

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

% *Judgment reserved on: 22nd March, 2016*
Judgment pronounced on: 25th July, 2016

+ **O.M.P. No.300/2015 & I.A. Nos.9783-84/2015**

M/S DEDICATED FREIGHT CORRIDOR CORPORATION OF
INDIA LTD. (DFCCIL) Petitioner

Through Mr.S.K.Taneja, Sr. Adv. with
Mr.J.K.Singh & Ms.Shaheen,
Adv.

versus

M/S SOMA ENTERPRISES LTD. Respondent

Through Mr.Dharmendra Rautray,
Adv.with Mr.Ankit Khushu &
Ms.Tara Shahani, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of this judgment, I propose to decide the objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") whereby the petitioner is challenging the Award dated 4th January, 2015.

2. Brief facts of the case as per pleadings of the parties are that the petitioner was awarded the work for design and construction of 54 important and major bridges of western freight corridor between Vaitarna and Utran (approx. 200 Kms) on a lump sum contract basis. The respondent accepted the proposal of the petitioner for Rs.605.15 crores vide Letter of Acceptance ("LOA") dated 26th December, 2008 and vide letter dated 17th February, 2009 it was

agreed that the date of commencement of work or the "Notice to Proceed with work" shall be considered from 16th February, 2009 and 30 months period of completion of works on the entire 54 bridges shall be computed from that date. Accordingly, the date of completion was 14th August, 2011.

3. The respondent by letter dated 16th January, 2009 submitted a performance Security Bank Guarantee dated 7th January, 2009 for an amount of Rs.48,41,20,000/- being 8% of the contract value to the petitioner.

4. The Project information and scope of work contained in the Invitations for Bids (IFB) at Clause 1.4 stated that out of the total number of 54 bridges, 8 were important bridges, 6 were in Gujarat and balance 2 were in Maharashtra. In case of major bridges, 27 were in Gujarat and 19 were in Maharashtra.

4.1 Clause 3.1.2 of the IFB, inter alia, provided that the bidder was required to carry out requisite modifications to the General Arrangement Drawings (GAD).

4.2 Clause 3.1.5 of the IFB stated that preliminary geotechnical investigations have been carried out by DFCC and indicative GADs of the proposed bridges have been developed.

4.3 Clause 5.1 of the General Conditions of Contract (GCC) dealt with general obligations of the respondent/contractor and provided as under:

"The Contractor shall carry out, and be responsible for, the detailed design of the Works followed by detailed drawings as well as construction drawings. These shall be

got approved from the Proof Consultant appointed by the Employer followed by final approval of the Employer...”

5. As per the petitioner, the work included the design and construction of 54 Nos. major bridges on lump sum contract basis. GADs and preliminary geo-technical investigation data was made available for majority of the bridge sites which was to be followed for construction and commissioning of the bridges. Approach earthwork and transition system on either side of the bridges, over a length of 50m to 100m, was also a part of the scope of this work.

6. In a meeting dated 8th April, 2009 between the petitioner and the respondent it was agreed that the Geotechnical Investigation report would be submitted together with GAD.

7. The "Appendix to Tender" stated that for the purpose of the definition of the term "Section" in Clause 1.1.6.9 of the GCC the expression "Section of Work" means "Each Bridge shall be treated as an entity or Section of Work".

8. The work program submitted by the respondent to the petitioner indicated specific dates for each milestone which was accepted by the petitioner. The first 5 sections comprised of bridges Nos. 139, 143, 263, 264 and 340 with completion dates as shown below:

Preconstruction Activities				
Milestone/Bridge No.	Start-Finish Date of GAD finalization as per program (incl. Approval of	Start-Finish Date of Sub-soil testing and approval of DFCC as per	Start-Finish Date of Detailed Engineering (Incl. Approval of DFCC)	Date of Handing over of work after construction.

	DFCC)	program		
139	14.3.2009 – 10.5.2009	14.3.2009 – 2.4.2009	11.5.2009 – 3.7.2009	5.1.2010
143	12.3.2009 – 8.5.2009	12.3.2009 – 31.3.2009	9.5.2009 – 1.7.2009	5.5.2010
263	8.3.2009 – 4.5.2009	8.3.2009 – 27.3.2009	5.5.2009 – 27.6.2009	8.4.2010
264	8.3.2009 – 4.5.2009	8.3.2009 – 27.3.2009	5.5.2009 – 27.6.2009	4.3.2010
340	25.3.2009 – 21.5.2009	25.3.2009 – 15.5.2009	22.5.2009 – 14.7.2009	14.5.2010

9. Certain disputes had arisen during the course of the work. The respondent-contractor invoked arbitration clause vide clause No.20.6 of GCC of the Contract Agreement, by its letter dated 21st January, 2012. The Arbitral Tribunal comprising of Sh.S.M.Singla, Sh.Ashok Kumar Goel and Sh.Sudhir Kumar were constituted to adjudicate the dispute between the parties.

10. Three claims were raised by the respondent. No claim was filed by the petitioner. The details of which are recorded in para 6 of the award has been reproduced herein below:

- i) Claim No.1: Withdrawal of the illegal action of levying of liquidated damages and consequent payment of the recovered amount of LD, including refund of recovered Price Variation amounts, along with compensation for time and

cost etc as well as grant of Extension of time as per clause 8.3 of GCC (page 106 of CA)

Total Claim No.1: Rs.60.78 Crores

ii) Claim No.2: Compensation towards the additional time and cost due to deviation made by Respondent from the design parameter stipulated in Employer's Requirement in respect of bottom of pile cap levels.

This claim has further sub-claims from Claim 2(a) to Claim 2(e)(iv) as given below

Claim No.2(a): For bridges in case of channels that are dry in the working season, Bridge No 239, 288, 366 and 370

Claim No.2(a)(i): Bridge No 239

Claim No.2(a) (ii): Bridge No 370

Claim No 2(b): Compensation towards the cost of additional works executed due to deviation made in Employer's requirement in respect of pile cap levels in Bridge No 358 & 359

Claim No 2(b) (i): Bridge No 358

Claim No 2(b) (ii): Bridge No 359

Claim No2(c): Compensation towards the additional time and cost due to deviation made by Respondent from the design parameter stipulated in Employer's Requirement in respect of bottom of pile cap levels of Bridge No 135.

Claim No 2(d): Bridge No 387

Claim No 2(e)(i): Bridge No 368

Claim No 2(e)(ii): Bridge No 369

Claim No 2(e) Bridge No 401
(iii):

Claim No 2(e) Bridge No 417
(iv):

Total Claim No 2 is Rs.67.37 crores

Total Claim No 1 & 2 is Rs.128.15
crores

iii) Claim No 3: Interest on claims at 24% per annum from the date the claim fell due with the benefit of compounding on monthly basis on the claim amount against various claims stated herein.

11. After considering the evidence, material on record and written submissions, the award was published by the Arbitral Tribunal in case of Claim 1 as per para 9.1.5 which reads as under:

"i) The Liquidated Damages levied by Respondent under Clause 8.6 of GCC/PCC/Annexure to tender as per their notice (Ref. C1 Vol. 6 (exh no 331) dt. 17.07.2010) is held valid for Br. No.139 only. For other Milestones namely for Br. Nos.143, 263, 264 and 340, the notice is not held tenable and therefore Liquidated Damages be levied only for Br. No.139, from 05.01.2010 (milestone of bridge 139) to the scheduled date of completion of the work i.e. 14.08.2011. PVC indices are frozen for Br. No.139 only, for this period. The amount deducted towards LD/PVC frozen for other four bridges i.e. bridge nos 143, 263, 264 & 340 be refunded.

ii) The levy of LD @ 0.1% per week while extending the validity of contract beyond original date of completion i.e. upto 31.12.2013 is held illegal and the amount of LD so deducted be refunded to the Claimant.

iii) Freezing of respective PVC indices for Balance Work of the contract, from the date of breach of 1st Milestone for Br. No.139 i.e. 05.01.2010 is not correct, for the purpose of operating the Price Variation Clause (Clause 14.7 of

GCC/PCC/Annexure to tender) for the Balance Work. The PVC indices be frozen only for the balance work of Br. No.139, for which only the LD has been found tenable, from its milestone date, upto the original scheduled date of completion (14/08/2011) and not beyond this date, beyond which should be allowed as per the PVC indices as then prevailing. The amount of PVC frozen from 05.1.2010 for all the other bridges recovered/disallowed to Claimant be also refunded/paid."

12. The award on the claim No.2 was published after discussion of pleadings, document /evidence and arguments of the parties. The details are given as under:

#	Br.No.	Claimed amount Rs.	Awarded amt. Rs
1.	135	46,253,608	16 lakhs
2.	239	4,029,401	0
3.	358	80,553,125	40 lakhs
4	359	90,665,070	30 lakhs
5	368	166,197,720	33 lakhs
6	369	24,837,875	13 lakhs
7	370	9,653,304	0
8	387	31,580,514	10 lakhs
9	401	145,806,927	13 lakhs
10	417	74,130,864	30 lakhs
			185 lakhs

Note: The award calculations for each bridge, are based on the analysis of various bridges done individually.

13. On Claim No.3, nil award was published which reads as under:

"9.3.1 Claim related to payment of interest on the award amount

Clause 20.6.5. (ii) of G.C.C. at page 142 of the Contract Agreement states:-

"Whether the arbitral award is for the payment of money, no interest shall be payable on whole or any part of money for any period till the date on which the award is made."

Considering the specific clause of the Contract Agreement, no interest is payable till the date on which the award is made. Nil award."

The respondent's case before the Arbitral Tribunal.

14. As per the terms and conditions of the GCC, it was the petitioner's obligation to approve the Design Basis Report ("DBR") which formed the basis of the Detailed Engineering. The approval of the DBR was necessary to facilitate preparation of Detailed Designs and Drawings keeping in view the time line set out in the work program. The timely approval of the DBR was therefore imperative to enable the respondent to take up the Detailed Engineering and then to construct the work as per the approved work program. It was further submitted that there were several modifications in the DBR up to 25th March, 2011 i.e. more than half the period allotted for completion of work. The delay in approving the DBR by the petitioner was, *inter alia*, due to the petitioner's attempt to go beyond the Employer's Requirements and even instructing the respondent to modify the load combinations at a variance from Employer's Requirements.

14.1 The respondent had filed evidence before the Arbitral Tribunal for all the delays attributable to the petitioner which had resulted in

non-achievement of the milestones for all 5 bridges within the date of completion. In view thereof, the respondent asked the petitioner to grant interim extension of Time ("EOT) to the specified date of completion of the work for a period of 915 days from 14th August, 2011 pursuant to Clause 8.3 of the GCC vide letter dated 21st July, 2011. The petitioner/ Employer's Representative, however, despite delays attributable to it, issued notice dated 28th June, 2010 for levy of Liquidated Damages ("LD") pursuant to Clause 8.6 of the GCC for delay in completion of the milestones for the aforesaid bridges. The respondent by letter dated 15th July, 2010 replied to the said notice dated 28th June, 2010, inter alia, stating that the imposition of LD does not arise and the approved program was based on bid document and the same required revision due to various reasons, all of which were beyond the respondent's control and not attributable to it.

14.2 The respondent pointed out that the delay in achieving the milestones were due to:

- (i) Change in construction methodology (segmental to full girder casting) and the consequential implications.
- (ii) Change in sequence of pre-construction activities (with respect to the contract program).
- (iii) Abnormal increase in quantum of foundation work (with respect to the contract programme).
- (iv) Delay in GAD approvals - more than programmed.
- (v) Delay in design approval- more than programmed.
- (vi) Delay in Land acquisition near the Major Bridge locations and approaches.

- (vii) Delay in Western Railway clearances.
- (viii) Change in basic parameters viz. Pile cut-off levels etc.
- (ix) Change in bridge locations/alignment with respect to Contract Agreement.
- (x) Change in Employer's requirements.
- (xi) Delay in approvals for tree cutting.
- (xii) Delay in release of advance against mobilization and Plant & machinery.
- (xiii) Increase in test pile load /plate load capacity than prescribed in employer's requirements.
- (xiv) Approach roads, local problems, uncertainty of availability of encumbrances free land, hindrances/ restrictions.

14.3 The delays attributable to the petitioner which affected the work progress the Employer's Representative vide letter dated 17th July, 2010 imposed liquidated damages and recovered LD and Price Variation from respondent's IPCs up to IPC - 17, by the time, the claim statement was submitted to the Arbitral Tribunal. Clause 13.3 of the GCC deals with the Interim Payment Certificates (IPC) which provides that the IPC shall be submitted by the respondent/contractor at the end of each month showing the amounts to which the contractor considers himself to be entitled "for works executed by the contractor up to the end of the month". Thus, the deductions made by the petitioner in the form of LD and Price Variation from the respondent's monthly IPCs pertain to payments which are already due to the respondent for works executed by it in each month. No "additional claim" has been sought by the petitioner

under Clause 20.1 of the GCC and Claim No.1 is only refund of the illegal recoveries made by the petitioner in the form of LD and Price Variation.

14.4 It is submitted that the Employer's Representative vide letter dated 7th January, 2012 informed the respondent that the date of completion of the contract was extended from 15th August, 2011 to 30th December, 2013; fixing revised milestones for all the 54 bridges (including the 5 bridges, in respect of which levy of LD was notified).

14.5 In addition to the levy of LD, the petitioner froze the price indices to the level of January, 2010 under the pretext that LD was levied. According to Clause 14.7 (i) of the GCC, the payment for price adjustment would be on the basis of the formulae for components such as labour, material, cement and steel as indicated in Clause 14.7 of the GCC. It was provided that the price variation will be calculated on the basis of monthly price index number (average prices) etc. However, the petitioner after levying LD decided to freeze the price indices to the level of January, 2010 for the works i.e. all 54 bridges, based on an erroneous interpretation of the words "balance of work" in Clause 14.7(i) of the GCC, as the Employer's Representative had levied LD in respect of the 5 bridges only, for failure to achieve their respective milestones vide letter dated 17th July, 2010. It was contended by the respondent before the Arbitral Tribunal that the "balance of work" means the balance of work of the individual bridge-wise and not the whole of the work, as the LD were levied by the petitioner for alleged delays on the part of the respondent to achieve the milestones stipulated for each of the 5 bridges.

The Arbitral Tribunal had, no doubt, held that the imposition of LD by the petitioner was illegal except in case of Bridge No. 139 from 5th January, 2010 to the original scheduled date of completion of the work i.e., 14th August, 2011 (in para 9.1.5 (iii)):

"Freezing of respective PVC indices for Balance Work of the contract, from the date of breach of 1st Milestone for Br. No. 139 i.e. 05.01.2010 is not correct, for the purpose of operating the Price Variation Clause (Clause 14.7 of GCC/PCC/Annexure to tender) for the Balance Work...The amount of PVC frozen from 05.01.2010 for all the other bridges recovered/ disallowed to Claimant be also refunded/ paid."

14.6 By way of Claim No.2, the compensation towards the additional time and cost due to deviation made by the petitioner from the design parameters stipulated in Employer's Representative in respect of bottom of pile cap levels was claimed.

14.7 By way of Claim No.3 interest was claimed on the award amount.

15. The respondent in its reply to the objection relied upon the following provisions as contained in the Contract Agreement dated 17th March, 2009 as well as its comments:

"A. General Conditions of Contract:

- | | | |
|-----|-----------------------|--|
| i) | "Time for completion" | Clause 1.1.3.4 of GCC |
| | | Time for completing the works or a section (as the case may be). |
| ii) | "Section" | Clause 1.1.6.9 |
| | | Part of works specifically defined in |

the Appendix to Tender as a Section (if any)

- iii) "Work Programme" Respondent to submit work programme to ER within the time stated in the Appendix to the Tender. (Clause 4.14)

The approved Program is incorporated in Agreement. According to this programme, the design activity was to commence by 19.4.2009

- iv) "Time for Completion" "The whole of the works and each Section (if any) shall be completed ... within the Time for Completion for the works or such Section (as the case may be)". (Clause 8.2)

- v) "Liquidated Damages" Failure to comply with Clause 8.2 of GCC i.e. "Time for Completion", Respondent to pay DFCC sum stated in the Appendix to Tender as LD for such default (which sums shall be only monies due from the Contractor for such default).

"The Employer may, without prejudice to any other method of recovery, deduct amount of such damages from any monies due or to become due, to the Contractor". ER to give notice to Respondent under sub-clause 15.1 of entitlement to LD ("At any time after the DFCC has become entitled to LD"). (Clause 8.6)

- vi) "Interim Payment" "The Contractor shall submit a statement ... after the end of each

Certificate

month, in a form approved by the Employer's Representative, showing the amounts to which the Contractor considers himself to be entitled ...

(a) the estimated contract value of the Construction Documents produced and the Works executed up to the end of the month ... " (Clause 13.3)

vii) "Claims, disputes and arbitration

"If the Contractor intends to claim any additional payment under any Clause of these Conditions or otherwise, the Contractor shall give notice to the Employer's Representative as soon as possible and in any event within 28 days of the start of the event giving rise to the claim." ... "If the Contractor fails to comply with this Sub-Clause, he shall not be entitled to additional payment." (Clause 20.1)

B. Particular Condition of Contract:

i) "Liquidated Damages: "Relevant Time for Completion for each Miles stone and liquidated damages to be levied by the Employer for delay in achieving the Mile stone shall be specified in Appendix to Tender " (Clause 8.6)

C. Employer's Requirement: Section-V

i) "Design Data" "Design data given hereunder, for Bridge Structures is based on Employer's due diligence and Engineering. Contractor shall use

these data for preparing his proposal keeping in mind that he has to compulsorily follow the requirements stated herein and in the Specifications at volume - III and elsewhere in the Contract Document. (Clause 6)

ii) "Methodology"/

"9. Methodology

Segmental Construction"

Following methodologies are envisaged for important components of bridges:

"..... (f) Segmental construction for precast PSC box girders proposed by the Contractor shall be permitted subjected to their submission of detailed technical proposal in this regard and DFCCs approval there upon. (Clause 9 (f))

iii) "Design Manual"

The Design Manual (or DBR) shall incorporate all design requirements, standards codes, loading cases etc. which are relevant to and govern the design. The Design Manual shall be produced so that it can be used by those involved in the preparation or review of the design of the Permanent Works as a comprehensive reference text and efficient working document. (Clause 4.2 (c) (I))

D. Technical Bid Form Qualification information Appendix Form:Section-VII

Appendix to Tender

i) "Section of Work"

"Each Bridge shall be treated as entity or Section of Work". (Sr. No.

81 Clause 1.1.6.9)

- ii) "Liquidated Damages" "Taking over of each bridge by the Employer shall be a milestone for the purpose of this sub clause. The programme submitted by the contractor in terms of sub clause 4.14 of General Conditions shall clearly show the date of completion of each mile stone. Approval of such programme by the Employer will set the date of completion of each mile stone ... "

"Liquidated Damages

Liquidated Damages for delay for the whole works - 0.1% of the Contract Price per week.

Liquidated damages for delay in completion of any Mile Stone - 0.001% of the Contract Price per week.

Total liquidated damages shall not exceed 5% of the Contract price."

(Sr. No. 16, Clause 8.6)"

16. It is held by the Arbitral Tribunal under these circumstances that the petitioner is liable for the delay in handing over of land for construction works for most of other bridges (excluding Bridge Nos. 139, 143, 263, 264 and 340). In respect of bridges where there were no delays in handing over of land, the petitioner had delayed the construction works due to non-approval/finalization of the DBR. It is observed that the respondent had in fact submitted the details showing the delay in approval of DBR by the petitioner vide its letter

dated 4th April 2014. The respondent also indicated the time taken by it in re-submitting the DBR and the time taken by the petitioner in communicating its remarks and conveying its approval thereafter. The time taken by the petitioner was approximately 578 days.

17. The Arbitral Tribunal had recorded the placing of the said letter by the respondent which evidenced the details on DBR submission and grant of approval thereto. A statement showing the status of the details of bridges (25 bridges) for which site was not handed over was placed before the Arbitral Tribunal by the respondent in its rejoinder to written submissions filed by the petitioner. It is submitted that the petitioner had also delayed in making payment against the work carried out by the respondent resulting in further delay in the construction work.

18. The case of the petitioner before the Arbitral Tribunal as well as before this Court is that the date of the completion of the entire work was 30 months. However, by 14th August, 2011 the respondent had completed only 20% work.

18.1 There was admitted delay on the part of the respondent/contractor in the execution of the various milestone in the submission of GAD and the Geo Technical Report. The entire delay was on the part of the contractor and none of the milestones were achieved within the date of completion i.e. 14th August, 2011. The petitioner had rightly so notified the respondent about the levy of liquidated damages for delaying the aforesaid five mile stone (Bridge No. 139, 143, 340, 263 & 264) in terms of the clause no. 8.6(a) of the CA vide letter SCPL/SOMA/2010/664 dated 17th July, 2010.

18.2 The respondent thereafter on 21st July, 2011 requested for extension of time for 915 days from 14th August, 2011 under clause 8.3 of GCC of CA. It is submitted by the petitioner that there was no dispute regarding availability of land or for any financial compensation. The petitioner granted extension up to 30th December, 2013 after considering all the reasons with levy of LD under clause 8.6 of GCC, vide letter No. SCPL/SOMA/2012/1622 dated 7th January, 2012. The said extension was accepted by the respondent and was acted upon it.

18.3. Thus, the petitioner had rightly levied the LD on the respondent/contractor on account of delay in completion and inadequate progress under the relevant contract provision, the price adjustment amount for the balance work from the date of LD was pegged under clause No. 14.7 of GCC w.e.f 5th January, 2010. By letter dated 7th January, 2012 the extension of time was conveyed for the period 15th August, 2010 to 30th December, 2013 with levy of LD as per clause 8.6 of GCC for the balance work.

18.4. The Arbitral Tribunal had wrongly held that LD could only be imposed for Bridge No. 139 only (up to 5th January, 2010), and not for other four bridges. Counsel submits that the findings are wholly illegal and against the terms of the contract as in fact admittedly the delay has occurred for 5 Bridges which has been acknowledged in the para 9.1.4 of the award. Pertaining to Bridge No.139 it was rightly held by the Arbitral Tribunal that in reply of Observations of Employer's Representative, the respondent resubmitted the GADs with part compliance of observations in several stages which resulted in 8 revisions of the GAD. Thus, the respondent is substantially responsible as the total time duration for completion of

Bridge 139 was 290 days as per the Mile stone dated 5th January, 2010. But the respondent/contractor had initially delayed 167 days in submission of first GAD. The defect and deficiencies were rectified in several stages, therefore, the delay is wholly on the part of respondent.

18.5 With regard to Bridge No. 263, the said PSC BOX Girder Bridge of 2 span each 19.8m long had the total time for completion as 389 days. The respondent/contractor had initially delayed 89 days in submission of first GAD on 12th June, 2009. It is stated by the petitioner that there was a further delay of rectification/corrections of defect and deficiencies in several stages, resulting in 6 revisions of GAD. Clause 9 (f) of Employer's Requirement of Contract Agreement, permits contractor for Segmental methodology, but the respondent/contractor failed to submit the technical details for heavy haul rail bridges in this regard. It was highlighted in document MOM of 6th August, 2009. Thereafter, the respondent had withdrawn the clause 9 (f) unconditionally by their letter dated 19th December, 2009. Hence the entire delay was on the part of the respondent and the milestone 4th August, 2010 could not be achieved. It is submitted by the petitioner that the finding of the Arbitrator on this issue is wholly illegal and against the terms of the contract.

18.6 In respect of Bridge No. 264, the PSC BOX Girder Bridge of 2 span each 19.8m long had the total time for completion as 354 days, per Mile stone dated 4th March, 2010. The respondent/contractor had initially delayed 87 days in submission of first GAD on 10th June, 2009. Further, he had delayed rectification/corrections of defect and deficiencies in several stages, resulting in 4 revisions of GAD. Clause 9 (f) of Employer's Requirement of Contract Agreement permits

contractor for Segmental methodology, but the respondent/contractor failed to submit the technical details for heavy haul rail bridges in this regard which was brought to the notice of Arbitral Tribunal by MOM dated 6th August, 2009. Thereafter, the respondent/contractor had withdrawn the clause 9 (f) unconditionally vide their letter dated 19th December, 2009. It is stated that Arbitral Tribunal has not considered the above facts that the entire delay was on the part of the respondent/contractor for not achieving the milestone. It is submitted by the petitioner that the finding of the Arbitrator on this issue is wholly illegal and against the terms of the contract and therefore, the same is liable to be set aside.

18.7 In respect of Bridge No. 340, it is submitted that as per the contract provision of the Mile stone for completion of the Bridge is 409 days i.e. 14th May, 2010. The respondent/contractor had delayed 151 days in submission of first GAD on 29th August, 2009. Further, the respondent had also delayed the rectification/corrections of defect and deficiencies in several stages, resulting in 4 revisions of GAD. The Arbitral Tribunal held that rocky strata was available at pier P1, then also the respondent/contractor delayed 863 days in deciding the foundation pile to open foundation. It is the submission of the petitioner that the entire delay was on the part of the respondent/contractor but the Arbitral Tribunal has not considered the above facts and held that both the parties are equally responsible for the delay. It is submitted that the finding of the Arbitral Tribunal on this issue is wholly illegal and against the terms of the contract who has also erred in holding that freezing of PVC indices of the contract from the date of first milestone bridge No.

139 i.e. 5th January, 2010 is not correct. It is submitted that the Arbitral Tribunal had given perverse interpretation to clause No. 14.7 of GCC regarding the balance work.

19. It is stated by the petitioner that the claims for PVC amount is an additional amount claimed by the contractor. In the absence of 28 days notice, no claim could be raised. The Arbitral Tribunal has incorrectly interpreted clause No. 20.1 of GCC. It is alleged that the award is perverse and has been passed against the admitted delay on the part of the respondent. The Arbitral Tribunal has given the incorrect interpretation of clause No. 14.7 and 20.1 of GCC.

20. It appears from the Award published that the Arbitral Tribunal after considering the evidence on record held that the delay is attributable to the petitioner in handing over of land for majority of the bridges and the delay has been caused by the petitioner in approving the DBR's.

21. It was held in the Award in Para 9.1.4 (b) and Para 9.1.5 which reads as under:

"Delay and corresponding levy of liquidated damages on the whole work w.e.f 15.08.2011

The Respondents have levied LD on the whole work and extended the validity of the contract up to 31.12.2013 under clause 8.6 of GCC/PCC read with Annexure to tender (Page 288 of CA). While extending the validity of contract the Respondents did not consider the following factors:

...

(ii) There has been a substantial delay on the part of the Respondents to hand over the land for many of the bridges. The Respondents clarified, during oral submission before the AT that process for acquisition

of land for 3 bridges was still in progress (document R9 pages 2577 to 2580). As per the Respondents own admission, land for 22 bridges was made available for main bridge but balance land for approaches, wing walls etc. was still not handed over to the Claimants even up to 20.12.2012 i.e. well beyond the original date of completion of work.

(iii) There have been several modifications in Design Basis Report right up to 25.03.2011 i.e. more than half the period allotted for completion of the work. Though the preparation and obtaining approval of DBR is the responsibility of the Claimants, but Respondents have been attempting to go beyond the Employers Requirement (ER) and even instructing the Claimants for modifying the load combinations at a variance from ER. The Respondents had instructed the Claimants (C1/Vol.8 (exh. no. 481) dt. 24.10.2010) to revise the design submissions in accordance with the latest approved design Manual i.e. DBR 7. The Respondents have stated that this did not affect the approval of detailed design, but the AT cannot turn a blind eye to the events and considers that this would have certainly contributed substantially to the delay in finalizing the detailed design of structures.

In view of the reasons stated above, it is held that the levy of penalty while extending the validity of the contract beyond 18th August, 2011 under clause 8.6 of GCC/PCC/Annexure to tender, up to 31st December, 2013, is therefore not proper and not tenable.

22. The Arbitral Tribunal in 9.1.5 of the Award in case of Claim 1 held as under:

"(ii) The levy of LD @ 0.1% per week while extending the validity of contract beyond original date of completion i.e. up to 31.12.2013 is held illegal and the amount of LD so deducted be refunded to the Claimant."

23. It is submitted that the total amount recovered by the petitioner towards LD on whole of the works prior to publishing of the Award dated 4th January, 2015 was Rs.29,67,42,931/-. The Arbitral Tribunal ordered refund of amounts recovered towards Liquidated Damages up to 31st December, 2013, except for Bridge No. 139 for the period 5th January, 2010 to 14th August, 2011. As per the petitioner, the said findings are incorrect.

24. It is a matter of fact that the respondent no doubt sought refund of the amount deducted towards LD and payment of the amounts towards Price Variation along with interest from respondent's IPCs up to IPC - 17 for an amount of Rs.60,77,56,824/- as Claim No.1 (amount recovered by the petitioner as on the date of filing of the Statement of Claim before the Arbitral Tribunal on 23rd October, 2012) in the arbitration proceedings. It was the continuous act of the petitioner to deduct the amount even after the disputes were referred. There could have been two options either to invoke fresh arbitration proceedings for subsequent period or to raise the claim of LD etc. which were deducted by the petitioner. As it was the recurring cause of action, I am of the opinion that the Arbitral Tribunal has taken the correct view.

25. As regards the refund of Price Adjustment, the Arbitral Tribunal in its meeting held on 12th January, 2014 directed the respondent to file the details of the amounts payable by the petitioner to the respondent. The respondent along with its letter dated 24th January, 2014 bearing reference No. *Soma/DFCC/Vaitarana Utran (54 Bridges)/D&B/ND/Arbitration/020* filed the said details. Copy thereof was also sent to the petitioner.

Subsequently, the price adjustment amount payable up to 31st December, 2013 was reworked by the respondent based on the prices and submitted to the Arbitral Tribunal through letter No. *Soma/DFCC/Vaitarana-Utran(54Bridges)/ID&B/ND/Arbitration/021* dated 18th February, 2014, with an advance copy thereof to the petitioner. The amount recoverable by the respondent was Rs.77,64,82,018/-. The said amount was not disputed by the petitioner before the Arbitral Tribunal. The net amount payable towards price variation from December, 2013 to June, 2014 (IPC 29 to IPC 32 including supplementary Bill) is Rs.14,32,45,170/-. The net amount payable towards price variation till the date of Award is Rs.91,97,27,188/- as the respondent submitted a statement to the petitioner for recovery of the LD and Price Adjustment on 18th January, 2015 wherein it sought refund of the said Price Adjustment and LD amount.

26. The petitioner has challenged the impugned award dated 4th January, 2015, *inter alia*, mainly on the following grounds:-

- i) "the impugned order is contrary to judgment of Supreme Court in the matter of *Hindustan Zinc Ltd. v. Friends Coal Carbonisation* [2006 (4) SCC 445] where the Supreme Court has held that award contrary to terms of the contract are patently illegal and opposed to the public policy of the India and such award would be opened to the interference by the court under Section 34(2)(b) (ii) of Arbitration & Conciliation Act, 1996.
- ii) By means of different clauses the Contract Agreement insist the compulsion of providing notice within stipulated period of 28 days, to the employer by the contractor in case of arising of any event or any action of employer or his representative, which results in to loss of time and money or leads toward any claim / extension of date of completion of Work. The Tribunal has wrongly concluded

this aspect without proper appreciating the terms and conditions of the contract between the parties. They had not commented over the provisions of the contract agreement in this regard. Doing so Tribunal has not reasoned the issue completely. Hence the impugned award is liable to be set-aside under Section 34(2)(b)(i) of Arbitration and Conciliation Act, 1996.

- iii) The Arbitrator, has wrongly come to conclusion as made in the award which is not based on any evidence and contrary to the materials on record.
- iv) The Arbitrator has granted interest at the rate of 12% which is on higher side. The Supreme Court has held in case of Krishna Bhagya Jala Nigam Ltd. v. G. Harishchandra Reddy [AIR 2007 Supreme Court 817] & A.P. State Trading Corpn. V. G.V. Malla Reddy Co. [2011(2010) SCALE 476] that interest 9% is just and proper.

27. The scope of interference of an arbitral award has been held by the Supreme Court as well as by this Court in various decisions which are as follows:

- (i) In ***Union of India v. Bungo Steel Furniture Pvt. Ltd.***, AIR 1967 SC 1032, the Supreme Court held as under:

"...it is well settled that the Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out whether or not the arbitrator has committed an error of law and that the award of the arbitrator can be set aside on the ground of error of law on the face of the award only when in the award or in a document incorporated with it ..

- (ii) In ***Allen Berry and Co. Pvt. Ltd. v. The Union of India***, 1971 (1) SCC 295, the Supreme Court held as under:

"8. ... Therefore, even when an arbitrator commits a mistake either in law or in fact in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake."

(iii) In ***Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar***, 1987 (4) SCC 497 at 503, the Supreme Court held as under:

"4. Appraisement of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisement of the evidence..... The arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator."

(iv) In ***Indian Oil Corporation Ltd v. Indian Carbon Ltd***, 1988 (3) SCC 36, the Supreme Court held that the jurisdiction to set aside an award on the ground of an error apparent on the record is not to be lightly exercised" and observed as under:

"The court does not sit in appeal over the award and review the reasons. The court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous. "

(v) In ***Puri Construction Pvt Ltd. v. Union of India***, 1989 (1) SCC 411, the Court held as under:

"7. When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in

appeal and examine the correctness of the award on merits."

(vi) In ***Sudarshan Trading v. Govt of Kerala***, 1989 (2) SCC 38, the Supreme Court held that a Court has no jurisdiction to examine the different claims to find out whether in arriving at its decision the arbitrators acted correctly or incorrectly. The Court cannot evaluate conclusions of law or fact. It was observed as under:-

"31. Whether a particular amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiction. "

(vii) In ***State of Rajasthan v. Puri Construction Co. Ltd.***, 1994 (6) SCC 485, the court considered extensively the extent to which Courts would interfere, both on issues of fact and of law. The Supreme Court held *inter alia* that the arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. It held that the court should not reappraise evidence in its anxiety to render justice.

(viii) In ***Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.***, (2009) 10 SCC 63, it was held as under:

"29. The legal position is no more res integra that the arbitrator having been made the final arbiter of resolution of disputes between the parties, the award is not open to challenge on the ground that arbitrator has reached at a wrong conclusion. The courts do not interfere with the conclusion of the arbitrator even with regard to construction of a contract, if it is a possible view of the matter Where the arbitrator has given elaborate reasons and such view of the arbitrator

is a possible view, we are afraid in the circumstances, award is not amendable to correction by the Court. "

(ix) In ***Swan Gold Mining Ltd. v. Hindustan Copper Ltd.***, (2015) 5 SCC 739, the Supreme Court held as under:

"12. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

19. The words "public policy" or "opposed to public policy", find reference in Section 23 of the Contract Act and also Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy. "

(x) In ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran***, (2012) 5 SCC 306, it was held as under:

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the Interpretation accepted by the arbitrator.'

(xi) In ***P.R. Shah, Shares and Stock Brokers Private Limited v. B.H.H. Securities Private Limited***, (2012) 1 SCC 594, the court held as under:

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence."

(xii) In ***M/s. Chugh Kathuria Engineers (P) Ltd. v. Delhi Development Authority*** 2013 (137) DRJ 152, a Division Bench of this Court held as under:

"14. The Award cannot be challenged on the ground that the Arbitrator had arrived at a wrong conclusion or that the evidence had been appreciated in a manner different from that in which the appellate court would have appreciated it This court is not an appellate body where a reasoned Award has been passed by the Arbitrator there is little scope for interference as the Arbitral Tribunal is the sole judge of the quality as also quantity of the evidence and it is not for the court to take upon itself the task of being a judge on the evidence which has been adduced before the Arbitrator. '

(xiii) In ***Navodaya Mass Entertainment Ltd. v. J.M. Combines***, (2015) 5 SCC 698, it was observed as under:

"6. In our opinion, the scope of interference of the Court is very limited. Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator. Once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail."

28. The contention of the petitioner, that the respondent failed to mobilize adequate resources for the site work, its design and drawing, was denied, as from the record of the arbitration proceedings it would show that the respondent had engaged M/s

Tandon Consultants on 5th February, 2009 i.e. prior to the issuance of letter dated 16th February, 2009 to proceed and the same had been accepted by the petitioner vide letter dated 2nd March, 2009. As regards the mobilization of the resources for site work, it was submitted that due to failure of the petitioner to approve the Design Manual on time for preparation of design and execution of works, the said resources could not be put to optimum utilization and was lying idle.

29. It appears from the record that the approved programme provides for taking up the design works from 19th April, 2009, the petitioner approved the Design Manual (7th Revision - R7) on 25th March, 2011 vide letter of the Chief Project Manager, DFCC, Surat (Exhibit - 621). The delay, inter alia, in approval of Design Manual (DBR) resulted in delay in submission and approval of designs, ultimately resulting in delay in execution of the works.

30. The Arbitral Tribunal in its award dated 4th January, 2015 had concluded that there were several modifications to the DBR right up to 25th March, 2011 i.e. more than half the period allotted for completion of work. The petitioner's representative had also stated that Design activity had come to halt from August, 2010 as the petitioner was reviewing the DBR. The Arbitral Tribunal at para (iii) of the award therefore held that *"this would have certainly contributed substantially to the delay in finalizing the detailed design of structures"*.

31. It appears that the petitioner did not approve the Design Manual on time for preparation of designs and execution of works. It is also a matter of fact that the respondent had submitted to the

petitioner Monthly Progress Reports (MPRs) to the Employer's Representative indicating the machinery and equipment deployed at site. The said MPRs were part of the arbitral record and was appended as Annexure - A to the rejoinder to the Statement of Defence of the respondent for Interim Award. The respondent had submitted extracts from the MPRs for the period from March 2009 to February, 2013.

It was denied by the respondent as contended by the petitioner that the designs and drawings submitted by the respondent were having lot of errors and not complying with the contract provisions.

32. The Arbitral Tribunal has come to a categorical finding of fact in para (iii) of the award that the petitioner had been making several modifications to the DBR right up to 25th March, 2011 and was in fact going beyond the Employer's Requirements and even instructing the respondent to modify the load combinations at a variance from the Employer's Requirements.

33. The petitioner had admittedly instructed the respondent vide letter dated 24th December, 2010 to revise the design submissions in accordance with the latest DBR i.e. Revision - 7. All together the petitioner required the respondent to carry out 7 revisions to the Design parameters and ultimately Revision - 7 was approved by the petitioner on 25th March, 2011 vide letter of the Chief Project Manager, DFCC, Surat.

34. Therefore, in view of the said reasons, the Arbitral Tribunal held that the petitioner was responsible for the delays for reasons including revision of the DBR which resulted in delay in designs and execution of works. The respondent had submitted the DBR to the

petitioner on 12th March, 2009 and the same was approved by the petitioner on 25th March, 2011 after undergoing 7 revisions i.e. in the 25th month out of 30 months contract completion period.

35. It is not denied by the petitioner that the petitioner instructed the respondent to change the requirements leading to a number of revisions of DBR and delay has occurred. Clause 6 of the Employer's Requirements pertaining to "Functional and Outline Design" which forms a part of the Agreement provides as under:

"Clause 6 - Design Data

Design data given hereunder, for Bridge structure is based on Employer's due diligence and Engineering. Contractor shall use these data for preparing his proposal keeping in mind that he has to compulsorily follow the requirements stated herein and in specification at Volume - III and elsewhere in the Contract Document."

36. In its Reply to the Statement of Claims at para 7 states as under:

"The revision of DBR (R7) is not due to respondent requirements but due to general engineering practice vide which design for structures should be as economical as possible. The design submitted by claimant before approval of DBR (R7) was not economical..."

37. In a way the petitioner admits that the revision of the DBR was not necessary to meet the Employer's Representatives.

38. Thus, it appears to the Court that the petitioner imposed LD, ignoring the fact that there were considerable delays in approval of designs and despite Project Management Consultant (PMC) qualifying its recommendation for imposing LD by stating "Subject to no delay in approval of design". The Arbitral Tribunal had based its

findings by placing reliance on the documents on record and the pleadings of the parties and had arrived at the conclusion that there was substantial delay on the part of the petitioner in finalizing detailed design of structures and therefore, the imposition of LD was illegal and the amount of LD should be refunded to the respondent.

39. For example, the petitioner has merely relied upon the finding in the Award dated 4th January, 2015 pertaining to Bridge No.139 only and not other 4 bridges, for which it has been held that LD deducted by the petitioner and freezing of the Price Variation Clause was illegal and not tenable, as the finding on bridge No.139 is arrived against the respondent who does not now want to challenge the same in order to avoid delay in the matter.

40. The petitioner further submits that the detailed engineering phase should have been completed by 3rd July, 2009. It is admitted by the respondent that on 4th September, 2009 the GAD of Bridge No. 139 was submitted by the respondent showing the width top slab as 10.80 m in line with the tender GAD. It is the petitioner who did not approve the GAD, the petitioner rather asked the respondent during a meeting held on 8th December, 2009 to submit revised GAD proposing the width of top slab as 13.60m. Thereafter, respondent submitted the revised GAD on 11th February, 2010 informing that it reserves its right to claim for additional time and cost. The respondent informed the petitioner on 8th July, 2010 for issuing variation order. The Proof Consultants appointed by the petitioner recommended to retain the top slab width at 13.60m for technical reasons through its letter dated 3rd August, 2011. But the petitioner informed the respondent through its letter dated 27th September, 2011 about the non agreement to the GAD as recommended by their

own proof consultants. It was the case of the respondent that the petitioner took more than one year seven months to comment on the width of top slab, thereby delaying the approval of the GAD. It was the petitioner who gave its decision on width of top slab after the original scheduled completion date. The GAD was ultimately approved by the petitioner on 16th March, 2012; i.e., after more than seven months of the original scheduled date of completion of Contract. The detailed designs were approved thereafter on 11th May, 2012.

41. All the above would indicate that the detailed Engineering Phase could not be completed by 3rd July, 2009, as originally planned, due to the delays for which the respondent could not be blamed, who clarified that the LD imposed on Bridge No.139 by the petitioner was not justified but still the Arbitral Tribunal has chosen to decide the issue on LD for the said bridge against the respondent who has now conceded the said findings.

42. With regard to the challenge of the petitioner in para I (b) that the amount of award as per the invoice submitted by the respondent contractor is Rs.122.98 Crores up to the period of 31st December, 2013, on the ground that the Arbitral Tribunal was constituted to decide the dispute up to 8th August, 2012. However, the award which was published covered the period up to 31st December, 2013. As such the Arbitral Tribunal cannot award more than what was asked for in the claim.

43. It is evident that the total amount claimed as per the Award dated 4th January, 2015 in respect of Claim No.1 and Claim No.2 put together is Rs.122,98,81,370/-. The respondent has claimed refund of Rs.29,67,42,931/- towards refund of Liquidated Damages

recovered up to December, 2014 and a sum of Rs.91,97,21,699/- towards price adjustment amount on the value of work done up to December, 2014. The total amount claimed in respect of Claim No.1 is Rs.121,13,81,370/-. Thus, the total amount claimed as per the Award in respect of Claim No.1 and 2 put together is Rs.122,98,81,370/-.

44. The summary of the award has been reproduced herein below:-

"10.0 SUMMARY OF AWARD

10.1 Decisions of the Tribunal on the claims preferred by the Claimant have been given above. In the paragraphs that follow, summary of the award of the Tribunal, that is relief granted is detailed claim-wise, as also directions relating to payments of cost incurred on arbitration etc

10.2 CLAIMS

10.2.1 Claim No.1

1) Penalty on Bridge No. 139 only is held tenable from 05.01.2010 (milestone of Br. No, 139) to the scheduled date of completion of work that is up to 14.08.2011. Any penalty recovered/deducted beyond 14.08.2011 be refunded to the Claimant.

2) Penalty on 4 other bridges that is Br. No. 143, 263, 264 and 340 for breach of Mile stone, is not held tenable. The amount deducted as penalty be refunded to the Claimant.

3) The imposition of penalty while extending validity of contract beyond the original date of completion of the contract that is up to 31.12.2013 is held not tenable. The amount of penalty so imposed be refunded to the Claimant.

4) Freezing of PVC indices for Balance Work of Bridge no. 139 is considered valid from 05.01.2010 till 14.08.2011 only. Beyond 14.08.2011, for Br. No. 139, price variation shall be allowed as per the PVC indices, as then prevailing, as per the Contract Agreement.

5) Freezing of respective PVC indices for Balance Work of Contract from 05.01.2010 is not found to be tenable for the purpose of operating the Price Variation clause (Clause 14.7 of GCC/PCC/Annexure to tender). Price variation be allowed as per the PVC indices for the Bridges and the recovered/disallowed price variation amount, be paid to the Claimants as per the prevailing indices.

NOTE: The above award is in reference to the period from start of contract to the date of reference of the dispute to the Arbitral Tribunal i.e. up to 08.08.2012.

10.2.2 Claim No.2

An amount of Rs 185 lakhs is awarded.

10.2.3 Claim No.3

Nil award.

10.3 The Claimant shall prefer an invoice for the awarded amounts and prefer the Bill to the Respondents.

10.4 The Respondent shall arrange payment of the awarded amount as preferred by the Claimants in 10.3 above, within 30 days of the date of submission by the Claimants, failing which simple Interest at the rate of 12% per annum shall be payable on the amount due to the Claimant on the basis of this Award, from the date of the publication of the Award, to the date of payment.

10.5 Expenditure incurred by each Party in presenting its case before the Tribunal, leading evidence, etc., shall be borne by each Party themselves.

10.6 Cost incurred on the Arbitral Tribunal shall be shared equally by the two Parties.”

45. Thus, it is evident that the Arbitral Tribunal hold the entire recovery by the petitioner of LD in respect of Bridge Nos. 143, 263, 264 and 340 to be refunded to the respondent and the amount of PVC frozen by the petitioner from 5th January, 2010 for the said 4 bridges be also refunded to the respondent. Hence, this finding of fact in the award of the Arbitral Tribunal needs the petitioner to refund all the amounts recovered by it in respect of all the bridges till date notwithstanding the amount claimed by the respondent in the arbitration proceedings.

46. The claim of the respondent before the Arbitral Tribunal was for refund of the amounts recovered towards Liquidated Damages and pay for Price Adjustment amounts at the relevant indices without freezing the indices, therefore, the submissions of the petitioner that the Arbitral Tribunal cannot award a sum of money more than what was asked for in the claim has no force. Section 31 (8) (b) (iii) of the Act pertain to the costs expended by each party in conducting the arbitration proceedings and does not relate to claims made by a party before the Arbitral Tribunal.

47. The other contentions raised by the petitioner are also without any force as Clause 20.1 of the CA applies only where the claim is for an "additional payment" by the respondent and it further provides that the Contractor "shall not be entitled to additional payment". The respondent has not claimed any additional payment under Claim No. 1 as would be evident from a mere reading of the claim head. Even if Claim No. 2 is interpreted as claim for additional payment the last sentence of Clause 20.1 only speaks of

'entitlement' and does not put an embargo or prohibition on the Arbitral Tribunal to allow the said claim. A conjoint reading of the said clause would reveal that the intention of the clause is to require the respondent to maintain the contemporary records of any event which may give rise to additional payment and therefore, the respondent's entitlement would come into play. Even otherwise the said provision or any other provision for that matter does not bar or restrict the grant of EOT simply because no notice has been given by the respondent to the Employer's Representative within the stipulated time period, even otherwise the respondent's claim for refund of the amount withheld towards levy of LD by the petitioner is not an 'additional payment' sought by it and therefore, does not fall within the purview of Clause 20.1 of the CA. The said LD was levied by the petitioner and deducted from the work done by the respondent from its IPC.

Therefore, the payments already due to the respondent under the IPCs for work done at site, which was deducted by the petitioner towards LD and are now being asked by way of refund by the respondent, do not qualify as 'additional payment' in terms of Clause 20.1 of the CA. Before the Arbitral Tribunal, the respondent had by letter dated 21st December, 2010 to the petitioner refuted the averments of the petitioner/Employer's Representative in respect of the applicability of Clause 20.1 of the GCC, inter alia, stating that:

"Notwithstanding the above, the time period of 28 days, indicated in Clause 20.1 of GCC is a guidance and procedure clause and it is not limitation clause that prohibits / prevents raising any matter of claim and/or dispute etc. at a later stage. Hence, comments of Respondent are not correct and against the condition and spirit of the contract which was formulated by the Respondent themselves."

48. It is rightly submitted by the respondent that the conjoint reading of Clause 2.2, Clause 8.3 and Clause 20.1 of the GCC does not support the submissions of the petitioner and does not apply to a case where the respondent is not claiming additional payment and is merely seeking a refund of the amounts already recovered or deducted by the petitioner. Further, the refund of LD and PVC recovered by the petitioner is not a "claim" by the respondent. The petitioner having recovered the said amount towards LD and PVC has raised a "claim" against the sum recovered and therefore, it is the claim of the petitioner rather the claim of the respondent seeking a refund towards LD and PVC from the petitioner.

49. It is evident that the recovery made by the petitioner is based on the fact that there are alleged delays by the respondent as a result of which the milestones for the 5 bridges could not be achieved. The issue before the Arbitral Tribunal was, inter alia, as to "whether the imposition of liquidated damages imposed by the petitioner herein was justified?" The Arbitral Tribunal in its award has unanimously held that petitioner was responsible for the delays in achievement of the milestones and therefore, the petitioner is liable to refund the amounts recovered from the respondent.

50. Assuming for the sake of argument that the claims are in respect of additional payment, the said Clauses read together does not prohibit or restrict the raising of the claims before the Arbitral Tribunal by the respondent.

The interpretation of contractual terms lies within the domain of the Arbitral Tribunal and need not be interfered with, even if it is assumed that the provisions of the GCC, in particular Clause 20.1 is

mandatory and not directory, the respondent was able to satisfy the requirements of the said clauses from the facts.

51. It is a matter of fact that the Employer's Representative before the Arbitral Tribunal had notified the levy of LD in respect of 5 bridges to the respondent alleging non-achievement of milestones for the said bridges vide letter dated 17th July, 2010. The respondent thereafter represented to the Employer's Representative to withdraw the proposed levy of LD vide its letter dated 16th August, 2010. The Employer's Representative did not respond to respondent's letter dated 16th August, 2010 until 15th November, 2010 wherein Employer's Representative informed the respondent that he had recommended recovery of LD and freezing of payment of Price Adjustment Indices to the level of 5th January, 2010.

As soon as the Employer's Representative responded, the respondent vide letter dated 16th November, 2010 issued notice under Clause 20.1 and Clause 20.3 of the GCC seeking settlement of dispute. Accordingly, the respondent informed the Employer's Representative through the notice who was the part and parcel of the petitioner. The levy of LD and freezing of Price Adjustment being of continuous nature, the claim No. 1 cannot be treated to be barred. The respondent was finally informed, who by letter dated 16th November, 2010 issued notice under Clause 20.1 and 20.3. The respondent till 15th November, 2010 and 20th November, 2010 was not sure that Employer's Representative would positively confirm the recommendation of recovery of LD and freezing of payment of price adjustment indices or not. The final decision of Employer's Representative was unseen by the respondent who immediately on the next day itself issued the notice under clause 20.1 and 20.3 of

the contract. Thus, assuming, the requirements of 28 days are attracted to the Claim No. 1 as raised by the respondent being mandatory in nature, the respondent has fulfilled the said requirements by issuing notice on time from the relevant date i.e. 15th November, 2010.

52. The interpretation given by the petitioner has been rejected by the Arbitral Tribunal. The same cannot now be the subject matter of challenge in Section 34 petition unless the petitioner satisfies the Court that the plausible view taken by the Arbitral Tribunal is wholly perverse, contrary to the clause of contract and against the law. The Arbitral Tribunal has held that the records were readily available with the petitioner as well and therefore, there was no difficulty in verification of the reasons of delay. From the conduct of the parties at that point of time, one could easily find out the reasons of delay. Although Clause 20.1 of the GCC does not talk of EOT, assuming it is applicable, it would be at the option of the respondent whether or not the provisions were effective, and by choosing not to apply for an extension to cover acts of prevention the respondent is entitled to render the liquidated damages provisions inoperative.

If the petitioner is allowed to interpret Clause 20.1 of the GCC in the manner it is seeking to do, it would tantamount to permitting the petitioner to take advantage of its own wrong.

53. It is undisputed that IPC No.3 was finally paid on 12th November, 2010, being the first IPC from which the petitioner had deducted LD i.e. marking "the start of the event giving rise to the claim", it was from that date onwards which can be said to be the "start of the event". Accordingly, the respondent issued a notice dated 16th November, 2010 under Clause 20.1 of the GCC which was

within 28 days from the start of cause of action in view of conduct of the parties. The notice having been issued by the respondent under Clause 20.1 of GCC was within the time prescribed. The stipulation of the time limit of 28 days under Clause 20.1 of GCC is even otherwise contrary to Section 28 of the Indian Contract Act, 1872 (amended by Act No.4 of 2003) wherein it is provided that if a party is restricted absolutely from enforcing his rights under or in respect of any Contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may enforce his rights, since the time limit for preferring the claim is 3 years under Limitation Act.

54. Pertaining to Bridge No. 263 the Arbitral Tribunal in para 9.1.5 (i) of the Award has arrived at a finding of fact that the levy of LD for Bridge Nos. 143, 263, 264 and 340 was not called for and the amount deducted by the petitioner towards LD and Price Adjustment for the said 4 bridges should be refunded as the respondent/contractor submitted the GAD on 12th June, 2009, which was approved on 4th February, 2010 by the petitioner after six revisions. The revisions were made as per the advice of the petitioner. There was therefore a delay of 218 days for approval of GAD. The Arbitral Tribunal in para 9.1.4 (a) of the award had held in respect of Bridges that "without a major decision on the type of super structure to be designed, the GAD could not have been finalized". It was denied by the respondent that drawings were of poor standard and delayed hampered due to respondent, rather, it was submitted that Bridge No. 263 was one of the 13 bridges that was proposed with segmental construction for the super structure. Clause 9 (f) of the Employer's Requirements relating to Functional

and Outline Design provided for "segmental construction for precast PSC box girders by the Contractor shall be permitted". Accordingly, the respondent proposed segmental construction for Precast PSC Box Girders. However, the petitioner denied permission for segmental construction. Therefore, there was loss of time due to change in the method of construction of PSC girders from segmental construction to full girder casting despite Clause 9 (f) of the Contract Agreement providing so. It is submitted that the Arbitral Tribunal in para 9.1.4 (a) of the award has arrived at the conclusion as stated below:

"It is the opinion of the AT that Respondents (Petitioner herein) changed their view subsequent to award of the work to the Claimants, after discussion with ROSa, Railway Board, etc. and insisted for withdrawal of the condition from the Claimants. Without a major decision on the type of super structure to be designed, the GAD could not have been finalized. The AT considers that the Claimants are not responsible for delay in the process of approval of GAD."

55. It is the admitted position which is not denied by the petitioner that the Claim No. 1 is not limited to the levy of LD in respect of only 5 bridges but in fact the petitioner has levied LD in respect of 43 out of 54 Bridges. The total amount of LD levied on the respondent and recovered by the petitioner up to 30th December, 2013 works out to Rs.27.79 Crores on the reason that the petitioner was paying towards price adjustment.

56. It is evident that in the award, Arbitral Tribunal has not acted arbitrarily, irrationally or independently of the contract who had travelled outside the bounds of the contract and without jurisdiction thus, the submissions of the petitioner has no force. In view of the

above, the objections of the petitioner are without any merit and the same are dismissed. Pending applications also stand disposed of. No costs.

(MANMOHAN SINGH)
JUDGE

JULY 25, 2016

