionally adverse climatic conditions,
- (d) any delay, impediment or prevention by the Employer, or
- (e) other special circumstances which may occur, other than through a default of or breach of contract by the contractor or for which he is responsible, being such as fairly to entitle the Contractor to an extension of the Time for Completion of the Works, or any Section or part thereof, the Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly, with a copy to the Employer.

44.2 Provided that the Engineer is not bound to make any determination unless the Contractor has

- (a) within 28 days after such event has first arisen notified the Engineer with a copy to the Employer, and
- (b) within 28 days, or such other reasonable time as may be agreed by the Engineer, after such notification submitted to the Engineer detailed particulars of any extension of time to which

he may consider himself entitled in order that such submission may be investigated at the time.

44.3 Provided also that where an event has a continuing effect such that it is not practicable for the contractor to submit detailed particulars within the period of 28 days referred to in Sub-Clause 44.2(b), he shall nevertheless be entitled to an extension of time provided that he has submitted to the Engineer interim particulars at intervals of not more than 28 days and final particulars within 28 days of the end of the effects resulting from the event. On receipt of such interim particulars, the Engineer shall, within undue delay, make an interim determination of extension of time and, on receipt of the final particulars, the Engineer shall review all the circumstances and shall determine an overall extension of time in regard to the event. In both such cases the Engineer shall make his determination after due consultation with the Employer and the Contractor and shall notify the Contractor of the determination, with a copy to the Employer. No final review shall result in a decrease of any extension of time already determined by the Engineer.

(b) all adjustments upon measurement of the estimated quantities set out in the Bill of Quantities, excluding Provisional Sums, dayworks and adjustments of price made under Clause 70.

But not from any other cause, there have been additions to or deductions from the Contract Price which taken together are in excess of 15 per cent of the "Effective Contract Price" (which for the purpose of this Sub-Clause shall mean the Contract Price, excluding Provisional Sums and allowance for dayworks, if any) then and in such event (subject to any action already taken under any other Sub-Clause of this Clause), after due consultation by the Engineer with the Employer and the Contractor, there shall be added to or deducted from the Contract Price such further sum as may be agreed between the Contractor and the Engineer or, failing agreement, determined by the Engineer having regard to the contractor's Site and general overhead costs of the Contract. The Engineer shall notify the contractor of any determination made under this Sub-

Clause, with a copy to the Employer. Such sum shall be based only on the amount by which such additions or deductions shall be in excess of 15 per cent of the Effective Contract Price.

g) Clause 53.1 :

53.1 Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.

h) Clause 53.4 :

53.4 If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clauses 53.2 and 53.3)

i) Clause 70.1 :

The amounts payable to the Contractor, in various currencies pursuant to Sub-Clause 60.1, shall be adjusted in respect of the rise or fall in the cost of labour, Contractor's Equipment, Plant, materials, and other inputs to the Works, by applying to such amounts the formulae prescribed in this clause.

j) Clause 70.2 :

To the extent that full compensation for any rise or fall in costs to the Contractor is not covered by the provisions of this or other clauses in the Contract, the unit rates and prices included in the Contract shall be deemed to include amounts to cover the contingency of such other rise or fall of costs.

k) Clause 70.3 :

Contract price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures as per formula given below. The amount certified in each payment certificate is adjusted by applying the respective price adjustment factor to the payment amounts due in each currency :

(a) Price adjustment shall apply only for work carried out within the stipulated time or extensions granted by the Employer and shall not apply to work carried out beyond the stipulated time; price adjustment for extensions for reasons attributable to the Contractor, shall be paid in accordance with sub-clause 70.6;

(b) Price adjustment shall be calculated for the local and foreign components of the payment for work done as per formulae given below; and

(c) Following expressions and meanings are assigned to the value of the work done during each month:

R= Total value of work done during the month. It would include the value of materials on which secured advance has been granted, if any, during the month, less the value of materials in respect of which the secured advance has been recovered, if any, during the month. This will exclude cost of work on items for which rates were fixed under variations clause (51 and 52) for which the escalation will be regulated as mutually agreed at the time of fixation of rate.

RI = Portion of 'R' as payable in Indian Rupees

Rf = Portion of 'R' as payable in foreign currency (at fixed exchange rates)

$R = RI + RF$

To the extent that full compensation for any rise or fall costs to the contractor is not covered by the provisions of this or other clauses to the contract, the unit rates and price included in the

contract shall be deemed to include amounts to cover the contingency of such other rise or fall in costs.

(i) Adjustment for Labour Component

Price adjustment for increase or decrease in the cost due to labour shall be paid in accordance with the following formula:

$$VL = 0.85 \times P/100 \times RI \times (L1 - L0)/L0$$

VL = increase or decrease in the cost of work during the month under consideration due to changes in rates for local labour.

L0 = the average consumer price index for industrial workers for Allahabad centre on the day 28 days prior to the closing date of submission of bids as published by Labour Bureau, Ministry of Labour, Government of India.

LI = The average consumer price index for industrial workers for Allahabad centre on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related as published by Labour Bureau, Ministry of Labour, Government of India.

PI = Percentage of labour component of the work.

(ii) Adjustment for Cement Component.

Price adjustment for increase or decrease in the cost of cement procured by the contractor shall be paid in accordance with the following formula

$$VC = 0.85 \times PC/100 \times RI \times (C_i - C_o)/C_o$$

VC = Increase or decrease in the cost of work during the month under consideration due to changes in the rates for cement.

C_o = The all India average wholesale price index for cement on the day 28 days prior to the closing date of submission of bids as published by the Ministry of Industrial Development, Government of India, New Delhi.

CI = The all India average wholesale price index for cement on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related, as published by Ministry of Industrial Development, Government of India, New Delhi.

Pc = Percentage of cement component of the work

(iii) Adjustment for steel component

Price adjustment for increase or decrease in the cost of steel procured by the contractor shall be paid in accordance with the following formula:

$$Vs = 0.85 \times Ps \cdot 100 \times RI \times (Si - So) / So$$

Vs = Increase or decrease in the cost of work during the month under consideration due to changes in the rates for steel.

So = The all India average wholesale price index for steel (Bars and Rods) on the day 28 days prior to the closing date of submission of bids as published by the Ministry of Industrial Development, Government of India, New Delhi.

Si = The all India average wholesale price index for steel (Bars and Rods) on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related as published by Ministry of Industrial Development, New Delhi.

Ps = Percentage of steel component of the work.

Note: for the application of this clause, index of Bars and Rods has been chosen to represent steel group.

(iv) Adjustment for Plant and Machinery and Spares component

Price adjustment for increase or decrease in the cost of plant and machinery spares procured by the Contractor shall be paid in accordance with the following formula:

$$Vp = 0.85 \times Pp / 100 \times RI \times (Pi - P0) / P0$$

Vp = Increase or decrease in the cost of work during the month under consideration due to changes in the rates for plant and machinery spares.

Po = The all India average wholesale price index for heavy machinery and parts on the day 28 days prior to the closing date of submission of bids as published by the Ministry of Industrial Development, Government of India, New Delhi.

Pi = The all India average wholesale price index for heavy machinery and parts on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related as published by Ministry of Industrial Development, New Delhi.

Pp = Percentage of plant and machinery spares component of the work.

Note: For the application of this clause, index of Heavy Machinery and Parts has been chosen to represent the Plant and Machinery Spares group.

(v) Adjustment for Bitumen Component

Deleted

(vi) Adjustment for Fuel and Lubricants

Price adjustment for increase or decrease in cost POL (fuel and lubricants) shall be paid in accordance with the following formula:

$$V_f = 0.85 \times P_f / 100 \times R_{I\&L} \times (F_i - F_o) / F_o$$

Vf = Increase or decrease in the cost of work during the month under consideration due to changes in the rates for fuel and lubricants.

Fo = The average official retail price of High Speed Diesel (HSD) at the existing consumer pumps of IOC at Allahabad on the day 28 days prior to date of submission of bids.

Fi = The average official retail price of HSD at the existing consumer pumps of IOC at Allahabad on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related.

Pf = Percentage of fuel and lubricants component of the work.

Note: For the application of this clause, the price of High Speed Diesel oil has been chosen to represent fuel and lubricants group.

(vii) Adjustment for Other Local Materials

Price adjustment for increase or decrease in cost of local materials other than cement, steel, bitumen, plant spares and POL procured by the contractor shall be paid in accordance with the following formula:

$$V_m = 0.85 \times P_m / 100 \times R_{ix} (M_i - M_o) / M_o$$

V_m = Increase or decrease in the cost of work during the month under consideration due to changes in rates for local materials other than cement, steel, bitumen, plant spares and POL.

l) Clause 70.4 :

The source of indices shall be those listed in the appendix to bid as approved by the engineer. Indices shall be appropriate for their purpose and shall relate to the contractor's proposed source of supply of inputs on the basis of which his contract price and expected foreign currency requirements shall have been computed. As the proposed basis for price adjustment, the contractor shall have submitted with his bid the tabulation of weightings and sources of indices in the appendix to bid, which shall be subject to approval by the engineer.

m) Clause 70.6 :

If the contractor fails to complete the works within the time for completion prescribed under Clause 43, adjustment of prices thereafter until the date of completion of the works shall be

made using either the indices or prices relating to the prescribed time for completion, or the current indices or prices, whichever is more favourable to the employer, provided that if an extension of time is granted pursuant to Clause 44 the above provision shall apply only to adjustments made after the expiry of such extension of time.

n) Clause 70.8 :

If, after the date 28 days prior to the latest date for submission of tenders for the contract there occur in the country in which the works are being or are to be executed changes to any national or state statute, ordinance, decree or other law or any regulation or by law of any local or other duly constituted authority or the introduction of any such state statute, ordinance, decree, law, regulation or by law which caused additional or reduced cost to the contractor, other than under the preceding sub-clauses of this clause, in the execution of the contract, such additional or reduced cost shall, after due consultation with the employer and the contractor, be determined by the engineer and shall be added to or deducted from the contract price and the engineer shall notify the contractor accordingly, with a copy to the employer. Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have taken into account in the indexing of any inputs to the price adjustment formulae in accordance with the provisions of sub-clauses 70.1 to 70.7.”

37. Upon the collective reading of the aforementioned clauses of the agreement, the following position can be said to be discernible:

- That there are different kinds of delays and costs which are enumerated under clause 6.4, clause 12.2 and clause 42.2 respectively which may become reason for the grant of the extension of the time and incurring of the cost which may be added to the contract price. Clause 6.4 provides that if any delay

is caused by reason of any failure or inability of the Engineer to issue any drawings or instructions for which notice has been given by the contractor, the extension of time is permissible under clause 44 and the amount of such costs which the engineer may determine may be added. Similarly, clause 12.2 deals with the delay caused due to physical obstructions or other adverse climatic conditions and clause 42.2 relates to the delay occurred due to failure on the part of the employer to give possession in accordance with the sub clause 42.1. There are different kinds of delays which have been earmarked by the clauses 6.4, clause 12.2 and clause 42.2. In all such cases of the delays, the provision for the grant of the extension of time is common which is clause 44.

- As there are different kinds of delays and the extension of time in the contract period are mentioned in the clauses 6.4, 12.2 and 42.2, similarly, the element of the costs which may be incurred by the contractor are also mentioned for determination of the same by the Engineer which may be added in the contract price. The expression used in the said clauses is “costs which shall be added in contract price”. The wordings are thus confined to “costs” “which shall be added in the contract price”. The expression costs is distinctly defined under the provisions of clause 1.1(g) and the expression “contract price” is also defined in clause 1.1 (e) of the agreement. As the wording used in the said clauses is “costs”, no expression “additional costs” can be separately found in the clauses or defined in the contract

different from “costs” and thus one has to revert back to the definition of the expression “costs” as defined in clause 1.1 (g) in order to see what shall constitute costs which shall be proper expenditure incurred or to be incurred on the site or off the site with certain inclusions as mentioned in the said clause. It is cost of such a nature which shall be added to the contract price and not all other inclusions which may be outside the scope of the expression “costs” as defined in the agreement.

- The reading of the definition of the expression “costs” make it further clear that the costs means all the expenditure properly incurred or to be incurred on the site or off the site and includes the overheads and other charges properly allocable. The expression costs is contractually defined with certain inclusions like overheads and other charges and exclusions like allowance of the profits. The said definition of “costs” is means and includes definition which covers the “other charges” which are on or off the site “properly allocable”. Once there exists a delay in the completion of the works due to preventions or obstructions of the employer, the other charges incurred or to be incurred by the contractor may include the payment towards the purchase of inputs at the relevant time or later on, may be at higher price, charges on the overheads towards stay of machinery or plant, etc. In that way, the definition of the expression ‘costs’ is per se wide enough to encompass within itself the other charges which are connected with the delay caused. What flows from this is that though the costs are not the same as that of the compensatory

damages which may include the element of profit or loss of earning capacity depending upon the proximity or remoteness, still the definition of costs as defined in the contract is itself wide enough to cover other charges properly allocable. Under such circumstances, the possibility of inclusion of the charges relating to the rise and fall of the inputs as other charges which are allocable as uncovered compensation in the manner done by the respondent in order to categorize them as costs cannot be ruled out in view of the definition of the expression cost.

- It is also noteworthy to mention that the clauses 6.4, 12.2 and 42.2 in all use the term “costs which shall be added to the contract price”, the expression cost has to be understood in the context of the nature of the delay caused by the engineer or the employer. The costs which shall be added to the contract price under the relevant clauses has to have the nexus between the incurring of the expenditure *vis-à-vis* the nature of the delay caused. This is due to the reason that it is because of the said nature of delay caused which resulted into the extension of time and consequential costs. Thus, the costs which are required to be claimed and included under the relevant clauses 6.4, 12.2 and 42.2 cannot be unrelated to the causes of the delay and no costs in generality can be put inside the said bracket in order to claim the same. It is necessary to point out this position at this stage as the Arbitral Tribunal while reading the said clauses together arrives at the broad based conclusion at para 11.4.11 that the reading of the clauses suggest that for every default of

the employer, the costs becomes payable and the said costs can be claimed in generality. I find upon reading of the clauses 6.4, 12.2 and 42.2 that such is not the position, the delays are discretely defined along with their respective causes and the consequential costs which are required to be ascertained by the Engineer added to the contract price.

Thus, the Arbitral Tribunal's interpretation upon the collective reading of the clauses suggesting that the additional costs are payable in each and every delay caused due to the default of the employer and the costs as an expression should be loosely used to cover the element of the profit and earning capacity wherever it is claimed is not an interpretation which can be discerned from even the plain reading of the Clauses 6.4, 12.2, 42.2 under the contract. The costs are payable only to the extent that the same have some nexus with the nature of the delay caused which attracts the costs and the amount claimed falls within the definition of the expression costs and not otherwise.

It is well settled principle of the interpretation of the contract that the each and every word employed by the draftsmen in the clauses should be given meaningful effect in order to keep every clause of the contract workable and operative in their respective fields. Applying the said principle to the clauses of the agreement, if the intention of the draftsmen was to provide for the recovery of the costs in generality which is in nature of compensatory damages, there was no occasion to use the expression "costs which shall be added to contract price" in each and every clause relating to delay for

different reasons. Obviously, the intention was to provide for the addition of the costs in the contract price which are germane to the reason of the delay and are direct consequence of the reasons of the delay and not the ones which are unconnected with that of the delay in question. Thus, the interpretation given above makes the clauses workable as against the ones interpreting the expression “costs” in generality which makes them unworkable.

- Clause 53.1 provides a non obstante clause which enables the contractor to claim any additional payment pursuant to any clause of these conditions or otherwise. The said Clause 53.1 uses the wordings “additional payment pursuant to any clause of these conditions or otherwise” as against the expression “additional costs” in the language of the arbitral tribunal. The words “additional payment pursuant to any clause” may include the element of the compensation in the form of the claims. However, the said clause merely allows the contractor to raise the claim to the engineer and the question whether the said additional payment is recoverable or not and under which head either as a compensation or escalation etc shall be determined either by the engineer after inspecting the contemporary records or by the arbitral tribunal if not by the engineer. It is thus true that there exists Clause 53.1 which provides for raising a claim for additional payment but that does not imply that the costs mentioned in Clauses 42.2, 6.4 and 12.2 axiomatically become compensation so as to include in their ambit other facets of recoverable sums like profit element or profit earning capacity. It

is one thing to say that the liberty is provided to the contractor to claim additional payment by maintaining the contemporary records which may be ultimately determined by the engineer or by the arbitrator in case Clause 53.4 is applicable as to by which mechanism and by virtue of which condition under the contract, the said sum is payable. It is however altogether different thing to say that since the costs are added to the contract price in the cases of the extension of time under certain eventualities and resultantly the costs can be equated to the compensatory damages which may include several other aspect of damages not covered within the definition of the expression 'costs'. Thus, the costs payable under certain conditions may be compensatory for certain eventualities.

- The reading of the Clause 70.1 would reveal that the amounts payable to the contractor pursuant to Clause 60.1 shall be adjusted in respect of the rise or fall in the cost of labour, contractors equipment, plant materials and other inputs to the works by applying the formula prescribe in the clause. The expression used in the Clause 70.1 is the “amount payable pursuant to Clause 60.1” which clearly indicates as to how the applicability of the relevant condition is essential for the purposes of ascertaining the payable sums relating to rise and fall of inputs. The adjustment in such cases shall be done by way of price adjustment formula relating to rise and fall of inputs.
- The further reading of Clause 70.2 indicates that to the extent the full compensation of rise and fall in costs to the contractor is

not covered by the provision of this or other clauses in contract, the unit rates and prices included in the contract shall be deemed to include amounts to cover the contingency. The said Clause 70.2 provides a hint that the extent of full compensation of the rise and fall in the prices can either be covered by the Clause 70 or by any other conditions of the contract. This is clear from the reading of the wordings “to the extent that full compensation for any rise or fall in costs to the contractor is not covered by the provisions of this or other clauses in the contract.” Thus, the existence of the present stipulation in the contract gives an indication of the intent of the parties which is that the parties agree that extent of the compensation can either be covered in Clause 70 or in any other clause of the contract and if it is not covered in any of the other clauses, the unit rates and price can take care of the situation. In simple words, if it is found that the rise and fall in the costs of the inputs are not fully compensating in nature either they are not covered by the Clause 70 or the amount of such compensation due to rise or fall is not covered elsewhere in the contract agreement, the unit price and rates shall take care of such eventuality. In view of the existence of the present Clause 70.2 in the agreement, the possibility of the inclusion of the extent of the compensation towards the rise and fall of costs of inputs in the provisions relating to payment of the costs which shall be added to the contract price under Clauses 1.1 (g) read with Clause 53.1 as

“other charges properly allocable” as per definition of the costs under clause 1.1 (g) cannot be ruled out.

- Clause 70.3 of the contract agreement suggests that the price adjustment clause shall be applicable to the work performed within a stipulated period or the extensions granted by the employer. There is no term stipulated period as defined in the contract. The term which is closer to the expression stipulated period is “time for completion” as defined in Clause 1.1 (c) (ii) which includes the extended time period as per Clause 44 of the contract. Going by the combined reading of Clause 70.3 and Clause 1.1 (c) (ii), it can be said that the price adjustment clause is also applicable to the extended period and more so when the clause provide for the extension given by the employer. The latter part of Clause 70.3 also provides that in case the extensions are attributable to the contractor, the price adjustment shall be applicable as per Clause 70.6.
- The further reading of Clause 70.6 in the contract would show that though the clause relates to adjustments in price relating to the extension of time attributable to that of the contractor, but the said Clause 70.6 also gives a hint towards the price adjustments to be carried out in relation to the extended time under Clause 44. The reading of Clause 70.6 alongside Clause 70.3 would show that the price adjustment mechanism provided under Clause 70 takes into the consideration the extended time period also. So far as the sentence “shall not be applicable to any work done beyond the stipulated period” is concerned, the said

sentence can only mean that no price adjustment shall be applicable for the work done after passing of the stipulated period which is duly extended by the employer. This is apparent from the combined reading of Clause 70.3 and Clause 70.6. Any other construction would cause violation with the other provisions of the contract and would render the operation of a part of Clause 70.6 (which indicates the price adjustments applicable to the extensions granted under clause 44) as otiose.

- Clause 70.8 provides for the price adjustments when there is a change in the legislation or statute or decree of the court after the submission of the bidding prices. The analysis of the said clause is necessary in as much as the latter part of the said clause provides for non obstante clause which reads “ Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall have already taken into account in the indexing of any inputs to the price adjustment formulae in accordance with the provisions of sub clause 70.1 to 70.7”. The significance of the said clause is that wherever draftsmen intended to limit the applicability of price adjustments to the Clause 70 only with no further compensation to be provided, there is a provision in the form of non obstante clause in the manner provided under Clause 70.8. As against the same, so far as the price adjustment towards the rise or fall in the inputs are concerned, there is no such similar non obstante clause limiting the applicability of the compensation towards the price adjustment in cases of rise and fall of costs of inputs to the

Clause 70 only. On the contrary, there exists Clause 70.2 which provides that there can be an eventuality where full compensation relating to rise and fall in the inputs can be either covered under this condition or other conditions of the contract. The combined effect of the reading of Clause 70.2 along with Clauses 1.1 (g) read with Clause 53.1 and contrasting it with non obstante clause existing in Clause 70.8 would make it clear that the price adjustment for rise and fall in the prices of inputs can be covered in the condition 70 or if need be in the other conditions of the contract to the extent of the full compensation of the rise and fall. If the said allocation in the other conditions is not possible, the unit prices or rates shall take care of the said contingency.

38. The above was the analysis upon the combined reading of the conditions of the contract which clearly point out that unlike the analysis done by the arbitral tribunal by equating the costs or additional costs with that of the compensatory damages payable under the contract, different import of the clauses are emerging from the conditions of the contract which supports the resultant award of some claims as costs awarded by arbitral tribunal but for different reasons than that of what have been accorded by the arbitral tribunal in its award and some claims relating to loss of profits and financial charges towards the expectancy of the profits in case of receipt of timely overheads are outside the purview of the costs as defined in the agreement which will further become clear in the discussion done with respect to the relevant claims. To sum up, the summary of the

analysis of the provisions of the contract can be enumerated in the following points:

- a) The “costs” shall be payable in cases where the extensions of the time is granted under condition 44 as per the applicability of clauses 6.4, 12.2, 42.2 of the contract. The said costs shall be added to the contract price.
- b) The ‘costs’ is contractually defined under the provisions of Section 1.1 (g) and the scope and ambit of the expression “costs” cannot travel beyond what has been defined under the agreement. By way of the definition “costs” as a term is broad enough to cover within its sweep “other charges” which if read along with the condition 53.1, 70.1 and 70.2 indicate that the term “other charges” may include rise and fall in inputs. Thus, the costs as a term is compensatory in nature to the extent of the eventualities prescribed under the definition and not beyond the same. Thus, once the element of profit is not included in the costs, the claims pertaining to the same cannot be categorized as costs payable under the contract.
- c) Price adjustment clause is applicable to the rise and fall in the prices of the inputs under condition 70. Condition 70.2 is a peculiar clause providing a hint that the compensation towards rise and fall in prices of the inputs can be covered in condition 70 or other conditions of the contract which means that the parties intended to compensate the rise and fall in prices not merely on the applicability of the formulae but in addition to the same as

well. The existence of the said condition 70. 2 as against non obstante clause in Clause 70.8 is a compelling reason to take this view and makes the present price adjustment condition existing in the contract peculiar and exceptional from the other kind of price adjustment clauses where formula provided in them are normally sacrosanct. In the instant case, such is not the case as the Clause 70.2 itself is departure from limiting the applicability of price adjustment to the condition 70 only.

- d) Price adjustment clause is also applicable to the extended period also which can be seen from the reading of condition 70.3 and 70.6. This is also fortified by the fact the claims of the respondent before the tribunal as recorded in the award clearly provide that the uncovered compensation is claimed after subtracting the price adjustment from the same which means that even the respondent believes that the price adjustment is applicable in the extended period.

The combined reading of the clauses of the contract in the manner done above was not undertaken by the arbitral tribunal which became the reason to conduct such exercise especially when there is a well settled principles of law clearly stating that the arbitrator is a creature of the contract and cannot travel beyond the contract. Let me now proceed to evaluate the claims determined by the Arbitral Tribunal in the award by applying the above said interpretation of the provisions of the contract and ascertain as to whether all of the claims determined by the Arbitral Tribunal are sustainable or not. I shall also be dealing with the submissions advanced by the learned

counsel for the parties simultaneously during the course of the discussions in relation to the respective claims.

Claim No. 1 and 2

39. The claim No. 1 is the award of sums of Rs.2729.42 lacs and Rs.2688.5 towards the overhead costs in the respective extended periods and the claim No. 2 is the award of Rs. Rs.2902.95 lacs and Rs.1414.53 towards the extended stay of the plant and machinery at the site during the terms of the extended periods.

40. The award passed by the majority of the Arbitral Tribunal was challenged by Mr. Sethi, learned Senior counsel in his arguments as well as in written submissions of the petitioner on following grounds:

- a) There exists no contemporaneous document on record furnished by the respondent supporting the said grant of the said claims.
- b) CA certificate was inadmissible piece of the evidence.
- c) The respondent has already claimed these sums under uncovered compensation and other heads and thus not entitled to the same.
- d) There is a difference in overheads percentage wise which show that the claims were highly inflated.
- e) The claims are not covered by the condition 70 and thus barred.
- f) There are delays attributable towards the claimant as well which are not considered by the arbitrator.

41. I have examined the grounds urged by the learned Senior counsel for the petitioner and find that the said submissions are duly noted by the Arbitral Tribunal at paragraph 10 of the award passed by the majority in great detail. Thereafter, under the separate head at paragraph no. 11.5 and 11.6, the arbitral tribunal rejected the submissions of the petitioner that there is any delay attributable to that of the claimant/respondent. At paragraph 11.12.3 of the award, the Arbitral Tribunal appreciated the contemporaneous documents in order to arrive at the finding that the computation of the sums is backed by the documents. Rather at paragraph 11.13.2, the Arbitral Tribunal also disallowed certain heads from the claim no. 1 relating to overheads.

42. Likewise in relation to claim no. 2, the detailed evaluation of the claim filed by the respondent has been made by the arbitral tribunal at paragraph 11.13.3 and the documents in respect of the same are also reviewed and appreciated by the Arbitral Tribunal.

43. I find that as the Arbitral Tribunal has carefully reviewed the documents filed by the petitioner and weighted them alongside the objections raised by the respondent in order to arrive at the awarded sum, there exists no infirmity in the decision making process which may invite interference of this court by calling it error of jurisdiction or error of law which may be against the public policy. Both claim no. 1 and 2 under the head no. 8 and 8 A pertain to the overheads and cost of the overstay which are in the nature of the costs as permissible under the contract under Clauses 6.4, 12.2, 42.2 read with Clauses 1.1(g). The Arbitral Tribunal has fairly arrived at the

finding that the delays are attributable due to the defaults at the petitioners end.

44. The submissions which the petitioners are canvassing at this juncture are merely re-agitating the controversy before this court or calling upon this court to re-appreciate the material already considered and appreciated by the Arbitral Tribunal which is outside the scope of the enquiry permissible under the provisions of Section 34 of the Act. (See ***Sumitomo Heavy Industries Ltd. Vs. Oil and Natural Gas Corporation Ltd.***; 2010(11) SCC 296).

45. Likewise, the question of the wrongful appreciation of the evidence by the Arbitral Tribunal is no ground to interfere with the award passed by the Arbitral Tribunal when it can be seen that the awards are in the nature of the costs which is permissible under the agreement and the said view adopted by the majority of the Arbitral Tribunal is plausible view based on the documents. Under these circumstances, the submissions of the petitioners as noted above are all rejected as meritless and the said submissions so far as they relate to the lack of evidence, inflated claims, delays attributable by the claimant are rejected by the courts. With regard to bar of clause 70, there is no such bar in recovery of the costs so far as the Clauses 6.4, 12.2, 42.2 clearly permit the costs which shall be added to the contract price.

46. In view of the aforementioned analysis, the award granting the sum of Rs.2729.42 lacs and Rs.2688.5 lacs, respectively in relation to

claim no. 1 and Rs Rs.2902.95 lacs and Rs.1414.53 lacs in relation to claim no. 2 is upheld.

Claim Nos. 3. to 6

47. The said claim no. 3 to 6 relate to the uncovered compensation towards rise and fall of the prices in cement, steel costs, labour costs, POL costs. Out of these claim no. 3 and 4 have been rejected by the arbitral tribunal wherein no amount has been awarded in both the extended periods. Only claim no. 5 and 6 have been granted for both the extended period for the sum of Rs.160.85 lacs and Rs.55.36 lacs in claim 5 and Rs Rs.806.49 lacs and Rs.248.37 lacs in relation to claim no. 6.

48. The main thrust of the challenge raised by learned Senior counsel for the petitioner in relation to the instant claims is that the said claims are already covered by the escalation formulae provided under Clauses 70 of the contract and the escalation clause covers the rise and fall in the prices of inputs even during the extended period. Due to the said reason, as per the learned Senior counsel for the petitioner, the claim related to rise and fall of the prices of the inputs including labour and POL cannot be covered in any other clauses in the Contract. It has also been argued that clause 70. 2 also does not prohibit the applicability of the clause 70 from such claim and thus the awarded sums in claim 5 and 6 are clearly barred in view of the escalation formulae accepted by the parties under Clause 70.

49. In this regard the judgment passed by this court in the case of ***N.J. Devani Builders P. Ltd. vs. Indian Farmers Fertilizer Co-operative Ltd.***, 2013 (1) Arb.L.R. 218, is relied in order to support the proposition that wherever the parties had agreed to the formula as per the escalation clause or price adjustment clause, no addition compensation is permissible.

50. I have considered the submission advanced by the learned counsel for the petitioner in relation applicability of Clause 70 which is escalation clause to the extended period and accept the submission of the learned counsel. In the discussion relating to the combined effect of the clauses of the agreement, I have separately arrived at the finding that though the price adjustment clause is applicable to the extended period as per the indications given in clause 70.3 and 70.6 of the said Clause but due to the existence of the clause 70.2 which leaves a room for coverage of the extent of the compensation relating to rise and fall of the prices of the inputs in the Clause 70 or any other conditions of the contract and upon the combined reading the same with Clause 6.4, 12.2, 40.2 and 42.2 read with Clause 1.1 (g), it can be said that uncovered costs incurred by the contract can fall under the head of "other charges properly allocable" as permitted by the definition of the expression "costs". I have also arrived at the finding that normally the escalation clause is all encompassing without any further compensation awarded in addition to the computation done as per the agreed formula, however due to the existence Clause 70.2 which itself contemplates an eventuality

relating to the coverage of the compensation towards rise and fall of inputs in other Clauses of the contract, the Clause 70 in the present form as it is worded in the contract Clause becomes an exceptional one where such proposition that the escalation formula is sacrosanct cannot hold good. I, therefore, reject the submission of Mr. Sethi that claim 5 and 6 are barred by the Clause 70 and the judgment passed in the case of **N.J. Devani** (supra) is clearly distinguishable as there was no such factual position existing in the said case where there was a clause indicating the permissibility of the compensation under the other conditions in the contract besides escalation clause. There is no prohibition contained in the escalation clause which limits its applicability only to the formula agreed between the parties as against the same, there is contra inference which can be drawn by way of clause 70. 2 of the contract agreement.

51. The said claim nos. 5 to 6 are thus in the nature of other charges which are falling within the ambit of the costs of the inputs. The said costs are claimed by the respondent after deductions of the claim granted under escalation clause. Thus, there is no question of any double payment to the respondent which may arise as contended by the petitioner. Accordingly, for the reasons stated above, the said costs are clearly permissible and rightly awarded by the Arbitral Tribunal though by giving reasons which are similar in nature if not based on the reading of the clauses of the agreement in the manner done by me in the preceding paragraphs.

52. I also agree with the submission advanced by Dr. Singhvi, learned Senior counsel for the respondent that even if the said interpretation as done by me in relation to clause 70.2 is not correct, still the room for ambiguity exists in clause 70.2 so far as the coverage of the compensation element relating to rise and fall in prices of the inputs in other conditions of the contract is concerned and in view of the said ambiguity, the doctrine of the *contra proferentum* is applicable which clearly draws inference against the draftsmen which instant case is petitioner in case of an ambiguity existing in relation to operation of the clause in the contract either in favour of one party or the other.

53. The said principle of *contra proferentum* has been applied by the Supreme court in the case of **Bank of India v. K. Mohandas**, (2009) 5 SCC 313 wherein the court observed thus:

“32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (verba chartarum fortius accipiuntur contra proferentem).” (Emphasis Supplied)

54. In view of the said discussion, no ground is made by the petitioner which requires interference in relation to claim no. 5 and 6 under the provisions of Section 34 of the Act. The award passed by the majority of the arbitral tribunal so far as it awards sum of Rs.

Rs.160.85 lacs and Rs.55.36 lacs in relation to claim no. 5 and Rs.806.49 lacs and Rs.248.37 lacs with respect to claim no 6 is upheld.

Claim No. 7 relating to costs relating to financial charges.

55. The said claim is related to delay in the recovery of the costs relating to overhead costs and element of the profit and interest on the expected revenues which would be lost on account of such delays. The said claim is further premised on the expectancy of the profit in case the over head expenditure is recovered timely and the award of sums of Rs.976.28 lacs and Rs.392.70 lacs, have been passed for both the extended periods.

56. The challenge made by the petitioner in this regard is that the claim no. 7 which has been awarded by the arbitral tribunal is purely hypothetical in nature and the said claim is awarded without any appreciation of the evidence and merely by believing the set of facts and claims presented by the claimant/respondent in the claim statement.

57. I have gone through the decision on the claim no. 7 at paragraph no. 11.13.8 rendered by the majority of the arbitral tribunal. The said award of the sums is based on the delay in recovering the overhead and its effect on the interest and revenues of the claimant and on account of the profit expectancy in case the said sum of the overheads could have been timely recovered.

58. In order to support the claim, the arbitral tribunal noted the documents filed by the respondent which are:

- a) Proof towards the work value done and certified – Extracts from IPC
- b) Overhead percentage – Auditors certificate in respect of onsite and offsite overheads
- c) Element of the profit of 10 %

59. Based on this evidence, the award of Rs.13 Crore (approx) was made by the Arbitral Tribunal. I find that the awarded sum under the head of the financial charges which has been granted on the premise that the additional costs covers the element of the profit or expectancy of profit as unsustainable. This is due to the reason that the award of the said sum on the premise that the costs and compensatory damages are equivalent to each other and have same consequences in law is based on wrong analysis of the provisions of law. Furthermore, once the costs is contractually defined which means all the expenditure properly incurred or to be incurred on or off the site and includes overheads and other charges excluding the profits, then the costs as a term is contractually defined. Thus, the costs as a term is compensatory in nature to the extent of the eventualities prescribed under the definition and not beyond the same. Once the element of the profit is not included in the costs, the claim pertaining to the same cannot be categorized as costs payable under the contract.

60. In the instant claim, going by the definition of the expression 'costs' which is means and includes definition, the costs includes charges which are in the nature of proper expenditure incurred or to

be incurred which are realistic in nature on the site or off the site including overheads, for which the respondent has claimed overheads under the separate head. The term "other charges properly allocable" would be a term which shall be construed to mean the charges which are in present or in future likely to be incurred by the contractor as a proper expenditure. This is due to the reason that the words other charges mentioned in clause 1.1(g) would derive colour from the accompanying words like proper expenditure incurred or to be incurred including overheads and would thus include the kinds of the charges, the occurrence of which is realistic either in present or in future. Thus, the words "other charges" should be given contextual interpretation as per the definition of the expression costs under clause 1.1 (g). The words "other charges" would thus never deem to include the element of the benefit which ought to have been accrued to the contractor if the recovery of the expenditure could have been made timely nor will it include the element of the profit which is expressly excluded from the purview of the definition of 'costs' as defined under the clause 1.1(g). The Arbitrator thus clearly fell in error which is apparent on the face of the record by granting the sum of nearly to Rs.13 crore towards profit expectancy by seeing the shortfalls in the revenues of the respondent. The said award in the instant case under the head of the additional costs is clearly a contrary interpretation to the express definition of the expression "costs" which clearly exclude the element of profit or benefit from its purview. In view of the same, the error committed by the Arbitral Tribunal by traveling beyond the agreement and rewriting the

definition of the costs and applying the wrong legal principles by equating the same to compensatory damages clearly warrants interference of this court under the provisions of Section 34 of the Act.

61. The said financial charges as claimed by the respondent on the basis that in the event of timely receipt of the overheads, the respondent could have earned profit out of the said amount is also not legally tenable and would not fall within the ambit or sweep of the compensatory damages under the provisions of the Section 73 of the Contract Act which provides that the party who suffers from the breach is entitled to compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

62. Thus, the plain reading of the provisions of Section 73 provides that for the purposes of applicability of compensatory damages, that sort of compensation is payable which is loss or damage caused to him that naturally arose in the usual course of things or which parties knew at the time of making the contract. Thus, the damages either have to be natural consequence of the usual course of things or within the contemplation of the parties at the time of the entering into the contract. Section 73 also provides that such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

63. When there is a monetary claim which is made from the party breaching the contract on account of the default to repay the same on the specified date, the party at the default is liable to the principle sum along with the element of the interest which is a sufficient compensation as a consequence which is damage or loss that arose in the usual course of the things on account of the said payment and not beyond the said amount the sum which could have utilized to earn profit. This is evinced from the illustration (n) appended to the Section 73 of Contract Act explaining the said principle. The said illustration reads as under:

“A Contracts to pay sum of money to B on a day specified. A does not pay money on that day. B in consequence of not receiving the money on that day is unable to pay his debts and is totally ruined. A is not liable to make good to B anything except the principle sum he contracted to pay together with interest up to the day of the payment.”

64. The underlying principle behind this illustration is that the liability of the sum to be paid by the defaulting party after contracting it has to be the specified time after expiration of the same and is confined to the specified sum and interest component therein upto the day of the payment and is not dependent upon the profit or the loss caused to the recipient on account of not having received the payment timely. This is due to the reason that the said loss caused suddenly to the recipient was neither direct consequence of the breach as it did not happen in the usual course of the things nor was

the same known to any of the parties to the contract at the time of making the contract.

65. Applying the said principle to the instant case, if one sees the stipulations in the contract then clause 1.1(g) clearly provides costs to include overheads for which separate claim is made under the head of overheads which parties contemplated at the time of the entering into the contract. The parties also contemplated the extension of the time in the event the original completion period of the works is extended on account of the preventions by way employer in the relevant clauses 6.4, 12.2 and 42.2. But the parties never contemplated the expectancy of the profit in the event of the delayed recovery of the overheads and neither is the loss or damage caused to the respondent is the natural consequence of the delayed payment in the usual course of things due to the reason that the said loss is based on the profit expectancy in the event of the early recovery of the overheads and thus it is not a loss in the strict sense of term in actuality but the profit component which could have incurred to the respondent and would thus be remote. Under such circumstances, applying the principle of the illustration appended to Section 73, the employer would be sufficiently compensating the contractor in the event he pays him the sum of overheads and interest thereon and nothing beyond the same. In instant case, overheads are being paid along with the interest component and thus the present claim becomes hypothetical and remote loss which may not fall within the sweep of Section 73 of the Contract. To this extent any English authorities where any provision is mentioned to pay such expected

profits in the construction contracts would be inconsistent with the legal position in this country as can be seen from the plain reading of Section 73 of the Contract Act and drawing aid of interpretation from illustration narrated in the section itself.

66. So far as in cases where certain contracts provide for such stipulations or guidelines to pay expected profits in the event of delay in recovered sums at the definite rate, the same becomes a case where parties knew at the time of the entering into contracts that such guidelines or stipulations are pre-existing from department. Such is not the case in the present case. Thus, the award to the extent of grant of claim 7 is not merely contract to the express provisions of the contract but also applies wrong principles of law by holding that the claim of the present nature would fall within the ambit of Section 73 and would be recoverable as additional cost.

67. In addition to my finding that there is an apparent error on the basis of wrong interpretation of the provisions of the contract and application of principles of law which calls for interference of this court so far as the claim no. 7 is concerned, I also agree with the submission of the learned counsel for the petitioner that the evidence considered in support of the claim was also of the nature which only show that the overheads were payable, proof of the work done and on that basis hypothetical figure of the expectancy of the profit has been arrived at believing the set of the facts narrated by the respondent. Thus, the grant of the said claim is also unsupported by the evidence which show the realistically that the expenses or charges of such a nature are incurred or to be incurred in future by

the respondent. The award with respect to claim no. 7 is liable to be interfered with on the basis of the lack of evidence as well.

Claim No. 8

68. Claim 8 is related to the loss of earning capacity and profits. The Arbitral Tribunal noted that if the petitioner could have fulfilled the promises in the agreement in the timely manner, there would not have been any delay in completion of the works and consequently the claimant/respondent would not have been required to stay at the project site with the manpower and machinery and could have utilized these resources in some other project of similar nature and other type for earning revenue from other projects on hand. Thus, the said loss of opportunity to deploy the resources and manpower at the similar project is recoverable loss of earning capacity and profits as per Arbitral Tribunal.

69. The Arbitral Tribunal after noting Hudson on Building contract and deducing therefrom that claim of such nature is permissible also referred the judgment of Supreme Court in the case of **Bharat Coking Coal's** case (supra) wherein the Supreme Court noted that it is not unusual for the contractors to raise such claim of the loss of profit arising out of the diminution in the turnover on account of the delay in a matter of the completion of the work.

70. The Arbitral Tribunal after appreciating the detail of one similar project submitted by the respondent (which was granted to the respondent after the completion period of the present contract) proceeded to observe that the respondent had established such loss of the opportunity and earning capacity of the profits as per the

dictum of ***Bharat Coking*** (supra) granted a sum of Rs. Rs.22.63 crores towards loss of the opportunity and profits for the extended periods under the contract.

71. Learned Senior counsel for the petitioner has challenged the said award on the ground that the definition of the expression costs as per clause 1.1 (g) does not include the profit element and as such the grant of the loss of profit is impermissible under the contract. Mr. Sethi also argued that the loss of profits as a claim is not permissible in the cases of escalation but is applicable on the illegal breach of the contract and relied upon certain cases providing such position. Mr. Sethi also assailed the grant of the said award on certain factual aspects but mainly stress was laid on the definition of the expression 'costs'.

72. Dr. Singhvi, on the other hand justified the award of the said sum by refuting the contentions of the petitioner by arguing that the contention relating to the definition of expression costs was never raised before the arbitral tribunal. Further, the respondent has furnished the material supporting the said claim and thus has solid foundation before the arbitral tribunal and as such the award should not interfered with and the court should also consider applying the observations judgment passed in the case of ***NHAI v. Oriental Structural Engineers*** (supra) by not interfering with the award.

73. I have already discussed in the preceding paragraphs, the import of the expression costs as defined under the agreement in clause 1.1 (g). The said expression costs is compensatory to the extent of the eventualities covered under the definition as provided in

the contract and not beyond the same. The said definition clearly provides that the cost does not include the allowance of profit. It has already been noticed above that the Arbitral Tribunal further came to the conclusion that the additional costs or compensation as per the contract may include the loss of profit which as per the arbitral tribunal is payable under the laws of India and the said conclusion was derived by applying the principles of Section 73 and 55 of the Contract to the additional costs. All this discussion is available at the determination point (b) and (h) by the Arbitral Tribunal which also has been discussed earlier in the preceding paragraphs. The said interpretation provided by the majority of the Arbitral Tribunal to the additional costs is inconsistent to the plain definition of the expression costs which excludes the allowance of the profit.

74. I do not agree with the submission of the learned counsel for the respondent that the said contention was not raised before the arbitral tribunal as the definition of the cost has quoted in the majority award also and the dissenting opinion of the minority award with respect to claim no. 8 is based on the finding that the expression “cost” is defined which exclude the profit and once the terms of the agreement is plain and ambiguous, one need not travel beyond the same and applied the dictum of the **ONGC v. Saw Pipes**; (2003) 5 SCC 705 which observes that while computing the damages, the arbitral tribunal and the court will first look into terms of the contract and thereafter proceed further with the enquiry.

75. I totally agree with the finding of minority as in view of my own independent analysis to the clauses of the agreement and application

of the law on the same, I have found that the expansion of the definition of the costs by importing the components of profit on the pretext that as a matter of law they are payable as part of the compensatory damages when as a matter of fact, they are contractually excluded is serious error which is based on wrong appreciation of facts and also incorrect application of law on the subject. The said error vitiates the authority of the Arbitrator to award profit component in view of the clear and unambiguous definition of the expression costs excluding the same and as such liable to be interfered with under Section 34 of the Act as it is error of jurisdictional nature.

76. Furthermore, I have already discussed that the compensatory damages are payable as per the provisions of Section 73 of the Act only when the said damages or losses naturally arose in the usual course of things from such breach or which the parties knew when they made the contract to be likely result from the breach of it. In the case of the loss of profits and earning capacity which has been pegged on the expected overturn in case the resources were deployed to the other contract of similar nature is not the eventuality which is the natural consequence of the prolongation on the part of the employer in the usual course of the things. The rise and fall in the prices, costs of the plant and machinery, labour charges, overheads are all direct consequences of the prolongation in the usual course of the things. But the loss of profit is not a natural consequence of prolongation which is so directly connected with it that it could be said to be happening in the usual course of things. Thus, the only place

where the claim of “loss of profit” can be put is that the parties knew at the time of the contract that such loss is likely to result from the said breach which is another disjunctive part of Section 73.

77. Section 73 uses the expression “or” between the damages and losses which are natural consequences and the ones which parties knew that they are likely to result from the breach. This is due to the reason that the damage has two components actual as a natural consequence or likely within the knowledge. So loss of profit which is based on probability and not certainty would be covered in the latter part of the Section 73 of the Contract Act.

78. If such is the position in law that loss of profits are recoverable when the parties knew that they are likely to result from the said breach, the contracts which do not debar the recovery of the loss of the profits or remain silent on the recovery of the profit components arising out of the breaches or prolongation can readily tolerate the claims based on the loss of the profits because in such cases, it shall be assumed that it was within the contemplation of the parties that such loss of profits are likely results of the breaches. That is why Hudson on Building contracts and the judgments of the courts including the one by the Supreme Court in ***Bharat Coking*** (supra) provides that it is not unusual to claim such loss of profits in the claims relating to building and construction contracts.

79. But in sharp contradistinction to the same, the cases where the parties agree to the contrary (like in instant case the component of the profit is not recoverable as costs which shall be added to the contract price in the event the contract period is extended as per the

provisions of clause 6.4, 12.2 and 42.2) then it cannot be said that the intention of the parties at the time of the agreement was to foresee the likely loss of profits resulting from breach when there exists express exclusion of profit from the costs which are compensatory in nature to other eventualities provided in the definition clause 1.1 (g). Consequently, it cannot be said that it was within the contemplation of the parties that the said loss of the profits are likely result of the said breach at the time of the making contract. Instead, the parties were conscious of the same and explicitly expressed the contrary intention in the contract.

80. In such cases, the Arbitrator cannot travel beyond the agreement by awarding the loss of profit in the form of compensatory damages as ingredients of the section 73 are not satisfied and doing the same would be rewriting the contrary by ignoring the intention of the parties emerging from the contract. The law that the arbitrator cannot ignore the express prohibition under the contract has been explained by the Supreme Court in the case of ***Steel Authority of India Ltd v. J.C. Budhiraja***, (1999) 8 SCC 122 in the following words:

“The arbitrator derives the authority from the contract and if he acts in manifest disregard of contract, the award given by him would be an arbitrary one....It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator however, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the

agreement, the award would be arbitrary, capricious and without jurisdiction.” (Emphasis Supplied)

In ***Continental Construction Co. Ltd. vs. State of Madhya Pradesh***, (1988) 3 SCC 82, the Supreme Court observed in following words in relation to the arbitrators ignorance of the express stipulation under the contract:

“It is to be reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. **Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. Arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error.** For this limited purpose reference to the terms of the contract is a must.”

Dealing with similar question the Supreme Court in ***New India Civil Erectors (P) Ltd. Vs. Oil and Natural Gas Corporation*** [(1997) 11 SCC 75] held that it is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot

award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The Arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account.

81. Applying the said exposition of the law to the facts of the present case, I find that the majority of the arbitral tribunal clearly fell in error in awarding the claim no. 8 towards loss of the profits as profit components are clearly excluded from the purview of the costs and it cannot be said that the same was within the contemplation of the parties at the time of the entering into agreement when the contrary position exists within the agreement itself. Once, the respondent has signed the commercial agreement with open eyes and also holding in entering into such building contracts containing express exclusion on the recovery of the profits as costs, then the respondent is now estopped from claiming any departure from the intentions expressed in the agreement by claiming damages on account of the loss of profit. In view of the same, claim of sum of Rs.22.63 crores granted by the Arbitral Tribunal under claim no. 8 is set aside as loss of the profits are not intended to be recoverable under the contracts and thus cannot also be granted under Section 73 of the Contract Act as well given the contrary intention expressed in the contract.

Claim no. 9 : Cost due to increase in the price of the materials used in Guide Bund Works

82. The instant claim relates to additional costs incurred on account of the rise in the material costs in respect of Gabion Boxes, GI pipes and Geo textiles used for Guide Bund works. The said cost of sum of Rs 612.36 lacs (6 Crore and 12 lakhs) has been awarded by both majority and minority of the Arbitral Tribunal on the basis of the rate prevailed in the contract period as a base price and the rate prevailed in the extended period as current rate.

83. The tribunal has considered the material available on recorded and made the fair analysis of the same in paragraph 11.13.10.3 of the award. Upon analysis of the said material and after considering the submission of the petitioner opposing the grant of the said claim proceeded to observe that the claim in relation to rise in the price of Guide Bund works is admissible.

84. Mr. Sethi, learned senior counsel for the petitioner has raised his challenge on the ground that the present claim is covered in the escalation clause contained in Clause 70 of the contract. The said contention of Mr. Sethi, learned Senior counsel for the petitioner has already been answered in the award in the form of rejection by the arbitral tribunal. It has been observed that these items related to Guide Bund works are specially imported items and are not covered under the escalation clause. I find that there exists no reason to interfere with the said observations of the Arbitral Tribunal.

85. On a separate note, upon the independent analysis done by me of the interplay between the clauses 70.1, 70.2, 70.3 relating to escalation clause *vis-a-vis* clause 1.1(g) read with clause 6.4, 12.2 and 42.2, I have come to the conclusion that the costs of the rise and

fall of the inputs is not exclusively covered by clause 70 and by existence of clause 70.2, the extent of the compensation of the inputs can also be covered by the other conditions in the contract in view of the wordings leaving room for such eventuality. The combined effect of clause 1.1(g) and the extension provisions (clauses 6.4,12.2,42.2) along with clause 70 is that there can be other charges within the ambit of the expression costs which may be added to the contract price. I find that the rise in the price of the material used for Guide Bund works being specialized items not contemplated in the clause 70 in the form of formula can be covered in extension provisions in the form other charges which is also costs to be added to the contract price. Consequently, no infirmity on this account can be found in the award so far as it relates to instant claim.

86. The other contentions raised under this claim are more of general nature which includes that it is the respondent who was responsible for delay and no material was produced to prove the claim which are all factual disputes and have been dealt with by the arbitral tribunal while awarding the claim and thus need not require further discussion. Accordingly, the instant claim of sum of Rs.612.36 lacs is upheld.

Rate of interest

87. The arbitral tribunal has awarded an interest at the rate of 12 % average SBI PLR rate compounded monthly on the amounts awarded for the claims from 4th August, 2008 with respect to dispute 8 which is first round of the extended period and from 2nd June, 2009

with respect to Dispute 8 A which is second round of the extended period.

88. The arbitral tribunal in order to arrive at the finding of award of compounded interest at SBI PLR rate relied upon clause 60.8 which provides for payment of the compound interest at SBI PLR relates on sums due and upon contractual indication awarded the interest at the rate of 12%.

89. Learned counsel for the petitioner has challenged the award of the interest at the rate of 12 % as excessive. It has been argued that clause 60.8 relates to the cases where the interim payment certificate issued by the Engineer which is not the instant case. It has been further argued that there is no stipulation in the contract for awarding such high rate of interest to be compounded monthly. It is further submitted that the interests on the damages are not awarded by the tribunals and this Court should consider interfering with the award of interest component.

90. I have gone through the submissions advanced by the learned counsel for the petitioner. I find that interest has been granted by the arbitral tribunal after placing reliance on the contractual condition stipulating the award of such rates on the sums due. Once, the provision exists in the contractual mechanism to award the interest rate compounded at the SBI PLR rates, no unreasonableness can be inferred in relation to the interest granted at the rate of 12 % as granted by the Arbitral Tribunal.

91. So far as the contention of the petitioner that the interest on damages are not granted, it is submitted that the award in the instant

case is in the nature of the costs which are based on the fair computation and supported by the documents. The said sums are monetary liability towards the expenses incurred along with the other charges incurred by the respondent. Thus, the interest on the delayed payment of such sums is permissible under the provisions of the Contract Act and no fault can be found on grant of interest on the said account.

92. To sum up, the position which emerges after discussing the challenge made on claim by claim basis can be summarized below.

- a) Claim No. 1, 2 , 3 to 6 and 9 awarded by the majority of the arbitral tribunal are upheld and call for no interference in view of the discussions done under the respective heads.
- b) Claim No. 7 and 8 are required to be interfered with as the said claims are not merely against the provisions of the contract but also awarded on the basis of the application of the wrong application of the provisions of law. The elaborate discussion along with the reasoning can be found under the respective head.
- c) The award of the interest at the rate of 12 % compounded monthly at SBI PLR rate is upheld for the reasons stated under the relevant head.

93. With these observations, the award dated 16th March, 2012, to the extent of the grant of the claim no. 1, 2, 3 to 6 and 9 which are in the nature of the costs to be added to the contract price during the extended periods at the relevant times is upheld. The award to the extent of the grant of the claim no. 7 and 8 relating to financial

charges and profits during the extended periods by the arbitral tribunal is set aside. The impugned award is modified accordingly.

94. The objections filed by the petitioner are disposed of in view of abovementioned reasons.

95. No costs.

(MANMOHAN SINGH)
JUDGE

JULY 08, 2014