

\$~

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

Reserved on: February 27, 2017

Date of decision: April 18, 2017

+ **O.M.P. 1203/2013**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Mr. Arun Batta, Advocate.

versus

BRIDGE & ROOF CO. LTD. Respondent

Through: Dr. P.C. Markanda, Senior Advocate with
Mr. Rajesh Markanda, Mr. A.P. Dhamija
and Mr. Sumeet Pushkarna, Advocates.

AND

+ **O.M.P. 248/2014**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Petitioner

Through: Mr. Arun Batta, Advocate.

versus

BRIDGE & ROOF CO. LTD. Respondent

Through: Dr. P.C. Markanda, Senior Advocate with
Mr. Rajesh Markanda, Mr. A.P. Dhamija
and Mr. Sumeet Pushkarna, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

18.04.2017

1. These are two petitions under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') filed by the National Highways Authority of India ('NHAI') against Bridge & Roof Company Limited (hereafter Respondent/Contractor) challenging two Awards arising out of the same set of facts. OMP No.1203 of 2013 challenges the majority Award dated 8th August 2013 passed by the Arbitral Tribunal ('AT') allowing the claims of the Respondent Contractor to an extent of Rs.200.64 crores. OMP No. 248 of 2014 challenges the majority Award of the AT dated 2nd November 2013 rejecting the counter claims of NHAI to the extent of Rs.17,98,45,886 (inclusive of interest) towards advances given to the Contractor.

2. It must be mentioned at the outset that the claims of the Contractor and the counter claims of NHAI were referred to two separate ATs. Although the nominees of the NHAI and the Contractor respectively were same in both ATs, the Presiding Arbitrator was different. The other significant feature is that the dissenting Award in both ATs was given by the nominee of the NHAI.

3. The Government of India through the Ministry of Shipping, Road Transport and Highway launched a national highways development programme which envisaged 4/6 laning and strengthening of the existing national highways which included a stretch from Km 26.00 to Km 70.00 of Bhogpur-Mukerian Section of NH-1A in the State of Punjab. The Respondent's bid for undertaking to complete the work at the contract price of Rs.201 crores was accepted. The contract agreement was entered into between the parties on 4th October 2005.

4. The contract was a unit rate contract. The bidding documents contained detailed bill of quantities ('BOQ') containing the items of work with the estimated quantities of each item to be excluded by the contract i.e. M/s. Bridge & Roof Company Limited. The parties adopted the terms and conditions of the contract as contained in the General Conditions of Contract ('GCC') and Special Conditions of Contract ('SCC') to the extent they modified and amended the GCC clauses.

5. The date of start of work was 22nd November 2005. The stipulated date of completion was 21st May 2008. According to NHAI, the Respondent abandoned the work after 22nd April 2008. The firm of M/s. Engineers and Management Associates was engaged by NHAI to supervise the construction work. They were appointed as 'Engineer' for the project.

6. In terms of the contract, NHAI was to give the Respondent 10 Kms of land at the time of commencement of the project, 12 Kms after six months of commencement and 22 Kms after 12 months of commencement. According to NHAI all 22 Kms of land was made available to the Respondent at the beginning of the project out of which 10.535 Kms land between Km 28 to Km 45 was found to be obstruction free during the joint survey. It is also alleged by NHAI that the said land was between a concentrated stretch of Km 28 and Km 39 and Km 43 and Km 45. Besides most of the site for structure work, according to NHAI was available to the Respondent despite that the progress achieved by the Respondent was only 7% on account of poor planning and management at the site. It is stated that the availability of land was delayed on account of land acquisition

formalities involved between the NHAI and the State authorities. This according to NHAI was beyond its control. It is stated that the matter was nevertheless resolved and land was progressively made available to the Respondent after disbursement of compensation to the land owners. It is claimed that in terms of the joint survey conducted on 26th March and 1st May 2008 the availability of land was 14 Km and 20.485 Km respectively. It is claimed that as on 21st May 2008, 25 Km of land was made available.

7. The case of the Respondent, however, is that the date of commencement was not specified in the contract as 22nd November 2005. This hinged upon compliance by NHAI with some of the express obligations contained in Clause 41.1 of the Conditions of Particular Application ('COPA'). While it is not disputed that the work was to be completed within 30 months of the date of commencement, the contract contained a number of reciprocal promises to be performed by NHAI. This included handing over of possession of land in terms of Section VIII Schedule A to the contract; handing over land in continuous stretches in terms of the construction programme approved by Engineer; preparing and handing over drawings and designs in time; making payment of advances and interim bills; appointing of Engineer before the date of commencement and finally determining compensation while granting extension of time ('EOT'). The case of the Respondent is that on all these accounts there was a failure by NHAI to comply with its obligations. The Respondent furnished to NHAI four bank guarantees ('BGs') amounting to Rs.35 crores covering the entire project involving 44 Kms. The Respondent claimed to have mobilised the machinery and equipment worth Rs. 30 crores for execution of the project. It

is stated that on account of various breaches committed by NHAI, the work could not be completed. The work front availability till September 2008 i.e. the date of termination of the contract was about 25% of the area that should have been handed over to the Respondent.

8. There were ten claims filed by the Respondent for the aggregate value of Rs.18,545.02 lakh. This was apart from interest and costs of arbitration. While NHAI could have preferred a counter claim in this arbitration itself, it chose to file an independent statement of claim before another AT as already mentioned hereinbefore. 12 claims were filed by NHAI.

9. As far as the first arbitration is concerned, the majority of the first AT by their Award dated 8th August 2013 held as under:

“1. In respect of the first Claim "for dues related to performance" we award a sum of Rs. 360.12 lakh in favour of Claimant Bridge & Roof Co. (I) Ltd. and against Respondent National Highways Authority of India.

2. In respect of Claim no. 2 relating to "Delay Damage Claims" we award a sum of Rs.11201.15 lakh in favour of Claimant Bridge & Roof Co. (I) Ltd. and against Respondent National Highways Authority of India.

3. As regards Claim no. 3 pertaining to "Termination losses" we award a sum of Rs. 8324.05 lakh in favour of Claimant Bridge & Roof Co. (I) Ltd. and against Respondent National Highways Authority of India.

4. As regards Claim no. 4 "on account of Equipment advance" we award a sum of Rs. 9.31 lakh in favour of Claimant Bridge & Roof Co. (I) Ltd. and against the Respondent National Highways Authority of India.

5. We decline Claim no. 5 relating to "litigation costs" which pertains to cost incurred in proceedings in the Hon. Calcutta High Court and Committee on Disputes. We leave the parties to bear their own respective costs.

6. As regards Claim no. 6 pertaining to "maintaining validity of Bank guarantees" we give a direction by way of award that National Highways Authority of India shall release the Bank Guarantees forthwith in favour of Claimant Bridge & Roof Co. (I) Ltd.

7. As regards Claim no. 7 relating to "interest" the same has been awarded separately in respect of each claim.

8. We decline the Claim no. 8 pertaining to "loss of opportunity to earn bonus".

9. As regards Claim no. 9 pertaining to "cost of confiscated material" we award a sum of Rs. 170.23 lakh in favour of the Claimant Bridge & Roof Co. (I) Ltd. and against the Respondent National Highways Authority of India.

10. As regards Claim no. 10 pertaining to levy of "Custom Duty" the same is to be adjudicated by Custom Authorities under Custom Laws and we decline to give any award on the amount of Custom duty."

10. As far as the second arbitration concerning the claims of NHAI was concerned, the issues framed by the second AT read as under:

"1. (a) Whether the claimant handed over site in terms of clause 1.4 of ITB (p. 108 of Contract) read with Schedule A (p. 79 of contract)?
(b) If not, the consequences thereof?

2. (a) Whether handing over of the sites was in piecemeal and in fragmented manner with hindrances?
(b) Whether the Claimant incapacitated the Respondent from performing their reciprocal contractual obligations?

3.(a) Whether the Claimant caused delay in execution of work by

delaying drawings and making major changes therein?

(b) If yes, the effect thereof?

4. (a) Whether the action of the Claimant in terminating the contract on 5.9.2008 was illegal and non-contractual?

(b) If so, the consequences thereof?

5. Whether by not challenging the findings of the DRB dated 24.12.2008 that termination of contract was not in order, the Claimant is debarred from contending anything to the contrary in the arbitration proceedings?

6. whether the claims preferred by the Claimant can be adjudicated in view of the Preliminary Objections filed by the Respondent?

7. Whether the Claimant is entitled to the claims preferred by it?

8. Relief, including interest and costs?"

11. The majority of the second AT by their Award dated 2nd November, 2013 held as under:

i. Claim No.1 was rejected.

ii. Claim No.2 was allowed holding that NHAI was entitled to the return of Rs.12,14,17,976 by way of principal amount of advances and Rs.5,84,27,910 by way of interest for the period up to 31st May, 2011. Out of the above amount it was held that NHAI would be entitled to *pendente lite* and future interest till payment at 10% per annum calculated with effect from 1st June, 2011 on the principal amount of Rs.12,14,17,976.

iii. The remaining claims were all rejected.

12. This Court has heard the submissions of Mr. Arun Batta, Advocate

appearing for the NHAI and Mr. P.C. Markanda, learned Senior Advocate appearing for the Respondent. In both arbitrations there was a separate dissenting Award by the nominee of NHAI whereby the claims of the Respondent were rejected and the claims of NHAI were allowed.

13. The scope of interference by this Court with an arbitral award under Section 34 of the Act is limited. The legal position has been summarised by the Supreme Court in *NHAI v. ITD Cementation (2015) 14 SCC 21* 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.”

14. Earlier, in *Delhi Development Authority v. R.S. Sharma and Co. (2008) 13 SCC 80*, the Supreme Court explained the legal position as under:

“From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

- (i) fundamental policy of Indian law; or
- (ii) the interest of India; or
- (iii) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India”

15. Turning to the case on hand, one of the issues that arose before both the ATs was regarding the party that was in breach of the contract. In this context, both ATs examined if there was a failure by the NHAI to acquire and provide land to the Respondent in terms of the contract.

16. The majority Award in the first AT returned the following findings:

“ ... It is correct that land was not handed over to the Claimant as per the contract terms and whatever site was given it was not in continuous stretches. Claimant has said that effectively less than 2 months before the date of completion it was given possession of only 10.010 Km. (out of 44 Kms) When put to the learned counsel for the Respondent, he could not deny the same ”

"NHAH could not even perform its basic act/duties of providing land to the Claimant and thus committed fundamental breach of the agreement. .. ”

" A party which commits fundamental breach of the contract is certainly' not 'in position to terminate the contract on' alleged breaches of contract of the other party ”

"Section 3E clearly provides for notice and surrendering of possession thereof. Sending of letter like the one quoted above would not mean that claimant is in possession of the land to build the road on the land (and virtually dispossessing the land owner or any other person in possession of the land in face of the provisions of Section 3E of the Act). In (Any) other interpretation of Sec. meaningless.

"It is wrong to contend that in case of road projects land is handed over merely by official letters. It is wrong to contend on the part of NHAI that it handed over the site to the Claimant in terms of Clause 44 of the Contract read with Schedule A. ... "

17. As far as the second AT is concerned, the majority Award returned the following findings of fact;

"M-1.22 It is held under issue no. 1 that the Claimant failed in handing over site in terms of Clause 1.4 of ITB (p. 108 of Contract) read with Schedule A (p. 79 of Contract). The Claimant has to suffer the consequences thereof." (paragraph M. 1.22 on page 22 of the 2nd award)

"M-2.26 It is held that from the documentary evidence it is amply borne out that handing over the sites was in piecemeal and in a fragmented manner with hindrances. The documents do spell out that the Respondent was incapacitated from performing its obligation for failure of the Claimant to perform their reciprocal contractual obligations. Issue Nos. 2 (a) & (b) are decided accordingly."

"M-3.41 As a result of the above discussion, to sum up, we find the work was possible only on 8-9 Kms on the RHS of the highway, 19 culverts, 14 Minor Bridges and 3 Major Bridges upto pier/well level only. In addition, other hindrances such as (a) Change in culvert drawing on 22.04.2008 (b) Non-issue of Abutment Well drawing of Major Bridge at Km. 28+938; (c) Constant changes in drawings and non-issue of drawings; (d) Fragmentation of site, and (e) one tree was yet to be cut by the Claimant from the abutment A-1 of Major Bridge at Km 59+505, the progress achieved by the Claimant was possibly

the maximum that could be physically achieved at site."

"M-3.45 The upshot of what has been stated hereinabove is that the cause for delay in execution of work is attributable to the Claimant and that amounts to breach of contract on the part of the Claimant, NHAI and not the Respondent, B&R Co."

18. The ground raised by NHAI that its responsibility ended with the notional handing over of land to the Respondent and that it was the duty of the Respondent to make such land hindrance free was rejected by the majority in both the ATs. The majority Award in the first AT in this regard held as under:

"... It is obligatory for NHAI to make available (site) so as to enable the Claimant to execute works thereupon. Site which was handed over has to be such as to enable the Claimant to execute works. We agree with the contention of the Claimant that merely handing over of land on paper on which it is not possible to execute any work is thus not envisaged in the contract. Land which was handed over ought to legally belong to or owned by NHAI. NHAI in the present case has not even paid the compensation to the landowner for acquisition of land.

"It is a matter of fact that as late as February, 200B NHAI could only deposit compensation for acquisition of 19.430 Km out of total length of 44 Kms and when the term of the contract was ending on 20.5.200B.

"Claimant has contended that under Clause 110.3 it is only when NHAI as employer had to be made payment to the authorities from whom contractor shall have to obtain necessary permission for removal of the trees and utilities. Record of these proceedings does not show as to when NHAI deposited the amount with the authorities.... .

"It does appear to us that in the circumstances of the present case reliance of clause 110.1 of the Technical Specifications is not

correct." (p. 74 - 75 of award)"

19. The majority of the second AT, on the same issue, held as under:

"M-2.B It was submitted on behalf of the Respondent that in terms of Clause 5.2 of COPA, Clauses 42.1, 42.2, 1.1 (f)(i), 1.1 (f)(vii), 1.4 ITB, Schedule VIII, Section A of the contract (reproduced above) have precedence over Clause 110 of the Technical Specifications. The above-said Clauses of Contract clearly obligate the Claimant to make available "Site" so as to enable the Respondents to execute "Works" thereupon. Thus, the Site which is handed over has to be such as to enable the Respondents to execute Works. Mere notional handing over of land on which it is not possible to execute any Works is not envisaged by the contract. Further, the land handed over ought to legally belong to the Claimant - In the present case (as demonstrated above) Claimant has not acquired a major portion of the Site on which the Works were to be carried out.

"M-2.12 During the course of hearing a very specific stand was taken on behalf of Respondent that at no point of time the Claimant has ever written to the Respondent and alleged that the works were being delayed due to failure of the Respondent to co-ordinate with various authorities/service providers. This stand of the Respondent could not be refuted on behalf of the Claimant."

20. As already noticed by the majority in both Awards there were admissions by the NHAI regarding its failure to comply with its obligations as envisaged in the contract. This was in the joint surveys regarding availability of land held on 21st December 2006, 26th March 2008 and 1st May 2008. The Minutes of Meeting ('MOM') dated 4th April 2006, 6th December 2006, 3rd January 2007, 6th March 2007, 4th April 2007, 4th July 2007, 31st October 2007 and 6th February 2008 record the statements of the Contractor regarding the entire stretch of land not made available. In addition in its letter dated 31st January, 2008, the Respondent adverted to the

discussions held on 12th December, 2007 at the headquarters of NHAI during which NHAI was unable to indicate any time schedule for handing over the balance length of land. There were also admissions in the letters granting EOT. The Engineer by his letter dated 6th May, 2008 recommended EOT up to 31st May, 2009. In this letter it was clearly stated that as on 29th February, 2008 “only 10.485 km of land was available to the Contractor out of total 44 km length of project. With the present progress about 7% the project is likely to be delayed by two years.”

21. Even the DRB in its recommendations dated 22nd, 23rd and 24th December 2008, observed that “in this case NHAI failed to fulfil their material obligation of handing over site to M/s. B&R Co. Ltd. by giving only 20.59% work front up to 21.5.2008 i.e. the scheduled completion date of project....”

22. There was also an admission by the NHAI itself in its representation before the AT to the following effect:

“.... Considering the available work front of more than 10 KM and most of the structures, the total scope of work available to the Claimant was 34.59% out of which, considering all hindrances, 20.59% of progress should have been achieved by the Claimant till May 2008. However, the progress achieved by the Claimant was only 7% due to its own fault and poor planning & management at site. No doubt that the availability of land was delayed due to land acquisition formalities involved between the Respondent and the State Authorities, however, the matter was resolved and the land was being progressively made available to the Claimant after disbursement of compensation to the land owners”

23. In view of the overwhelming evidence before it on the issue, the

conclusion arrived at independently by the majority in both ATs that there was a failure on the part of NHAI to hand over stretches of land to the Respondent as envisaged under the contract cannot be held to be patently illegal or perverse or shocking to the judicial conscience so as to attract any of the grounds of invalidation of an Award as set out under Section 34 of the Act.

24. The conclusion by the majority in each of the ATs on the question of the illegality attached to the termination of the contract by the NHAI was more or less the same. On this aspect the majority of the first AT held as under:

“NHAI could not even perform its basic act/duties of providing land to the Claimant and thus committed fundamental breach of the agreement. ... ”

"NHAI was in position to hand over only 10-10.5 km. of site till 2 months prior to 21.5.2008, the date of completion of the contract. It committed breach of the basic condition of the work. When there is no land there cannot be any road. Records show that the balance site had not been acquired by NHAI even till 5.9.2008 when the contract was terminated. As a matter of fact NHAI was even unable to indicate as to when the balance site would be made available to the Claimant. It has also been shown by the Claimant that NHAI did not hand over the site in continuous stretches as per approved construction programme submitted in terms of Clause 14 read with Clause 42.1 of the contract. In such a circumstance it may not be necessary for the Tribunal even to comment on the statements made by the Claimant which it said was based on the record that NHAI did not hand over the drawings of major bridges and the drawings given were full of discrepancies and to rectify that NHAI took long time. Not only that, NHAI made numerous changes in the drawings once given and also put numerous 'holds' on execution of the work and even changed the requirements/specifications of the drawings pertaining to culverts. Claimant says that as per NHAI itself the maximum work that could have been carried out by the Claimant on the sites handed over to it

was 20.59% establishes the fact that NHAI committed breach of the contract. A party which commits fundamental breach of the contract is certainly not in position to terminate the contract on alleged breaches of contract of the other party "

25. On the same issue the second AT held as under:

"M-4.11 It cannot be disputed that the Contract under consideration does have reciprocal obligations of the parties. The Respondent could not have performed its obligations unless the Claimant had performed its obligations specially the one of making available the site for work."

"M-4.21 In the light of the above discussion, under Issue No.4, it is held that Claimant's action of terminating the Contract was illegal and not in conformity with the provisions of the Contract. The Claims which are based upon termination of contract cannot be allowed as termination itself has been held to be illegal."

"M-7.3 As to Claim No.1 the first part of the claim, i.e. invocation of Performance Bank Guarantee of Rs. 20.10 crore proceeds on the basis that the Respondent failed to perform the contract in terms thereof thereby leading to termination of contract. We have already found that the contract could not be performed due to fundamental breaches of contract committed by the Claimant itself as argued under Issue No. 1-2-3. Under Issue Nos. 4 and 5, we have held the termination of contract by the Claimant was gross illegal. Since the termination of the contract was illegal, the Claimant cannot be allowed to enforce the terms of Clause 10.1 and 63 of the contract. They are not entitled to any relief under the present sub-claim."

26. On the question whether there was a failure by NHAI to provide the drawings of structures within the stipulated time, the factual finding of the majority of the first AT was as under:

"As noted above in support of its contention that the Claimant was directed time to time to extend the work which the Claimant failed to do so. Reference was made to letters dated 27.3.2008; 16.4.2008 and

14.5.2008 from the Engineer. These letters are close to the date of completion of the contract. With respect to these letters Claimant has alleged that these letters were written only after Claimant was pressing NHAI for payment of compensation. It is difficult to appreciate what weight can be attached to such letters particularly when examined in the context of failure on the part of NHAI in handing over the site for construction of road in terms of the contract. When Claimant pointed out steps taken by it or preventions faced by it for construction or non-construction of culverts, minor bridges, major bridges, Bhogpur fly-over, underpasses and walls, NHAI failed, to respond to the same”

27. The majority of the second AT returned the following factual finding:

“M-2.13 On behalf of the Respondent, a lengthy tabulated statement running into 50 printed pages has been compiled and made available (see Vol. WS 1 pages 57-106). This table sets out reference to several documents including correspondence and Minutes of Meeting, picking up therefrom the nature of hindrances and obstructions. Some of them are set out hereunder:

- i. Land owners of acquired land not permitting work by the contractor because they were not paid compensation.
- ii. Drawings of major structures not made available by Claimant.
- iii. Intervention of pipeline, a service utility, which could not be crossed.
- iv. Existence of various utilities hampering the works.
- v. Six schools falling in the alignment (see Vol. 4, p. 486, Ex. R-88).
- vi. Existence of -trees which were required to be cut subject to permission from the Forest Department.
- vii. An old existing bridge which needed to be dismantled to accommodate the proposed bridge.

viii. Oral instructions of the Project Director NHAI to temporarily suspend the road work between CH. 32+600 to CH 33+100 (a 500 m stretch) due to abrupt change in the ,Longitudinal Profile between GOOD FOR CONSTRUCTION DRAWINGS... and TENDER DRAWINGS.

“M-2 .14 What we have stated hereinabove stands substantiated by the documents available on record and these documents find a reference in the tabulated statement made available on behalf of the Respondent which we have referred to hereinabove.”

28. Having perused the majority Awards of both ATs the Court is unable to be persuaded to hold that the above factual findings are perverse or contrary to the evidence on record or in any manner opposed to the fundamental policy of Indian law in the manner envisaged under Section 34(2)(b)(ii) of the Act.

29. Coming to the claims of the Respondent which were allowed by the majority in the first AT it is seen that these too were based on findings of fact. As far as the Respondent's claims were concerned:

a. Claim No.1 was for a sum of Rs.249.91 lakh for dues related to performance security. The Respondent had submitted a detailed bill of work done up to 5th September, 2008, i.e., the date of termination. NHAI was unable to rebut any of the figures mentioned therein. Significantly it was noticed by the majority of the first AT as under:

“It may be noticed that in spite of the details having been given in respect of each of the sub-items of claims made by the Claimant, respondent NHAI has not commented upon the merits of any such sub-claims, which amounts to admission on the Part of NHAI.”

Therefore, the Respondent was entitled to a sum of Rs.249.91 lakh. Interest at 9% per annum was awarded on the said sum from the date of termination till the date of the Award.

b. Claim No.2 was for a sum of Rs.7773.18 lakh towards delay damage claims. The majority Award in this regard held as under:

“Claimant has made a claim for Delay damage by giving cogent reasons as to what approach it adopted as far as Part B of Delay damage claim is concerned. Reliance has been placed on the "Standard Data Book For Analysis of Rates (First Revision) Published by Indian Roads Congress on behalf of the Govt. of India, Ministry of Shipping, Road Transport & Highways, New Delhi-23", on the basis of which complete details have been given. There is no answer to any of these details by NHAI or even that the Claim is not in accordance with the criteria given in the Standard Data Book for Analysis of Rates NHAI does not contradict the same which amounts to acceptance on its part ... ”

30. Apart from reiterating the standing taken by it before the AT, NHAI has been unable to point out in what manner the above factual findings by the majority can be said to be opposed to the fundamental policy of Indian law.

31. Claim No.3 pertained to the termination loss and comprised claims for loss of profit, damages for illegal confiscation of machinery and equipment and demobilization costs. Applying the principles explained in *A.T. Brij Paul Singh & Bros. v. State of Gujarat (1984) 4 SCC 59*; *Mohd. Salamatullah v. Government of Andhra Pradesh (1977) 3 SCC 590* and *Dwarka Das v. State of M.P. (1999) 3 SCC 500*, the majority awarded loss of profit at the rate of 12% of the balance value of work as that was held to be reasonable in the circumstances of the case. Accordingly the loss of profit

was worked out as Rs. 2,244 lakhs. As regards the damages for illegal confiscation of the machinery and demobilisation cost, it was noted that NHAI had not filed any reply contradicting the claim. A sum of Rs.4,123.18 lakh was awarded towards illegal confiscation of the machinery and Rs.81.72 lakh together with interest.

32. Claim No.4 was for replacement of Equipment Advance BG. The Respondent was held entitled to compensation of bank commission charges for the additional value of BG in the sum of Rs.9.31 lakh.

33. Claim No.6 was for keeping the BG alive. This was negated by the majority since this claim was not made before the DRB. However, the action of the NHAI in seeking to encash the BG was held wrongful. As rightly pointed out by the Respondent, the BGs tendered by it should be returned and the amount of advances adjusted from the amount awarded by the majority of the first AT.

34. Claim No.7 was towards interest and the majority held that the Respondent would be entitled to interest @ 9% per annum from the date of cause of action till the date of Award.

35. Claim No.8 was towards loss of opportunity to earn bonus. This was rejected.

36. Claim No.9 was for cost on material confiscated by NHAI. The Respondent was held entitled to Rs.118.14 lakh, which claim anyway was not disputed by the NHAI. This was awarded together with interest @ 9%

per annum from the date of termination till the date of Award. The AT noted that even as per the joint inventory taken by the parties it was plain that 200 bags of useless set cement were returned to the Respondent in April, 2011 and four cutting edges, which were mentioned in the taking over certificate of September, 2008 were not returned. It is the cost of these 200 bags and the four cutting edges that have been awarded. Therefore, this was virtually an undisputed amount.

37. Claim No.10 regarding liability to pay customs duty was rejected.

38. Turning to the second AT, the majority of which rejected all but one counter claim of NHAI. It is seen that Claim No.1 was contingent on NHAI being able to show that the termination of the contract was justified. This would have then justified the invocation of the BG of Rs.20.10 crore. The majority held that there were fundamental breaches of the contract committed by NHAI. This has already been referred to hereinbefore. In the impugned Award of the majority of the second AT, the finding in this regard reads as under:

“M-7.3 As to Claim No.1 the first part of the claim, i.e. invocation of Performance Bank Guarantee of Rs.20.10 crore proceeds on the basis that the Respondent failed to perform the contract in terms thereof thereby leading to termination of contract. We have already found that the contract could not be performed due to fundamental breaches of contract committed by the Claimant itself as argued under Issue No. 1-2-3. Under Issue Nos. 4 and 5, we have held the termination of contract by the Claimant was gross illegal. Since the termination of the contract was illegal, the Claimant cannot be allowed to enforce the terms of Clause 10.1 and 63 of the contract. They are not entitled to any relief under the present sub-claim.”

39. As already noticed Claim No.2 of NHAI was allowed but made subject to the first Award concerning the claims of the Respondent. This was the right order to be passed since the issue was gone into by both ATs.

40. As regards Claim No.4 of NHAI, i.e., damage and/or deterioration in the works on account of the alleged abandonment of the works by the Respondent between 22nd May, 2008 and 5th September, 2008, the majority Award found that the NHAI was unable to prove that the Respondent abandoned the project. According to the majority “documents on record show to the contrary.” Further the documents placed on record by the NHAI did not show the period when the alleged deterioration occurred. Thirdly, there was no notice received by the Respondent either from the employer or the Engineer for rectification of any loss, damage or defect in the work. Additionally no notice or determination was made under Clause 20 or 63.3. No proof of payment made to any successor agency was also produced. In the circumstances the majority held that NHAI had been unable to substantiate counter claim No.4.

41. Again apart from reiterating what was already submitted before the AT, which has been rejected in comprehensive terms there was nothing placed before the Court to persuade to hold that the above determination by the majority was perverse or contrary to the evidence placed on record. The Court is not sitting in appeal over the Award of the AT and is not expected to re-appreciate the evidence.

42. Claim No. 6 of NHAI was towards costs of supervisions and administration of the balance work in the sum of Rs.378.31 lakh. This was

held to be a mere extension of claim No.5, which had already been rejected. The majority noted that the counsel for the NHAI was unable to point out the provision in the contract which enabled recovery of such sum from the Respondent. Apart from saying that the AT should have taken the entire facts into consideration and law on the subject even in the present petition, NHAI has failed to show the provision in the contract which would enable the recovery of the above sum.

43. Claim No.7 of NHAI was for Rs. 3,17,09,225 towards repair and maintenance. The findings of the majority of the AT in this regard in the impugned Award read as under:

“M-7.22 During the course of hearings held on 01.06.2011, the Tribunal had enquired from the Claimant - Whether there was anything on record to show that the defects/discrepancies existed when the Respondent left the work? A further question was put as to - Whether an inventory/list had been prepared by the Engineer to show what were the defects/discrepancies, if any, left by the Respondent? To both these very pertinent questions, the Claimant had simply stated that they would revert back.

"M-7.23 On behalf of the Claimant reliance was placed on Clauses 49.5 and 63.3 of the Contract according to which if the Contractor has failed in carrying out instructions of the Employer (here referable to repair and maintenance), then the value of the work done by the Employer can be recovered from the Contractor. On behalf of the Respondent, it was submitted that these clauses will not apply for several reasons. Firstly, Clause 49 provides for rectification of defects observed during the "Defect Liability Period". In the present case, the contract was terminated on 05.09.2008 and hence, Clause 49 does not have any application in this case. Secondly, Clause 49.4 envisages a process of consultation between the Employer, Engineer and Contractor before any liability can be saddled upon the Contractor. In the present case, there is no evidence of any such consultation.

Thirdly, the sine qua non for application of both Clauses 49.4 and 63.3 is a Determination by the Engineer. In the present case, no such determination of the Engineer has been placed on record.

“M-7.24 The claim is rejected.”

44. It is submitted by NHAI that the majority of both ATs should have appreciated the documentary proof placed on record by NHAI, the BOQ and the contract agreement for rectifying the defects. That is precisely what the majority in both ATs has done. Therefore, there is no merit in the contention of the NHAI.

45. Claim Nos. 3, 8 and 9 of NHAI were rejected on the ground that there was no evidence to substantiate the expenses allegedly incurred by the NHAI. Apart from stating that the majority erred in rejecting the claims nothing is placed on record to show in what manner the majority has erred.

46. Claim No.10 of NHAI was on account of toll collection. In other words the case of the NHAI was that if the Respondent had not abandoned the work and completed it as stipulated NHAI would have collected Rs.66,95,08,984 as toll amount. As rightly pointed out by the majority of the AT, having incorporated the liquidated damages clause in the contract, the NHAI was not entitled to claim the above amount. In any event it failed to prove the quantum of loss. Even in the present petition it is not explained how the above amount has been calculated by the NHAI.

47. Claim No. 11 of NHAI was on account of loss of revenue to the Government on account of exemption of excise duty on imported equipment in the sum of Rs.43,27,520. Indeed NHAI did not have any authority on

behalf of the Union of India to decide upon the correctness of the exemption availed by the Respondent. The claim was rightly rejected by the majority.

48. Claim No.12 of the NHAI was for a sum of Rs.50 crore due to loss of life, damage to vehicle, excess consumption of petrol, oil and light, etc. Here again there was no proof placed on record to justify the above claim.

49. No grounds whatsoever have been made out for interference with the majority Award in both the arbitrations, i.e., the allowing the claims of the Respondent and rejection of all but one claim of NHAI. It is clarified that it would not be necessary for the Respondent to keep the BGs in question renewed and the NHAI should return the BGs to the Respondent forthwith.

50. For all the aforementioned reasons, the Court finds no merit in either of the petitions. They are accordingly dismissed with costs of Rs.20,000 in each of the petitions, which would be paid by the NHAI to the Respondent within four weeks.

S. MURALIDHAR, J

APRIL 18, 2017

dn/b'nesh