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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1158 OF 2012

Atlanta Limited ...Petitioner.
vs
Executive Engineer Road Development Division & Anr...Respondents.

WITH
ARBITRATION PETITION (L) NO. 1541 OF 2014
(MISCELLANEOUS APPLICATION NO.230 OF 2012)

The State of Maharashtra ...Petitioner.
vs
Atlanta Ltd. ..Respondents.

AND
ARBITRATION PETITION (L) NO. 1542 OF 2014
(MISCELLANEOUS APPLICATION NO.229 OF 2012)

The State of Maharashtra ...Petitioner.
vs
Atlanta Ltd. ..Respondents.

.....

Mr Mukesh Vashi Sr. Advocate i/b M.P.Vashi for Petitioners.
Mr Dinesh Khaire AGP with Mr D.P.Adsule for Respondents.

CORAM : S.C. GUPTE, J
Order Reserved on : 27 October 2014
Order Pronounced on : 12 February 2015

JUDGMENT :

These arbitration petitions arise out of awards passed by an arbitral tribunal in two references. The references arise out of a Build, Operate and Transfer Contract for construction of a road. The contract authorizes the contractor to collect toll from vehicles passing through the road for a certain concession period towards consideration. Miscellaneous Application Nos.229 of 2012 and 230 of 2012 are arbitration petitions arising out of Reference No.1, the subject matter of which is the extension of concession period claimed by the contractor due to extra work carried out as well as damages suffered by the contractor. Arbitration Petition No.1158 of 2012 arises out of Reference No.2, which pertained to the contractor's claims arising in respect of suspension of toll collection during particular intervals of the concession period fixed under the contract.

2 The Petitioner in Arbitration Petition No.1158 of 2012, who is the Respondent in Miscellaneous Application Nos. 229 and 230 of 2012, is the contractor, M/s Atlanta Limited, (hereinafter referred to as “Atlanta”). The State Government of Maharashtra through the Executive Engineer, Road Development Division, who had ordered the subject road work and entered into the contract with Atlanta, and who are the Respondents in Arbitration Petition No.1158 of 2012 and the Petitioners in the Miscellaneous Applications, are hereinafter referred to as the “State”.

3 In October 1998, the State invited bids on 'Build, Operate and Transfer (B.O.T.)' basis for construction of Mumbra Byepass from KM 133/800 of Mumbai Pune Road, N.H.4 and joining the existing Mumbai Pune Road at KM. 138/200, i.e. for a total length of 5.41 km. Atlanta was the successful bidder. A formal agreement was signed between the State and Atlanta, followed by a work order. The contract between the parties is contained in bid documents together with the formal agreement and work order (hereinafter referred to as the “BOT contract”). Under the BOT contract, Atlanta was to execute and complete the project in accordance with the terms, and within the stipulated period, provided therein. In consideration of such execution and completion, the State agreed to allow Atlanta to collect and retain toll from motor vehicles using the project facility as per specified rates during a certain period, known as the “concession period”.

4 There was a delay in completion of the project, which Atlanta attributed to breaches of the BOT contract on the part of the State. On the other hand, it was the case of the State that this delay was caused due to defaults/ breaches on the part of Atlanta. Atlanta claimed to be entitled to extension of the concession period under the terms of the BOT contract to recoup its damages, whilst the State had counter-claims against Atlanta. These disputes were referred to an arbitration panel of three arbitrators. This reference was termed as Reference No.1.

5 During the existing concession period under the BOT contract, the collection of toll was suspended at the instance of the State for two particular periods, i.e. from 1.9.2010 to 10.9.2010, and 18.9.2010 to 15.1.2011. According to the State, the action of suspension was due to negligence of Atlanta in repairing the road in accordance with the conditions of the BOT contract, which elicited a public outcry, leading to the State ordering suspension of toll collection. On the other hand, it was the case of Atlanta that the BOT contract did not provide for any such action on the part of the State and the suspension ordered was in breach of the contract, entitling Atlanta to recover damages *inter alia* by extending the concession period. This dispute, which was also referred to the same arbitration panel, formed Reference No.2.

6 Separate awards were rendered by the arbitral tribunal in the two references, which are the subject matter of challenge in these Petitions.

7 By their award in Reference No.1, the arbitral tribunal partly allowed Atlanta's claims and gave an award of Rs.58,59,31,595/- on account of its claims with interest at the contractual rate of 20 per cent per annum from the commencement of the arbitration till payment. The arbitral tribunal also awarded costs of Rs.41,00,000/- to Atlanta. The arbitral tribunal directed the State to work out an extended concession period on the basis of the cash flow statement submitted by Atlanta to recover the awarded amount and to issue an appropriate Gazette Notification in that behalf, and in the event of its failure to do so within two months of the award, pay to Atlanta the entire awarded sum with interest. This award is challenged by the State by way of Miscellaneous Application No.229 of 2012. Atlanta, on its part, is aggrieved by the directions in the award for recovery of the awarded sum with interest. It wants the awarded compensation to be recovered in accordance with the details furnished in its cash flow statement of 40 years and 6 months in the event of the State not allowing the extended period of concession to Atlanta and instead taking over the facility. Arbitration Petition No.1158 of 2012 contains this challenge.

8 In Reference No.2, the arbitral tribunal accepted Atlanta's claims for compensation on account of suspension of toll collection for the two periods mentioned above and awarded a sum of Rs.14,92,38,050/- to Atlanta with interest at the rate of 14.75 % p.a. on Rs.1,14,79,850/- from 5.9.2010 and on Rs.13,77,58,200/- from 17.11.2010. This award is challenged by the State in Miscellaneous Application No.230 of 2012.

9 Miscellaneous Application Nos. 229 of 2012 and 230 of 2012 were filed before the Court of Principal District Judge, Thane. By an order passed by a learned Single Judge, the Applications were transferred to this Court, to be heard with Arbitration Petition No.1158 of 2012 filed by Atlanta. The Miscellaneous Applications have been renumbered as Arbitration Petition (L) Nos.1541 of 2014 and 1542 of 2014. That is how all these matters are heard together by this Court and are being disposed of by this common order.

10 We will first take up the State's challenge to the impugned award, since that is the main or substantive challenge to the whole of the award in Reference No.1. The award of Rs.58,59,31,595/- granted in favour of Atlanta is under various heads set out below.

Sr.No.	The description of claims	Amount awarded
(A)	Extra overheads and loss of expected profit	Rs.8,80,00,000/-
(B)	Compensation on account of reduced productivity of plant and machinery due to extension of construction period	Rs.4,94,27,000/-
(C)	Reimbursement for escalation in prices of HSD, cement and steel, etc. except Bitumen	Rs.16,95,47,000/-
(D)	Compensation payable on account of subsequent legislation	Rs.8,38,61,595/-
(E)	Reimbursement of royalty charges	Rs.1,96,18,000/-
(F)	Excess excavation work due to landslide and shifting of alignment	Rs.7,16,62,000/-
(G)	Difference in rates and cost on account of additional work ordered	Rs.10,38,16,000/-

11 Most of these claims were based on the delay in completion of the project. The question was, who was responsible for this delay; whether there was any breach or default on the part of the State or Atlanta. The first two points for determination framed by the arbitral tribunal dealt with these aspects. These points covering common grounds, clubbed together for adjudication of claims, were as follows:

> "a) Whether the Respondent committed breach/ breaches of the terms and conditions of the Contract Agreement No.COM/BOT/1 of 2000-2001 supplemented by the Supplemental Agreement dated 11th May, 2005 as alleged by the Claimant?
>
> b) Whether any delay in completion of the project was caused by the Claimant ? If so, whether the delay in completion of the project was caused due to any default and/or breach on the part of the Respondent?"

12 For consideration of these two issues, the arbitral tribunal split up the total contract period between three periods: (i) the original stipulated period for completion of construction works under the BOT contract, which was two years starting from 18.8.2000 and ending on 17.8.2003, (ii) the extended period of completion, i.e. the period extended by the Supplementary Agreement between the parties, from 17.8.2003 to 17.5.2005; and (iii) the further extended period between 17.5.2005 and 27.12.2007 upto which date the State granted extension without levy of penalty. The breaches alleged by Atlanta as having been committed by the State were mainly: (a) breach of clause 3.7.15 of the General Conditions of contract ("GCC"), which required the State hand over the possession of the land required for the construction work progressively, (b) non-removal of encroachments and non-rehabilitation of the encroachers, (c) non-resolution of disputes about the ownership of the land between the Forest Department and private landowners, and (d) failure to communicate the revised concession period even after the signing of the Supplemental Agreement. The arbitral tribunal considered the rival pleadings in this behalf and the documentary evidence on record, and in particular, Atlanta's letters dated 22.8.2000, 28.8.2000 (Exh.C.5 and C.6), 25.9.2000 (Ex.C.9), 25.9.2000 (Ex.C.10), the State's letter dated 27.9.2000 (Ex.1-in State's compilation-RD-1), 27.9.2000 (Exh.C-11),

Atlanta's Letters dated 5.10.2000 (Ex.C-12), 11.12.2000 (Ex.C-19), Minutes of Meeting dated 2.1.2001 (Ex.C-20), Atlanta's Letters dated 31.1.2001 (Ex.C-21), 10.2.2001 (Ex.C.22), the State's letter dated 1.6.2001 (Ex.C.23), Atlanta's Letters dated 12.11.2002 and 14.10.2003 (Ex.C-24 and C-25), 16.8.2002 (Ex.C-26), State's letter dated 20.12.2002 (Ex.C.27), Atlanta's reply dated 20.12.2002 (Ex.C.28), and Superintending Engineer's letter dated 12.5.2003 (Ex.C.36). Based on the facts and documents on record, the learned arbitrators held that out of 5500 m of total land acquired, about 2280 m was not made available by the State for construction of the road even after the lapse of the originally stipulated time for completion of the project and that in the circumstances, Atlanta could carry out the work of construction of the value of only Rs.10.88 crores as against the contracted value of Rs.29.68 crores. The arbitrators further held that whilst the progress of the work within the original scope itself was lagging behind, the State directed Atlanta to take up additional works costing about Rs.23 crores; and that the designs and drawings for additional works approved by the State involved considerable extra time and cost. In the premises, the arbitral tribunal held that Atlanta was not responsible for non-completion of the construction work within the original stipulated period of two years.

13. The arbitrators, thereafter, considered the extended period under the Supplemental Agreement, i.e. between 17.8.2002 and 17.5.2005. It was Atlanta's case that the work could not be completed even within this period due to continuing breaches on the part of the State and other causes not attributable to Atlanta. According to Atlanta, the relevant causes for this delay were: (a) non-availability of traffic and power blocks from Central Railways to enable Atlanta to execute the work of Railway Over Bridge ('ROB'), (b) landslide between chainage 1.560 to 1.660, (c) non-initiation of remedial action to avoid landslides in future, as suggested by the State's own expert geologist, (d) the problems posed by the existence of a Madrassa at chainage 900 and stoppage of work by locals at chainage 3450, (e) lack of timely decision for extension of concession period on the part of the State, adversely affecting the cash flow of Atlanta already strained due to delays and variations ordered, and (f) further variation orders issued after July 2005. The arbitrators considered the pleadings of the parties

and documentary evidence such as State's letter dated 20.4.2006 (Ex.C-48), Atlanta's letter dated 29.5.2006 (Ex.C.49), State's agreement with the Railways (Ex.6 in RD-1), Atlanta's letter dated 8.11.2006 (Ex.C-54), various letters exchanged between the parties (Ex.C-55 to C-87) and the proforma of time limit extension (Ex.C-88). On the basis of this material, it was held by the learned arbitrators that the facts and evidence on record established that the issues regarding delay and responsibility for the delay had stood resolved inasmuch as the State had granted extension of time to Atlanta for execution of construction work till 25.12.2007 for reasons not attributable to Atlanta. In the premises, the arbitral tribunal held that Atlanta could not be blamed for non-completion of the construction work till 25.12.2007 and that the State committed breaches of the terms and conditions of the BOT contract read with the Supplemental Agreement and caused the delay.

14. These conclusions involve interpretation of the contract and appreciation of documentary evidence led by the parties. The whole exercise was very much within the jurisdiction of the arbitral tribunal. The interpretation of the contract by the arbitrators cannot be termed as either impossible or perverse. The conclusions are supported by evidence. Neither is any inadmissible material relied upon by the arbitrators nor is any material document disregarded. No fault can , thus, be found with the conclusions drawn by the arbitrators on the first two points for determination.

15 The arbitrators then took up each of the claims raised by Atlanta as a result of the aforesaid breaches and delays and rendered their award on each. These individual claims may now be considered. But before taking up this part of the challenge, one more controversy, which goes to the root of many of these claims, may be dealt with at the outset. It was the case of the State before the arbitrators that even if Atlanta could be said to be not responsible for the delay in execution of the work, it could not claim any compensation on account of the delay, since the issues of delay and variation of the contract by ordering additional work, etc. were resolved under the Supplemental Agreement between the parties; extension of the concession period was duly granted under the

Supplemental Agreement to compensate Atlanta for the delays and variations; and nothing could be claimed which was not provided for under the Supplemental Agreement.

16 The arbitrators considered the voluminous correspondence between the parties, marked as Exhibits C-37 (a) to C-37(c) and Ex.C-38 to 47, in this behalf. This correspondence pertained to the circumstances attending the signing of the Supplemental Agreement and the various terms thereof. The arbitrators noted that Atlanta had time and again declined to sign the Supplemental Agreement, since the terms proposed were not acceptable to it; that there were various pressures brought to bear on Atlanta to sign the agreement; that throughout the period of negotiations, Atlanta disputed the compensation offered and brought out a comprehensive statement of claims which remained outstanding; and that the State finally reconciled and proposed to Atlanta that for the purpose of record, authenticating the additional work being incorporated by way of the Supplemental Agreement, Atlanta might sign the Supplemental Agreement pending finalization of its claims. The arbitrators were of the view that this clarification was expressly given by the State in its letter dated 7.4.2005 (Ex.C.45), which reads as follows:

> "*The Claims raised by you are being processed separately. In the mean while, pending finalization of claims, you are requested to execute the Supplemental Agreement on Rs.100 stamp paper as per letter no.982 dated 11.03.2005"*

The arbitrators also considered the circumstances in which Atlanta had continued to execute the additional work without entering into any supplemental agreement; and the fact that Atlanta was put to notice by the State that this entire work would be illegal in the absence of any supplemental agreement. According to the arbitrators, it was these aspects coupled with the State's assurance that signing of the Supplemental Agreement would not amount to giving up its claims and disputes, which were yet to be finalized, which prompted Atlanta to sign the Supplemental Agreement. In the premises, the arbitrators held that Atlanta's claims were not adversely affected by the terms of the Supplemental Agreement and were required to be adjudicated on merits.

17 Even this part of the award takes a possible view on the contract between the parties and is supported by evidence on record. As in our case, so in the case of **T.P.George Vs State of Kerala**[1] a claim for extra costs incurred was made on the footing of a delay caused without any fault on the part of the contractor. The claim was resisted by the employer on the same ground, as in our case, that supplemental agreement executed between the parties in the light of such delay barred any claim for extra costs. The contractor repelled the employer's contention on the ground, as in our case, that the supplemental agreement was got executed under coercion and that the same was in any event without prejudice to his claims. The arbitrator accepted the contractor's case. The Supreme Court upheld the award, holding as follows:

> "8. We have considered the rival submissions. It is to be seen that the question, whether the supplemental agreement dated 20.10.1983 debarred the appellant from pursuing his claims, was before the arbitrator. Such a question having been referred to the arbitrator, the view of the arbitrator would be binding if it is one which is possible. The arbitrator has taken note of the appellant's letters dated 6.10.1983 and 24.11.1983 and come to a conclusion that the supplemental agreement had been got executed and that the same was executed without prejudice to the claims which had already been made. This is a possible view.
>
> **9.** We have seen the impugned judgment delivered by the High Court. The High Court has not at all considered the letter dated 6.10.1983 and 24.11.1983 nor dealt with the question as to whether or not the supplemental agreement was got executed. The High Court has not even considered the effect of the supplemental agreement having been executed without prejudice to the claims which had already been made. Even if the High Court had considered these aspects it could not have substituted its views for those of the arbitrator as it could not be said that the view taken by the arbitrator is unreasonable or one which cannot be arrived at by a reasonable person. In this view of the matter the impugned judgment cannot be sustained and is set aside in respect of claims under Items 12(i) and (k)."

1 AIR 2001 Supreme Court 816

The impugned award does not, thus, suffer from any infirmity and deserves to be sustained whilst exercising jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

18 We may now take up the individual claims, which are the subject matter of challenge on the part of the State.

19 **(A) Extra Overheads and loss of expected profit.**

19.1 Atlanta claimed a total sum Rs.11.01 crores on this score. The claim was formulated on the basis of overheads and profits taken at 25 % of the construction cost in Atlanta's bid. It was the case of Atlanta, that due to reduced productivity, Atlanta incurred loss of overheads and profits, which, considering the cost of work accomplished during the stipulated period, work out (at the rate of 25 %) to Rs.453 lacs. The calculation goes like this :

(A) The total cost of the profit was Rs.2591 lacs; at 25 %, the overheads work out to Rs.648 lacs; these overheads were to be earned over 24 months at the rate of Rs.26.99 lacs per month; but the cost of work done during this period of 24 months was only Rs.780 crores, thus giving overheads (at 25 %) of only Rs.195 loacs; thus, Atlanta was entitled to recover the difference between Rs.648 lacs and Rs.195 lacs, which was its net loss during the originally stipulated period of construction.

(B) The varied scope of work together with the balance of the original scope of work was to be completed during the revised period of 4 years 9 months and 25 days under the Supplemental Agreement. But the delays by the State and other causes not attributable to Atlanta did not permit such completion, resulting in reduced productivity even during the extended period. On the same basis as in the case of the original period of completion, and considering the cost of the project to be incurred at Rs.5010 lacs as against the value in fact achieved at Rs.3679 lacs, the loss of overheads/ profits works out for these 58 months to

Rs.333 lacs.

(C) For the further extended period, i.e. from 17.5.2005 (the extended date under the Supplemental Agreement) and 27.12.2007 (the date up to which extension of time was granted without levy of penalty), the loss of overheads/ profits works out to Rs.315 lacs.

19.2 The State opposed this claim on several grounds. Firstly, it was claimed that there was no condition in the contract for payment of extra expenses on account of overheads and supervision cost; all these charges have to be borne by the contractor. Secondly, the State contended that the final piece of land of the length of 940 meters was handed over by the State to Atlanta on 23.4.2004 and as such, there was no question of considering overheads for the period between 17.5.2005 to 25.12.2007. The State claimed that considering the delay in handing over the land, i.e. delay upto 23.4.2004, the Superintending Engineer of the Department had recommended a sum of Rs.241.29 lacs as a compensation to Atlanta and accordingly proposed an extension of the concession period to the Government, but the Finance Department did not agree with the same. The State also contested the quantum of compensation worked out by Atlanta, namely, 25 % of project cost. The compensation recommended by the Superintending Engineer was at the rate of 10 % of the project cost.

19.3 As noted above, the conclusions of the arbitral tribunal on the factum of delay and Atlanta's entitlement to recover compensation on that score are clearly sustainable. The question really is of the quantum of compensation payable. As noted above, the Superintending Engineer had originally proposed the rate of 10 % of the project cost. The arbitrators allowed the rate of 20 % and gave an award of Rs.880 lacs on this claim. The Arbitrators considered the following material to work out this rate:

(a) Various formulas used in adjudication of overheads and profits, such as Hudson formula, Ashley formula and particularly, Emdem formula;

(b) The evidence placed by Atlanta on record (including its balance sheets and accounts) showing overheads as a percentage of the total value of works carried out – combined percentage during the relevant years ranging from 22-25 % to 42-43%;

(c) The oral evidence of CW-1 in this behalf, which, according to the arbitrators, withstood the test of cross-examination;

(d) The tender documents and bid submitted by Atlanta, which calculated overheads, etc.; and

(e) The trade practices in relation to calculation of overheads, etc. including the norms used by National Highway Authority of India, providing for overheads at the rate of 20 % for road works and 35 % for bridges and structural works.

The arbitrators also considered the law in this behalf including the judgment of the Supreme Court in the case of **Mc Decmott International Inc. Vs. Burn Standard Co.Ltd[2].** Based on all this material, the arbitrators considered the rate of 20 % of project cost as reasonable compensation for loss on account of overheads and profit. The arbitrators held that the percentage of overheads and profit stood substantially proved through oral and documentary evidence; that grant of extension of the construction period without extending the concession period did not properly mitigate the losses on this account, though extension of construction period without levy of penalty amounts to a tacit acceptance that the delay was entirely attributable to the State; that in recommending the compensation, the Superintending Engineer had admitted the loss incurred by Atlanta; that as mentioned in clause 3.7.14 of the GCC, Superintending Engineer being the final authority for taking decisions for settlement of disputes, his decision in this behalf was binding on the State; and that trade practices and usages also supported the percentage awarded by the arbitrators. Except the finding that the Engineer's decision was binding on the State, all other findings,

2 (2006) 11 SCC 181

which support the conclusion, are clearly justifiable. They are supported by the contract and evidence on record and are based on a possible view of the material. As for the finding of the binding effect of the Engineer's decision, it is obvious that the recommendation of the engineer was no decision under the dispute resolution provisions of the BOT contract, which alone could be said to be binding on the State. It was actually a recommendation made to the Government for the latter's acceptance. The Government could either accept or reject it. If that is so, it cannot be termed as binding on the Government. (This matter, though not decisive in respect of this claim, has a material bearing on some other claims, as noted below.) Though the arbitrators' decision on this point is not sustainable, since the ultimate conclusion is supported by all other findings, which are beyond reproach in a challenge under Section 34, the same needs to be sustained. The award of Rs.880 lacs on this score is, thus, upheld.

20 **(B) Compensation on account of reduced productivity of plant and machinery due to extension of construction period.**

20.1 This claim was on account of reduced productivity as a result of idling of the machinery and equipments at site during the extended period of construction and made on the basis of deployment cost of such machinery and equipments at the rate of 15 %. This claim was awarded in the sum of Rs.494.27 lacs. On principle, the award of such a claim cannot be taken exception to. But the question is, is this claim proved. There are two important matters which need to be considered before such a claim is awarded. Whether the Contractor could not have employed the machinery elsewhere and what is the measure of damages. There are two findings in the award in this behalf. One, Atlanta's request for shifting of the idling machinery and equipments to some other site being turned down by the State; And two, the recommendation of the Superintending Engineer in respect of this claim. Both the findings are clearly unsustainable. In the first place, the claim is for the entire length of the extended period, whilst the request for shifting and its rejection pertains to and accounts for only the initial period around the end of 2000 and the beginning of 2001 based on a solitary document of 3.1.2001 (Ex.C-20). It is not possible to accept that because at that time, i.e. around 3.1.2001, a request for shifting of machinery made by Atlanta was rejected, the case of Atlanta that throughout the extended period, i.e. between 2002 to 2007, Atlanta could not have deployed its machinery to other sites, is proved. In fact, Ex.C-20, which is minutes of meeting of 3.1.2001, shows that this request at that time was rejected because *"in all likelihood, entrepreneur will be able to commence work in full swing by February 2001."* If a request to permit shifting of machinery in January 2001 was rejected on an express footing that in February 2001 the work could be started in full swing, it is impossible to hold on that sole basis that throughout the extended period of construction, i.e. from February 2001 to December 2007, Atlanta was prevented from shifting its machinery to other sites and the machinery had to be idled at the subject site, due to the State's refusal to permit such shifting. The conclusion simply cannot be sustained. There is no evidence to support it. The second finding also is clearly unsustainable. As noted above, the Superintending Engineer had merely recommended a claim of Rs.494.27 lacs against this item for the consideration of the Government, which the Government was not bound to accept. The Finance Department did not in fact accept the recommendation. Whatever be the reasons for the Finance Department's view, they are not decisive in the context of adjudication of this claim. The Superintending Engineer's recommendation and its rejection by the Finance Department of the Government is an internal matter of the State. Though it may have some evidentiary value, to base the award on this recommendation by holding that the State had thereby accepted the claim of Rs.494.27 lacs, is clearly an impermissible approach. A recommendation placed before the State for its consideration cannot bind the State or be termed as an admission on its part. No doubt the arbitrators also observe that the recommendation is justified on the basis of log books maintained by the State. But the log books merely show the manner in which the work was done at site and what machinery was available at the relevant time. What we are concerned with is the claim for idling of machinery on the footing that it could not be deployed elsewhere. The log book does not make us any wiser in this behalf. In other words, the main and substntial basis of this claim could not be justified by any material on record. The quantum of damages also stands unproved. There is no discussion on the quantum of damages in the impugned award except a solitary observation that *"the deployment cost of machinery and equipments at the rate of 15 % is partly justified on the basis of analysis of rates prior to submission of bids relied upon by the claimant".* This unilateral material, in the absence of any other material in support, cannot by itself sustain the quantum of damages awarded.

20.2 The arbitrators' conclusion and award on this score, thus, cannot be accepted as a possible conclusion in the face of the material on record.

21 (C) Reimbursement of escalation in prices of HSD, cement and steel, etc. except Bitumen.

21.1 According to Atlanta, the parties has assumed 10 % escalation per year in the cost of material and manpower excluding the escalation on account of Bitumen. Atlanta had contemplated execution of 50 % works in the first year and balance 50 % in the second year. Considering this, on a weighted average basis, 2.5 % escalation in the first year and 7.5 % escalation in the second year totalling 10 % was provided for, as reflected in Form 6 of the Agreement. On the same basis, Atlanta claimed escalation for the subsequent years during which the contract got extended. Atlanta made a claim of Rs.1645 lacs on this account. The State opposed this claim. According to the State, in the BOT Contract, there was no provision to reimburse escalation in the prices of HSD, Cement and Steel. Only escalation payable was for bitumen. The State also contended that even in respect of this claim, there was a recommendation made for Rs.679.27 lacs by the Superintending Engineer, but the same was not accepted by the Finance Department of the Government. The State denied the whole claim during the arbitration reference.

21.2 As a matter of principle, whenever a project is delayed and the contract work is required to be executed during an extended period, where such delay and consequent extension are on account of a breach of contract on the part of the employer, the contractor has always been held to be entitled to compensation for extra expenses incurred due to rise in prices of material and labour. This irrespective of the fact that the contract does not provide for such escalation.

21.3 In **P.M.Paul Vs Union of India**[3] a claim was made by the contractor to recover the extra amount which he had to spend due to escalation of prices caused by delay in handing over the site. The arbitrator allowed the claim and the Supreme Court upheld it, observing:

> "In the instant case, it is asserted that the extension of time was granted and the arbitrator has granted 20 % of the escalation cost. Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay and he has further referred to this aspect in his award. The arbitrator has noted that claim related to the losses caused due to increase in prices of materials and cost of labour and transport during the extended period of contract from 9.5.1980 for the work under phase I and from 9.11.1989 for the work under phase II. The total amount shown was Rs.5,47,618.50. After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20 % of the compensation under Claim I, he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not misconducted himself in awarding the amount as he has done."

Similar views have been adopted by the Supreme Court in many subsequent decisions. In **K.N.Sathyapalan Vs State of Kerala**[4] , whilst resisting the claim of the contractor, the employer had contended that the original agreement in that case did not provide for such escalation, whilst the supplemental agreement between the parties specifically provided that no extra rates would be allowed. This is how the Supreme Court dealt with that contention:

> "31. The learned Single Judge of the High Court who was a party to the earlier orders passed in writ petition very graciously directed the Lt. Governor to

3 AIR 1989 Supreme Court 1034
4 SCC (2007) 13 SCC 43

consider the matter afresh when it was brought to its notice that the earlier order dated 7.9.2001 stood rescinded by an order dated 23.4.2002.

32. The order directing allotment of land was not a judicial or a quasi-judicial order. It was an executive order. If an executive order had been passed in ignorance of various judicial orders passed by the High Court, the same could be reviewed. In view of the fact that the development plans have the force of a statute and the purpose for which the area was earmarked by the Development Authority therein we do not see any reason as to why the mistake committed by the Lt. Governor could not be rectified."

Then in **Associated Construction Vs. Pavanhans Helicopters Pvt. Ltd.**[5] the Supreme Court followed the decisions in **P.M.Paul and K.N.Sathyapalan** (supra) and held that even in the face of a clause prohibiting compensation on account of increase in costs of material or labour, it was open to a contractor to contend it was liable to be compensated on account of the fact that delay had been occasioned due to reasons attributable to the employer.

21.4 Once it is accepted that the grant of escalation is justified on principle, the next question is of the quantum of damages that can be awarded on this account. The arbitrators have taken 10 % per year as the basis. This was on the footing of a rate of escalation accepted by the parties themselves, as reflected in Form 6 forming part of the BOT contract. The basis thus adopted by the arbitral tribunal cannot be termed as unreasonable, arbitrary or impossible.

21.5 The claim awarded by the arbitral tribunal in this behalf is, thus, not open to challenge under Section 34.

22 **(D) Compensation/ damages on account of subsequent legislation.**

22.1 This claim was on account of imposition of income tax at the rate of 10 % with 3 % education cess and a surcharge of 10 % introduced under the Finance Act, 2000 with effect from 1.4.2001 by way of a Minimum Alternate Tax

5 (2008) 16 Supreme Court Cases 128

(MAT) for BOT projects. The claim was on the footing that Atlanta's tender was based on Section 80-1A read with Section 12 CA of Income Tax Act, which allowed 100 % tax exemption for continuous 10 years, and as such, Atlanta did not consider outflow on account of Minimum Alternate Tax (MAT). This claim was further updated, when MAT was enhanced to 15 % with 3 % education cess and a surcharge of 10 %. The arbitrators awarded the updated claim of Rs.838 lacs upto financial year 2010-2011 and granted an award for payment or an extension of concession period on a pro rata basis, with a declaration that the concession period was liable to be extended after every three years based on actual payment of MAT certified by Statutory Auditors.

22.2 Ordinarily, such a claim would have no justification in law. A contractor cannot seek to recover from the employer taxes levied by the Government post the award of the contract on the ground that these laxes were not considered by the contractor whilst placing his bid. But in the present case, the claim is sought to be justified with reference to the contract between the parties. The argument goes like this. Clause 3.7.14 of the GCC requires the contractor to take into account all taxes payable unto 30 days prior to the last date of the receipt of the bids and Atlanta's bid having been submitted on 12.4.1999, Atlanta is entitled to claim additional taxes levied subsequent to 12.3.1999. Atlanta could have taken only taxes upto 12.3.1999 into account; that included the concession available under Section 80-1A(4A) read with Section 12-CA of the Income TAX Act; this concession was withdrawn by a subsequent legislation; hence, the liability which arose as a result of the subsequent legislation was payable to Atlanta.

22.3 There is an inherent flaw in this submission. What the contract provides is that tax concessions concerning the project declared by the Government of India or Government of Maharashtra upto 30 days prior to the receipt of the bid shall alone be available to the contractor and not other concessions. That does not mean that the contract provides for continuation of a particular tax concession for all times during the contract and compensation to the contractor for the loss occasioned to him on account of withdrawal of such concession at any time during the contract due to change of law. The particular clause of the contract provides as follows:

> "3.7.14 The Entrepreneur shall not be entitled to any special tax concession or any other concessions as a result of undertaking the proposed project, other than those declared by the Government of Maharashtra or the Government of India upto 30 days before the last date of receipt of the bids".

It obviously means that if any tax concession is declared by the Government after the period (i.e. after 30 days prior to the receipt of the bid), the contractor cannot claim that concession or any relief from the State on the footing of that concession. In other words, the terms of the contract shall remain fixed as contained in the bid and no relief can be claimed from the employer, i.e. the State, on the basis of a tax concession of a posterior date. That is the mandate of the particular clause. The mandate is not to perpetuate any concession already made available, but to deny the benefit of a future concession. The arbitrators' conclusion for awarding this claim based on their interpretation of clause 3.7.14 to the effect that this clause enjoins upon the State to compensate the contractor for a concession available upto the stipulated date, i.e. 30 days prior to the receipt of the bid, but withdrawn by a subsequent legislation, is not a conclusion which a reasonable person duly instructed in law could ever reach or be expected to reach.

22.4 In fact, Clause 3.7.14 is not a clause about subsequent legislation at all. The arbitrators are aware of this. But they say, clause 3.7.14 *"though explicitly not a clause of subsequent legislation, it implies that the claimant is entitled for compensation on account of withdrawal of the concession in terms of income tax which was available to him on the date of submission of the bid".* Nothing can be further from the true interpretation of the clause.

23. **(E) Reimbursement of royalty charges**

23.1 This claim was on account of royalty charges incurred by Atlanta.

When the bid was submitted, there were no royalty charges payable on minor minerals required for construction of roads in Public Works Department, Government of Maharashtra. Due to change in laws subsequent to Atlanta's submission of bid, Atlanta was required to pay royalty at different rates on minor minerals and material from time to time. It sought a reimbursement of these royalty charges from the State. Even here, initially a claim of Rs. 196.18 Lacs was recommended by the Superintending Engineer to the higher authorities, but the same was not accepted by the latter.

23.2 Even this claim was allowed by the arbitrators only on the grounds of (a) clause 3.7.14 permitting compensation on account of change in the law subsequent to 30 days prior to the last date of submission of the bid and (b) State's acceptance of the claim contained in the Superintending Engineer's letter of recommendation to the higher authorities. As discussed above, both these grounds are devoid of any merit and are not available to Atlanta. Reading of clause 3.7.14 as a stipulation requiring compensation to be made to Atlanta on account of a subsequent change in law, is neither reasonable nor possible, as discussed above. So also, the recommendation of the Superintending Engineer cannot be termed as an acceptance or admission of liability on the part of the State as explained above.

23.3 This claim could possibly be justified on account of the increased cost incurred by the contractor during the extended period as a result of the delay ensuring from the employer's breaches. But then we do not have before us any analysis or working of extra costs incurred during the extended period in this behalf. It cannot be ascertained from the material available on record if any royalty had to be paid on minerals or materials particularly during the extended period, which the contractor would not have paid during the original period of contract and therefore could be claimed as extra costs incurred on account of delay, particularly so because the subject royalty was introduced by the Government during the original period of contract. Besides, that may even amount to rewriting of the award, which is not permissible in a challenge under section 34.

23.4 In that view of the matter, the award in relation to this claim cannot be sustained.

24 **(F) Excess excavation work due to landslide and shifting of alignment.**

24.1 This claim was in the nature of a variation claim. According to Atlanta, during the construction of the Bye-pass, some excavation was noticed in a real estate adjoining the Bye-pass, endangering the safety of the Bye-pass. Some of these cuttings caused landslides. As a result, the alignment was shifted towards hill side. It was, therefore, necessary to construct an additional retaining wall in landslide area, the cost of which was taken into consideration for additional scope of work. But Atlanta was further required to incur an extra cost of excavation in landslide area and towards the hillock, which was not within the contemplation of the parties in the additional scope of work. It was Atlanta's case that this cost was required to be reimbursed to them. The State contested the claim relying upon the force majeure clause, clause 3.4.19 of GCC. The Superintending Engineer had earlier recommended this claim in the sum of Rs. 744.43 Lacs for the consideration of the State, but it was not considered. After the scrutiny of the claim, during the arbitration the State accepted the claim of Rs. 181 Lacs in this behalf.

24.2 In relation to this claim, original measurement books maintained bilaterally as well as certificates were produced before the arbitral forum. The arbitrators noted that the relevant facts, namely, shifting of the alignment and landslides having taken place, were admitted by the State; that the quantities of extra excavation and transportation were recorded in measurement books bilaterally maintained and were not in dispute; and that the rate applied was the tendered rate. The arbitrators noted that the contractual provisions, clause 3.6.6 of GCC read with Form 6, implied that any extra work carried out by Atlanta was to attract 22% charges over the rate; and that accordingly the Superintending Engineer had prepared his estimate in the recommendation made by him. In the premises, the arbitrators accepted the claim. The arbitrators rejected the State's contention that the work involved only shifting (loading, unloading and transportation) and not excavation and therefore, payable only at the rate of Rs. 51.70 / cum (which was exclusive of excavation).

24.3 This view of the arbitrators is clearly a possible view. It is based on a reasonable and possible interpretation of contract, is supported by material on record and there is no legal infirmity in either the admissibility of the claim or its assessment in value. No infirmity can be found with this part of the award.

25 **(G) Difference in the rates and cost as claimed and allowed on account of additional work ordered.**

25.1 This claim concerned working out of rates for additional works. According to clause 3.6.6 of GCC, additional works were to be valued at the rates of items included in the BOT contract and in their absence, at current District Schedule of Rates (DSR rates) plus 15 per cent and for items not finding place in the Contract or DSR, at mutually agreed rates. It was the case of Atlanta that for various reasons, the rates allowed by the State for additional works sanctioned later were not proper. Some of the broad reasons were these. Firstly, in some cases it was claimed that the original BOT contract having contemplated completion of works within 2 years, in a case where there was abnormal delay in completion, and additional works were ordered much later, the agreement rates were inapplicable for the additional work. Secondly, it was claimed that DSR rates not having been updated for more than 2 years before the ordering of additional works, the same did not reflect the correct prevailing rates at the relevant time, and some corrections were necessary to the old DSR rates. Thirdly, it was submitted that some extra work ordered like ROB, viaduct, retaining wall etc. took more than 3 years for completion. Even otherwise, DSR rate of each year was required to be considered for the items executed. But the State had considered the same flat rate throughout the execution period of over 3 years, instead of DSR rates of each year. Lastly, it was claimed that the contract provided for item rates at DSR plus 15 per cent plus 22 per cent as per Form 6 of the Concession

Agreement. It was the case of Atlanta that some of these aspects were acknowledged by the Superintending Engineer and the State.

25.2 The arbitrators accepted the contention of Atlanta in respect of mark-up of 22 per cent over and above DSR rates. The arbitrators also accepted Atlanta's contention regarding provision of escalation in the cost of maintenance and renewal. The arbitrators decided the various subsidiary issues concerning rates for additional works. Taking into account the submissions and evidence presented by parties and based on the findings and conclusions referred to in this behalf, the arbitrators held that Atlanta was entitled to a sum of Rs. 1038.16 Lacs in this behalf and awarded the sum.

25.3 It is pertinent to note that many of these claims, as a matter of principle, were admitted by the State in the arbitration. In fact, in its statement before the arbitral tribunal, the State admitted that as per actual work done by Atlanta, the claim on account of anti crash barrier for Rs. 162.50 lacs was justified. Even for additional work after opening of the road, the claim of Rs. 27.86 lacs was accepted by the State in the arbitration. On the other hand, no comments were offered on the variation of the rate of Bitumen for which an escalation payment of Rs. 244.50 lacs was recorded in the measurement book. The main dispute was relating to the claim of 22% additional mark-up over and above DSR rates. The arbitrators' conclusion in this behalf is based on a possible interpretation of the contract, and not liable to be interfered with under the accepted parameters of challenge under Section 34. Even as regards the escalation in cost of maintenance and renewal, the arbitrators' conclusion is based on a possible interpretation of the contract. The arbitrators considered the provisions of Form 3 of the original contract agreement and standard practice followed in comparable matters to consider such escalation in cash flow. Barring the reliance on the recommendation of the Superintending Engineer as in the case of other claims, the reasons discussed and material considered in this behalf by the arbitrators can very well support the award. No interference is called for in relation to this part of the award under Section 34.

26. **(H) Interest.**

26.1 The arbitrators have granted pendente lite and post award interest on the principal amount of the award at 20 per cent per annum. The rate of interest is in accordance with the provisions of the contract, namely, the concession agreement, and need not be interfered with.

27. **(I) Costs.**

27.1 Atlanta having succeeded to a substantial extent in the reference, a bulk of the award having been sustained ever in this order, no fault can be found with the award of costs.

28. Let us now take up the challenge to the award at the instance of Atlanta. As noted above, the Challenge of Atlanta is limited to the manner of recovery of the awarded sum with interest. It is the case of Atlanta that the awarded sum can only be recovered by extension of the concession period. Atlanta also disputes the date with effect from which interest is allowed to it under the award. Atlanta has disputed the interest ordered at simple rate. According to it, interest ought to have been compounded annually. After working out the interest thus, it is claimed by Atlanta, the arbitrators ought to have directed extension of the concession period and in case the facility was taken over by the State at any time during such extended concession period, ordered recovery of compensation (of unrecovered amount) as per details furnished by Atlanta in their 'cash flow statement'. This is the subject matter of challenge in Arbitration Petition No. 1158 of 2012.

29. The award is basically for recovery of damages occasioned by the delay for which the State was responsible and extra work carried out under the contract which was not in contemplation of the parties. Clause 3.6.6 of GCC, which applies for adjustment of the target date and project cost 'as a result of variation ordered by the Engineer' within the meaning of clause 3.6, cannot be made applicable to the recovery of the amount awarded. So also, clause 3.9 of

GCC, which deals with the taking over of the facility by the Government during the concession period, cannot be invoked in the present case. Clause 3.9 applies, when the Government exercises its right to take over the facility at any time after completion of the project but before the concession period available to the contractor expires. In that event, the contractor is eligible to recover compensation for the unrecovered amount as per the details furnished by him in the accepted cash flow statement. Once it is clear that damages or compensation ordered to be paid to Atlanta under the award is neither in the nature of original cost of construction nor an extra amount payable as a result of any variation ordered by the Engineer, which results into an adjustment of the concession period, there is no question of applying clause 3.9 for the recovery of that amount. It is not an unrecovered amount as understood by clause 3.9. There is, thus, no merit in the contention of Atlanta that the awarded sum can be recovered only in accordance with the cash flow statement furnished by it.

30. Award of interest on the principal amount awarded by the arbitrators is within the discretion of the arbitral tribunal and no fault can be found either with the date (the date of commencement of arbitration) with reference to which such interest is calculated in the award or the manner of calculating such interest, namely, simple interest method as opposed to annual compounding method.

31. There is, thus, no merit in Atlanta's challenge to the impugned award.

32. That takes us to the challenge to the award in Reference No.2. In this reference, the arbitrators have accepted Atlanta's case of compensation on account of suspension of toll collection during two particular periods within the concession period. It was the case of Atlanta that the suspension of toll collection ordered by the State during these periods was not justified; that the contract was on 'Build, Operate and Transfer' basis and not on 'Design, Build, Finance, Operate and Transfer' basis and there was no freedom to Atlanta for designing the road crust; that Atlanta had sucessfully completed the work and no failure of the road could be attributed to bad workmanship on its part; that formation of pot

holes and damage to the road surface during monsoon ought to be attributed to a faulty design and not to bad workmanship; that there was no negligence or lack of care on the part of Atlanta in road maintenance; and that the toll collection could not be suspended under any contractual provision.

33. The State had suspended toll collection on the grounds that Atlanta had failed to maintain the road surface in motorable condition as per Section 7 (specifications for maintenance) of the BOT contract. The toll collection was accordingly suspended by the State purportedly under the provisions of clause 3.1.23 read with clause 3.8.1 (a) and (d) of GCC.

34. These clauses deal with suspension of the **work** and not the **concession period**. Besides, the only remedy available to the State in the event of non-compliance with the stipulation of repairs and maintenance, was to carry out the work at the risk and cost of Atlanta, under clause 7.1.8 of GCC. The arbitrators held that there was no provision in the contract for suspension of toll collection or the concession period as such, and in the absence of any specific provision in that behalf, the Chief Engineer was not within his rights to order suspension of toll collection.

35. These are matters of interpretation of the BOT contract and the arbitrators have taken a view, which is certainly a possible view. This Court ought not to interfere with it in its jurisdiction under Section 34.

36. On the question, whether Atlanta was in beach of the provision in the contract concerning repairs and maintenance, the arbitrators considered the records placed before them, and came to a conclusion that from the correspondence on record, and having regard to the proof tendered by Atlanta for maintaining the road in pothole free condition including the certified copies of deployment of manpower and machinery, Atlanta did what was reasonably expected of it and the State had failed to prove that Atlanta was negligent or careless in road maintenance. These are matters of fact, and the conclusion of

the arbitrators is a possible view on the basis of the material available before the arbitrators. The conclusion is supported by evidence. Sufficiency of the evidence and the merits of its assessment by the arbitrators are not matters for this Court to examine, and no interference is called for.

37. There is, thus, no merit in the challenge to the award laid in Misc. Petition No. 230 of 2012.

38 Accordingly, Arbitration Petition (L) No.1542 of 2014 (Miscellaneous Application No.229 of 2012) is partly allowed by setting aside the award in respect of the claims mentioned at Item Nos. (B), (D) and (E) in paragraph 10 above in the sum of Rs.4,94,27,000/-, Rs.8,38,61,545/- and Rs.1,96,18,000/-, respectively. The rest of the award for the sum of Rs.43,30,25,000/- together with interest and costs awarded is confirmed. Arbitration Petition (L) No.1541 of 2014 (Miscellaneous Application No.230 of 2012) is dismissed. Arbitration Petition No.1158 of 2012 is dismissed. There shall be no order as to costs.

(S.C.GUPTE J.)