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

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Pronounced on: 28.09.2018

+ O.M.P. (COMM) 36/2017

JAINTIA HIGHWAY PVT. LTD

....Petitioner

Through Mr. Dayan Krishnan, Sr. Adv. with
Ms. Shally Bhasin, Mr. Karan Lahri, Mr. Vaibhav
Niti, Mr. Chaitanya Safaya and Ms. Shruti Garg,
Adv.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Respondent

Through Mr. Ragvesh Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (JUDGMENT)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act seeking to impugn the Award dated 7.10.2016. A tender was floated by the respondent for construction work of two laning of Jowai-Meghalaya/Assam Border section of NH-44 (Km 69.2 to Km 173.2) to be executed on DBFOT Pattern i.e. Design Build Finance Operate and Transfer Basis. One Simplex Infrastructure Ltd. was declared the successful bidder and a Letter of Award was issued in its favour on 20.3.2012. The Letter of Award required formation of a Special Purpose Vehicle (SPV) by Simplex Infrastructure Limited for the purpose of execution of the project. Hence, the petitioner Company Jaintia Highway Private Limited was incorporated. On

05.06.2012 a Concession Agreement (*hereinafter referred to as the 'CA'*) was executed between the parties.

2. The Concession Agreement envisaged that the Appointed Date would be declared upon the fulfillment of the conditions precedent by the parties. The condition precedents to be fulfilled by the respondent as per the CA were listed in Clause 4.1.2 of the CA. One of the provisions regarding fulfillment of the conditions precedent was that it was essential for the respondent-NHAI to provide vacant access and Right of Way (*in short the 'ROW'*) of least 80% of the total area of the site.

3. The Appointed Date is defined in Article 48 of the Concession Agreement read as follows:-

“Appointed Date” means the date on which Financial Close is achieved or an earlier date that the Parties may by mutual consent determine, and shall be deemed to be the date of commencement of the Concession Period. For the avoidance of doubt, every Condition Precedent shall have been satisfied or waived, as the case may be, the Appointed Date shall be deemed to occur only each and every Condition Precedent is either satisfied or waived, as the case, may be”

4. Hence, the two main requirements stipulated for determining the Appointed Date was that financial closure should have been achieved and all conditions precedent should have been satisfied before declaration of the Appointed Date.

5. The case of the petitioner is that the petitioner initiated and completed the process of obtaining financial closure on 04.06.2013. The bank of the petitioner duly intimated the same to the respondent. It is pleaded by the petitioner that it duly fulfilled the contractual obligations within the time set

out in the Concession Agreement. It is further contended that the respondent was always aware that a large amount of land was still required to be acquired for the project. A total of 186.02 hectare land was required whereas only 130 hectare was the existing land at site. The case of the petitioner is that 80% of the Right of Way for the land had to be provided by the respondent before the Appointed Date could be declared whereas only 69.88 % of land had been acquired. It is pleaded that despite being aware that the respondent had not yet acquired 80% of the land as required by the Concession Agreement and despite the fact that there was a controversy in respect of the acquisition the respondent went ahead and declared illegally that it had fulfilled all its conditions precedent and that the petitioner too had fulfilled all its conditions precedent and declared the Appointed Date.

6. The respondent on 10.01.2014 declared that the Appointed Date had been fixed. It was pleaded that the declaration of 10.01.2014 as the Appointed Date was a unilateral illegal declaration.

7. On 08.08.2014 the respondent issued a notice upon the petitioner under clause 37.1 of the Concession Agreement calling upon the petitioner to cure the alleged breaches within 60 days. On 22.10.2014 the respondent issued a notice of intention to terminate the Concession Agreement in terms of clause 37.1.2 of the Agreement. The Performance Bank guarantee was invoked on 10.11.2014. A Supplementary Agreement was entered into between the parties on 29.04.2015 where both the parties agreed to adjudication through Arbitration Rules of SAROD. Thereafter the Arbitral Tribunal was constituted.

8. The learned Arbitral Tribunal (*hereinafter referred to as the 'AT'*) has now given its Award dated 7.10.2016. The petitioner raised the following claims before the learned Arbitrator:-

10.1 CLAIMS OF CLAIMANT

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| Claim No.1 | Reimbursement of enhanced PBG of Rs.19.58 Cr. along with interest there on |
| Claim No.2 | Compensation for loss of profit of Rs.118.0 Cr. on account of illegal termination of CA by respondent. |
| Claim No.3 | Reimbursement of Rs.10,03,966/- on account of expenses incurred by Claimant on the project |
| Claim No.4 | Interest on sums claimed by the Claimant as well as the cost incurred by Claimant on defending the matter |

9. The AT framed the following issues:

- i) Whether Respondent fulfilled all the conditions precedent and more particularly the condition precedent to make available 80% of ROW, obtaining Environmental clearance including Forest clearance etc?.
- ii) Whether the Respondent breached CA declaring the Appointed Date through issue of letter dated 10.01.2014?
- iii) Whether the appointment of IE by respondent was contrary to the terms of CA?
- iv) Whether encashment of PBG of Rs. 19.58 Crs. by the Respondent was contrary to terms of CA and whether the Concessionaire is entitled to reimbursement thereof together with interest?

- v) Whether the Concessionaire is entitled to be compensated for loss of profit for a sum of Rs.118.00 Crs. on account of illegal and non-contractual termination of CA by respondent?
- vi) Whether the Concessionaire is entitled for reimbursement of Rs.10,02,03,964/- on account of expenses incurred by it on the project?
- vii) Whether the Concessionaire is entitled to interest on the sums claimed by it as well as the costs incurred by it in defending the matter?

10. The main grievance of the petitioner revolves around Issue No.1. namely, as to whether the respondent fulfilled all the conditions precedent and more particularly, the condition precedent to make available 80% of ROW. The case of the petitioner was that respondent was obliged to hand over 80% of the total area required for the project. It is pleaded that the total land requirement was 186.02 hectares. As a condition precedent 80% of this was to be handed over to the petitioner. The AT noted that the ROW required for the project has been categorically specified in Article 48, Clause 10.1, Annexure 1 of Schedule A and in Appendix B V of Annexure 1 of Schedule B. The AT concluded that there is no ambiguity in the matter and it was incorrect on the part of the petitioner to mention that the area of land required in Schedule A was only tentative.

As per the AT the total land required for the declaring the Appointed Date was 112.73 hectares. The land required for Toll Plazas and additional land that the petitioner may claim to which the respondent may agree are lands which do not form part of ROW and are not relevant for declaring the Appointed Date. The AT noted the insistence of the petitioner on

specification IRS: SP73 of the Indian Road Congress but noted that the same is not material since the deviations from the specifications in the said manual are clearly mentioned in Annexure 1 (Schedule D) wherein the width of the shoulder and paving has been reduced. The AT concluded that the shortfall of land was less 0.5 hectare even after considering approximately 2 hectares of land which required forest clearance. The AT concluded that the Right to Way was more than 95% and condition precedent had been duly fulfilled by the respondent.

The AT also noted that the petitioner heavily relied upon the communications exchanged between the parties to contend that the respondent had all along referred to the figure of 186.02 hectares as the required land. The AT concluded that some of the officials of the respondent should have categorically responded to the petitioner's communications. It noted that some of the officers have computed the land available with reference to the land requirement as projected by the petitioner. It however concluded that the clear and unambiguous provisions of the contract could not be modified by any correspondence between the officers of the parties unless an amendment is carried out in the agreement in writing signed by the parties as stated in Clause 47.10 of the Concession Agreement.

The AT also noted that the petitioner had applied for financial closure in June 2013. It was the respondent who in consultation with their consultant Deloitte finally confirmed the financial closure on 13.12.2013 whereas the respondent could have approved the financial closure w.e.f. June 2013 itself. The AT also noted that the correspondence first initiated with the respondent for seeking higher quantum of land as Right to Way was first initiated on 13.09.2013 which is much after the petitioner had applied for financial

closure. Prior to that there had been no suggestion of the increased Right to Way. The AT also noted that if the petitioner was clear that the available Right to Way is less than required 80%, the petitioner would not have claimed and applied for financial closure in June 2013. The AT concluded that the requirement for additional land appears to be an afterthought on the part of the petitioner. Based on these observations, the AT concluded that the respondent had fulfilled all the conditions precedent in the Agreement. Issue No.1 was decided accordingly.

11. Having decided issue No.1 as above, the AT has rejected most of the claims of the petitioner. However, some relief was granted to the petitioner while considering issue No.4, namely, as to whether the performance bank guarantee of Rs.19.58 crores was rightly encashed by the respondent. The AT was of the view that the respondent was guilty of delay and laches and the petitioner had to incur some unwarranted extra expenses as timely action for termination of the contract would have mitigated these to some extent. The AT hence concluded that 10% of the amount of the performance bank guarantee, i.e. Rs.1.958 crores should be reimbursed to the petitioner by the respondent alongwith simple interest @ 12% per annum. Hence, an award was passed in favour of the petitioner and against the respondent for a sum of Rs.2,39,44,462/-.

12. I have heard learned counsel for the parties. Learned senior counsel appearing for the petitioner has stressed that a conjoint reading of the clause 10.3.1 of the agreement and connected appendix shows that as a condition precedent to the contract Right of Way to 80% of the total site was required necessarily to be handed over prior to the Appointed Date. He has pleaded that only 135.97 hectare of land was handed over to the petitioner out of

186.02 hectares. Parties were at ad idem that 186.02 hectare was required. Hence, the respondent has wrongly notified the appointed date as 10.1.2014 which aspect the AT failed to note.

It is further pleaded that the plea of the respondent was that the government of Meghalaya has provided an advance possession of 14 hectares which is required for toll plazas etc. Reliance was placed on letter of the respondent written to the Deputy Commissioner, East Jaintia Hills District, Jowai, Meghalaya dated 31.12.2013 which clearly shows that 14 hectares was not available and has wrongly been inspected for the purpose of computation of the right of way. Based on the above, it is pleaded that there are serious flaws in the findings recorded by the AT. It is pleaded that the AT acted beyond the terms of the contract and hence the award is liable to be set aside.

Reliance is also placed upon the communications exchanged between the parties, namely, letter dated 13.09.2013 written by the petitioner, letters dated 14.11.2013 and 19.11.2013 received from the respondent to plead that the parties all along understood that total area required was 186.02 hectares and that 80% of this land was not available. The respondent declared the Appointed Date wrongly and erroneously. The AT has come to palpably erroneous conclusions ignoring the correspondence.

13. I may first look at some of the terms of the CA. Clauses 4.1, 10.1 and 10.3 of the Concession Agreement reads as follows:-

4.1 Conditions Precedent

4.1.1 Save and except as expressly provided in Articles 4, 9, 10, 24, 34, 44 and 47, or unless the context otherwise requires, the respective rights and obligations of the Parties under this Agreement shall be subject to the satisfaction in

full of the conditions precedent specified in this Clause 4.1 (the "Conditions Precedent").

4.1.2 The Concessionaire may, upon providing the Performance Security to the Authority in accordance with Article 9, at any time after 90 (ninety) days from the date of this Agreement or on an earlier day acceptable to the Authority, by notice require the Authority to satisfy any or all of the Conditions Precedent set forth in this Clause 4.1.2 within a period of 30 (thirty) days of the notice, or such longer period not exceeding 60 (sixty) days as may be specified therein, and the Conditions Precedent required to be satisfied by the Authority shall be deemed to have been fulfilled when the Authority shall have:

(a) procured for the Concessionaire the Right of Way to the Site in accordance with the provisions of Clause 10.3.1;

.....

14. "Site" is defined in Article 48 of Concession Agreement as follows:-

"Site" shall have the meaning set forth in Clause 10.1;"

"10.1 The Site

The site of Project Highway shall comprise the real estate described in Schedule-A and in respect of which the Right of Way shall be provided and granted by the Authority to the Concessionaire as a license under and in accordance with this Agreement (the 'Site'). For the avoidance of doubt, it is hereby acknowledged and agreed that reference to the Site shall be construed as references to the real estate required for Two-Laning of the Project Highway as set forth in Schedule-A.

.....

10.3 Procurement of the Site

10.3.1 Pursuant to the notice specified in Clause 4.1.2, the Authority Representative and the Concessionaire shall, on a mutually agreed date and time, inspect the Site and prepare a memorandum containing an inventory of the Site including the vacant and unencumbered land, buildings, structures, road works,

trees and any other immovable properly on or attached to the Site. Such memorandum shall have appended thereto an appendix (the "**Appendix**") specifying in reasonable detail those parts of the Site to which vacant access and Right of Way has not been granted to the Concessionaire. Signing of the memorandum, in two counterparts (each of which shall constitute an original), by the authorised representatives of the Parties shall, subject to the provisions of Clause 10.2.2, be deemed to constitute a valid licence and Right of Way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered Site during the Concession Period under and in accordance with the provisions of this Agreement and for no other purpose whatsoever. For the avoidance of doubt, it is agreed that valid licence and Right of Way with respect to the parts of the Site as set forth in the Appendix shall be deemed to have been granted to the Concessionaire upon vacant access thereto being provided by the Authority to the Concessionaire.

10.3.2 Without prejudice to the provisions of Clause 10.3.1., the parties hereto agree that on or prior to the Appointed Date, the Authority shall have granted vacant access and Right of Way such that the Appendix shall not include more than 20% (twenty per cent) of the total area of the Site required and necessary for the Two-Lane Project Highway, and in the event Financial Close is delayed solely on account of delay in grant of such vacant access and Right of Way, the Authority shall be liable to payment of Damages under and in accordance with the provisions of Clause 4.2 .

15. A perusal of the Clause 4.1.1 and 4.1.2 of the Agreement shows that the petitioner on providing the necessary performance security may by notice require the respondent to satisfy the conditions precedent set forth in

Clause 4.1.2.

As per the said clause 4.1.2, the respondent shall procure for the petitioner the Right of Way of the site in accordance with clause 10.3.1. Clause 10.1 stipulates that the site of the project highway will comprise the real estate described in Schedule A.

16. Essentially the case of the petitioner was that Schedule D was to be taken into account and the standards as stated in Schedule D were to be adhered to including IRS:SP73 published by the Indian Road Congress. The land requirement gets enhanced considerably and the requirement in Schedule A would not suffice. Hence, it was pleaded that taking into account Schedule D, the land requirement of the petitioner was 186.02 hectares and not 112.73 as determined by the AT.

17. The AT has not accepted the above contention holding that the agreement is very clear. The reference to specification IRS: SP73 was not material since deviations from the specification of IRS:SP73 are clearly mentioned in Annexure 1 of Schedule D wherein the width of shoulder and paving has been reduced both for the rolling terrain and mountainous terrain/steep terrain as deviation from the manual. Hence, the plea of the petitioner relying heavily upon Schedule D/IRS: SP73 was rejected.

18. Learned senior counsel for the petitioner has also heavily relied upon the correspondence exchanged between the parties to state that the parties were ad idem that 186.02 hectares was the requirement and that there was no dispute in this regard. Reliance was placed on communication dated 14.11.2013 written by the Chief General Manager to Member (Technical) of the respondent. A perusal of the said communication shows that it has only noted the submission of the petitioner that the land requirement is 186.02

hectares. The conclusion is that in any case, 80% of the land requirement as projected by the petitioner is available. Relevant portion of the said letter reads as follows:

“2. DPR consultant vide his letter forwarded alongwith RO Guwahati letter quoted of paragraph 1(a) above, intimated that total requirement of land for two laning with paved shoulder of Jowai-Ratachera is 141.30 Ha out of which 132.75 Ha is available which is 94.6% of required land hence financial closure can be done and appointed date be fixed for commencement of work. However, during discussion at RO-Guwahati, Concessionaire has raised the issue that land required for construction of two lane with paved shoulder as per CA is 186.02 Ha. This Concessionaire also intimated that available land is 130.00 Ha instead of 132.75 Ha. The details are as per letters of Concessionaire referred as paragraph 1(b)(i) and 1(b) above.

....

6. Total percentage of land available in either of the case for construction now is more than 80% as per the requirement projected by the Concessionaire. Hence, it is recommended that financial closure be carried out and appointed date be fixed accordingly.”

19. Similarly reliance has also been placed on letter dated 19.11.2013 written by the respondent to the petitioner where the communication notes that the land requirement is 186.02 hectares. However, this communication concludes that 80% of Right of Way is available.

20. I may note that the AT went into the above communications but rejected the plea of the petitioner relying on the said documents stating that the terms of the Concession Agreement are unambiguous and clear. The AT noted that the clear unambiguous provisions of the contract cannot be modified by correspondence between the officers of the claimants. The AT

further held that any modification in the CA can only be in writing signed by the parties as provided in clause 47.10 of the CA.

21. The correspondence exchanged between the parties can be of help in interpretation of the terms of the contract only in case where there is any ambiguity. In *The Godhara Electricity Co. Ltd. & Anr. vs. The State of Gujarat & Anr.*, (1975) 1 SCC 199, the Supreme Court held as follows:-

“11. In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performances under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidence by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation (see *Corbin on Contracts*, Vol. 3, pp.249 & 254-56).

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16. We are not certain that if evidence of subsequent acting under a document is admissible, it might have the result that a contract

would mean one thing on the day it is signed but by reason of subsequent event it would mean something a month or year later. Subsequent “interpreting” statements might not always change the meaning of a word or a phrase. A word or a phrase is not always crystal clear. When both parties subsequently say that by the word or phrase which, in the context, is ambiguous, they meant this, it only supplies a glossary as to the meaning of the word or phrase. After all, the inquiry is as to what the intention of the parties was from the language used. And, why is it that parties cannot clear the latent ambiguity in the language by a subsequent interpreting statement? If the meaning of the word or phrase or sentence is clear, extrinsic evidence is not admissible. It is only when there is latent ambiguity that extrinsic evidence in the shape of interpreting statement in which both parties have concurred should be admissible. The parties themselves might not have been clear as to the meaning of the word or phrase when they entered into the contract. Unanticipated situation might arise or come into the contemplation of the parties subsequently which would sharpen their focus and any statement by them which would illuminate the darkness arising out of the ambiguity of the language should not be shut out. In the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible.

“The question involved is this: Is the fact that the parties to a document, and particularly to a contract, have interpreted its terms in a particular way and have been in the habit of acting on the document in accordance with that interpretation, any admissible guide to the construction of the document? In the case of an unambiguous document, the answer is ‘No.’ (See *Odgers’ Construction of Deeds and Statutes*, 5th Edn. by G. Dworkin, pp. 118-19).”

But, as we said, in the case of an ambiguous one, the answer must be “yes”. In *Lamb v. Goring Brick Co.* [(1932) 1 KB 710, 721] a selling agency contract contained the words “the price shall be mutually agreed”. Documents showing the mode adopted

for ascertaining the price were put in evidence without objection. In the court of appeal Greer, L.J. said:

“In my opinion, it is not necessary to consider how this contract was acted on in practice. If there had been an ambiguity and the intention of the parties had been in question at the trial, I think it might have been held that the parties had placed their own construction on the contract and, having acted upon a certain view, had thereby agreed to accept it as the true view of its meaning.”

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18. In these circumstances, we do not think we will be justified in not following the decision of this Court in *Abdulla Ahmed v. Animendra Kissen Mitter* [AIR 1950 SC 15 : 1950 SCR 30, 46] where this Court said that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and that evidence of the acts done under it is a guide to the intention of the parties, particularly, when acts are done shortly after the date of the instrument.”

22. Hence, extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. In such circumstances, evidence of the acts done under it is a guide to the intention of the parties.

23. Hence, the correspondence exchanged between the parties, could at best have served as a guide in case there was any doubt or grey areas in the agreement between the parties. The AT however has taken the view that there is no ambiguity and the terms and conditions of the agreement are clear and unambiguous and do point out that the required area was only 112.73 hectares and not 186.02 hectares. The AT concluded as follows:

“5.7.3 Perusal of above shows that the total ROW is 12 mtrs. For chainage 69.2 – 87 Kms. and 10.6 mtrs for chainage 87-173.2 Kms. For the two Toll Plazas, 80 mtrs width is specified in the designated stretches. The requirement of vacant access and ROW for 80% or more of the total area is only with reference to the ‘Site’ under Clause 10.3, and as mentioned above, the ‘Site’ is specified in Schedule ‘A’ and Schedule ‘B’. There is no ambiguity in this matter, and it is incorrect on the part of the Claimant to suggest that the area of land required, as mentioned in Schedule A was only tentative and not final. The reference to specifications of IRS: SP73 is also not material, since the deviations from the specifications in the said Manual are also clearly mentioned in Annexure 1 (Schedule ‘D’), wherein the width of shoulder and Paving has been reduced both for the rolling terrain, as well as for mountainous/steep terrain, as a deviation from Clause 2.5.2 of the Manual and figure 2.5.

There is thus no ambiguity regarding the specifications and ROW which is required for the said project, The AT noted that in reality there were four categories of land. First was the contractual ROW land required as per Schedule ‘A’ and Schedule ‘B’ of the C.A (112.73 hectares). Second was some extra land available with NHAI, in excess of the ROW prescribed under Schedule ‘A’ and ‘B’ i.e. where the width of the land available was more than 10.6/ 12 mtrs ($135.97(-) 112.73=23.24$ hectares). The third category was the land required for construction of Toll Plazas, Traffic Aid Posts and other facilities (13.97 hectares). This land, if not available, was required to be acquired after the AD, and therefore was not to be considered for the mandatory 80% ROW required for fulfilling 'conditions precedent' under Clause 4.1.2 read with Clause 10.3. The fourth category of land was any additional land which the Concessionaire may suggest/request and which may be required for any change of scope (36.13 hectares). The said land, only if agreed to in writing by the Authority and the Concessionaire, would then be required to be acquired; but again only after the AD.

Accordingly, any such land would also have no concern with the mandatory 80% ROW required for the fulfillment 'condition precedent'.

5.7.4 The AT also noted that regarding the statutory vacant access and ROW Site Land, as stipulated in Schedule 'A' (112.73 hectares), the shortfall of land was less than 0.5 hectare. Even after considering approximately 2 hectares of land requiring forest clearance, it is clear that the available vacant access land/ROW, out of the land specified for the Site, was more than 95%. Accordingly, the 'conditions precedent' were duly fulfilled by NHAI in this regard.”

24. I also cannot help noticing the conclusion of the AT that the communications relied upon by the petitioner appear to be an afterthought. The AT noted that the petitioner had applied for financial closure in the June 2013 itself whereas the respondent declared financial closure only on 03.12.2013. Only after June 2013, correspondences has been generated claiming that the Right to Way is not as per the terms of the Agreement. The AT rightly concluded that this seems to be an afterthought.

25. The AT has in its wisdom interpreted the terms of the contract. The interpretation appears plausible.

26. Reference may be had to the judgment of the Supreme Court in the case of *McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.*, **2006 (11) SCC 181**, wherein the court held as follows:

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into

consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*: AIR2003SC4519 and *D.D. Sharma v. Union of India*: (2004)5SCC325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

27. Similarly, the Supreme Court in *Associate Builders. vs. DDA., (2015) 3 SCC 49* held as follows:-

“45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran* [(2012) 5 SCC 306] , the Court held: (SCC pp. 320-21, paras 43-45)

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

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.* [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which

one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (*Sumitomo case* [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] , SCC p. 313)

‘43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately 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 agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

28. Clearly the constructions of the terms of a contract were within the domain of the AT. The construction of the AT in the present award is a plausible construction. There are no grounds to hold the same illegal. There is accordingly no merit in the present petition. Same is dismissed.

**(JAYANT NATH)
JUDGE**

SEPTEMBER 29, 2018/n/rb/v