

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

R-491

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OMP 719 of 2011

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Mr. Vikas Goel, Mr Abhishek Kumar
and Ms Arushi Gupta, Advocates

versus

PCL STICCO (JV) Respondent

Through: Dr. Amit George and Mr Swaroop
George, Advocates

CORAM: JUSTICE S.MURALIDHAR

ORDER

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14.02.2017

1. The National Highways Authority of India ('NHAI'), by way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act'), challenges an Award dated 9th May, 2011 passed by the learned Arbitral Tribunal ('AT') by a majority of 2:1 in the disputes between NHAI and the Respondent, PCL STICCO (JV) (hereinafter 'JV').

2. Under the Contract Agreement ('CA') dated 20th August, 2001 NHAI awarded to the JV the work of widening 4/6 lane and strengthening of the existing 2-lane carriageway of NH-5 to the State of Orissa from KM 284.00

to KM 338.00 (Ganjam – Sunkhala) Contract Package No. OR-VII. The CA was a rate contract containing the items of work to be executed under the Bills of Quantity (‘BOQ’). The General Conditions of the Contract (‘GCC’), the Special Conditions of the Contract (‘SCC’) and the Conditions of Particular Application (‘COPA’) were all applicable._

Relevant clauses of the CA

3. The clauses of the GCC, and the COPA relevant to the present case read as under:

“Clause 12.2 of GCC – Not Foreseeable Physical Obstructions or Conditions

If, however, during the execution of the Works the Contractor encounters physical obstructions or physical conditions, other than climatic conditions on the Site, which obstructions or conditions were, in his opinion, not foreseeable by an experienced contractor, the Contractor shall forthwith give notice thereof to the Engineer, with a copy to the Employer. On receipt of such notice, the Engineer shall, if in his opinion such obstructions or conditions could not have been reasonably foreseen by an experienced contractor, after due consultation with the Employer and the Contractor, determine:

(a) any extension of time to which the Contractor is entitled under Clause 44, and

(b) the amount of any costs which may have been incurred by the Contractor by reason of such obstructions or conditions having been encountered, which shall be added to the Contract Price, and shall notify the Contractor accordingly, with a copy to the Employer. Such determination shall take account of any instruction which the Engineer may issue to the Contractor in connection therewith, and any proper and reasonable measures acceptable to the Engineer which the

Contractor may take in the absence of specific instructions from the Engineer.

Clause 20.3 of GCC – Loss or Damage Due to Employer's Risk of GCC

In the event of any such loss or damage happening from any of the risks defined in Sub-Clause 20.4, or in combination with other risks, the Contractor shall, if and to the extent required by the Engineer, rectify the loss or damage and the Engineer shall determine an addition to the Contract Price in accordance with Clause 52 and shall notify the Contractor accordingly, with a copy to the Employer. In the case of a combination of risks causing loss or damage any such determination shall take into account the proportional responsibility of the Contractor and the Employer.

Clause 52.1 of GCC – Valuation of Variations of GCC

All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as "varied work"), shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the Contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such rates or prices as are, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates prices to enable on account payments to be included in certificates

issued in accordance with Clause 60.

Clause 52.2 of GCC – Power of Engineer to Fix Rates of GCC

Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the Works or to any part thereof, is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item of the Works is, by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.

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

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

Clause 52.2 of COPA – Power of Engineer to Fix Rates (3rd para)

"Provided further that no change in the rate or price for

any item contained in the Contract shall be considered unless such item accounts for an amount more than 5 (five) percent of the Contract Price and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of Quantities by more than 25 percent."

The dispute between the parties

4. During the course of execution of the CA, the JV raised disputes relating to abnormal increase in earthwork quantities for filling in embankment at the Balugaon by-pass area of the construction site. It was contended that the earth had to be brought in huge quantities from far long distances due to change in design and alignment of the road. A letter dated 18th August, 2006 was sent by the JV to NHAI in this regard. In this letter, the JV asked NHAI to reconsider the rates in terms of Clause 52.2 of the GCC and under Condition 20.3 of the GCC on account of the contemplated change in design. The JV sought release of payment with interest @ 10% per annum compounded monthly. It was pointed out that the work was continuing and, therefore, the JV should be paid the additional sum through the Interim Payment certificates ('IPCs') simultaneously. The Team Leader/Engineer was asked to give its decision in terms of paragraph 9 (b) of the Annexure 'B' to COPA Dispute Review Board's ('DRB') Rules and Procedure within 14 days.

5. In the Statement of Claim, it was *inter alia* noted by the JV that Khallikote Ghat area was to be handed over on 19th April, 2002 but the major part of the area was handed over only in July, 2003. Further, when it was handed over, there were major changes in the alignment/design of main

carriageway which resulted in abnormal change in the quantity of earth work by more than 75%. Likewise, the area comprising the Balugaon bypass was to be handed over on 19th April, 2002 but was ultimately handed over only in July, 2003. The work could not be started since it was monsoon and the area began drying up only in December, 2003. The modification for the foundation level at Balugaon Bypass was issued as late as January, 2005. As a result, the quantity for filling of embankment had increased abnormally. Specific to the Balugaon Bypass, the change was more than 138%. It was specifically pointed out that this abnormal change could not be visualized by the contractor in terms of Condition 12.2 of the GCC. Reference was made to Clause 20.4 (c) of the COPA which made it clear that any loss or damage to the contractor due to change in design would be at employer's risk and the Engineer/Team Leader shall determine the loss and damage on this account under Condition 20.3 of the GCC. It was reiterated that it is not a case of automatic change in quantities which resulted from any inaccuracy in the BOQ but was a result of a radical change arising from a design change by NHAI in the alignment / modification of the finished level which resulted in such abnormal decrease in cutting (BOQ Item 2.01) and abnormal increase in the quantity of filling (BOQ Item 2.02). It, therefore, called for fixing a new rate under condition 52.2 of the GCC.

6. A reminder was sent on 6th September, 2006. Since no decision was forthcoming, the matter went before the DRB which gave its recommendations on 27th December, 2006 by a majority of 2:1. It was held that the reduction of BOQ Item 2.02 by the contractor was not justified under Clause 52.2 of the GCC. Further, it was held that clauses 12.2, 20.4

and 20.3 were not applicable.

7. The matter was then referred to a three-member AT where the only claim by the JV was for extra payment in the sum of Rs. 6,63,47,328/- for executing a huge increase in the BOQ on account of change and design/alignment by NHAI.

The impugned majority Award

8. By the impugned Award dated 9th May, 2011 by majority of 2:1, it was held as under:

(i) The change in quantities is not covered under cl. 51 of GCC as no 'instructed changes' were placed on Claimant pursuant to cl. 51.1 of GCC by Engineer.

(ii) The change in alignment which resulted in abnormal increase in fill quantities in Balugaon Bypass was not indicated in the contract and is different from the tendered layout. Therefore, the rate for earthwork would not be applicable in a changed situation and that too after the expiry of stipulated contract period.

(iii) The above changes are governed by clause 52 of GCC and not by cl. 51.1 of GCC which relates to "instructed changes" as no instruction or variation order was placed on Claimant.

(iv) Cl. 51.2 deals with quantities which are otherwise affected if there is a variation in the BOQ quantities.

(v) Clause 52.2 deals with a different situation and relates to change in the rate of existing work that is changing the BOQ rates, which is not the case here.

(vi) Clause 52.1 of GCC applies which specifies that any addition to contract price, which is due to result of application of clause 12.2 and 20.3 of GCC, is required to be determined in terms of cl. 52.1 GCC.

(vii) Changes in design have been made by Respondent vide cl. 20.4 of GCC / COPA. Accordingly, method of regulation of loss sustained by Claimant is stipulated in sub-clause 20.3 of GCC which provides that Engineer shall determine an addition to the Contract Price in accordance with clause 52, which was not done by Engineer. AT upholds that there were changes in design and alignment made by Respondent's Engineer which will fall under clause 20.4 and need to be evaluated under clause 52.1 of GCC.

9. It was further noted by the majority Award that NHAI had in its written submissions dated 26th October, 2010 admitted that the change in quantities of earthwork occurred due to change in alignment caused due to local conditions which could not be anticipated by it. Further, NHAI included 6 additional new underpass structures on demand of the locals after the award of the CA. The existence of soft and expansive nature of soil encountered in about 50% of the Balugaon bypass, which was not envisaged earlier, warranted increase in the embankment height to take care of the settlement aspect. Hence, the claim under Clause 12.2 of the GCC was held to be justified. It was further held that the JV was required to be compensated for the loss under sub-clauses 20.3 and 20.4 of the GCC due to change in design.

10. It was pointed out by NHAI before the AT that the JV had written a letter on 7th August, 2004 acknowledging receipt of the revised design.

However, as noted by the majority Award, by the said letter, an alternate proposal of FRLs in respect of RCW & LCW was submitted by the JV as directed by the Project Director (PD), NHAI, Berhampur. The majority Award assessed the extra payment @ Rs. 74 per cubic meter as fair and reasonable for the extra quantity of work executed by the JV. It, accordingly, awarded the JV a sum of Rs. 4,51,42,000 together with interest compounded monthly @ 10% per annum as stated in the Appendix to the Bid in terms of Clause 60.8 of COPA from 29th September, 2006 till the date of publication of the Award and future interest @ 12% per annum under Section 31(7) of the Act from the date of the Award till the date of payment.

Submissions of counsel for NHAI

11. It was submitted by Mr Abhishek Kumar, learned counsel appearing for NHAI that the majority of the AT failed to note that the present case pertained to merely the increase in the quantity of BOQ Item 2.02 and such increase had to be seen in view of the variation clauses of the CA i.e., Clause 55.1 of the GCC which specifically provided that the quantities mentioned in the CA were estimated quantities which were subject to change as per the construction requirements and the said fact was well known to the JV. He submitted that, as rightly noted in the minority Award, it was practically not possible to provide actual quantity of any material. There is a tendency of increase or decrease of quantities which every experienced contractor like the JV was aware of. He further submitted that it could have sought a clarification before submitting the bid or could have avoided submitting the bid.

12. Mr Abhishek Kumar submitted that a Detailed Project Report ('DPR') was prepared on the basis of a detailed survey of 54 kms of the road stretch. An aerial survey was done over only a small portion of the Balugaon bypass. There also a well recognized modern method of survey with the help of Global Positioning System ('GPS') was used. As such, the majority Award was based on incorrect facts.

13. It was submitted that the majority Award has attempted to rewrite the CA. It was further submitted that the majority Award wrongly observed that Clauses 12.2, 20.3 or 20.4 of the GCC were applicable. Further, on the one hand, in para 4.4 (i) of the majority Award it was held that the change in quantities was not covered under Clause 51 of GCC as no 'instructed changes' were placed on the JV; on the other hand, it was held in para 4.4 (iii) that the changes were governed by Clause 52 of the GCC and not by Clause 51.1. Referring to letter dated 7th August, 2004 of the JV, it was pointed out that the JV was fully aware of the changes and consented to it. The question of not having instructions with regard to changes was contrary to the record.

14. Mr Abhishek Kumar further submitted that the finding in the majority Award in para 4.4 (iv) to (vii) that Cause 52.1 applied to changes occurring due to applicability of Clauses 12.2 and 20.3 of the GCC was perverse since Clause 52.2 was nothing but a proviso to Clause 52.1 which had to be considered while interpreting Clause 52.1. It could not be read in isolation. It is submitted that the dichotomy brought about in the majority Award between Clauses 52.1 and 52.2 is legally as well as factually not tenable and

amounted to the AT substituting or writing a new contract for the parties. Mr Abhishek Kumar relied on the decision of this Court dated 17th November, 2009 in FAO (OS) No. 427/2007 [*National Highways Authority of India v Som Datt Builders–NCC-NEC (JV) & Ors.*] where, in similar circumstances, the Court held that the interpretation placed by the AT in respect of the contractual clauses in that case to be perverse and shocking to the judicial conscience.

15. Lastly, it was submitted by Mr. Abhishek Kumar that the AT had committed a legal misconduct by revising their fees without the consent of NHAI. The fees initially fixed by the order dated 1st February, 2007 was revised by the order dated 15th November, 2007 of the AT. The fee of Rs. 8,000/- per hearing was increased to Rs.22,000/- per hearing besides increasing the other heads of fees. Further, by the minutes of meeting dated 20th and 21st September, 2010, an additional fee of Rs. 20,000/- per arbitrator was charged for publishing and declaring the Award. There was no complexity involved in the matter and the volume of the work was also not great.

Submissions of counsel for the JV

16. In reply, it was submitted by Dr. Amit George, learned counsel appearing for the JV, that under Section 34 of the Act, the Award was not open to challenge only on the ground that the AT reached a wrong conclusion or on the interpretation of certain provisions of the contract was incorrect. He pointed out that the AT was the final Judge of both, questions of facts and law referred to it. While exercising its jurisdiction under Section

34 of the Act, the Court is not to sit in appeal over an Award given by an AT. The Court had no jurisdiction to investigate into the merits of the case or re-examine the evidence on record in order to find out whether the AT committed an error of law.

17. Dr. George further pointed out that as noted in the majority Award, it was evident on the basis of the admission of the Engineer vide its letter dated 14th January, 2006 written to NHAI that NHAI had in a totally unprofessional and grossly negligent manner collected the information regarding the quantity of work and the conditions at the work site, on which information the JV based its bid and work programme.

18. Dr. George further submitted that the decision relied upon by NHAI i.e., ***National Highways Authority of India v Som Datt Builders-NCC-NEC (JV)*** (supra) was rendered in an entirely different factual context. In that case, there was minor work which was to be performed by NHAI itself and accepted by the Court on the ground that there was no change in design.

19. Dr. George further submitted that *de hors* the aspect of fraud, NHAI clearly was a party to various defaults during the course of execution. There was change in alignments, revision in design, reduction in depth of cutting, abnormal change in lead etc. This led to a change in the very complexion and nature of the work for which delays and disruptions the JV was entitled to be compensated under Clauses 12.2 and 20.3 of the GCC. Dr. George pointed out that the survey conducted by NHAI for which the DPR was produced was undertaken in a totally unprofessional manner. In view of the clear admission by NHAI as regards the change in the alignment, revisions

in design etc. resulting in change of the very complexion and nature of the work, the JV was entitled to compensation in terms of Clauses 12.2 and 20.3 of the GCC. Since the work itself was of a different nature, the question of applicability of Clause 51.2 did not arise. This was not a case where the JV sought change in the rate of BOQ items. It only sought to urge that the work executed by it was of a fundamentally different nature. It was pointed out that Clause 52.2 was not a proviso to Clause 52.1 but in the nature of an exception and, therefore, had no application to the present case. Dr. George placed reliance on the decision of this Court in ***Chennai-Ennore Port Road Co. Ltd. v. RDS Project Ltd., 2016 (2) Arb. LR 155 (Delhi) (DB)*** and ***National Highways Authority of India v NCC-KNR, 2013 (2) Arb. LR 136 (Delhi) (DB)***.

20. On the question of revision of fees, it is pointed out by Dr. George that an order of the AT revising its fees was not a ground under Section 34 of the Act for setting aside the Award. Reliance is placed on the decision of this Court in ***National Highways Authority of India v. DS Toll Road Ltd. & Ors. (2015) 2 Arb. LR 416 (Del)***.

Analysis and reasons

21. The above submissions have been considered by the Court. There is a factual finding by the majority Award that no written instructions were in fact issued to the JV in respect of the change in design. There is merit in the contention of Dr. George that there were serious flaws in the manner in which the survey was conducted of a crucial part of the stretch of the Balugaon bypass over which the work was to be performed. Indeed, vide

letter dated 14th January, 2006 written by the Engineer to NHAI regarding the failure to conduct physical survey for the entire stretch was explained.

The following portion of the said letter makes this clear:

“During the preparation of the DPR, the Design Consultants were prevented by the local population to perform detailed site investigation throughout the entire stretch of the bypass because of their strong anti-bypass stance then. We had also sought police intervention with the help of the Employer but the opposition mindset of the local population was so severe that even the police could not convince the people and so the was unable to provide adequate protection for those staff that was involved in the tasks of soil investigations and survey operation to determine the bypass alignment. The Employer had duly been reported with all these adversaries in the design stage.

Consequently the entire stretch could not be physically surveyed and the design had to be prepared with the help of aerial survey drawings only.

The strong and persistent action by the local population continued unabated. Later in the supervision stage, the Government of Orissa had to swing into action in order to convince the local people. Actually, Mr MS. Padhi, the then Collector and District Magistrate, Khurda on behalf of the State the State Govt. treaded the 17 km of the proposed bypass stretch, interacted with the people, took them into confidence by honouring their suggestions regarding the bypass alignment and convinced them finally in favour of the bypass construction. Subsequently the alignment was demarcated in the field with the consent of the people and the revised land plans, land schedules were prepared by M/s DHV Consultants and submitted to the Employer for initiation of the land acquisition proceedings accordingly. After completion of the LA Process, the bypass land was handed over by the

P.D to the Contractor in the early part of the month of the July 2003 even as the onset of monsoon had already taken place.”

22. Added to this is the evidence of the Engineer referred to in the majority Award where it was admitted that there was a change in design and alignment. The work for which the bid was made and rates quoted against the BOQ was different from the work that was actually executed. There is a difference between the proposal by NHAI for a revised design to be prepared as per written instructions issued by NHAI to the JV and the JV accepting such instructions. In fact, the findings of the AT that there were no written instructions by NHAI issued to the JV is relevant.

23. The Court is not expected, in exercise of its jurisdiction under Section 34 of the Act, to sit in appeal over the above fact finding or re-appreciate the evidence. This was a case where due to the failure to carry out a proper survey of the entire stretch of road and the resultant increase in the quantities of earthwork, the very basis of the BOQ was changed. This important fact was held back by NHAI from the bidders. The conclusion drawn by the majority Award that this amounted to a fraudulent practice adopted by NHAI cannot be said to be perverse. Clause 12.2 of the GCC talks of physical inspection of the conditions which were foreseeable. Clause 20.3 of the GCC deals with the loss and damages due to employee risk. Clause 52.1 of the GCC states that all variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as "varied work"), shall be valued at the rates and prices set out in the CA if, in

the opinion of the Engineer, the same shall be applicable. Where the CA does not contain any rates or prices applicable to the varied work, the rates and prices in the CA shall be used as the basis for valuation so far as may be reasonable. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued.

24. The distinction between Clauses 52.1 and 52.2. of the GCC has been brought out by the JV in a tabular form as under:

	52.1 of GCC	52.2 of GCC
1.	A rate is to be fixed for the varied work.	A new rate is to be fixed for the BOQ item if existing rate of items of BOQ become inappropriate or inapplicable due to the effect of variation.
2.	No item of work in the BOQ is considered for rate revision.	Rates of items of Work in the BOQ alone is considered for rate revision.
3.	For valuing the varied work rate of items in the contract is the first consideration.	Existing rate of item cannot be considered at all for fixing the rate as it is only the existing rate that can be revised in this Clause.
4.	In valuation of varied work, the rate of items in the contract alone will be considered as the first method. Quantity of any item	The Engineer's power to change the rate of a BOQ item is further subjected to 5% contract value

	contained in the contract or its increase/decrease are not relevant considerations.	and 25% of BOQ (52.2 COPA)
5.	Fixation of rate for the varied work is not dependent on Clause 52.2	Fixation of new rate or BOQ item depend on Clause 51.1
6.	Applies when the Engineer instructs Varied work under Clauses 51, 12.2 and 20.4.	Applies when the Engineer decides to change the rate of existing BOQ items in the contract due to the effect of variation.

25. There is thus a clear distinction between the variation in the BOQ quantities in which case Clause 51.2 of the GCC would apply and where there are no instructed changes placed on the contractor and the increase in quantity is as a result of structural change in design. In such an event, Clause 52.1 of the GCC would be applicable. What was claimed by the JV were new rates for a different contract and not merely a variation of rates for the existing BOQ quantities. As pointed out rightly by the majority Award, Clause 51.2 dealt with quantities which were otherwise affected if there is a variation in the BOQ quantities. Therefore, the price of the work to be executed would be controlled by Clause 20.4 of COPA.

26. The facts in the present case are more or less similar to the factual situation in *Chennai-Ennore Port Road Co. Ltd. v. RDS Project Ltd* (supra) where the schedule of quantities disclosed in the NIT were found to be "horribly out of sync with the reality". On the other hand, In *National*

Highways Authority of India v. Som Datt Builders-NCC-NEC (JV) & Ors. (supra), there was no change in design and no such change was established before the AT. Further in para 17 of the decision, the findings of the learned Single Judge, whose judgment was under appeal, was summarized. One of those findings was that "there was no change in the design in view of the clear admission of the appellant before the DRB that the design was reviewed and found according to the specified criteria and the appellant was not able to establish any change in the design." In the present case, however, it has been factually found by the majority Award that the variation was much higher than 25% and it is Clause 52.1 which would apply.

27. The Court, therefore, holds that there is nothing perverse in the above finding in the majority Award. In any event, the settled legal position is that in exercise of its powers under Section 34 of the Act, the Court will not interfere with the Award only because an interpretation could be placed on the contractual clauses different from that determined by the AT. In ***National Highways Authority of India v. ITD Cementation India Limited***, (2015) 14 SCC 21, after discussing the case law including the decisions in ***McDermott International Inc. v. Burn Standard Co. Ltd.*** (2006) 11 SCC 181 and ***ONGC Ltd. v. Saw Pipes*** (2003) 5 SCC 705 it was concluded 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.”

Revision of fees by AT not a ground for invalidating Award

28. As regards the fixation of fees, it is seen that under Section 31(8) of the Act, there are two possibilities. One is that the parties could agree on the fees that should be paid to the AT. If the parties feel that the fee re-fixed by the AT is unreasonable, it would be open to them to agree to the contrary and convey that disagreement to the AT. In the absence of any agreement between the parties to the contrary, there is nothing in the Act which precludes the AT from revising the fees. Although it is expected that such fees would be 'reasonable', an order passed by the AT revising the fee of its members is not *per se* amenable to judicial review within the scope of Section 34 of the Act. As held in ***National Highways Authority of India v. DS Toll Road Ltd. & Ors.*** (supra), the revision of fees by the AT cannot constitute a ground on which the Award can be set aside. There, after referring to the decisions ***Union of India v. Singh Builders Syndicate*** (2009) 4 SCC 523 and ***Amiraj Construction Co. v. State of Maharashtra*** 1987 (3) Bom CR 607, it was observed as under:

“13. In terms of Section 31 (8) (a) the ATs were required to fix 'reasonable' fees. Unless the fees fixed by them are construed to not be 'reasonable', it cannot be said that they have acted in contravention of Section 31 (8) (a) of the Act. Both the ATs fixed their fees as per the ICA Rules and held that those were 'reasonable' fees. The mere reference to the ICA Rules would not *per se* render the fees not 'reasonable'. On the contrary, going by the observations of the Supreme Court in ***Singh Builders Syndicate*** (supra) one yardstick for determining whether the fees charged by an arbitrator is reasonable is to compare the fees with those fixed in institutional arbitrations. The ICA is an institution that has for many years now been providing arbitration services. It can be safely presumed that the fees fixed by it

is consistent with the acceptable norms. It is nobody's case that the fees structure of the ICA is not "reasonable". Merely because the fees in terms of NHAI's circular dated 13th January 2010 is less than the fees as per the ICA Rules, would not by itself make the fees in terms of the ICA Rules 'unreasonable'. Consequently, the Court is unable to agree with the submission of the learned counsel for the Appellant that the fees fixed by the ATs in the instant cases are not "reasonable". The observation of the Bombay High Court in *Amiraj Construction (supra)* reflects the general concern about arbitrators charging exorbitant fees. It by no means held that the fees under the ICA Rules is unreasonable."

Conclusion

29. For the aforesaid reasons, the Court holds that no ground exists to interfere with the impugned Award under Section 34 of the Act. The petition is, accordingly, dismissed but, in the facts and circumstances of the case, with no orders as to costs.

FEBRUARY 14, 2017

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S.MURALIDHAR, J