

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 28.11.2016

+ **OMP. (COMM) 73/2016**

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

..... Petitioner

versus

HINDUSTAN CONSTRUCTION CO. LTD.

.....Respondent

Advocates who appeared in this case:

For the Petitioner : Ms Gunjan Sinha Jain.

For the Respondent : Mr Dayan Krishnan, Senior Advocate with Ms
Malavika Lal.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'NHAI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the Arbitral Award dated 30.11.2015 (hereafter the 'impugned award') made by the Arbitral Tribunal constituted by Mr. M.P. Singh, Mr. P Sridharan and Mr. R.P. Indoria (presiding) (hereafter 'the Arbitral Tribunal'). The impugned award was made by the Arbitral Tribunal in the context of certain disputes that had arisen between the parties in relation to the contract dated 21.10.2005 (hereafter 'the agreement') entered into between the parties for execution of the project involving four-laning of the National Highway No.28 from KM 92 to KM 135 of Lucknow-Ayodhya Section of the National Highway (hereafter 'the project').

2. The parties had entered into the agreement for execution of the project at a contract price of ₹2,49,95,04,940/-. The project was to be executed within a period of 36 months from the commencement date.

3. The project was inordinately delayed and the respondent (hereafter 'HCC') raised certain disputes in relation to the agreement. The following disputes raised by HCC were referred for adjudication to the Arbitral Tribunal:

“Claim No.1: Non-fixation of appropriate rate for varied works which comply with Clause 52.2 of Conditions of Particular Applications (“COPA”) and the amounts for undertaking the varied works.

Claim No.2: Payment of additional costs incurred in the extended period of contract i.e. from 07.11.2008 to 22.02.2011 in various heads on account of delays/reasons not attributable to the Claimant.”

4. In respect of the first claim (Claim No.1), the Arbitral Tribunal has awarded a sum of ₹13,43,10,527/- (Rupees thirteen crores forty three lakhs ten thousand five hundred and twenty seven only) against HCC’s claim of ₹21,47,87,574/-. In respect of the second claim (Claim No. 2), the Arbitral Tribunal has awarded a sum of ₹82,50,29,082/- along with interest at the rate of 12% per annum, compounded monthly from 06.07.2011 upto the date of award and future interest at the rate of 15% per annum, thereafter.

5. NHAI is aggrieved by the impugned award made in respect of both the aforesaid claims and has therefore, filed the present petition praying that the impugned award be set aside.

Re-Claim No.1

6. The controversy regarding claim no.1 relates to interpretation of Sub-clause 52.2 of Conditions of Particular Applications (hereafter 'COPA'). Clauses 51.2, 52.1 and 52.2 of General Conditions of Contract (hereafter 'GCC') and sub-Clause 52.2 of COPA are set out below:-

"Instructions for variations	51.2	The Contractor shall not make any such variation without an instruction of the Engineer. Provided that no instruction shall be required for increase or decrease in the quantity of any work where such increase or decrease is not the result of an instruction given under this Clause, but is the result of the quantities exceeding or being less than those stated in the Bill of Quantities.
Valuation of Variations	52.1	All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as "varied work") shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the Contract does not contain any rates or prices applicable to the varied work, the rates and

prices, in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such rates or prices as are, in his opinion appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.”

**Power of
Engineer to
Fix Rates**

52.2

Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the works or to any part thereof, is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item of the works, is, by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the Employer and the

Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub Clause 52.1 or under this Sub-Clause unless, within 14 days of the date of such instruction and, other than in the case of omitted work, before the commencement of the varied work, notice shall have been given either:

- (a) by the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price, or
- (b) by the Engineer to the Contractor of his intention to vary a rate or price.

Sub-Clause 52.2 of COPA

“Power of Engineer to Fix Rates - Provided further that no change in the rate or price for any item contained in the Contract shall be considered unless such item accounts for an amount more than 2 percent of the Contract Price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of Quantities by more than 25 percent.”

7. Admittedly, the quantities of certain items executed by HCC had exceeded the quantities as set out in the Bill of Quantities (hereafter ‘BOQ’); BOQ item no. 3.01 (Granular Sub Base), 3.02 (laying of wet mix Macadam), 4.05 (Dense-graded Bituminous Macadam), 4.07 (b) (Laying of Bituminous Concrete wearing) and 6.04 (b) (RCC M-30) had exceeded beyond 25% of the BOQ quantities as also more than 2% of the Contract Price.

8. There is no dispute that HCC was entitled to seek fixation of new rates in accordance with the provisions of Clause 52.1 of GCC and 52.2 of the COPA.

9. The dispute between the parties essentially relates to the question whether the revised rates would be applicable in respect of quantities in excess of 125% of the BOQ quantities. It is NHAI’s case that in the event the quantities of an item of work executed exceed 25% of the BOQ quantities of that item and such variation results in variation of more than 2% of the contract price, revised rates would be applicable. However, the same would be only in respect of quantities executed in excess of 125%. In other words, according to NHAI, any quantity of works executed within the variance limit of 25% - that is, 75% to 125% - are payable at the

contractual rates; but, once the variance limit exceeded 125%, the balance quantity above 125% would be payable at revised rates. This was disputed by HCC and it claimed that once the quantities executed exceeded 125% of the BOQ quantities, it would be entitled to claim payment at the revised rates for any quantity in excess of the BOQ quantities. The Arbitral Tribunal considered the rival contentions and concluded that if the contractual rates were considered inappropriate or inapplicable on account of variation in the quantities - that is, the variation in the quantity executed exceeded 25% (plus or minus) of the BOQ quantities and the variation was also more than 2% of the contract price - revised rates as determined would replace the contractual rates and would be applicable for the entire quantity of BOQ item executed by the contractor. However, since, HCC had limited its claim for being paid on the revised rates only in respect of quantities executed over and above the BOQ quantities, the Arbitral Tribunal restricted the award to directing payment at revised rates only in respect of quantities executed in excess of the BOQ quantities.

10. In the present case, there is no dispute that the conditions which are required to be met for revision of contractual rates had been met for certain items as indicated above. Thus, undisputedly, Clause 52.2 of GCC was applicable. A plain reading of Clause 52.2 of GCC indicates that where in the opinion of Engineer, the rate or price contained in the agreement for any item or work on account of variation has been rendered inappropriate or inapplicable then a suitable rate or price would be agreed upon between the Engineer and contractor. Plainly, the rate to be agreed would be for the works executed since the rate or price as indicated in the contract has been rendered “inappropriate” or “inapplicable”. The revised rates in such circumstances would be applicable to the entire quantity of works

executed. This is also the view expressed by a Division Bench of this Court (of which the undersigned is also a party) in **JSC Centrodorstroy v. National Highways Authority of India**: 2014 (1) Arb. LR 148 (Delhi) (DB). Ms Sinha, the learned counsel appearing for NHAI contended that the said decision in **JSC Centrodorstroy** (*supra*) is not applicable as in that case, the observations made by the Court only related to a situation where the quantity of work executed was less by 25% of the BOQ quantities. She submitted that where the quantities executed are less than the BOQ quantities, the revised rates may be applied to the quantities of work executed by the contractor but in cases where the quantities have been increased then necessarily the revised rates must be applied only in respect of quantities above 125% of the BOQ quantities. In my view, the aforesaid contention is not sustainable. A plain reading of Clause 52.2 of GCC indicates that where the rates as fixed have been rendered inappropriate or inapplicable on account of variation in the works then a suitable rate or price shall be determined by the Engineer. Such suitable price/rate would obviously replace the contractual rates/price. The said interpretation would be equally applicable irrespective of whether the variation in the quantities is on the negative side or on the positive. In **JSC Centrodorstroy** (*supra*), the Court had further clarified that clause 51.2 of GCC does not restrict determination of appropriate rates only to variations as a result of increase or decrease in the quantities of BOQ items but would also include situations resulting from other variations. This is plainly clear from the following passage from the said decision:-

“Clause 51.2 of the GCC is not restricted only to variations as a result of increase or decrease in the quantities of work but also encompasses situations resulting from other

variations, as are indicated in Clause 51.1 of GCC, which may be required to be carried out in execution of the works. In all such cases, clause 51.2 would be applicable provided that variation of work has rendered the rates/prices as indicated in the contract as inappropriate or inapplicable and the volume of the variation is more than the threshold specified, in this regard, under COPA.”

11. It is also well settled that a decision as to the interpretation of a contract is clearly within the jurisdiction of an arbitral tribunal and even if the interpretation is erroneous, the same would not be amenable to judicial review under Section 34 of the Act.

12. In the present case, the Arbitral Tribunal has interpreted the relevant clauses of GCC and COPA and concluded that if the necessary conditions are met and revised rates are to be applied, the same shall apply to the entire quantities of work executed. The relevant extract from the impugned award is reproduced below:

"8.30 Issue No: 2 What would be the quantum of varied work for which the new rates shall be applicable?"

8.30.1 The Tribunal observes that as per clause 51 and 52 of G.C.C. the rate or price to be agreed is for the item of work and such rate fixed/determined shall be applicable for that particular item of work. As per Clause 52.1 any increase in B.O.Q. quantity would amount to varied work. It could also be interpreted that such changed rate shall be applicable for the item (BOQ) as a whole in view of such BOQ item rate becoming inappropriate or inapplicable. It is also to be noted that new appropriate unit rate has to be determined and agreed between the parties for execution of these varied items

of work based on the rates prevailing for the said item of works at the time when the variation took place.

In addition to aforesaid clauses, the Arbitral Tribunal also perused the Clause 52.2 of CoPA & case laws submitted by the Claimant. From the perusal of the aforesaid provisions of contract and case laws, Arbitral Tribunal finds the following:

(1) Varied work is defined under Clause 51, which clearly states that any increase or decrease of any work stipulated in the contract is a variation.

(2) The Clause 52.2 deals with two situations viz, (a) when the rates included in the contract would subject to rate revision? and (b) On what quantum the revised rate would apply? In the instant contract, the criteria set out in the proviso clause of 52.2 of CoPA ie., quantity of the varied work exceeds by more than 25% of BOQ quantity and the value of the item accounts for more than 2% of initial Contract price is situation (a). Thus, the criterion specified in proviso clause is nothing but tolerance limits beyond which the rates included in the contract would subject to rate revision. As far as the situation (b) is concerned, it is clear from the workings of proviso clause "any item, such item", that it refers to item as a whole ie., for the entire revised quantity.

Provided further that no change in the rate or price for any items contained in the Contract shall be considered unless such item accounts for an amount more than 2 percent of the Contract price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill Quantity by more than 25 percent.

(3) In this regard, Arbitral Tribunal notes the High Court Judgment submitted by the Claimant M/s JSC Centrodorstroy Vs NHAI, wherein the Hon'ble Court on a case having

similar factual matrix and similar clauses on variations, held the following:

"The rates/price so agreed/determined would have to substitute the existing rate/price as provided under the contract (in this case the BOQ) as the same have been rendered inappropriate or inapplicable."

(4) Arbitral Tribunal notes the High Court Judgment submitted by the Claimant between National Highways Authority of India vs M/s Progressive Construction Ltd dated 19th May 2014, wherein, it was held as follows:

The Arbitral Tribunal has discussed Clause 38 and has rightly held that for a change in the rate of the item as a whole and only for the varied work and noted the conduct of the petitioner and the Engineer at the relevant time, which would show the intention of the petitioner and the Engineer."

Thus, the revised rate, so determined by the Engineer would have to substitute the BOQ rate and therefore, the revised rate would apply to the entire revised quantum of works.

(5) Arbitral Tribunal also notes the contract clauses of other contracts between the same parties, wherein it is specifically stipulated that the revised rate would be applicable only for the quantity in excess of 125% of provision in BOQ. Such a provision is noticeably absent in the instant contract, which leaves the scope to apply such revised rate to the entire revised quantum of work ie, item in BOQ.

(6) Arbitral Tribunal further notes the pleading of the Claimant on the applicability of contra-proferentum rule in case of ambiguity in the provisions of contract. Arbitral Tribunal is of the view that the provisions of contract are unambiguous and there is no necessity to apply rule of contra-proferentum in the instant case.

(7) Therefore, considering the above analysis, Arbitral Tribunal is of the firm view that the revised rate would substitute the existing rate in BOQ and would apply to the revised quantum of the work included in the contract ie., BOQ item as whole.

(8) However, the Arbitral Tribunal notes that the Claimant has claimed only the quantity in excess of 100% for the application of revised rate and as such the Arbitral Tribunal limits the entitlement of the Claimant to their claim.

8.30.2 Therefore the Tribunal is of the firm view that new/revised rates would be applicable for the quantum of work executed in excess of 100% off B.O.Q. quantity and hence decides accordingly.

8.30.3 The contention/argument of the Engineer/Respondent that the new rates would be applicable only for the quantity exceeding 125% of B.O.Q. item is not based on any such specific terms of contract. In this contract there is no such specific provision. Hence the Tribunal rejects the contention of the Engineer/Respondent in this regard.”

13. This Court finds no infirmity with the aforesaid view. However, even if it is accepted - although this Court does not and there is no reason to do so - that the Arbitral Tribunal had erred in interpreting the relevant clauses of GCC and/or COPA, the said error is within the jurisdiction of the Arbitral Tribunal and the same cannot be corrected in proceedings under Section 34 of the Act. (see: **Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India**: (2010) 11 SCC 296 and **Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.**: (2009) 10 SCC 63).

Re-Claim No.2

14. HCC's second claim relates to additional costs incurred during the extended period for execution of the project. It is not disputed that the execution of the project was inordinately delayed. The Engineer - which is an independent entity - had also considered the question as to the extension of time and had assessed that extension of 27.55 months was necessitated against HCC's claim for an extension of 35.51 months. The period for completion was, accordingly, extended from 07.11.2008 to 22.02.2011. The Arbitral Tribunal had also returned a finding that the time period of the agreement was extended for delays which could not be attributed to HCC and were solely on account of delays attributable to NHAI.

15. The aforesaid finding is a finding of fact and indisputably the same is not subject to judicial review. Ms Sinha has also not endeavoured to contest the aforesaid finding, and rightly so. The dispute before this Court relates mainly to the amounts as awarded by the Arbitral Tribunal against various claims raised by HCC based on extension of time required for completion of the project. The summary of the claims awarded against NHAI are set out below:-

"13.3 Dispute No.6

- (i) **The claim of the Claimant is admitted and the amounts awarded and payable to the Claimant by the Respondent/NHAI under each head of**

Claim is as under:-

Sl. No.	Description of Sub-heads for the Claim for	Additional Cost Awarded
----------------	---	------------------------------------

	additional Cost	by the Arbitral Tribunal Rs.
1.	Additional cost incurred towards the Onsite and Offsite overhead expenses	316,649,470
2.	Additional cost incurred towards retention of Contractor's plant & equipment.	182,282,317
3.	Finance charges (interest) on account of delayed recovery of overheads and profit	2,27,88,987
4.	Loss of earning capacity and profit.	103,051,689
5.	Additional cost incurred in respect of Labour on account of uncovered component of Price variation	77,997,810
6.	Additional cost incurred in respect of Steel on account of uncovered component of Price variation	15,911,295
7.	Additional cost incurred in respect of Cement on account of uncovered component of Price variation.	12,537,957
8.	Additional cost incurred in respect of Bitumen on account of uncovered component of Price variation	8,071,955

9.	Additional cost incurred in respect of POL on account of uncovered component of Price variation	85,737,602
	TOTAL	82,50,29,082

(ii) The Arbitral Tribunal awards a sum of Rs.82,50,29,082 (Rupees Eighty Two Crores Fifty lacs Twenty nine thousand eighty two only) towards the Additional costs incurred in the extended period from 07.11.2008 to 22.02.2011, for Dispute No.6 to be paid to the Claimant by the Respondent/NHAI.

(iii) **Interest.**

The Respondent is directed to pay Interest at the rate of 12% per annum monthly compounded on the awarded amount of Rs.82,50,29,082 (Rupees Eighty Two Crores Fifty lacs Twenty nine thousand eighty two only) from the date 06.07.2011 up to the date of Award.

(iv) **Future Interest**

The amounts awarded and due as above under para 13.3(ii) & (iii) above shall be paid by the Respondent to the Claimant within a period of 90 days from the date of this award. In the event of failure to make payment within 90 days, simple interest at the rate of 15% per annum shall be payable on the total award till the date of actual payment.”

16. Ms Sinha had fairly pointed out that the issues regarding various items as listed above except at Sl. no.2 are covered by the decision of the Division Bench of this Court in FAO(OS) No.402/2014 titled as M/s

National Highway Authority of India v. M/s Hindustan Construction Company and FAO(OS) No.437/2014 titled as *M/s Hindustan Construction Co. Ltd. (HCC) v. M/s National Highways Authority of India*, both decided on 24.02.2016. Whereas items at Sl.Nos.1, 4, 5, 6, 7, 8 & 9 are covered against NHAI, the issue as to finance charges on account of delayed recovery of overheads and profits- Sl no. 3 - is covered against HCC.

17. Mr Dayan Krishnan, learned senior counsel appearing for HCC also concurred with the above and stated that there was no material on record which would substantiate HCC's claim that it had incurred finance charges or interest. Thus, the Arbitral Tribunal's award for a sum of ₹2,27,88,987/- as finance charges on account of delayed recovery of overheads and profits is liable to be set aside.

18. I have some reservations as to the award of ₹103,051,689/- on account of "Loss of earning capacity and profit." The claim made by HCC is in the nature of what the cost accountants term as "opportunity costs". In other words what a person would have earned if he had not pursued the activity in question but had deployed his resources in another venture. This claim must satisfy the twin criteria of assessing damages resulting from breach of contract: proximity and measure. A person claiming such damages must establish that he had the opportunity to deploy his resources in another venture - which in this case the Arbitral Tribunal holds has been proved as HCC had other contracts in hand - and that venture would have yielded profits. The relevant question to be considered is whether in this case HCC has sufficiently established that other ventures/contracts would have yielded profits to the extent as awarded by the Arbitral Tribunal. It

does not appear that the Arbitral Tribunal had any material to assess the profitability of those contracts; the opportunity that HCC had lost. Another aspect is whether the equipment/resources were hired or owned by HCC. Clearly, if the resources blocked by HCC in the agreement in question were hired, there would be no opportunity costs as similar equipment/resources could also be hired for other contracts and possibly there would be no opportunity costs as there is no loss of opportunity.

19. However, since both the counsels state that the amounts awarded at S.Nos.1, 4, 5, 6, 7, 8 & 9 are covered, the same are sustained in view of the decision of the Division Bench of this Court in ***National Highway Authority of India v. Hindustan Construction Company*** (*supra*). The only remaining controversy to be addressed is a sum of ₹18,22,82,317/- awarded as additional costs incurred towards retention of plant and machinery.

20. The controversy in this regard relates to the equipment and machinery which have been considered by the Arbitral Tribunal for awarding the aforesaid sum. According to NHAI, HCC's claim with regard to machinery physically available at site was exaggerated and was not borne out by the admitted record between the parties. The Arbitral Tribunal had rejected the Monthly Progress Reports (hereafter 'MPRs') submitted by the Engineer and had accepted the monthly statement of equipment furnished by HCC for the purposes of computing the amount awarded. Ms Sinha earnestly contended that the said decision of the Arbitral Tribunal was perverse and wholly unsustainable.

21. Ms Sinha earnestly contended that the findings of the Arbitral Tribunal were not only factually incorrect but perverse. She submitted that

the Arbitral Tribunal had rejected the MPRs submitted by the Engineer and had accepted the statement made by HCC on the ground that the same had not been refuted by the Engineer/NHAI. She submitted that the reasoning was patently fallacious as the Engineer had submitted MPRs which included the machinery provided at site. The said reports were considered at joint meetings held by the parties and the minutes of those meetings clearly indicate that no objection was raised by HCC to those reports. She submitted that since the MPRs submitted by the Engineer were duly accepted at joint meetings, the question of the Engineer or NHAI objecting to statements furnished by HCC did not arise; the reports submitted by HCC did not form part of the record as jointly accepted by the parties. She further urged that while the Arbitral Tribunal was influenced by the fact that HCC's statement had not been controverted, the Arbitral Tribunal had completely ignored that the MPRs submitted by the Engineer were also never controverted by HCC.

22. She further pointed out that the finding that the Engineer had only considered deployment of machinery notionally as per list of minimum requirement of plant and machinery was plainly wrong as the MPRs submitted by the Engineer also separately specified the machinery at site.

23. Mr Dayan Krishnan countered the aforesaid submissions. He referred to Clause 53.1 and 53.2 of the GCC and submitted that HCC had duly issued a notice of claims under Clause 53.1 and had maintained the records as required under Clause 53.2 of GCC. He submitted that in the event if the Engineer required further records it could have directed HCC to maintain the same, however, no such communication was issued by the Engineer. He also referred to Ex.CD-19 which included the table indicating

the number of machineries/equipment as per HCC's report, the equipment as per Engineer's MPRs and the equipment considered by the Engineer for determination of additional costs. He submitted that although the Engineer had only considered 27 items for determination of additional costs but had not considered 47 other items that according to HCC were deployed at site.

24. Before proceeding further to consider the rival contentions, it would be necessary to refer to the relevant reasons indicated by the Arbitral Tribunal for its decision to prefer the statements submitted by HCC. The relevant extract of the impugned award is quoted below:-

“12.2.2 As decided in Issue (iv), the extended period of contract was on account of delays attributable to the Respondent. As a consequence of the delay in completion of the works, the Claimant had to retain all the plant and machinery which he had deployed in the extended period of the Contract, causing additional cost to him which could not have been provided for in the rates quoted by him. Hence the Claimant is entitled to the additional costs for such of those equipments which were really retained on site under this subhead of the Claim. The details of equipment deployment were notified to the Engineer as well as the Respondent by the Claimant through monthly progress reports. These are contemporary and credible evidence in support deployment of equipment in the extended period. Arbitral Tribunal notes from review of records that the Claimant has claimed equipment charges only for such of those equipments retained site as vouched by monthly reports. However, the Respondent was contending that the Engineer had also prepared monthly reports and the AT can only consider such reports, if it were to conclude that the Claimant is entitled to costs. In this regard AT notes the following:

- (a) The Engineer had considered the deployment of machinery notionally as per the list of minimum requirement for plant & equipment available at page no.42, 43 & 44 of contract. Thus, the actual deployment of machineries is modified from 68 types to 27 types and from numbers as per actual deployment for each type to numbers as per minimum requirement of the list of plant & equipment at Pages 42 to 44 of contract for each type. Thus, AT is of the opinion that the Monthly report prepared by the Engineer does not reflect/ represent what was deployed actually at site.
- (b) The Claimant demonstrated the aforesaid position to the Arbitral Tribunal by submitting a chart (CD-19 at page 4793) showing the equipments considered by the Claimant, equipments as per the Engineer's MPR' s and equipments considered by the Engineer in its determination of additional cost as extracted from the chart available at Pages 1298 to 1299 of SOC.
- (c) Further, AT notes that, even in the Engineer's determination, the no. of equipments considered by the Engineer is not matching with his own reports. AT also notes that, from the records available before the AT, the reports submitted by the Claimant is not denied or refuted by the Engineer/Respondent.
- (d) Thus, AT is of the considered opinion that the reliable contemporaneous document insofar as the deployment of equipment is concerned, is the monthly report submitted by the Claimant which represents the actual Plant and Machineries deployed at site.”

25. It is necessary to bear in determine that the scope of interference in an Arbitral Award is highly restricted. Examination of an Arbitral Award

under Section 34(2)(b) of the Act does not extend to re-appreciating the evidence. Unless it is established that the findings arrived at by the Arbitral Tribunal are perverse and wholly unsustainable on the basis of the evidence, a Court will not interfere with the Arbitral Award. The findings of the Arbitral Tribunal must be examined in the aforesaid perspective.

26. It is not disputed that the Engineer, although engaged by HCC, is an independent entity. It is also not disputed that the Engineer had submitted MPRs (monthly reports) which form part of the record of the joint meetings held between the parties. It is equally admitted that HCC had never contested any of the MPRs indicating the equipment deployed at site, which were furnished by the Engineer. A bare perusal of the MPRs submitted by the Engineer indicate that the Engineer had indicated the minimum requirement of equipment as per the agreement in a separate column and the equipment physically deployed at site in a separate column. HCC may assert that the MPRs did not correctly reflect the equipment deployed at site, but it cannot dispute that the MPRs submitted by the Engineer did reflect, what according to the Engineer, were the equipment deployed at site. Viewed in the aforesaid context, the finding of the Arbitral Tribunal that *"the Engineer had considered the deployment of machinery notionally as per the list of minimum requirement for plant & equipment available at page no.42, 43 & 44 of contract"* is incorrect. The finding that Engineer's MPRs does not reflect what was deployed at site is contrary to the material on record.

27. This Court has not examined the conclusion that the Engineer had only considered the minimum requirement of plant and machinery to be deployed for computing the additional costs; and the same may be correct.

However, the finding that "*the actual deployment of machineries is modified from 68 types to 27 types and from numbers as per actual deployment for each type to numbers as per minimum requirement of the list of plant & equipment*" is also plainly not supported by any material.

28. A plain reading of the afore-quoted conclusion indicates that the Arbitral Tribunal had found that, (i) the Engineer had modified the deployment of machinery from 68 types to 27; and (ii) the Engineer had modified the numbers as per actual to as per minimum requirement.

29. The second finding regarding modifying the numbers of machinery to what was specified as the minimum requirement under the agreement is plainly wrong. The MPRs submitted by the Engineer clearly indicated the machinery deployed at site as well as the minimum requirement. A perusal of the MPRs indicate that the Engineer has, in fact, reflected certain items of machinery at site to be in excess of the minimum requirement. In this regard Mr Dayan Krishnan was pointedly asked as to how the Arbitral Tribunal's conclusion could be sustained. He fairly responded that although there were some discrepancies, the Engineer had recorded the machinery available at site, albeit, in respect of only 27 items for which minimum requirement was specified in the agreement. He however contended that in addition to the 27 types of machinery, there were other machinery and equipment, which were necessary for completion of the agreement and were deployed at site, but the Engineer had ignored the same. Be that as it may, the finding that the Engineer had modified the *numbers* of machinery physically deployed at site to as per minimum requirement is plainly wrong; it is not supported by any material and falls foul of what is commonly known as the *Wednesbury principle*, that is, no reasonable

person could, looking at the MPRs, arrive at such a conclusion. A finding which is perverse is susceptible to judicial review under section 34 of the Act (See: *Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd.*: (2014) 9SCC 263).

30. It is difficult to understand as to what the Arbitral Tribunal means when it states that the actual deployment of machinery had been modified by the Engineer from 68 types to 27 types. One would understand that although HCC had deployed 68 types of machineries, the Engineer had reclassified the same to 27 types; however, Mr Krishnan contends that Arbitral Tribunal had concluded that the Engineer had only considered 27 types of machinery/equipment and ignored the other types of machinery, which had been deployed by HCC. Although, the Arbitral Tribunal's finding does not read as such, even if Mr. Krishnan's interpretation is accepted, the finding does not appear to be correct. Ms Sinha has drawn the attention of this Court to MPR submitted by the Engineer under the cover of its letter dated 13.07.2007 which clearly indicates that although the Engineer had only listed 25 items as the minimum requirement but had found 20 types of equipment at site spanning over 28 types of machinery.

31. The HCC in its report showed that 68 types of machinery were deployed at site. However, that does not mean that the Engineer had modified its report to include only 27 types of machineries. There is no material to indicate that either the Engineer or NHAI had accepted the reports submitted by HCC as to the equipment deployed at site. However, it is not disputed that the MPRs submitted by the Engineer formed part of the record of the joint meetings held monthly and there was no objection to the said reports at the material time. Thus, the Arbitral Tribunal has

discarded the MPRs of the Engineer even though the same were admitted inasmuch as the MPRs were not objected to by the representative of HCC at the meetings or for that matter thereafter; but, has accepted the statements submitted by HCC. It is apparent that the impugned award is solely based on the unilateral statements of HCC (the claimant).

32. It appears from the reading of the impugned award that the Engineer had calculated the additional costs on account of deployment of machinery at site during the extended period on the basis of minimum requirement; the rationale being that if the machinery at site is idle, the contractor ought to have maintained only the minimum required. Whether this rationale should be applied or the actual machinery brought at site should be considered for computing additional costs is a contentious issue. The Arbitral Tribunal has concluded that the computation made by the Engineer was wrong and the additional costs have to be computed on the basis of machinery physically deployed at site. Since the issue is a contentious one and the view accepted by the Arbitral Tribunal is also a plausible one, this Court cannot supplant its views over that of the Arbitral Tribunal. However, the determination as to the equipment physically deployed at site has to be made on the basis of material on record and as indicated earlier, the Arbitral Tribunal's finding in this regard cannot be sustained. In my view, the Arbitral Tribunal has not disclosed any plausible reason for rejecting the Engineer's MPRs as to the machinery physically deployed at site and thus any computation of additional costs on account of equipment retained at site could only have been based on the admitted MPRs submitted by the Engineer.

33. The contention that HCC had given a notice of claims under Clause 53.1 of the GCC and there was no communication from NHAI or the Engineer requiring HCC to maintain further records as contemplated under Clause 53.2 of the GCC is of little relevance. The controversy involved is not whether HCC could have been called upon to maintain further records; the question is as to the acceptability of the record submitted by HCC in the context that it had not disputed MPRs furnished by the Engineer reflecting the deployment of equipment at site. Thus, in my view, the amount of ₹18,22,82,317/- awarded as additional costs towards retention of plant and equipment during the extended period is not sustainable and the impugned award is liable to be set aside to that extent.

34. Accordingly, the impugned award is set aside to the extent that it awards ₹18,22,82,317/- as “Additional costs on account of extended stay of plant and machinery at site” and further to the extent that it awards ₹2,27,88,987/- as “Finance charges (interest) on account of delayed recovery of overheads and profits.”

35. The petition is, accordingly, disposed of.

VIBHU BAKHRU, J

NOVEMBER 28, 2016
MK