

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 2nd March, 2016*
Judgment pronounced on : 8th July, 2016

O.M.P.No.589/2014

M/S NHAI NEW DELHI Petitioner
Through Mr.Prashant Mehta, Adv. with
Mr.Adarsh Ramakrishanan, Adv.
versus

M/S BEL-TBL (JOINT VENTURE) Respondent
Through Dr.Amit George, Adv. with
Mr.Swaroop George & Ms.Rajsree
Ajay, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the objection under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') against the unanimous arbitral award dated 15th November, 2013 passed by a three member Arbitral Tribunal.
2. The brief facts of the case as per pleadings of the parties are that the subject work was awarded to the respondent vide the petitioner's letter of intent No. 11011/9/98-C-F/ Karur Bypass dated 8th July, 1999, for a contract value of Rs. 34,95,72,588/-.
3. The contract agreement was subsequently entered into between the parties on 30th August, 1999. As per the stipulations of the contract, the entire work was to be completed within 24 months from the date of commencement of work.
4. The work was started on 28th September, 1999 and as per the contract conditions it was to be completed by 28th September, 2001.

However, the work could not be completed within the period stipulated in the contract and hence, certain extensions of time for completing the work were necessitated. The work was finally completed on 30th September, 2002 with a delay of about 12 months.

5. The case of the respondent was that the respondent stayed on the site for an extra period of 12 months (hereinafter referred to as the 'extended period'). It is not in dispute that the petitioner granted extensions of time upto this date for completion of the work without imposition of any liquidated damages on the respondent.

6. On completion of the work, the Engineer issued the taking over certificate for the work by letter dated 30th November, 2002 and the defect liability certificate was also issued by Engineer by letter dated 9th December, 2002.

7. The respondent raised certain claims against the petitioner, mainly arising out of the delay in completion of the works, and when the petitioner refused to pay the claimed amount to the respondent, the disputes between the parties arose and a three member Arbitral Tribunal was constituted by the parties to resolve the disputes.

8. After hearing both the parties and production of the evidence of the parties, the unanimous arbitral award dated 15th November, 2013 was published.

9. Few certain claims i.e. claim No.1, 2.1, 2.2 and 4 of the respondent have been partly allowed by the Arbitral Tribunal, however, claim Nos. 2.3, 2.4 and 3 have been rejected.

10. The petitioner has filed the present petition under Section 34 of the Act challenging the arbitral award dated 15th November, 2013. The petitioner has not challenged the award of Claim No. 1 and has

accepted the same. Only the finding pertaining to claim No.2.1, 2.2 and 4 have been challenged.

11. On claim No.2 the Arbitral Tribunal in the impugned award has awarded damages against Claim 2.1 on account of idling of machinery: Rs. 2,42,23,889.56/-and against Claim 2.2 for Compensation for expenses for the extended period: Rs.1,82,04,901/- Both claims 2.1 and 2.2 have been wrongly awarded by the Tribunal.

It is submitted by the petitioner that on claim No.2.1 and 2.2 the findings of Arbitral Tribunal are illegal, wrong and not sustainable. The award is liable to be set-aside. The main reasons for delay in the project were (i) non availability of land, (ii) additional items of work to be executed (iii) delay in fixing alignment, (iv) existence of utilities to be removed. It is submitted that the Tribunal without ascertaining the cause of such delays, summarily decided that all delays to the Project were occasioned by the petitioner. It is argued that the same is contrary to the terms of the contract as there was no delay caused due to non availability of land. The entire stretch was handed over to the respondent as it can be seen from the Notice to Proceed with Work dated 16th September, 1999 and there was no delay in carrying out additional items of work. Proper and necessary extension of time along-with adequate price escalation was granted by the petitioner to the respondent to carry out any additional work. Reference is placed by the petitioner on letters dated 1st September, 2001, 15th February, 2002 and 16th September, 2002 in order to show that the purported reasons for delay is not attributable to the petitioner.

12. It is stated by the petitioner that the delay in fixing alignment cannot be ascribed to the petitioner. Such finding of the Tribunal is contrary to the terms of the Contract itself. As per the Instructions to Bidders, para 1.1.1 (b) the Contractor is responsible to carry out all works ancillary to fixing alignment.

Admittedly, there were errors in fixing the alignment and the centre line. However, a bare perusal of the correspondences exchanged between the parties shows that the delay was fully on account of the respondent. It is submitted that a delay of 244 days was occasioned due to not fixing the alignment and centre line correctly. The Tribunal did not consider any of the communications/evidence in this regard and summarily fixed the responsibility of the same on the petitioner.

13. It is submitted that the delay in removal of utilities also cannot be ascribed to the petitioner. The Instructions to Bidders, para 1.1.1 (a) sets out the Contractor's responsibility to carry out site clearance activities. This is further elaborated in sub clauses 110.1 to 110.7 of Technical Specifications to the contract. This can be further seen in para 2 of Construction Methodology issued to the respondent. Furthermore, para 7.1 of the Instruction to Bidders itself is clear in its terms that the respondent would visit, examine the Site and its surroundings and ascertain for itself the nature of its responsibilities. It was the contractual obligation of the respondent to remove any obstructions/ utilities. The respondent cannot claim any damages/ additional expenses for the purported additional works carried out in the removal of any obstructions/ utilities. The contract as per Clause 11.1 made it clear that the respondent ought to have satisfied himself to the extent and nature of work and materials necessary for

the execution and completion of the works. The contract itself did not envisage handing over of the Site free from obstructions/ utilities. The entire stretch of the land was handed over to the respondent vide Notice to Proceed with Work dated 16th September, 1999 as per Clause 42.1 of the Contract.

It is submitted that the Tribunal has not considered any of the above circumstances and has not given any valid finding on the responsibility to carry out the works which caused delays. The Tribunal has incorrectly assumed that it was the petitioner's contractual obligation. The Tribunal did not consider the fact that the reasons for which the work was delayed was attributable to the respondent.

14. Counsel for the petitioner in support of his submission has referred the decision of this Court in the case of **Mecon Limited v. Pioneer Fabricators (P) Ltd.** 2007 (4) ArbLR 323 (Delhi) wherein it was held that "if a party is responsible for the delay, it cannot avail of the benefit of the delay."

15. It is argued that the Tribunal had gone through the Extension of Time correspondences in an arbitrary and piecemeal manner. Instead of examining the cause of delay and ascertaining the true and correct reasons for the delay in work, vide paras 2.3.8, 2.3.11 and 2.3.15 of the impugned award, without assigning any reasons therewith and wrongly held that the reasons for extension were not attributable to the respondent.

16. It is submitted that the Tribunal has also failed to consider the fact that the respondent had already been granted price escalation as per Clause 70.3 of the Special Conditions of Contract. Thus, the claims qua extra over heads and additional costs granting additional

costs over and above price cannot be granted. The Tribunal by not assigning proper reasons to its order and passing an unreasoned award, it did not appreciate the law laid down in the case of **Som Datt Builders v. State of Kerala** 2009 (10) SCC 259, wherein the Supreme Court had held that "The requirement of reasons in support of the award under Section 31 (3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy of the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute to reasons which the Arbitral Tribunal is obliged to give..."

17. Lastly, it is stated by the petitioner that the Tribunal also failed to understand that the claims raised by the respondent were *ex facie* barred under limitation. The "Draft Final Statement" in - accordance with Clause 60.11 of the Special Conditions of Contract was submitted by the respondent on 29th January, 2004 detailing the claims due to the respondent. Accordingly the limitation period for invoking the arbitration would commence from 29th January, 2004 and run up to 29th January, 2007. However, letter for appointment of Arbitrator was sent only on 21st April, 2010. The Tribunal has wrongly recorded that the petitioner is not pressing the issue of limitation. It is petitioner's case in the pleadings that the claims of the respondent are barred by limitation. In any event, the primary duty of any Tribunal is to see whether the claims which are being adjudicated are live claims or not, even if any such plea was not taken in the reply to statement of claims. While by refusing to

consider the submissions of the petitioner in regard to the claims being barred by limitation, the Tribunal committed grave error for which the impugned award is liable to be set aside.

It is also alleged that the Tribunal failed to appreciate that the non compliance of notice under Clause 53.1 of the Contract, when price escalation had been expressly granted to the respondent, rendered the claims before the Tribunal as not maintainable. It was mandatory on part of the respondent to serve notice to the Engineer and to file contemporary records in evidence for costs and expenses (if any incurred) on account thereof. The Tribunal did not understand that the respondent did not give a specific notice to the petitioner to the effect that the resources/ machinery were idle and unutilized which led to incurrence of extra costs by the respondent. The claim of the respondent in respect of idling of resources has been adjudged from the period of 28th September, 2001 to 30th September, 2002, the period for which the resources i.e. machines and equipments have been admittedly under use. For the period in which the machines and equipments of the respondent purportedly remained idle cannot be compensated for as the reason for such idling of resources is squarely attributable on the respondent and not on the petitioner. The Arbitral Tribunal has erred in awarding claims for idling of resources of the respondent in the period for which the resources were not 'idle'.

18. On claim No.4 for return money, it is submitted on behalf of the petitioner that the Arbitral Tribunal has incorrectly awarded losses due to delay in releasing Retention Money ("RM") for an amount of Rs.2,33,386/-. Further losses due to submission of Bank Guarantee for release of RM-Rs.79,056/- was awarded by the

Tribunal. The same is contrary to the terms of the Contract and the policy of the petitioner. Clause 60.5 and 60.6 of the Special Conditions to Contract envisaged for the need of replacing the amount of RM with an unconditional Bank Guarantee. This was later made mandatory vide petitioner's Circular No.11041/21/2002/Admn. III dated 10th January, 2003 and was duly informed to the respondent.

It is stated that 50% of RM was released immediately after recommendation from petitioner's consultant in accordance with the provisions of the Contract and the said Circular. The remaining 50% was released on receipt of approval from the petitioner's Headquarters on 13th May, 2013. This approval was in terms of the petitioner's Circular dated 10th January, 2003 after it was clear that the respondent had submitted a bank guarantee. It is alleged that the Award of the Claim No.4 is contrary to the terms of the Contract and the Tribunal committed a jurisdiction error in awarding Claim No.4. Thus, Claim No.4 is accordingly liable to be set aside.

19. The petitioner has also challenged the interest component as awarded against claim No.5. It is stated that the Tribunal awarded interest @ 12% p.a. The contract provides interest at the rate of 9% per annum. Thus, the finding is illegal as the delays if any, were caused by the respondent.

20. Both the counsels have made their submissions from time to time. They have also filed their written submissions which were referred by them so as the pleadings, documents and the award published by the Arbitral Tribunal.

21. Firstly, I shall deal with claim No.2 i.e. additional costs in the extended period of the contract. The said Claim No.2 was raised by the respondent which relates to the additional cost incurred by it while staying on site for the extended period of the contract. The Arbitral Tribunal has given its findings with regard to this claim. The relevant findings of the Arbitral Tribunal have been reproduced here as under:

"2.3.4 The work was delayed on account of non-availability of land, delay in fixing alignment, existence of utilities to be removed and additional items of work to be executed.

2.3.5 Extensive evidence was presented by the Claimant before the Arbitral Tribunal to prove that there was delay in execution of the work on account of reasons of non-availability of land, delay in fixing alignment and removal of public utilities.

2.3.6 Extension of time has been granted by the Competent Authority upto 30.09.2002 (12 Months) in three stages.

i. First Extension of time was granted by the Competent Authority upto 31.01.2002 vide his letter dated 22.10.2001 addressed to the General Manager (Technical) NHA I – Salem, without levy of liquidated damages.

ii. Reasons of grant for Extension of Time as recommended by G.M. Salem vide his letter dated 01.09.2001 to Respondent are as below:

(Ref.RD-4, Page No. 4&5 – Submitted by the Respondent during proceedings).

1. Finalization of realignment:

"Of Course, there were some delay in finalizing the alignment with respect to the land available and with respect to the site conditions and it may not be to the extent as claimed by the Contractor and can not be fully accepted".

2. Utilities /Obstructions:

"The General Manager (Tech.) and the Manager (Tech.) were only taking sustained and continuous efforts for clearing the utilities and obstructions. There had been some delay due to the following.

a) In some places, the utilities were required to be shifted on the land under acquisition and there was delay in getting prior "enter upon permission" on the land under acquisition from the land owners.

b) There were of course certain delays as sanction for the estimates from various state government departments the estimates/removing obstructions were not received in time.

c) There were a few objection from the land owners for getting "enter upon permission" for the land under acquisition.

3. Increase in number of culverts:

There was increase in number of culverts.

2.3.7 Project Director and General Manager(Technical) NHAI-Salem vide his letter dated 1.9.2001 addressed to Member(Tech), NHAI reported as below:

" In this regard, I may state that, in view of the time required to clear the remaining obstructions/land possession and the various reasons as recommended by the Consultant, NHAI may consider to grant time extension upto 31.01.2002 with price escalation and without liquidated damages (instead of 31.12.2001 recommended by Consultant) along with all the terms and conditions as stipulated by the Consultant. This time extension upto 31.01.2002 is inclusive for the anticipated delay in clearing the remaining minor hurdles/obstructions".

2.3.8 None of the reasons mentioned in the above recommendations of the G.M is attributable to the Claimant.

2.3.9 Second Extension of time was granted upto 31st March 2002 with price escalation and without liquidated damages by the Competent Authority vide his letter dated

14.03.2002, on the basis of recommendations of Project Director dated 15.02.2002 to the NHAI Authorities (Respondent).

2.3.10 Recommendations of General Manager (Tech) dated 15.02.2002 to NHAI Authorities are briefly mentioned as below (Ref. Page 28.)

a. "The effective delay pointed out by the contractor up to 15.05.2002 various grounds is not fully due to the part of consultant and client in getting clearances and delay in taking decision and it is also on the part of the contractor. Hence, it is very difficult to assess the period of delay caused in removal of utilities, vagaries of rainfall, short supply of Bitumen, Rectification of old Bridge and other minor repairs, Further delays in shifting of utilities were accounted and the decision of repairing old bridge was given much earlier. But replacing the wearing coat in old bridge can be taken up only after allowing the traffic through new bridge, which is under execution."

b. " I also examined the recommendations of the Consultant on the subject matter. After a detailed examination and discussion, the Project Management had later agreed to complete the project in all respects by 31.03.2002, I hereby recommend that the period of completion of the project may be extended upto 31.03.2002 with allowance of price escalation and without imposing any liquidated damages along with all the terms and conditions as stipulated and recommended by the consultant."

2.3.11 The reasons of extension mentioned above are not attributable to the Claimant.

2.3.12 Third extension of time has been granted by the Competent Authority – NHAI vide letter 23.10.2002 (Ref. RD-4, Page No. 30) on the basis of recommendations of the Project Director and General Manager (Tech.) dated 19.09.2002 (Ref. RD-4, Page No. 31) (Camp at Delhi) to the NHAI Authority-without levy of liquidated damages.

Part of letter dated 23.10.2002 (Ref. RD-4, Page No. 30) is reproduced below.

"Competent Authority has granted extension of time for completion of Karur Bypass project to M/s. BEL-TBL (JV) upto 30th September 2002 with the terms and conditions stipulated by the "Engineer" in his letter No.RITES/Karur-Bypass/NH-7/Misc./292 Dated 16.09.2002.

2.3.14 The Recommendations of Project Director and General Manager dated 19.09.2002 to NHAI are briefly mentioned below:

"The request of the Contractor alongwith the comments of the Consultants (Engineer) and manager (Tech.) had been scrutinized by the undersigned and I hereby offer my remarks as follows.

It is true that the Contractor was requested to execute the additional work of Rehabilitation of the old Amaravathi Bridge. The work includes re-setting the damaged hard rails, footpath slabs, re-lay the bituminous overlay (B.C.) by removing the existing RC wearing coat, painting to the surface of the bridge, kerb painting and also strengthen the area near Round about (Rotary).

During execution of scarifying the RC wearing coat, reinforcement were seen laid and it could be removed carefully by cutting them without affecting the deck slab. The sudden release of water in the river by the PWD for irrigation purpose resulted in dislodging of the form work erected for the painting to the bridge. The land near the Rotary was made available after removal of the structures only by 08.08.2002. The above obstruction /hurdles caused delay to complete the work.

Considering the reasons mentioned by the Contractor, justifiable, as recommended by the Consultants (Engineer) and the Manager (Tech.). I request that the application of the Contractor requesting the grant of EOT of completion upto 30.09.2002 may be favourably considered and orders issued at the earliest."

2.3.15 None of the reasons mentioned in the recommendation of the Project Director and General Manager (Tech.) are attributable to the Claimant.

2.3.19 No liquidated damages have been levied on the Claimant.

2.3.20 None of the reasons mentioned in the recommendations of Project Director and General Manager to the NHA in all the three Extension of Time cases discussed above are attributable to the Claimant.

2.3.22 Arbitral Tribunal is of the view that since reasons of delay are not attributable to the Claimant and three extensions have been granted upto 30.09.2002 without levy of liquidated damages, the Claimant is entitled to recover the additional cost incurred for executing the work in the extended period.

2.4.9 This plea of the Respondent is against the record and facts. As pointed out above the notice under clause 53.1 was issued by the Claimant. AT has observed from record that the Claimant has supplied contemporary records at various stages of execution of the project. As mentioned in RH-7 Dated 4.12.2012 (page1, item 6 and item 7), first interim claim for Rs.1,14,81,298.37 was submitted by the Claimant on 10.11.2000 (C-10 page 215-224) and second interim claim for Rs.36,72,415/- was submitted by the Claimant n 26.12.2000 (C-11, Page 225-233). In these claims detailed contemporary records have been submitted by the Claimant.

2.4.14 Arbitral Tribunal has come to the conclusion that as the extension of time was granted from 28.9.2001 to 30.9.2002 for reasons attributable to the Respondent, without levy of liquidated damages, the claimant is entitled to recover additional cost under clause 42.2, 6.4 and 12.2 of the conditions of contract for the extended period of 12 months.
(emphasis supplied)

22. It is evident from the findings that the Arbitral Tribunal has come to a conclusion that (a) the reasons for delay in the completion of the work were attributable to the petitioner, particularly its failure to make available the requisite land; (b) the contract contains clauses that provide an explicit entitlement to the respondent to

claim additional cost on account of this delay for the extended stay at the site, namely clauses 6.4, 12.2 and 42.2. Whereas clause 6.4 deals with delay and cost of delay of drawings; clause 12.2 deals with unforeseeable physical obstructions or conditions and clause 42.2 deals with failure on the part of the petitioner to give possession of the site to the respondent. All these clauses envisaged additional costs to be awarded to the respondent; (c) there is extensive evidence led by the respondent to prove the damages suffered by it; and (d) the petitioner itself had consistently extended the time for completion without imposing any liquidated damages on the respondent.

The submission of the petitioner is that there is no provision for award of additional cost to the respondent. The petitioner also submits that price escalation has been paid to the respondent who was responsible for the delay. The issue of payment of additional cost in the extended period of contracts has been discussed by this Court even in other cases of the very petitioner itself.

The Arbitral Tribunal has referred several judgments of this Court wherein the award of additional cost in the extended period in identical contracts involving the petitioner has been upheld. The details of the said judgment are given as under:

- i) In ***National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd. Gammon India Ltd.,*** (2013) 2 Arb. LR 264 (Delhi) (DB), a Division Bench of this Court has held as under:

"5. Learned senior counsel for the appellant submits that the Arbitral Tribunal has awarded the amount under Claim No. 2 on presumptions; there were no actual figures available before him; even otherwise

compensation for delay in work was adequately covered by the escalation clause for which purpose attention has been drawn to Clause 44 of the contract. Submission being that in all cases where extension of time was granted to the contractor he would be adequately compensated; further submission being that the formula adopted by the Arbitral Tribunal for the computation of the claim contained an element of profit and this is evident from the calculation chart given by him while allowing the aforesaid compensation. Submission being that the definition of 'cost' as defined under Clause 1.1(g)(i) of the contract in no manner includes any allowance for profits; it is only "the expenditure properly incurred or to be incurred, whether on or off the Site", which has to be afforded; this fact has been overlooked by the Arbitral Tribunal and the learned single Judge endorsing the finding of the Arbitral Tribunal on this count has committed an illegality. In support of his submissions reliance has been placed upon (2004) 5 SCC 109 Bharat Coking Coal Ltd. Vs. L.K. Ahuja. Submission being what has been awarded under Claim No. 2 is the loss of profit which could not have been awarded; the contract specifically excludes the grant of loss of profit; the error is apparent.

8. 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 favor 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.

9. These factual findings which were based on voluminous evidence i.e. the monthly reports submitted by the claimant and verified by the Engineer of the respondent and by applying the MORTH formula to determine the 'cost' and noting the facts that the delays in the work being attributable to the respondent, the claimant was accordingly awarded the aforementioned amount.

10. These finding were rightly not interfered with by the learned Single Judge. Objections under Section 34 of the said Act are limited in scope; the learned single Judge while dealing with such objections is not an appellate form. Unless there is a plain perversity appearing on the face of the Award there is little scope for interference; non-interference was accordingly rightly adhered to by the learned single Judge.” (emphasis supplied)

The price escalation alone would suffice as it was specifically noted in paragraph 5 and was subsequently found to be unmeritorious in view of clauses 6.4, 12.2 and 42.2, by the Division Bench, in paragraphs 8 and 9, in ***Oriental Structural Engineers Pvt. Ltd.*** (supra). It was held that award of additional cost towards machinery and overheads in the extended period is perfectly valid in light of clauses 6.4, 12.2 and 42.2, when the delay has been found to be on the part of the petitioner.

- ii) Reference in this regard may also be made to the judgment of a Learned Single Judge of this Court in ***National Highways Authority of India v. Ssangyong-OSE (JV)*** (OMP No. 424/2006 decided on 25th April, 2012), wherein it was held as under:

“9. On the question of mobilization of equipment, the Tribunal took note of Clauses 42.1 and 42.2 GCC and held that the handing over of the site was not dependent on the preparedness of the contractor for starting the work. The Tribunal also relied upon the Condition of Contract for Works of Civil Engineering Construction published by the FIDC which, in Clause 14.1.1 made it clear that the employer had to in possession of the site and has clear access to it even before the notice was sent. Also the contractor was given possession of the site only for the carrying out of the work. It was mandated under Clause 42.2 that the employer must give the contractor possession of the site at the same time as the engineer

gives notice to commence the work pursuant to Clause 41. The Tribunal then concluded as under:

'AT therefore finds that Respondents (Employer) have misinterpreted the contractual requirements regarding handing over of site and carrying out activities required for starting the actual execution of work. The Employer has to hand over requisite site to the contractor as per contract provisions, without examining the readiness/preparedness of contractor for starting actual execution and the Contractor is entitled for extension of time on account of delayed handing over of site by Respondent.'

10. The Court is unable to find any error in the above reasoning or conclusion." (emphasis supplied)

23. The general entitlement under the law of a party in a construction contract to claim damages in the extended period of the contract from the defaulting party, has even otherwise allowed the claim in various judgments.

i) The Supreme Court in ***Associated Construction v. Pawanhans Helicopters Ltd.*** AIR 2008 SC 2911 has held as under in this regard:

"10. We are, therefore, of the opinion in the light of the aforesaid judgments, that it was open to the contractor to contend that it was liable to be compensated on account of the fact that delay had been occasioned on account of reasons attributable to Pawanhans. It is significant that the Division Bench of the High Court has been silent on this aspect of the matter and has not referred to the finding of the learned Single Judge with regard to the responsibility for the delay."

ii) A Division Bench of this court in ***Delhi Development Authority v. S.S. Jetley***, 2001 (1) Arb. LR 289 has also held that such claims for damages on account of prolongation of the

contract are admissible under Sections 73 and 74 of the Indian Contract Act, 1872. It was held as under :

"8. It was the case of the respondent that because of prolongation of the contract due to the fault on the part of the appellant, the respondent was made to incur the expenditure on idle labour, staff, machinery centering, shuttering and other ancillary requirements like electricity, water, petroleum, etc. It was the case of the respondent that it was necessary for the respondent to keep regular establishment including graduate engineer at site till the work is completed as required under clause 36 of the agreement. The arbitrator found that the respondent had in fact incurred expenditure on the aforesaid grounds and awarded the claim @ 5,000 per month for the period of delay which was 44 months and on this basis a sum of Rs.2,20,000 was awarded. It was clear, therefore, that claim No.17 was for damages on account of prolongation of contract inasmuch as respondent was made to incur unnecessary expenditure due to the fault of the appellant in prolonging the contract. This claim is, therefore, maintainable as per Sections 73 and 74 of the Contract Act which gave entitlement to the respondent to claim damages/loss suffered due to breach of contract by the appellant. The award of Claim No.17 was, therefore, justified and we see no merit in the aforesaid contention raised by the appellant."

24. From the aforesaid judgments and settled law, it appears to the Court that the Arbitral award in the present case can be sustainable in law as also in the context of the particular contractual provisions. It has been laid down in the referred judgments for award of additional cost i.e. finding of fault, existence of relevant evidence and similar contractual clauses like 6.4, 12.2 and 42.2 are present in the case. The Arbitral Tribunal has in fact rejected the claim Nos. 2.3 and 2.4 of the respondent pertaining to loss of profit and delayed accrual of contract price in the extended period and

only awarded the component of damages suffered on account of machinery cost and overheads in the extended period.

25. The argument of the petitioner regarding payment of escalation has already been examined and found to be unmeritorious by the Division Bench in ***Oriental Structural Engineers Pvt. Ltd.*** (supra) inasmuch as the additional cost provisions provide a specific entitlement to claim this cost in the extended period over and above the standard price escalation clause. The other argument of the petitioner that the fault for delay was that of the respondent is not supported by the material on record. A perusal of the first extension of time granted by the petitioner would show that there were admitted instances where the respondent could not enter upon the site due to the land acquisition process not having been completed, and further that several required approvals from local state departments could not be arranged by the petitioner. Counsel for the respondent has pointed out that the land acquisition process had not been completed in as much as the permission to enter upon the site itself had not fructified. Such an eventuality of non-availability of land that clause 42.2 has been raised by the petitioner itself. Even otherwise, such a re-appreciation of evidence is impermissible in exercise of jurisdiction under Section 34 of the Act. The other aspect of the matter is that the Arbitral Tribunal has dealt with the issue extensively in the award after considering the objections of the petitioner to the claim for additional cost made by the respondent.

26. Learned counsel for the respondent submits that the Arbitral Tribunal has correctly noted the fact that the petitioner itself gave extensions of time to the respondent to finish the work without levying any liquidated damages on the petitioner. This is also a

relevant fact. A Single Judge of this Court in the case of **Sh. Bharat Lal v. Municipal Corporation of Delhi and Ors.** passed in OMP No.327/2003 decided on 25th March, 2010 has in this regard held as follows:

"2. ...Once the Arbitrator has found as a fact that no compensation/liquidated damages were imposed by the respondent under Clause 2 of the Agreement, the petitioner consequentially is not guilty of delay in the performance of the work. If the petitioner was guilty of delay in the performance of his obligations, then, the respondent would definitely have imposed liquidated damages and which it has not. Consequentially, therefore, the petitioner is entitled to payment of higher cost..."

27. Counsel for the respondent submits that the aforesaid aspect is even more relevant in the present case in as much as clauses 6.4, 12.2 and 42.2 specify that with every extension of time that is granted due to the reasons attributable to the petitioner, the additional cost suffered by the respondent on account of such consequential extended stay is also required to be worked out and paid to the respondent by the petitioner. The relevant portion of clause 42.2 is being reproduced here as under:

"42.2 Failure to Give Possession

If the contractor suffers delay and/ or incurs costs from failure on the part of the Employer to give possession in accordance with the terms of sub-clause 41.1 the Engineer shall, after due consultation with the Employer and the Contractor, determine:

- (a) any extension of time which the Contractor is entitled under Clause 44, and
- (b) the amount of such costs, which shall be added to the Contract Price, and shall notify the Contractor accordingly, with a copy to the Employer."

(emphasis supplied)

28. Counsel for the respondent submits that the only occasion that eventuality would not arise is if the petitioner were to impose liquidated damages once the original time for completion were to get over thus, signifying that the fault was that of the contractor. However, this is admittedly not the position in the present case. Neither do the extensions of time state that despite the fault of the respondent, the petitioner is being magnanimous and extending the time for completion.

29. The petitioners have never imposed liquidated damages, the said act of the petitioner would speak for itself. It is submitted that the Arbitral Tribunal has correctly awarded the amounts under claim Nos.2.1 and 2.2 pertaining to cost of machinery and overheads respectively in the extended period, which quantification has been based and backed by cogent evidence on the record and as per the applicable law. The Arbitral Tribunal has not gone by the quantification given by the respondent with regard to the additional cost on account of machinery in the extended period under claim No.2.1. As regards the claim for loss of overheads in the extended period, the arbitral tribunal has gone strictly by the parameters laid down in the MORTH data-book.

30. The arguments of the petitioner as regards the award of the relevant claims by the Arbitral Tribunal are without any merit, a general conspectus of the contentions of the petitioner would reveal that the main of the case of petitioner is that this Court should re-appreciate the evidence and upset the unanimous factual findings of the Arbitral Tribunal and yet further that instead of the interpretation placed on the contract terms by the Arbitral Tribunal, another interpretation of the contract terms is possible and that the Court

should uphold that alternative interpretation. As regards the finding of fact as to responsibility for delay in completion of work, the Supreme Court has consistently held that such findings are purely within the jurisdiction of the Arbitral Tribunal and cannot be challenged. . The Supreme Court in the case of **K.V. Mohammed Zakir v. Regional Sports Centre** (2009) 9 SCC 357, has held as under:

“We find that the arbitrator in this case has reached a finding of fact on the materials on record about the delay on the part of the respondent and it has also been held by the arbitrator that because of such delay the claimant was put in great difficulty in completing the work in time. It is nobody's case that by doing so the arbitrator has acted beyond his jurisdiction or committed any legal misconduct.”

31. Even if the Arbitral Tribunal has taken the plausible view on interpretation of the relevant contractual terms, and assuming that an alternative interpretation is possible, the law is well settled that even if two interpretations are possible, if the interpretation given by the Arbitral Tribunal is a possible view, even though the Court may have a different view, the Award will not be interfered with by the Court under Section 34 of the Act. The Supreme Court in the case of **M/s. Arosan Enterprises Ltd. v. Union of India** (1999) 9 SCC 449, has held as under:

“39.The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.”

32. It has also been held time and again that an error relating to interpretation of the contract by an Arbitrator is an error within his jurisdiction. The Supreme Court in the case of **Steel Authority of**

India Ltd. v. Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63 has summarized the law on this point, in paragraph 26 of the said judgment, as under:

“26. (ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.”

33. The petitioner has challenged the arbitral award on claim No.2 in the grounds as set out in the petition and there are not valid grounds which may fall under the limited and narrow mandate of Section 34 of the Act. The words in Section 34(2) that “*An Arbitral award may be set aside by the Court only if*” are imperative and take away the jurisdiction of the Court to set aside an Award on any ground other than those specified in the Section.

34. The Court is not expected to sit in appeal over the findings of the Arbitral Tribunal or to re-appreciate evidence as an appellate court. Even if the additional grounds under Section 34, as laid down by the Supreme Court in the case of **ONGC v. Saw Pipes Ltd.** AIR 2003 SC 2629 are considered, which are patent illegality arising from statutory provisions or contract provisions or that the Award shocks the conscience of the Court, no such facts are narrated in the petition.

35. It appears that the petitioner is trying to challenge the arbitral award in the manner which is akin to an appellate proceeding involving a total re-hearing of the matter and re-appreciation of evidence, and as per the consistent dicta of the Supreme Court is impermissible in law. A recent observation of the Supreme Court in the case of **P.R. Shah, Shares and Stock Brokers Private**

Limited v. B.H.H. Securities Private Limited and Others (2012)

1 SCC 594, is apposite in this regard and is reproduced as under:

"21. A Court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34 (2) of the Act. Therefore, in the absence of any ground under section 34 (2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at".

The Supreme Court has expounded on the principle as to the sanctity of the decision of the Arbitrator in the case of **Markfed Vanaspati and Allied Industries v. Union of India** (2007) 7 SCC 679, wherein it was observed as under:

"17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavor of the court should be to honor and support the award as far as possible".

36. Under these abovementioned circumstances and reasons given, no case of interference on the finding of claim No.2.1 and 2.2 is made out, the objections are therefore dismissed.

37. Claim No. 4 raised by the respondent was about the losses relating to delay in releasing retention money. The said claim relates to the retention money. Whereas claim No. 4.1 relates to the loss of interest on account of delay in releasing the retention money, claim No. 4.2 relates to the loss suffered due to the submission of the bank guarantee for release of retention money, for which there was no requirement under the contract as per the respondent.

38. The Arbitral Tribunal has dealt with claim No. 4.1 as under:

"4.3.1 Clause 60.6 of special conditions of contract reads:

"Upon the issue of the Taking over Certificate with respect to the whole of the works the Retention money shall be certified by the Engineer for payment to the contractor. Provided also that if at such time, there shall remain to be executed by the contractor any work ordered pursuant to clauses 49 and 50, in respect of the works, the Engineer shall be entitled to withhold certification until completion of such work, of so much of the balance of the retention money as shall, in the opinion of the Engineer, represent the cost of the work remaining to be executed".

4.3.2 In the present case the Team leader (Engineer) issued Taking over certificate for the whole works of the contract without any conditions vide his Reference No. RITES /KARUR- BYPASS/NH-7/Works/304 Dt.30.11.2002. As per 60.6 of special Conditions of Contract it is imperative that the Respondent should release the Retention money, which is reported to be Rs.1,25,59,194/-.

4.3.3 Clause 60.8 of special conditions of contract reads:

"The amount due to the contractor under any interim payment certificate issued by the Engineer pursuant to this clause, or to any other term of the contract shall, subject to clause 47, be paid by the employer to the contractor within 56 days after the contractor's monthly statement has been submitted to the Engineer for certification etc. In the event of the failure of the employer to make payment within the times stated the Employer shall pay to the contractor interest compounded monthly at the rates stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid etc."

4.3.4 Appendix to Bid (Page 70 of contract document) specified an interest rate of 8% on all unpaid amounts referred to in clause 60.8 As per the contract conditions quoted in the preceding paras interest on unpaid amounts has to be paid at 8% to the Claimant/ contractor for the period of delay in releasing the payments due to the contractor. Then how to compute the delay caused? The dates of payments are fixed. The date on which the payment falls due as per contract conditions is the other parameter to be fixed to compute the delay in payment. The Claimant has considered the date of completion of works

(30-09-2002) as the datum line and allowing 56 days from that date, as per clause 60.8 taken 26.11.2002 as the date from which the delay has to be computed. But clause 60.6 stipulates the date of issue of Taking over certificate as the event upon which the Engineer has to recommend release of Retention money. Taking over Certificate was issued by Engineer on 30.11.2002 and allowing 56 days from that date, 25.01.2003 becomes the last date on which the Retention money should have been released. The Tribunal, in accordance with the conditions of contract, considered this date (25.01.2003) as the date from which the delay has to be computed." (emphasis supplied)

39. The Arbitral Tribunal has dealt with claim No. 4.2 as under:

"4.6.1 The Tribunal observed that the Agreement does not envisage submission of bank guarantee for release of Retention money. The Respondent has to compensate the extra expenditure incurred by the Claimant towards production of the Bank Guarantee for the required period as demanded by the Respondent. The Claimant furnished the details of expenditure incurred by him in producing the BG along with his Claim Statement are in accordance with the details indicated by the Bank." (emphasis supplied)

40. Counsel for the respondent without prejudice does not press the said claim as mentioned during the course of hearing. The Arbitral Tribunal has only awarded an amount of Rs. 79,056/- to the respondent under this head. The award is modified to this extent.

41. With regard to challenge of claim No.5, it is pleaded in ground V of the object that the interest awarded at the rate of 12% per annum is exorbitant. The contract between the parties provides interest at the rate of 9% per annum.

42. Before the Arbitral Tribunal, the only plea was raised by the petitioner that the statement of claims is barred under the law. Thus, the question of interest does not arise. After considering the relevant provisions of Act, the Arbitral Tribunal has awarded simple

interest at the rate of 12% per annum as well as future interest till the date of payment. As the plea of limitation was given by the petitioner, the interest awarded by the Arbitral Tribunal, I feel it was fair and reasonable. Thus, no interference on the finding of claim No.5 is called for. The objections are therefore dismissed on this ground.

43. In view of the above, the objections of the petitioner are without any merit and the same are dismissed. The award is modified pertaining to Claim No.4.

44. This Court wishes to put on record its appreciation for the co-operation and fairness in making their submissions to the point by Dr.Amit George appearing on behalf of the respondent and Mr.Prashant Mehta appearing on behalf of the petitioner.

(MANMOHAN SINGH)
JUDGE

JULY 08, 2016