

\$~

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

+ FAO (OS) 116/2017 & CM No.14479/2017

NHAI

..... Petitioner

**Through: Mr.Rajiv Kapoor and
 Mr.Srikant Sharma, Advs.**

versus

**M/S. HINDUSTAN CONSTRUCTION
CO. LTD**

..... Respondent

**Through: Mr.Dayan Krishnan, Sr. Adv.
 with Ms.Malavika Lal,
 Ms.Niyati Kohli and
 Ms.Aakash Lodha, Advs.**

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

%

11.09.2017

C. HARI SHANKAR, J.

The present appeal is directed against judgment, dated 24th January 2017, of the learned Single Judge in OMP 260/2015, which had been preferred by the appellant, under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”), challenging Award, dated 29th November, 2014, as corrected on 15th December, 2014.

The Facts:

2 In 2004, bids were invited, by the appellant, for development of road connectivity to Paradip Port in Orissa. The respondent bid, and was awarded the contract, by the appellant, *vide* Letter of Acceptance dated 16th December, 2003, for a sum of Rs 327,76,71,777/-. Pursuant thereto, contract agreement, between the appellant and the respondent, was signed on 29th of January, 2004. Work, under the contract, was to be completed within a period of 36 months from the “start date” of the contract. As per notice of commencement of the work, the date for starting the work was 19th February, 2004, so that the date of completion of the whole work, as originally stipulated, was 18th February, 2007.

3 The work was divided into 3 Milestones, in the following manner:

“Milestone 1: Complete minimum length of 25 Km (anywhere in the entire stretch) in all respects of new Carriageway between 18 months and the Start date excluding major bridges falling in between – i.e. on 18.08.2005.

Milestone 2: Complete length of 25 Km of old carriageway in all respects of Milestone No 1 and additional 20 Km length of new carriageway in all respects so that total completed stretch would be 45 km of new carriageway and 25 km of old carriageway between 28 months from the Start Date. This also excludes major bridges i.e. on 18.08.2005.

Milestone 3: *Remaining length including all Bridges (complete work) shall be completed by the end of the Contract period i.e. 36 months from the Start Date i.e. on 18.08.2005.”*

4 The dispute, which came to be referred to the Arbitral Tribunal, in the present case, related to payment, claimed by the respondent, for additional cost stated to have been incurred, and loss suffered, by it, owing to extension of the period for completion of the contract from 19th February 2007 to 15th June 2009 which, according to the respondent, was due to “compensation events” not attributable to it.

5 According to the respondent, the said “compensation events” rendered it impossible for the respondent to complete the work within the stipulated period of 36 months. The respondent, accordingly, applied, from time to time, for Extension of Time (“EOT”), also claiming the costs incurred by it on account of such extension. Extension of time, as sought by the respondent, was granted by the Engineer of the appellant, periodically, till 27th August 2009, under Clause 28 of the Conditions of Contract. EOT was, however, approved, by the appellant, only till 15th June 2009. Possession of land, in respect of the Chandhikhol intersection could not be handed over, by the appellant to the respondent, by the said date. Barring the work relating to the said intersection, the remaining work was admittedly completed, by the respondent, by 15th June 2009, and

Substantial Completion Certificate was also issued, to the respondent, by the Engineer. The respondent was allowed to complete the remaining work, i.e. pertaining to the Chandikhol Intersection, during the Defect Liability Period which, too, was admittedly performed by the respondent. As such, there was no dispute about the fact that the entire work, under the contract, was performed, by the respondent, before the expiry of the Defect Liability Period.

6 The time schedule relevant for the present case stands well-delineated in para 9.2 of the Award of the Arbitral Tribunal, and may be reproduced, verbatim, thus:

<i>“(i) Date of submission of Bid</i>	<i>20.03.2003</i>
<i>(ii) Issue of Letter of Acceptance</i>	<i>16.12.2003</i>
<i>(iii) Date of signing of Agreement</i>	<i>29.01.2004</i>
<i>(iv) Date of Start of work</i>	<i>19.02.2004</i>
<i>(v) Intended Time for completion of work</i>	<i>36 months</i>
<i>(vi) Original contractual Date of Completion</i>	<i>18.02.2007</i>
<i>(vii) Date of Completion of whole of the work</i>	<i>15.06.2009</i>
<i>(viii) Total Extension of time determined by the Engineer for completion of works</i>	<i>15.06.2009 (848 days)</i>

- | | | |
|------|---|----------------------------------|
| (ix) | <i>Final EOT approved by the Employees/Respondent</i> | <i>15.06.2009
(848 days)</i> |
| (x) | <i>Total extended period approved by Respondent</i> | <i>27.80
Months”</i> |

7 The claim of the respondent, for additional costs/expenses incurred by it during the extended period, was recommended, by the Engineer of the appellant, *vide* letter dated 28th March 2010, which was forwarded by the Engineer to the appellant for approval. No copy of the said letter was, however, supplied, by the Engineer, to the respondent, despite repeated requests; ultimately, the respondent had to obtain a copy of the said letter under the Right to Information Act, 2005 (hereinafter referred to as “the RTI Act”). Despite such approval, the respondent was not paid costs/expenses, as demanded by it, for the extended period, resulting in a dispute.

8 The respondent issued notice of dispute to the appellant and, thereafter, referred the matter to the Dispute Resolution Board (“DRB”), seeking its recommendations. No recommendation, within the period stipulated therefor in the contract, being forthcoming from the DRB, the respondent, *vide* communication dated 7th February 2011, indicated its intention to commence arbitration.

9 Approval, to refer the dispute to arbitration, was also accorded, by the appellant, *vide* letter dated 17th March 2011. It was thus, that

the proceedings came to be referred to arbitration, specifically to an Arbitral Tribunal consisting of 3 engineers.

10 Clauses 28.1 and 28.2 of the Conditions of Contract read thus:

“28.1 The Engineer shall extend the Intended Completion Date if a compensation event occurs or a Variation is issued which makes it impossible for completion to be achieved by the Intended Completion Date without the contractor taking steps to accelerate the remaining work and which would cause the contractor to incur additional cost.

28.2 The Engineer shall decide whether and by how much to extend the intended completion date within 21 days of the contractor are asking for a decision upon the effect of a compensation event or variation and submitting full supporting information. If the contractor has failed to give such warning of a delay or has failed to cooperate in dealing with a delay. The delay by this failure shall not be considered in assessing the new intended completion date.”

11 Clause 44.1(a) of the Conditions of Contract stipulated the following to be a “compensation event”:

“The Employer does not give access to a part of the Site by the Site Possession Date stated in the Contract Data. In case the Employer or service provider organisation is restrained by a Court Order from cutting of trees/shifting of utilities/removal of encroachments etc. it shall be Compensation Event.”

12 The precise backdrop, in which the dispute arose, stands distilled, in para 10.0 of the Award of the Arbitral Tribunal, thus:

“... The contract provides for completion of Milestone No 3 and complete work by the end of contract period of 36 months. The Milestone 3 and complete i.e. whole of the work could not be completed within 36 months i.e. by 18.02.2007. The work, except Chandikhol Intersection was completed by 15.06.2009 and the Engineer recorded the substantial completion of the work as on 15.06.2009. The respondent accorded approval for extension of time for the completion of Milestone-3 and whole of the work up to 15.06.2009 as determined by the Engineer in accordance with the contract provision at clause 4.2(1)(c) of conditions of contract, but with the condition that the grant extension is complete and in total satisfaction of terms of contract agreement due to delayed completion of work by the contractor and no other compensation or costs are payable to the contractor on this account. The claimant vide letter dated 30.05.2010, represented to the Engineer that the contention that ‘no other compensation or costs are payable on this account’ is unconscionable, untenable and against the terms and conditions of contract and law and requested for communication, within a week, the details of recommendation/determination made in respect of claim for compensation for additional cost in the extended period of contract, failing which the same shall be construed as inaction on the part of the Engineer and the claimant will be constrained to issue a notice of dispute in this regard. Not getting any response thereupon, the dispute arose with the Engineer.”

The Award

13 The issue arising, before it, for consideration, was rightly captured, by the Arbitral Tribunal, in para 13.0 of its Award, as being *“about the contentions raised by the respondent regarding EOT granted by itself and whether the additional cost sought by the claimant, under compensation events and on account of extension of time for completion of entire work, is payable or otherwise.”* It may be noted, here, that the claimant, and respondent, before the Arbitral Tribunal, are the respondent, and appellant, in the present appeal, respectively.

14 Having thus set out the issue for determination before it, the Arbitral Tribunal proceeded to subdivide the said issue into three distinct components, viz.

- (i) identification of the events which necessitated extension of the intended date of completion of the whole work from 19th February 2007 to 15th June 2009,
- (ii) determination whether they were "compensation events" within the meaning of Clauses 22.1 and 44.1 of the Conditions of Contract, and
- (iii) if so, ascertaining whether they were, or were not, attributable to the respondent.

15 The Arbitral Tribunal held - correctly, in our estimation - that, if the delay, and EOT, was on account of compensation events, and Extension of Time (EOT) had been granted under Clause 28, read with

Clause 44 and 21 of the Contract, the respondent would necessarily be entitled to additional costs therefor.

16 The reasoning, in the Award of the Arbitral Tribunal, thereafter, proceeds as under:

(i) The Engineer had regarded the following as compensation events, to justify extending the overall period of the contract till 15th June 2009:

- (a) delay on account of traffic jam - till 15th June 2009,
- (b) delay on account of repair of rocker roller bearings - till 11th June 2009,
- (c) delay on account of handing over of Chandikhol Interchange - till 28th August 2009,
- (d) delay due to commencement of high embankment - till 15th January 2009 and
- (e) delay on account of introduction of new structure - till 27th February 2009.

(ii) Treating the above as compensation events, the Engineer extended the time for completion of the work till 28th July, 2009, under Clause 28 of the Conditions of Contract (*supra*). The fact that EOT was granted under Clause 28, amounted by itself, to acknowledgement, by the Engineer, of the fact that the delay, and EOT necessitated as a result thereof, were attributable to compensation events.

(iii) Vide letter dated 20th March, 2010, addressed to the respondent, the Engineer communicated the approval, by the

appellant, of EOT for completion of the contract, till 15th June, 2009. The said communication stated that:

- (a) EOT had been granted on account of compensation events under Clause 28,
 - (b) EOT had been approved by the respondent till 15th June, 2009 under Clause 4.2.1(c) of the Conditions of Contract and
 - (c) EOT had been notified in accordance with Clause 28.
- (iv) Clauses 21.1 and 44.1 of the Conditions of Contract defined compensation events as those which were not attributable to the respondent. Clause 21.1 of the Conditions of Contract read thus:-

“21.1. The employer shall give possession of all parts of the site to the contractor. If the possession of a part is not given by the date stated in Contract Data the Employer is deemed to have delayed the start of relevant activities and this will be a Compensation Event”.

This clause made it clear that:

- (a) the Engineer had to give possession of the site to the contractor,
- (b) if such possession was not given by the date sought in the Contract Data, the Engineer was deemed to have delayed the start of relevant activities and
- (c) this would amount to a compensation event.

Clause 44.1 of the Conditions of Contract (already reproduced supra) further indicated that non-giving by the appellant, to the respondent, of access, to any part of the site, by the site possession date, free of encumbrance, constituted a “compensation event”.

(v) The appellant had sought to contend before the Arbitral Tribunal that, as per Item 18 of the Contract Data read with Clause 110 of the Additional Technical Specifications (“ATS”), the respondent was responsible for shifting utilities and removing encroachments. Consequently, it was sought to be contended by the appellant, that delay on account of these events, disentitled the respondent to compensation. The Arbitral Tribunal held, in respect of the said contention of the appellant, thus:

(a) Item 18 of the Contract Data, on which the appellant sought to rely, read as under:

“The Site Possession Dates shall be: The whole site shall be deemed to have been handed over to the contractor on the Start Date except Chandikhol junction improvement section. Chandikhol junction improvement section shall be handed over to the contractor after one year from the ‘Start Date’. The contractor shall be responsible to coordinate with service provider/concerned authorities for cutting of trees, shifting of utilities, removal of encroachments

and arranging all approvals and any other activities from any other authorities required for implementation of the project, etc and making the site unencumbered from the project construction area required for completion of work. This will include initial and frequent follow up meetings/actions/discussions with each involved service provider/ concerned authorities. The contractor will not be entitled for any compensation for delay in cutting of trees, shifting of utilities and removal of encroachments by the service provider/concerned authorities, arranging the approvals and clearances from various authorities including railways. Payment for cutting of trees and shifting of utilities as required by the concerned department shall be made by the Employer. The Employer will also write to all concerned departments/service provider organization for expediting and facilitating cutting of trees, shifting of utilities and removal of encroachment etc.”

Item 18 had necessarily to be read in conjunction with Clause 21.2 of the Conditions of Contract (supra). Thus read, it was apparent that the “deeming” provision in Item

18 was discordant with Clauses 21.1 and 44.1(a) (supra) of the Conditions of Contract, which required handing over of actual physical possession, by the appellant to the respondent.

(b) Item 18 was relatable to Item 110.6 of BOQ and had no reference to the Conditions of Contract.

(c) Fulfillment of Milestones necessarily required physical possession of, and access to, the site.

(d) These aspects had been raised by the bidder at the pre-bid meeting and were clarified by the answers given therein, which *ipso facto* became part of the contract by virtue of Clause 9.2.4 thereof.

(e) In so far as the requirement in Item 18 of the respondent to coordinate with the authorities for rendering the site unencumbered, the scope and ambit of such “coordination” could be understood by referring to Clause 110.1 of the ATS, which read thus:

"The Contractor shall be responsible to coordinate with service provider/concerned authorities for cutting trees, shifting of utilities and removal of encroachment etc and making the site unencumbered from the project construction area required for completion of work. This will include initial and frequent follow-up meetings/actions/discussions with each involved service provider/concerned authorities. The contractor will not be entitled for any

additional compensation for delay in cutting of trees shifting of utilities and removal of encroachments by the service provider/concerned authorities ... Employer."

This Clause made it clear that cutting trees/shifting utilities/removal of encroachments was the responsibility of the service provider/concerned authorities. This responsibility could not be shifted to the shoulders of the respondent, who had to decide on the priority of removal, etc., only because the work had to be carried out, ultimately, by it. "Coordination", within the meaning of this clause, inferred working harmoniously and together with the service provider/concerned authorities, and did not imply that the respondent was responsible to get the trees cut, utilities shifted, or encroachments removed. The appellant's contention, to that effect, was, therefore, misconceived and rejected accordingly.

(f) Having thus delineated the ambit of "coordination" as contemplated by the Conditions of Contract, it became clear that the payment, provided for under Clause 110.6 of the ATS, was for *coordination*, not for the extra time and the cost incurred thereby. The reliance, by the appellant, on the said Clause 110.6 of the ATS was, therefore, misplaced.

(g) Following therefrom, the Arbitral Tribunal proceeded to examine the stipulation, in Item 18 of the

Contract Data, that “*the contractor will not be entitled for any compensation for delay in cutting of trees, shifting of utilities and removal of encroachments by the service provider/concerned authorities, arranging the approvals and clearances from various authorities including railways*”, and the sustainability of the reliance, placed thereon by the appellant, thus:

- (i) Removal of encroachments involved (a) the service provider, (b) the appellant and (c) the respondent.
- (ii) The responsibility, of the respondent, was limited to “coordination” with the service provider/concerned authorities.
- (iii) The question that arose, therefore, was whether the respondent could be denied compensation, for delay attributable to the service provider, or the appellant.
- (iv) That the respondent had entirely fulfilled its responsibility, was apparent even from the fact that complete payment, under Clause 110.6 of the ATS, was made to the respondent, by the appellant, without raising any contention that the respondent had not fulfilled its responsibility to coordinate with other service providers/concerned authorities.

- (v) The delay in removing encroachments, therefore, was attributable either to the service provider, or the appellant.
- (vi) It was clear that the respondent could not be denied compensation for delay in execution of work, where such delay was attributable to delay on the part of someone else.
- (vii) This was supported by Clause 44.1 (*supra*), which stipulated that costs and expenses incurred owing to such delay would be a “compensatory event”. The said clause meant to the extent of stipulating that delay, even owing to an order passed by a court, would be a compensatory event.
- (viii) Applying Sections 23, 53 and 54 of the Indian Contract Act, 1872, it was held that the stipulation, in Item 18 of the Contract Data, to the effect that the respondent would not be entitled to compensation for delay in cutting trees, shifting utilities, or removal of encroachments, by the service provider/concerned authorities, was void.
- (h) The claim of the respondent was for the consequences arising out of the compensation event; not for delay in removal of encumbrances. The Engineer had determined EOT till 15th June 2009 and had also determined the claim of compensation allowable to the respondent as Rs 47.71 crores. Once EOT had been

accepted by the Engineer, cost for compensatory event was only consequential. The said claim was not barred by Clause 18 of the Contract Data or Clause 110 of the Technical Specifications.

(i) The appellant had the option of terminating the contract, in the case of breach by the respondent, but did not choose to do so; this was apparently because no fault could be attributed to the respondent on account of delay in completion of the work, which was attributable to compensation events.

(j) Insofar as the amount payable to the respondent due to the compensation events was concerned, the Engineer processed the claim and forwarded his recommendation to the appellant. The details of the amount recommended were not conveyed to the respondent, despite repeated requests, so that the applicant had to ultimately obtain the same, under the Right to Information Act, 2005. Against the claim, of the respondent, of Rs 14273.98 lakhs, the Engineer had recommended Rs 4770.93 lakhs. The entitlement of the respondent to payment was clear from the following:

(i) During the extended period, the respondent was compelled to stay at the site with establishment and resources, to ensure that the balance work was completed. As the contract

provided for extension of time, the respondent had no right to walk away.

(ii) Clauses 44.2, 44.3 and 44.4 of the Conditions of Contract specifically provided for payment of additional cost, in the event of occurrence of compensation events. As there was no requirement for the Engineer to obtain the approval of the appellant for certification of such additional cost, it was not understood as to why the Engineer sent his recommendation to the appellant. In any event, the making of the said recommendation also supported the entitlement, of the respondent, to additional cost.

(iii) The entitlement, of the respondent, to the additional cost, also flowed from Sections 53 to 55 and 73 of the Indian Contract Act, 1872.

(k) The Engineer, in his letter dated 20th March 2010, no doubt stated that grant of EOT was with the condition that no compensation or costs will be payable to the respondent on that account. However, this stipulation, as contained in the letter of the Engineer, was disputed, by the respondent, *vide* its reply, dated 30th May 2010. Clause 44.2 specifically provided for increasing the contract price, in the event of additional cost being incurred owing to compensation events. It was not open, therefore, to the Engineer, unilaterally, to change this

clause in the contract, by way of a letter, especially when the said letter was disputed. That apart, the act of the Engineer, in recommending Rs. 47.71 crores, to be payable to the respondent, in terms of Clause 44.3 of the Conditions of Contract, militated against the stipulation, regarding non-payment of costs, as contained in his letter dated 20th March 2010.

(vi) Following upon the above discussion, the learned Arbitral Tribunal held that, of the various claims of the respondent, the following were tenable:

- (a) additional overhead expenses incurred during the extended period,
- (b) additional expenses on account of extended stay of plant and equipment at site during the extended period,
- (c) additional costs by way of financing charges (interest) on account of delayed recovery of the company of overhead and profits in the extended period of contract, and
- (d) additional labour costs incurred over the period of contract for the maintenance of office and various site establishments.

However, it was held that the claim, of the respondent, towards “loss of earning capacity and profits on account of the extended period of contract” was not tenable.

(vii) Having returned the above findings, regarding the various claims of the respondent, as contained in the Statement of Claim filed before it, the Arbitral Tribunal quantified the total amount (sans interest), payable to the respondent, to be Rs. 69,98,36,300/-. The Tribunal further held the respondents to be entitled to simple interest, for the period 11th August 2009 to 28th November 2014, @ 12% per annum, which worked out to Rs 44,50,95,800/-.

17 Counter-claims, preferred by the appellant before the learned Arbitral Tribunal, were rejected. Inasmuch as, in the present appeal, the appellant has not chosen to press the said counter-claims, nor ventilated any such challenge during arguments before us, it would not be necessary to refer, further, thereto.

18 It would be relevant to mention, here, that the Award of the learned Arbitral Tribunal was rendered by a majority of two learned Arbitrators to one. Equally, it is required to be noted that, *vide* a subsequent order dated 15th December 2014, the learned Arbitral Tribunal effected certain corrections in its award; these corrections, however, were purely clerical in nature.

The OMP, and orders passed thereon

19 The appellant, predictably, challenged the aforementioned award, dated 29th November 2014, as corrected *vide* order dated 15th December 2014, by way of OMP 260/2015. A preliminary objection

to the Award, to the effect that there had been no meeting of minds of the learned Arbitrators before it was passed, was also taken. *Vide* judgment dated 21st April 2015, the OMP was dismissed, both in respect of the said preliminary objection as well as on merits. However, in appeal, the Division Bench of this Court, *vide* judgment dated 17th February 2016 rendered in FAO (OS) 383/2015, upheld the decision of the learned Single Judge insofar as rejection of the preliminary objection canvassed by the appellant was concerned, but remitted the matter to the learned Single Judge for *de novo* consideration on the merits thereof, as, in its view, the findings, on merits, in the judgment, dated 21st April 2015, were “token in nature”.

20 The impugned judgment, dated 24th January 2017, has been passed pursuant to such *de novo* consideration on merits.

21 Of the claims, raised by the respondent and awarded by the learned Arbitral Tribunal, the appellant limited its challenge, in the OMP, to the awarding of Claims Nos 1, 2 and 3, towards “Additional overhead expenses incurred over the extended period”, “Additional expenses on account of extended stay of plant and equipment on site during the extended period”, and “Financing charges (interest) on account of delayed recovery of overheads and profits”. Primarily, the contentions advanced by the appellant, before the learned Single Judge, on these claims, as set out in para 13 of the impugned judgement, were the following:

- (i) Grant of EOT did not, *ipso facto*, entitle the respondent to increase in the contractual price. The respondent itself was responsible for delay in completion of work at various stages.
- (ii) Insofar as Item 18 of the Contract Data, and the replies to Questions 39, 59 and 60 in the pre-bid meeting were concerned, the replies were limited to the question of land acquisition. Shifting of utilities, etc., it was contended, did not constitute a “compensation event”. These were contractual activities.
- (iii) The respondent had tendered for a lump sum amount, which covered, *inter alia*, delay in cutting of trees, shifting of utilities, and removal of encroachments. These could not, therefore, constitute “compensation events”.
- (iv) Clauses 10, 11 and 12 of the contract required the respondent to bear the consequent effects of events which were unforeseen or activities which took a long time.
- (v) Clause 110 made the respondent responsible for coordination, obtaining requisite permission from the site provider, and making the site unencumbered.
- (vi) 878 days’ EOT had been granted, by the appellant, on sympathetic grounds, and not on account of any delay or breach on its part.
- (vii) The finding, of the learned Arbitral Tribunal, that Item 18 of the Contract Data was hit by Section 23 of the Indian Contract Act, 1872, amounted to rewriting the contract, which was impermissible.

22 *Per contra*, the respondent contended that it had not claimed any amount relatable to Item 18 of the Contract Data, on account of delay in cutting of trees, shifting of utilities and removal of encroachments, as the period attributable thereto was of 242 days, which had been rejected by the appellant, against which no challenge had been laid by the respondent. The delay, for which claim had been made by the respondent, was of 848 days, which had been recommended by the Engineer and approved by the appellant. The grievance, of the appellant, regarding the reliance, by the learned Arbitral Tribunal, on Section 23 of the Indian Contract Act, 1872, was also, therefore, it was submitted, academic.

23 Having thus set out the rival contentions of both parties, the learned Single Judge proceeded to dismiss the petition filed by the appellant, returning, in the process, the following findings:

- (i) The Learned Arbitral Tribunal had, harmoniously, construed clauses 21.1 and 44.1 of the Conditions of the Contract, and come to the conclusion that if cutting of trees, shifting of utilities and removal of encroachment was delayed, and the site was not made unencumbered by the appellant, it would be considered that work had been delayed by the appellant itself. The respondent had written to the concerned department for expediting and facilitating the process of cutting of trees and shifting of utilities only because it was conscious of the permission required therefor. Queries in this regard, were raised by the respondent at the pre-bid meetings, and it was

clear that queries at serial Nos. 39, 40, 59 and 60 related to Item 18 of the Contract Data. The Learned Arbitral Tribunal, speaking through its majority, had, after noting the clarifications/replies provided in response to the said clarifications, come to the conclusion that the said clarifications as per the contract, been made part thereof. The learned Tribunal further noted that clause 110 of the ATS was similar to Item 18 of the Contract Data and, on the basis of the decent analysis, concluded that the respondent could not be denied compensation on account of the delay caused in completion of work, which, according to the terms of the contract itself, was attributable to the appellant.

(ii) The core issue was the extent to which the respondent was entitled to compensation as a result of the EOT granted by the appellant. The contention, of the respondent, before the Learned Single Judge, that the respondent had not claimed any amount for delay beyond 15th June, 2009, was found to be correct. The learned Appellate Tribunal had, on the basis of documents and calculations provided by the respondent which was supported by the certificate of a Chartered Accountant worked out the amount payable to the respondent. In doing so, the learned Tribunal had not allowed itself to be influenced by its finding that Item 18 of the Contract Data was violative of Section 23 of the Indian Contract Act, 1897.

(iii) The fact of the matter was that the appellant and respondent, had both accepted the determination of EOT by the

Engineer. Clearly, it was not open to the appellant to later challenge the said determination or the compensation claimed by the respondent on that basis. The learned Single Judge found the reliance, placed by the appellant, in this context, on the judgments of this Court in ***Kailash Nath & Associates v. New Delhi Municipal Committee 2002 (3) Arb. LR 631 (Del) (DB)*** to be misguided, as in the present case, there was no automatic presumption that the appellant was responsible for delay on account of grant of EOT, rather, the award was based on the approval of the Engineer as well as the appellant.

(iv) The Hon'ble Supreme Court had, in ***Kailash Nath Associates v. DDA (2015) 4 SCC 136*** and ***Associates Builders v. DDA (2015) 3 SCC 49***, held that interference under Section 34 of the Act, could be justified only where the award was perverse to the extent that it shocked the judicial conscience. This high threshold was not met by the challenge by the appellant, to the award. As such, the said challenge was found to be unmerited.

(v) It was also sought to be urged, by the appellant, that the disputes determined by the learned Arbitral Tribunal were barred by Order 2 Rule 2 of the Code of Civil Procedure, 1908. This submission was also found to be without substance, as the earlier arbitration, which was the foundation of the submission, was prior to completion of work, before the determination of EOT by the Engineer. The claim, in the present case, was rightly found, by the learned Arbitral Tribunal to have arisen

only after completion of the work on 14th May, 2009. The cause of action in the two arbitrations being different, no occasion arose, for Order 2 Rule 2 of the CPC to apply.

(vi) The last submission of the appellant, examined by the learned Single Judge, was regarding the quantification of the claim of the respondent. The appellant had contended that no acceptable or credible evidence was available, to support such quantification. The learned Single Judge held, in this regard, that

(a) Claim No.1 had been allowed on the basis of the Chartered Accountant's certificate produced by the respondent, by comparing overheads against the value of total work done, as a result whereof only 26% of the base cost of the work done was allowed,

(b) Claim No.2 was decided on the basis of Minutes of Meetings of the progressive reports issued by the Engineer, showing the list of equipments deployed at the site on month-to-month basis, which was never questioned by the appellant, and

(c) Claim No.3 was allowed on the basis of overheads computed at 26%.

(vii) All these claims were, therefore, quantified on the basis of the evidence on record, which was considered in great detail. The appellant had not pointed out any such infirmity, as could render these findings, of the learned Arbitral Tribunal, opposed to the fundamental policy of Indian Law.

For these reasons as already stated hereinabove, the impugned judgment, dated 24th January 2017, of the learned Single Judge, dismissed the OMP filed by the appellant under Section 34 of the Act. Costs of Rs 50,000/- were also imposed, on the appellant, in the process.

The judgment in NHAI v. CEC-HCC JV:

24 During the course of the hearing of the present appeal, on 21st July, 2017, we were informed that a similar issue had been decided by this Court in a litigation between the present appellant and CEC-HCC Joint Venture (JV), i.e. Joint Venture which included the present respondent. The said dispute was also in respect of award dated 31st March, 2014 passed by a majority of two learned Arbitrators, in a dispute between the appellant and CEC-HCC Joint Venture (JV). In that case too, the claims related, *inter alia*, to costs and expenses incurred owing to occurrence of compensation events. The said award was challenged, by the present appellant, before this Court by way of OMP (Comm.) 260/2016. Vide judgment dated 20th March, 2017, the learned Single Judge dismissed the said OMP.

25 Paras 13 to 23 of the judgment of the learned Single Judge deserve to be reproduced, thus:

"Responsibility for the delay in completion of the project

13. Mr Kapoor took exception to the finding in the majority Award that it was the NHAI which was responsible for the delay in completion of the project. Mr

*Kapoor placed reliance on the decision in **Kailash Nath & Associates v. New Delhi Municipal Committee 2002 (3) Arb. LR 631 (Del) (DB)** where it was held that merely because EOT was granted by the employer in that case it did not mean that the employer was responsible for the delay or that it had admitted its liability resulting therefrom.*

14. *The Court finds that there is a detailed assessment of the Extension of Time (EOT) granted from time to time. An EOT assessment table has been set out in para 9.5.5 of the impugned majority Award. The majority Award noted that the EOT determined by the Engineer was accepted by the NHAI. Further, the majority Award noted that whereas the EOT determined by the Engineer was for 255 days, the EOT approved by the NHAI was only for 223 days limiting it to the date of completion of work. The Engineer had only considered those delays that were not attributable to the Respondent herein and had determined the EOT on that basis. The NHAI has also accepted the reasons given by the Engineer for the EOT. Accordingly the majority Award concluded that the extension of the contract period from 27th April, 2008 to 5th December, 2008 was on account of delays/default of the NHAI and for reasons not attributable to the Respondent.*

15. *The Court is unable to discern any legal infirmity in the said factual finding based as it is on a proper appreciation of the evidence before the AT. The reliance placed by the NHAI on the decision in **Kailash Nath & Associates v. New Delhi Municipal Committee** (supra) is misplaced since in the present case the evidence has been discussed in detail by the majority to arrive at a definite conclusion that the NHAI was responsible for the delay in completion of the project.*

Interpretation of the TS Clauses

16. Mr Kapoor submitted that the majority Award erred in shifting the responsibility for removal of the encroachments on to NHAI. It selectively read Clauses 110.3 and 110.6 of the Technical Specifications ('TS'), which when read as a whole gave a different interpretation and meaning. He also referred to the minutes of the pre-bid meetings (PBMs), which showed that the attempts by the Respondent to have the above clauses changed was unsuccessful. This, according to him, distinguished the present case from the one in FAO(OS) No. 402/2014 (**National Highways Authority of India v. Hindustan Construction Company**) in which the DB gave a decision dated 24th February, 2016.

17. As regards the PBMs and the discussions with regard to the Clause 110 of the TS, Mr. Krishnan is right in his contention that the Respondent's responsibility as per this clause was limited only to co-ordinating with the service providers. It was indeed not the responsibility of the Respondent to actually ensure the removal of the encroachments by obtaining the permissions. The above findings of the majority Award are based on an analysis of the relevant clauses of the contract as well as the evidence on record. It is a plausible view to take. As explained by the Supreme Court in **NHAI v. ITD Cementation India Limited (2015) 14 SCC 21**, where it was observed as under:

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such

a way that no fair minded or reasonable person could do.”

Assessment of damages

18. It was next contended by Mr. Rajiv Kapoor that damages to the extent of Rs. 47 crore have been awarded which works out to more than 10% of the contract value. This was computed on the basis of a certificate of a Chartered Accountant ('CA') engaged by the Respondent. According to Mr Kapoor this was arbitrary and unreasonable. He submitted that in terms of Section 73 of the Indian Contract Act, 1872 ('ICA') the burden was on the Respondent to show that there was a breach by the NHAI of its obligations under the contract; that it had actually suffered losses as a result of such breach; and that it had mitigated the losses to the extent possible.

19. Mr Kapoor criticized the decision of the majority not to assign evidentiary value to the internal document (R6) written by the Engineer to NHAI while at the same time accepting the certificate of the CA engaged by the Respondent. This according to him showed the bias of the AT.

20. The Court does not view the majority Award in the manner suggested by Mr Kapoor. The majority Award was based on an appreciation of the evidence. The decision as to the weightage to be given to a document was for the AT to take. The Court does not sit in appeal over an Award. The Court is not expected to re-appreciate the evidence and interfere with the Award only because a different view is possible on an appreciation of the evidence.

21. In this regard the Court finds merit in the contention of Mr. Krishnan that the production of certificate of the CA was consistent with Section 65(g) of

*the Indian Evidence Act, 1872. It was possible for the Respondent to lead secondary evidence on the aspect of finance and accounts and that is what the Respondent has done by producing the certificate of the CA. The decision of the DB of this Court in **National Highways Authority of India v. Hindustan Construction Co. Ltd.** (supra) observed as follows in a more or less similar case:*

“31. On the subject of additional costs on account of extending stay of plant and equipment at site the argument that the majority and the minority awards are without any evidence is wrong for the reason we find that the manner of proof contemplated by the parties was a certification by the Chartered Accountant of HCC to file compilation with reference to the account books, stock register etc. of HCC. Record of the Arbitral Tribunal shows that the Chartered Accountant did the necessary ground work and filed a tabulation with reference to the books maintained by HCC. The extract of the compilation, summarized by the Chartered Accountant, forms part of the majority award in the form of enclosures to Annexure 1 to the award and we find that the learned Chartered Accountant has extracted the equipment deployed during the extended period of the contract Based on the jointly signed monthly reports. This has been highlighted by the majority award while annexing the tabulation as an Annexure to the award. The entire equipment used at the site, with reference to the jointly signed monthly reports is reflected in the Annexure. Section 65(g) of the Indian Evidence Act, 1872 reads:

“65. Cases in which Secondary evidence relating to documents may be given:

Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:

(a) – (f)

(g) When the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole connection.

In case (g), evidence may be given as to general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.”

22. *The majority has discussed in great detail the substantive Indian law in respect of entitlement for compensation for delay in performance of the contract attributable to one of the parties. The reasons that weighed with the majority to not permit NHAI to rely on the letter (R6) written by the Engineer have been set out in considerable detail in the impugned Award. The following observations of the DB in **National Highways Authority of India v. Hindustan Construction Co. Ltd.** (supra) apply on all fours to the case on hand:*

“24. The majority award is fairly lengthy and written by men with non legal background and thus has a fair amount of diffusion of thoughts, and to a reader does cause some degree of discomfort and one gets the feeling of being taken around the forest and have an experience akin to the one on a safari on a tiger sighting. But, the distillate of the majority opinion could be summarized that for

such elements of recompense which are not provided in the contract, if there is breach by a party, the other party would be entitled to remedy the loss incurred as a direct consequence of the breach.

25. The view taken by the majority Arbitrator conforms to the principles of law relating to damages and we simply note that for a similar contract such damages awarded have been upheld by this Court. The decision is dated January 31, 2013 in FAO (OS) No.461/2012 NHAI Vs. Oriental Structural Engineers Pvt. Ltd.....”

23. Consequently the Court rejects the plea of the NHAI that the above findings of the majority are contrary to Section 73 of the ICA or Section 28 of the Act or it is based on an incorrect or incomplete reading of the relevant clauses of the contract”.

26 The said judgment dated 20th March, 2017, of the learned Single Judge in OMP (COMM.) 260/2016, was carried in appeal by the present appellant, before the Division Bench of this Court in FAO (OS) (COMM.) 130/2017. It would be sufficient to reproduce the following extracts, from the judgment of the Division Bench, which are ultimately dismissed the said appeal:

"4. The objections focused on three main issues and two of them were interrelated. The first pertains to the construction of Clause 53.1 to Clause 53.4 of GCC. According to the NHAI, the demands and claims were made without complying with clause 53.1. It was also argued that the nature of the evidence, led before the Tribunal, was not such that would justify any judicial forum, granting of damages, or compensation for the events claimed. Besides this issue, the NHAI's contention

that the nature of damages granted by the Tribunal, were not in accordance with the principles of law specially Section 73 of the Contract Act 1872. The other main issue was with respect to the Extension of Time (EOT), given by the Engineer. The NHAI contended that mere extension of time did not entitle the contractor to damages, rather it only meant that the time for performance would be extended, without admitting any liability that a compensation event had occurred. Here it is emphasized that compensation under the contract was payable only and only if compensation events (as defined under the contract) occurred. Since no such compensation event occurred, by the mere Extension of Time (EOT), the damages as claimed by the contractor were not payable. The learned Single Judge rejected the submissions.

5. It was lastly urged that the Tribunal acted unreasonably in its interpretation of Clause 110 and chose to consider only part of Clause 110.3, holding it to be opposed to tender policy. The learned Single Judge discussed these issues in the impugned judgment and rejected all the contentions."

"8. It is quite evident from the above detailed discussion as well as the extracted portion of the Award that the Tribunal did not render its findings on the admissibility of claims for the extended period merely on the certificate of the Chartered Accountant. Rather the Chartered Accountant certificate served only as a reference to the compilation of the figures and primary evidence which was led both before the Engineer as well as Arbitral Tribunal. There is no dispute to the fact that this evidence was not denied by 'NHAI'. In these circumstances the objection that no contemporary document or evidence was looked into by Arbitral Tribunal, as it was expected under

Clause 53.4, is devoid of merit. The argument is, therefore, rejected.

9. The next main contention is with respect to the Award of damages in respect of 255 days. The court noticed that extension of time granted by the Engineer was 255 days. Mr.Rajiv Kapoor contended that the interpretation of Clause 110 of the Technical Specification was unreasonable because the Tribunal noticed only the first sentence of Clause 110.3 and chose to overlook the rest."

"11. This Court is of the opinion that there is no infirmity in the impugned order or to the conclusion of the learned Single Judge. As to the interpretation of the terms of the contract, it is now too well settled that unlike other, while it is deemed to be a question of law that can be gone into by the court, in India, right from the decision in Vishwanath Soodvs.UOI & Anr. AIR 1989 SC 952 onwards till date, interpretation of contract is deemed to be within the exclusive domain of the Arbitral Tribunal. In the present case, the Tribunal was circumspect in respect of the grant of damages. As against the claim for the period of 255 days, what was, in fact, finally permitted was damages/compensation for 223 days. That fact was noticed by the Single Judge as well. Consequently, we find no infirmity in the impugned order on this aspect.

12. While exercising the appellate review under Section 37 of the Act, the court cannot second guess, (twice removed in a sense) the decision of the Arbitrator. The parameters for intervention by the court are limited i.e. the findings are so unreasonable that no reasonable Tribunal placed in similar circumstances with respect to the same

facts could arrive at; or patent illegality. These stringent circumstances have to be always kept in mind by the appellate court in its scrutiny of the order of court of first instance which adjudicates upon the objections under Section 34. If the court strays from these principles, it can justifiably be accused of rendering 'rough and uneven justice' a course that is not permissible in law. For the foregoing reasons, this Court is of the opinion that there is no infirmity in the impugned judgment."

27 The above extracted paragraphs from the judgments of the learned Single Judge, and the Division Bench in OMP (COMM.) and FAO (OS) (COMM.) respectively, clearly indicate that the facts in that case broadly parallelise the facts in the present case. In that case, too, the claims of the contractor/claimant were based on cost and expenses incurred on account of EOT which in turn was relatable to "compensation events". There too, the claims, for EOT, and consequent compensation, was recommended by the Engineer, and subsequently reduced by the appellant. The claims were ultimately allowed by the majority of the learned Arbitral Tribunal by relying *inter alia*, on the Chartered Accountant's certificate produced by the contractor. Clearly, the grounds on which the application under Section 34 of the Act was rejected, by the learned Single Judge and subsequently by the Division Bench, in the said case, apply, *mutatis mutandis* to the present case.

28 Mr.Rajiv Kapoor, appearing for the appellant very fairly did not seek to contest the applicability, to the present case, of the decision in

M/s. NHAI v. M/s. Hindustan Construction Co. Ltd., beyond a reasonable point.

Legal position in re. Section 34

29 Sub-section (1) of Section 34 of the Act, which is relevant, reads thus:

“34. Application for setting aside arbitral award. –

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) *the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration:*

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or*

(b) *the Court finds that—*

(i) *the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*

(ii) *the arbitral award is in conflict with the public policy of India.*

Explanation 1.-- For the avoidance of any doubt, it is clarified that an award

is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

30 It needs no great insight to discern that the scope of judicial review, with an arbitral award, as conceptualized and adumbrated by Section 34 of the Act, is extremely narrow. Judicial pronouncements thereon are, by now, legion. Meandering through the bylanes of judicial thought on the issue, it is possible to discern a carefully expansive evolution of the law, conditioned, no doubt, by the felt need at different points of time.

31 *D.D.A. v R.S.Sharma & Co., (2008) 13 SCC 80*, held that an arbitral award would be susceptible to judicial interference, if it is (i) contrary to substantive provisions of law (including the provisions of the Act itself), (ii) against the terms of the contract, (iii) patently

illegal, (iv) prejudicial to the rights of the parties, (v) contrary to (a) the fundamental policy of India law, or (b) the interest of India, or (c) justice or morality, or (vi) so unfair and unreasonable that it shocks the conscience of the court.

32 As against this, *Mc Dermott International Inc. v Burn Standard Co. Ltd*, (2006) 11 SCC 81 held that

- (i) the supervisory role of courts, over arbitral awards, under the 1996 Act, was *“only to ensure fairness”*,
- (ii) *“intervention of court”* was *“envisaged”* only in *“few circumstances ... like ... fraud or bias by the arbiters, violation of natural justice, etc.”*,
- (iii) *“the court cannot correct errors of the arbitrators”*,
- (iv) *“patent illegality”* could constitute a ground for interference if it went *“to the root of the matter”*,
- (v) *“public policy violation”*, similarly, could justify interference only if it was *‘so unfair and unreasonable as to shock the conscience of the court’*; for this purpose *“the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government”*,
- (vi) *“an award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest, as. Such award/judgment/decision is likely to adversely affect the administration of justice, and*

(vii) awards which were beyond the dispute referred for arbitration, or suffered from internal contradictions, were also pervious to interference.

33 *N.H.A.I. v J.S.C. Centrodorstroy*, (2016) 12 SCC 592, though it broke no new ground so far as the circumstances justifying invocation of Section 34 of the Act were concerned, did sound a note of caution, that “*construction of the terms of a contract is primarily for an arbitrator or Arbitral Tribunal to decide and unless the arbitrator or Arbitral Tribunal construes the contract in such a way that no fair minded or reasonable person could do, no interference by Court is called for.*” Similarly, *M. Ansuya Devi v M. Manik Reddy*, (2003) 8 SCC 565 draws our attention to the apparent truism that an arbitral award can be challenged, under the Act, only on one or more of the grounds set out in Section 34, and no other.

34. The oft-quoted decision in *N.H.A.I. v I.T.D. Cementation India Ltd*, (2015) 14 SCC 21, highlights the autonomy of the arbitrator, in the matter of construction of the terms of the contract between the parties (relying, in the process, on the earlier decisions in *McDermott International v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181, *Pure Helium India (P) Ltd. v. O.N.G.C.*, (2003) 8 SCC 593, *D.D. Sharma v. U.O.I.*, (2004) 5 SCC 325, *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306, *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*, (2010) 11 SCC 296, *Associate Builders v. DDA*, (2015) 3 SCC 49), in the following words:

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do.”

35 To the same effect are the decisions in *Swan Gold Mining Ltd v Hindustan Copper Ltd*, (2015) 5 SCC 739 and *Navodaya Mass Entertainment Ltd v J.M. Combines*, (2015) 5 SCC 398. The latter judgement also underscores the position that the possibility of adopting a view, different from that adopted by the arbitrator, would not, by itself, justify interference under Section 34 of the Act. *Rashtriya Ispat Nigam Ltd (supra)* expresses the same thought, differently, by postulating that, if the view of the arbitrator were a possible, if not a plausible, view, the court should shun interference therewith.

36 *Associated Builders v. DDA*, (2015) 3 SCC 49, may justifiably be christened as the high watermark in the law relating to Section 34 of the Act, and any attempt to paraphrase the decision is fraught with the risk of mutilation. The decision is, almost entirely, definitively authoritative, and brooks no ambiguity or anomaly. Nonetheless, in view of the proliferation of litigation, challenging arbitral awards, in recent times, we have, in a recent decision, dated 10th August 2017, in *Shiam Cooperative Group v Kamal Construction Co. Ltd*, extracted,

in extenso, the relevant paragraphs from the said decision, and respectfully culled, therefrom, the following clear principles:

- (i) The four reasons motivating the legislation of the Act, in 1996, were
 - (a) to provide for a fair and efficient arbitral procedure,
 - (b) to provide for the passing of reasoned awards,
 - (c) to ensure that the arbitrator does not transgress his jurisdiction, and
 - (d) *to minimize supervision, by courts, in the arbitral process.*
- (ii) The merits of the award are required to be examined only in certain specified circumstances, for examining whether the award is in conflict with the public policy of India.
- (iii) An award would be regarded as conflicting with the public policy of India if
 - (a) it is contrary to the fundamental policy of Indian law, or
 - (b) it is contrary to the interests of India,
 - (c) it is contrary to justice or morality,
 - (d) it is patently illegal, or
 - (e) it is so perverse, irrational, unfair or unreasonable that it shocks the conscience of the court.
- (iv) An award would be liable to be regarded as contrary to the fundamental policy of Indian law, for example, if

- (a) it disregards orders passed by superior courts, or the binding effect thereof, or
 - (b) it is patently violative of statutory provisions, or
 - (c) it is not in public interest, or
 - (d) the arbitrator has not adopted a “judicial approach”, i.e. has not acted a fair, reasonable and objective approach, or has acted arbitrarily, capriciously or whimsically, or
 - (e) the arbitrator has failed to draw an inference which, on the face of the facts, ought to have been drawn, or
 - (f) the arbitrator has drawn an inference, from the facts, which, on the face of it, is unreasonable, or
 - (g) the principles of natural justice have been violated.
- (v) The “patent illegality” had to go to the root of the matter. Trivial illegalities were inconsequential.
- (vi) Additionally, an award could be set aside if
- (a) either party was under some incapacity, or
 - (b) the arbitration agreement is invalid under the law, or
 - (c) the applicant was not given proper notice of appointment of the arbitrator, or of the arbitral proceedings, or was otherwise unable to present his case, or

- (d) the award deals with a dispute not submitted to arbitration, or decides issues outside the scope of the dispute submitted to arbitration, or
 - (e) the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or
 - (f) the arbitral procedure was not in accordance with the agreement of the parties, or in accordance with Part I of the Act, or
 - (g) the award contravenes the Act, or
 - (h) the award is contrary to the contract between the parties.
- (vii) “Perversity”, as a ground for setting aside an arbitral award, has to be examined on the touchstone of the Wednesbury principle of reasonableness. It would include a case in which
- (a) the findings, in the award, are based on no evidence, or
 - (b) the Arbitral Tribunal takes into account something irrelevant to the decision arrived at, or
 - (c) the Arbitral Tribunal ignores vital evidence in arriving at its decision.
- (viii) At the same time,
- (a) a decision which is founded on some evidence, which could be relied upon, howsoever compendious, cannot be treated as “perverse”,

- (b) if the view adopted by the arbitrator is a possible view, it has to pass muster,
- (c) neither quantity, nor quality, of evidence is open to re-assessment in judicial review over the award.
- (ix) “Morality” would imply enforceability, of the agreement, given the prevailing mores of the day. “Immorality”, however, can constitute a ground for interfering with an arbitral award only if it shocks the judicial conscience.
- (x) For examining the above aspects, the pleadings of the parties and materials brought on record would be relevant.
- (x) The court cannot sit in appeal over an arbitration award. Errors of fact cannot be corrected under Section 34. The arbitrator is the last word on facts.

37 Apart from the fact that the controversy in the present case stands substantially covered, in favour of the respondent and against the appellant, by the judgments in *N.H.A.I. v C.E.C.-H.C.C. J.V.* (*supra*) (of the learned Single Judge as well as the Division Bench), we are also entirely in agreement with the findings of the learned Arbitral Tribunal. We have taken pains to set out the said findings, to the extent they are relevant for the purpose of deciding the present appeal, in such detail hereinabove, only to highlight the elaborate and painstaking exercise undertaken by the learned Arbitrators who constituted the majority of the Arbitral Tribunal. The analysis of the facts, and the law, by the learned Arbitral Tribunal, is comprehensive

and thorough, and we fail to discern any such infirmity, therein, as would justify interference, therewith, under Section 34 of the Act.

38 Having thus accorded the arbitral award, and, consequently, the impugned judgment of the learned Single Judge, our imprimatur, we proceed to examine the issue of costs of Rs.50,000/- awarded by the learned Single Judge. Learned Counsel for the appellant exhorts us to do away with the costs imposed by the learned Single Judge, pressing into service, for the said purpose, the reasonableness exhibited by the appellant in accepting the applicability, to the present appeal, the decision in *N.H.A.I. v C.E.C.-H.C.C. Joint Venture (supra)*. We have already expressed our appreciation for the fairness of learned Counsel in this regard. At the same time, we find this court to be inundated by challenges, against arbitral awards, by public sector undertakings – many of which are initiated by the present appellant - seeking re-appreciation of the findings of the arbitrator by entirely re-examining the evidence or re-interpreting the clauses of the contract. Such litigation defeats the very purpose for which the Act was conceived. We have seen, even before this Bench, several appeals, against orders which the learned Single Judge, who passed the impugned order in the present case, has had to pass, rejecting applications filed by public sector undertakings under Section 34 of the Act, which basically seek to convert this court into a court of appeal over the decision of the arbitral tribunal. It is apparently with a view to control the filing of such applications, and to confer greater sanctity to arbitral proceedings under the Act, that the learned Single

Judge has been constrained to impose, on the appellant, the costs which stand imposed by the impugned judgment. We do not deem it appropriate to interfere therewith.

39 Consequently, the present appeal fails and is accordingly dismissed.

40 The respondent shall be entitled to costs of this appeal which are assessed at Rs.1,00,000/-.

41 In the process of filing the untenable objections, the NHAI has compounded its liability and stands burdened with interest. All these amounts are payable out of the public exchequer, just as the liability towards the further interest as well as the costs.

CM No.14479/2017

42. In view of the order passed on the appeal, this application is also dismissed.

C.HARI SHANKAR, J.

ACTING CHIEF JUSTICE

September 11, 2017
neelam