IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 14.05.2018

\+ **<u>O.M.P. (COMM) 201/2018 & IA No. 6331/2018</u>**

NATIONAL HIGHWAYS AUTHORITY OF INDIA...Petitioner

Versus

PATEL – KNR (JV) ...Respondent

<u>Advocates who appeared in this case:</u>

For the Petitioner :Ms Pinky Anand, ASG with Dr Maurya Vinay Chandra, Mr Sumit Tekriwal and Ms Manisha Samanta.

For the Respondent :Dr Amit George, Mr Rishabh Dheer and Mr Swaroop George.

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HON'BLE MR JUSTICE VIBHU BAKHRU

<u>JUDGMENT</u>

<u>VIBHU BAKHRU, J</u>

1. The petitioner (NHAI) has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 27.12.2017 (hereafter 'the impugned award') to the extent that the respondent's claims have been sustained (except an award of ₹5,05,465/- made against a claim of painting of antiglare and pedestrian guard railing).

2. The impugned award was rendered in the context of disputes that had arisen between the parties with respect to the 'Contract Agreement' dated 17.10.2001 (hereafter 'the Agreement') and was

delivered by the Arbitral Tribunal comprising of three arbitrators, namely, Sh S.C. Sharma (Presiding), Sh M.K. Aggarwal and Sh P.V. Rama Raju (hereafter 'the Arbitral Tribunal').

3. The Arbitral Tribunal has awarded an aggregate sum of ₹24,49,55,742/- in favour of the respondent (hereafter 'Patel'). The said amount comprises of (i) ₹4,98,54,212/- on account of the balance payment due as per the certification of the Engineer (Claim No.1); (ii) ₹5,05,465/- on account of payment due for painting of antiglare coating on pedestrian guard railing (Claim No.3); (iii) ₹4,11,45,930/- for payment on account of the idling of plant and machinery (Claim No.8); (iv) ₹1,57,59,300/- on account of overhead expenses during the extended period of the contract (Claim No.9); (v) ₹92,25,364/- as escalation for mild steel (Claim No.12); and (vi) ₹12,84,65,471/- as interest for the period 18.10.2008 to the date of the award computed at the rate of 12% per annum and future interest at the rate of 10% per annum (Claim No. 14). NHAI has contested the awards made against each claim other than the award of ₹5,05,465/- against Claim No.3.

4. Briefly stated, the relevant facts necessary to address the controversy are as under:-

4.1 NHAI is a statutory body constituted under Section 3 of the National Highways Authority of India Act, 1988. Patel is a Joint Venture formed between M/s Patel Engineering Ltd and M/s KNR Constructions Ltd by Joint Venture Agreement dated 12.06.2001.

4.2 On 17.10.2001, NHAI invited bids for the work of widening to four lanes and rehabilitation of existing two lane carriageway of Krishnagiri – Vaniyambadi Section of National Highway-46 (NH-46) from km 0.00 to km 49.00 (hereafter 'the works').

4.3 On 18.06.2001, Patel submitted its bids pursuant to the aforesaid invitation. Thereafter, on 20.09.2001, NHAI awarded the contract and issued a Letter of Acceptance (LOA) accepting the bid at the contract price of ₹163,49,53,505/- (after deducting a rebate of 16.70% offered by the respondent).

4.4 On 17.10.2001, NHAI and Patel entered into a Contract Agreement ('the Agreement') for execution of the works. The period stipulated for completion of the works was thirty months from commencement of the works – that is, thirty months from 21.11.2001 – and the works were to be completed by 20.05.2004.

4.5 The execution of the works was delayed and was finally completed by 31.03.2005. In the meantime, NHAI extended the time for completion of the works till 31.03.2005 pursuant to a letter dated 30.03.2004 sent by Patel. Thereafter, on 24.06.2005, the Engineer issued the 'Taking-Over Certificate'.

4.6 On completion of the works, Patel – by a letter dated 23.06.2008 – submitted its final statement for an amount of ₹185,60,78,542/-.

4.7 On 21.06.2008 and 23.06.2008, meetings were held and the Engineer certified the final statement in two parts: Final Statement I for an amount of ₹6,01,08,801/- for all the works by letter dated 10.07.2008 and Final Statement II for an amount of ₹41,82,67,054/- which contained disputed items. On 23.07.2008, the said disputed items were referred to the Engineer in terms of Clause 67.1 of GCC and by letter dated 17.10.2008, the claims against the said items were rejected.

4.8 On 18.10.2008, Patel invoked the arbitration for the disputed items in Final Statement II as per Clause 67.1 of GCC and appointed Sh P.V. Rama Raju as its nominee arbitrator. On 02.02.2009, NHAI released an amount of ₹1,00,08,054/- against Final Statement-I but failed and neglected to make the balance payment of ₹5,01,00,747/-.

4.9 On 02.05.2012, NHAI appointed Sh Mahesh Chandra as its nominee arbitrator for adjudication of disputes relating to non payment of the balance amount covered under Final Statement I and Final Statement II. Both the arbitrators appointed Sh S.C. Sharma as the Presiding Arbitrator.

4.10 Patel filed its Statement of Claims before the Arbitral Tribunal in respect of fifteen different claims including claims regarding the delay in completion of the works due to failure on part of NHAI to perform its reciprocal obligations.NHAI filed its Statement of Defence contesting the claims made by the petitioner. NHAI, *inter alia*, claimed that the respondent failed to mobilize adequate machinery, material and manpower and such failure compounded with mismanagement that resulted in delay/completion of the works.

5. The Agreement was a unit rate contract. The bidding documents contained detailed 'Bill of Documents' (hereafter 'BOQ') containing the items of work with the estimated quantities of each item to be executed by Patel. 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). These terms are based on FIDIC Contract 4th Edition in 1987 with certain Conditions of Particular Application (COPA) amending the FIDIC and GCC.

Reasoning and Conclusion

6. Ms Pinky Anand, learned ASG had contested the impugned award on several grounds. Dr Amit George countered the said submissions. The rival contentions have been considered while discussing the claims awarded in favour of Patel.

Re: Claim No.1, Release of payments against certification of the Engineer.

7. The Engineer had certified a statement – Final Statement No-I for a sum of ₹6,01,08,801/- as per Clause 60 of the GCC vide his letter dated 10.07.2008. NHAI had released a sum of ₹1,00,08,054/- on 02.02.2009 but had withheld the balance amount. In this context, the petitioner claimed that a sum of ₹5,01,00,747/- was payable as the sum has been certified by the Engineer.

8. Ms Pinky Anand submitted that the aforesaid certified amount also included an amount payable on account of the Seigniorage fee.

She submitted that NHAI had not provided any proof of having paid the enhanced seigniorage fee and, thus, the said amount included in the Final Statement No-I could not be awarded. She also referred to the decision of the Division Bench of this Court in ***National Highways Authority of India v. ITD Cementation India Ltd.: 2008 (100) DRJ 431*** in support of her contention.

9. Dr Amit George, learned counsel appearing for Patel objected to the said contention being advanced at this stage. He submitted that NHAI had not contested the amount certified by the Engineer on any such ground.

10. It is seen that the only contention advanced by NHAI in respect of Claim No.1 was that it was beyond the scope of Clause 52.2 of GCC as modified by COPA. NHAI contended that the rates as prescribed under the BOQ have to be adopted unless the two conditions as specified under Clause 52.2 of GCC have been met. The first being that the item must account for more than 5% of the Contract Price and the second is that the work executed under the item exceeds or falls short of quantity specified in the BOQ by more than 25%. NHAI had claimed that for determining whether the item accounted for more than 5% of the Contract Price, the rate and quantity as specified in the BOQ were to be considered and not the actual work done.

11. This contention was rejected by the Arbitral Tribunal. It is relevant to state that no such contention has been advanced before this

Court to assail the conclusion of the Arbitral Tribunal in this regard. NHAI has now raised a new issue that the certified amount includes certain amounts on account of the seigniorage fee for which Patel was required to produce proof of payments. Clearly, NHAI cannot be permitted to raise fresh disputes at this stage. The learned counsel appearing for NHAI was asked to point out whether this issue had been raised in the Statement of Defence and she fairly conceded that this defence had not been taken in the Statement of Defence. Plainly, if NHAI had raised any such defence, Patel would have the opportunity to produce the material to address such objections. Since NHAI had chosen not to challenge the certification of the Engineer on this ground, it cannot be permitted to raise such contention at this stage. Thus, no interference with the impugned award is warranted in regard to the award for the balance amount due against Final Statement-I certified by the Engineer.

Re: Claim Nos. 8 and 9

Introduction

12. Patel had claimed a sum of ₹19,20,57,109/- on account of idling of plant and machinery and a sum of ₹4,12,00,000/- on account of the additional overhead expenses incurred during the extended period of contract. As noticed above, the Agreement was entered into on 17.10.2001 and the date of commencement of the works was stipulated to be 21.11.2001. The execution of the works was delayed for various reasons, which Patel claimed were attributable to NHAI.

The works were finally completed on 31.03.2005. Although, NHAI extended the time for completion of the works, it did not grant any compensation for the same. Patel claimed that due to delay in the contract, it had to retain its resources including plant and machinery at site till the completion of the works and this resulted in Patel incurring additional cost. It is in this context, Patel claimed that it was entitled to costs for idling and under utilization of machinery and equipment. Similarly, Patel had claimed additional cost due to overhead expenses incurred during the extended period, which were quantified at ₹4,12,00,000/-.

13. The aforesaid claims were contested by NHAI on several grounds including denying that there was any delay in handing over of site. NHAI also claimed that in terms of the Agreement, Patel was required to take all necessary steps so that the encumbrances and hindrances on the existing stretches could be cleared and for this, the BOQ included a specific item - BOQ Item No. 1.02, which was required to be executed as per Clause 110 of the Technical Specifications. NHAI claimed that Patel had failed to execute Item No. 1.02 of the BOQ and had been unable to clear the site or any encumbrances and, thus, any delay on that ground was attributable solely to Patel and not to NHAI. NHAI also claimed that Patel had adequate stretches of road to maintain the progress of work.

14. The Arbitral Tribunal found that there was a delay of 10 months and 11 days in completion of the works inasmuch as the works were completed on 31.03.2005, instead of the stipulated date of the

completion of 20.05.2004. The Arbitral Tribunal relied on the letter dated 05.11.2004 of the Supervision Consultant, which indicated that 50.112 kms of unobstructed work was to be handed over within a period of six months but only 20.28 kms stretch was handed over to Patel. Further, this stretch was also divided into separate stretches over the entire length and each section handed over ranged from 0.045 kms to 2.2 kms instead of the minimum 5 kms. The Arbitral Tribunal had concluded that the delay in handing over of the unobstructed site had resulted in prolongation of the contract and, therefore, Patel was entitled to cost towards deployment of additional resources over the extended period of time in terms of Clause 42.2 of GCC.

Submissions

15. Ms Pinky Anand had assailed the impugned award, essentially, on two grounds. First, she submitted that the Arbitral Tribunal had erred in not appreciating that the delay in handing over the unobstructed site could not be attributed to NHAI. She submitted that the site had been handed over within the stipulated time and it was Patel's obligation to remove all the hindrances, encroachments and to shift the utilities and the same was also the part of the BOQ item (BOQ Item No. 1.02). Further in terms of Clause 110 of the Tender Specifications, no such claim could be made.

16. Second, she contended that the amount awarded was without any sufficient evidence and, therefore, was unsustainable. She contended that the Arbitral Tribunal had merely applied the analysis of

rates as per the Standard Data Book for Analysis of Rates (First Revision) (hereafter 'MOST Standard Data Book') without Patel adducing any evidence of having incurred such expenditure or suffering any such loss. She further stated that the MOST Standard Data Book was a privileged document and could not be relied upon in the arbitral proceedings. She referred to the decision of the Division Bench of this Court in ***National Highways Authority of India v. ITD Cementation India Ltd.***(*supra*) and the decision of UK High Court in ***Costain Limited v. Charles Haswell & Partners Limited: (2009) EWHC 3140 (TCC)*** in support of her contention. She drew the attention of this Court to the relevant extract of the said decision, which is relied upon by her and is set out below:-

> "184. But a claim for damages on account of delays to construction work is rather different. There, in order to recover substantial damages, the contractor needs to show what losses he has incurred as a result of the prolongation of the activity in question. Those losses will include the increased and additional costs of carrying out the delayed activity itself as well as the additional costs caused to other site activities as a result of the delaying event. But the contractor will not recover the general site overheads of carrying out all the activities on site as a matter of course unless he can establish that the delaying event to one activity in fact impacted on all the other site activities. Simply because the delaying event itself is on the critical path does not mean that in point of fact it impacted on any other site activity save for those immediately following and dependent upon the activities in question."

17. Dr Amit George countered the aforesaid submissions. He

submitted that insofar as the BOQ Item No. 1.02 is concerned, the same only relates to coordination with other agencies for removal of hindrances. Admittedly, Patel was paid for the said works and, therefore, there could be no dispute that Patel had performed its obligation. He further relied upon Clause 5.2.2 of the Conditions of Particular Application (COPA) and submitted that the order precedence of the documents was specified in Clause 5.2.2 of COPA and the provisions of GCC would take precedence over the provisions of the Technical Specifications. He submitted that thus the provisions of Clause 42.2 of GCC would override Clause 110.1 of the Technical Specifications. He further stated that Clause 110.1 of the Technical Specifications must be read with BOQ item no. 1.02, which only requires Patel to coordinate with the concerned agencies.

18. He further submitted that the delay was not only on account of cutting of trees and shifting of utilities but also for the reason that NHAI had not completed the acquisition of the entire site. He submitted that the payment for acquisition of land in certain stretches had not been made to villagers and, therefore, they had obstructed any activity on their land. He submitted that, on 01.08.2003, a total stretch of 15.42 kms was not available as the compensation had not been paid. The said land was made available during the period 01.11.2003 to June, 2004. The acquisition regarding this stretch was also challenged by the occupants of the said land. He referred to the decision of a Coordinate Bench of this Court in ***National Highways Authority of India v. Bridge & Roof Co. Ltd.***: ***O.M.P. 1203/2013, decided on***

18.04.2017, wherein the Court had declined to interfere in an award upholding the view that Clause 42.2 of GCC would override Clause 110 of the Technical Specifications and that mere notional handing over of land on which it was not possible to execute any works, was not envisaged by the contract. He also referred to the decision of the Division Bench of this Court in ***NHAI v. Hindustan Construction Co. Ltd.***: ***2017 (5) Arb. LR 258 (Delhi) (DB)***, wherein the Court had held that the responsibility of the contractor was limited to coordinating with the service provider and not to ensure removal of encroachment. He also referred to the decision of a Coordinate Bench of this Court in ***National Highways Authority of India v. R.N. Shetty***: ***2014 (3) ARBLR 46 (Delhi)*** in support of his aforesaid contentions.

19. Insofar as the quantification of damages is concerned, Dr George referred to the written submissions. He submitted that Patel provided extensive evidence as to the quantification of the claim. In particular, Patel had provided details of the deployment of the machinery. The same were part of the Monthly Progress Report (MPR) submitted by the Engineer.

Reasoning & Conclusion regarding Claim nos. 8 and 9

20. The first and foremost question to be addressed is whether the Arbitral Tribunal had erred in concluding that Patel was entitled to damages for the delay in handing over the unobstructed site. Undisputedly, the execution of the works was delayed for a period of 10 months and 11 days as found by the Arbitral Tribunal. It is also

relevant to note that the time for execution of the works was extended without levy of any compensation. Although, NHAI had contended before the Arbitral Tribunal that the delay was attributable to Patel, this is not the contention, which was advanced on behalf of NHAI in this Court. Ms Anand has contended that although the delay may have been caused due to removal of obstructions or on account of unobstructed site not being available to Patel; however, in terms of Clause 110.1 of the Technical Specifications, no compensation for the same was payable by NHAI and, therefore, the Arbitral Tribunal had erred in awarding damages.

21. Before the Arbitral Tribunal, Patel had submitted that the delay in completion of the works was on several counts including delay in handing over of drawings; delay in handing over of site; delay in removal of utilities (which work was entrusted to other agencies); delay in frequent change of supervision consultant; additional work and delay in taking decisions.

22. In terms of Schedule – III to the Agreement, the site was to be handed over in a phased manner as set out below:-

"i) At Commencement	Stretch of 5 Km.
ii) After 2 months from commencement	Stretch of 10 Km.
iii) After 4 months from commencement	Stretch of 10 Km.
iv) After 6 months from commencement	Remaining stretches of 25.112 Km of the project road."

23. It is important to note that Patel's case is that although the site was handed over on paper; however, in fact, the site was not available for execution of the works for several reasons. First of all, the acquisition of the entire stretch of land was not complete. Patel had sent a letter dated 01.08.2003 pointing out that, as on 01.01.2003, only 11.285 kms in 26 bits along LHS and 9.555 kms in 22 bits along RHS could not be worked out due to various reasons including non-payment of compensation to the land owners and non-payment of compensation for the buildings, wells, etc. NHAI was also informed that villagers had obstructed the work at Barugur by-pass (4.5 kms) and Natrampally by-pass (0.6 kms). Patel claimed that the temples and other structures could not be shifted as NHAI had not located an alternate site. Patel had also relied upon the reports of Engineer – including a letter dated 10.06.2004 – indicating that only partial fronts were available with it for execution of the works.

24. The Arbitral Tribunal had considered the extensive pleadings and the evidence produced and had relied upon the letter dated 05.11.2004 of Supervision Consultant, which indicated that as on June, 2002, only 20.28 kms of the site had been handed over instead of 50.112 kms. Further, the site that was handed over was divided into several stretches over the entire land and the length of each section ranged between 0.045 kms to 2.2 kms as against minimum of 5 kms. The said report also indicated that 11.75 kms was obstructed at the time of handing over of the complete stretch of 50.112 kms on

27.03.2002 and the phase clearance of the obstruction was done from May, 2003 to June, 2004.

25. The fact, that the acquisition of the complete stretch of site was not complete inasmuch as compensation for stretches of land had not been disbursed, was not seriously disputed. Even before this Court, Ms Anand had contended that the delay on this count had been compensated by Patel by accelerating the progress of works.

26. Patel had also produced material to indicate that there were other obstructions on the site including temples, building, wells and other structures which had not been removed.

27. The Arbitral Tribunal had considered the material and rendered an unequivocal finding that there was delay in handing over of the unobstructed site and that had resulted in prolongation of the contract. The relevant extract of the impugned award is set out below:-

> "9.27 Having gone through the pleadings and documents and considering the respective submissions of the parties and judgments referred to by them, we find that:
>
> (i) The Supervision Consultant had analyzed the delay events in its letter dated 05-11-2004 (Exhibit RD-37) and stated that that the total length of continuous unobstructed work fronts of 50.112 km was to be handed over within 6 months (June 2002) whereas only20.28 km was handed over in divided stretches spread over the entire length. As per the Supervision Consultant's analysis the length in each section handed over ranged from 0.045 km to 2.2km as against minimum of 5 km. The total length of

50.089 km was handed over for construction over a period 30 months. As per the Respondent's admission, stretches aggregating to 11.75km were obstructed at the time of handing over the complete stretch of 50.112 km on 27.03.2002. The phased clearance of obstructions was done from May 2003 to June 2004 (Exhibit:RD-31)

(ii) Thus, the AT is of the view that there was delay in handing over of the unobstructed site resulting in prolongation of the Contract and therefore, the Claimant is entitled to cost towards deployment of the additional resources over the extended period in terms of Clause 42.2 of the Contract. As the handing over of unobstructed site was spread over the 30 months period there was no possibility of completing the work in 30 months. The Respondent has granted extension of time up to 31.03.2005. The Contract provides for any extension of time only if there is no default or breach of the Contract by the Contractor. Hence, the Claimant's entitlement to cost towards deployment of its resources and additional overheads over the extended period up to 31.03.2005 is justified. The progress achieved till May 2004 was 80.27% (p 438RD-31), hence about 20% work remained to be completed in the extended period. Considering the quantum of balance work, additional cost of Rs.l9.20 crore on account of deployment of the machinery in the extended period appeared to be very high and the claim requires to be modified as discussed below."

28. The finding that there was delay in handing over of the unobstructed site resulting in prolongation of the Contract, is a finding of fact, which is based on sufficient material and, therefore, is not

amenable to judicial review under Section 34 of the Act. The Supreme Court of India, in the case of ***Associated Builders v. Delhi Development Authority: (2015) 3 SCC 49***, has authoritatively held that an arbitral tribunal is the final adjudicator of facts and unless the conclusion is found to be perverse, it cannot be interfered with.

29. In view of the above, the Arbitral Tribunal had concluded that Patel was entitled to cost towards deployment of the additional resources over the extended period in terms of Clause 42.2 of the GCC. Thus, the next question to be addressed is whether the Arbitral Tribunal had erred in holding so.

30. Clauses 42.1 and 42.2 of the GCC are relevant and are set out below:-

> "GCC Clause 42.1: Possession of Site and Access Thereto (GCC)
>
> Save insofar as the Contract may prescribe:
>
> (a) the extent of portions of the Site of which the Contractor is to be given possession from time to time.
>
> (b) the order in which such portions shall be made available to the Contractor, and, subject to any requirement in the Contract as to the order in which the Works shall be executed, the Employer will, with the Engineer's notice to commence the works, give to the Contractor possession of
>
> (c) so much of the Site, and
>
> (d) such access as, in accordance with the Contract, is to be provided by the Employer as may be required to enable

the contractor to commence and proceed with the execution of the Works in accordance with the programme referred to in Clause 14, if any, and otherwise in accordance with such reasonable proposals as the Contractor shall, by notice to the Engineer with a copy to the Employer, make. The Employer will, from time to time as the Works proceed, give to the Contractor possession of such further portions of the Site as may be required to enable the Contractor to proceed with the execution of the Works with due dispatch in accordance with such programme or proposals, as the case may be.

Clause 42.2: Failure to Give Possession (GCC)

If the Contractor suffers delay and/or incurs costs from failure on the part of the Employer to give possession in accordance with the terms of Sub-Cause 42.1, the Engineer shall, after due consultation with the Employer and the Contractor, determine:

(a) any extension of time to which the contractor entitled Under Clause 44, and

(b) the amount of such costs, which shall be added to the Contract Price, and shall notify the Contractor accordingly with a copy to the Employer."

31. Thus, undisputedly, in terms of Clause 42.2 of the GCC, Patel would be entitled to compensation for delay in handing over of the site.

32. The contention that Patel was responsible for removal of obstruction and was precluded from raising any claims by virtue of Clause 110.1 of the Technical Specifications, is unpersuasive.

33. The BOQ item no. 1.02, which was relied upon on behalf of NHAI, reads as under:-

> "1.02 Co-ordinating with respective service providers/Authorities for cutting trees, shifting of utilities removal of all encroachments etc. as per Technical Specification Clause 110."

34. As is apparent from the above, Patel's responsibility was limited to coordinating with the respective service providers for cutting of trees, shifting of utilities and removal of encroachments as per Clause 110 of the Technical Specifications; and not to execute the work regarding cutting of trees or shifting of utilities. There is no dispute that Patel had performed its obligations and had also been paid for the same. NHAI had not found any fault with Patel in this regard. Therefore, reference to BOQ item no. 1.02 is of little assistance to NHAI.

35. Clause 110.1 of the Technical Specifications – which was relied upon by NHAI to contend that no compensation was payable to Patel – reads as under:-

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

> encroachments by the service provider/concerned authorities. The expenses incurred for cutting of trees and shifting of utilities as required by the respective departments shall be made by the Employer. The information contained in the Bid Documents concerning the public utility services such as water, sewer, power transmission lines, telephone lines and oil/gas pipelines, OFC cables etc may not be exhaustive and it shall be the responsibility of the Contractor to ascertained the utilities that are likely to be affected by works through site investigations and collection of information from the concerned utility owners."

36. The contention, that Patel was not entitled to any compensation for the delay in terms of Clause 110.1 of the Technical Specifications, is unpersuasive for several reasons. First of all, the delay in availability of the site to Patel included the delay on the part of NHAI to complete the acquisition of the site. The delay in disbursal of compensation to the land occupants/owners was clearly outside the scope of Clause 110.1 of the Technical Specifications. Further, there was also delay in shifting of the temples and other buildings and Patel had alleged that the same was on failure of NHAI to provide an alternate site. This is also not covered under Clause 110.1 of the Technical Specifications. Secondly, the contention, that Clause 110.1 of the Technical Specifications must be read in the context of BOQ item no. 1.02 and not for the delays that are not attributable to the contractor in performance of the said BOQ item, is also persuasive.

37. More importantly, Clause 5.2.2 of COPA clearly provided that GCC would take precedence over Technical Specifications. In the present case, Clause 42.1 of GCC specifically provided that the

possession and access to the site would be provided to the contractor for execution of the works. Clause 42.2 of GCC further provided that any delay giving possession of the site in accordance with the terms of sub-clause 42.1 of GCC would require the Engineer to grant extension and determine the cost to be added to the contract price.

38. In the present case, the Arbitral Tribunal had relied upon Clause 42.2 of GCC to hold that Patel would be entitled to further damages. This Court is of the view that no interference with this conclusion is warranted.

39. Insofar as the contention that MOST Standard Data Book was a privileged document is concerned, no such contention was raised before the Arbitral Tribunal, therefore, NHAI cannot be permitted to raise such disputes at this stage.

40. The next issue raised by NHAI was with regard to quantification of the amounts awarded. It was contended on behalf of the petitioner that such quantification is without any evidence and, therefore, cannot be sustained. It was earnestly contended that the Arbitral Tribunal had based his decisions solely on the MOST Standard Data Book without Patel providing any evidence. It was submitted that the MOST Standard Data Book is a privileged document and proceeds on certain assumptions and it was incumbent upon Patel to provide evidence to show that the said assumptions hold good in its case.

41. The aforesaid contention is un-merited, as Patel had produced

sufficient evidence before the Arbitral Tribunal to establish the quantification of the loss suffered by it. First of all, Patel had produced the list of machinery that was available at site during the extended period. This was also a part of the MPRs submitted by the Engineer. Although, the hire charges for the said machinery were computed on the basis of the MOST Standard Data Book, detailed analysis of the same was submitted by Patel (submitted in CD No.8 and further explained in CD No.10). Patel had computed the charges for the machinery during the entire period of execution of the works at ₹66,19,66,611/-.This was on the basis of BOQ quantities. It had reduced the hire charges computed as per BOQ quantities, which were computed at ₹33,55,90,094/-, accordingly, it was claimed that ₹32,63,76,773/- was the actual loss suffered. However, Patel had restricted its claim only to ₹19,20,57,109/-, which was the additional cost incurred during the extended period and the additional cost incurred during the original contract period was ignored.

42. The Arbitral Tribunal had further reduced the aforesaid amount on the basis of the value of the work done. The Arbitral Tribunal determined that about 20.75% of the total work was executed between 21.05.2004 to 31.03.2005 (the extended period), which worked out to ₹31,51,85,994/-. From the aforesaid sum, the Arbitral Tribunal had reduced the additional work of ₹3,03,68,275/- and, thus, determined that during the extended period, the work of the value of ₹31,51,85,994 of the BOQ quantities was executed. Since the hire charges for BOQ quantities was computed at ₹33,55,90,094/- for the

entire contract value of ₹163,49,53,505/-, the Arbitral Tribunal applied the same proportion to the works done during the extended period and, accordingly, determined additional cost for the machinery during the extended period at ₹6,46,95,000/-. From the aforesaid charges, the charges for the particular machinery that demobilized (value of which was computed to be ₹1,81,82,208/-) was reduced. Thus, the hire charges for the machinery during the extended period was computed at ₹4,65,12,792/-. This was further adjusted downward for inflation at the rate of 5% and a sum of ₹4,11,45,930/- was found payable.

43. It is apparent from the above that the said determination is based on empirical data as to the machinery available at site and the quantum of work done during the extended period. The value of cost of such machinery has been applied on the standards as specified. This Court finds no infirmity with the approach of the Arbitral Tribunal. Standard formula for determination of damages can be adopted, as a measure of damages provided that there is sufficient evidence to apply those formulas. In the present case, the empirical data as to the machinery available at site and the work done was available and, therefore, the same has been used by the Arbitral Tribunal for computing the additional cost incurred during the extended period. The contention that the Arbitral Tribunal had erred in using MOST Standard Data Book for assuming the hire charges as a measure of cost of the said machinery is not persuasive. It is also admitted that NHAI had not produced any material to show that the cost determined on hire charges was an unreasonable measure in the facts of the

present case. Thus, this Court finds no ground to interfere with the quantum of damages as awarded on account of idling of plant and machinery.

44. Similarly, this Court also finds no ground to interfere with the award of overhead charges. Patel had produced its balance sheet for overheads at site showing that the sum of ₹7,43,86,684/- had been spent during the period of 12 months. Since, the extended period was only 284 days, the proportionate overhead expenditure was computed at ₹5,78,79,094/-. Patel had submitted copies of the profit and loss account and the balance sheet for the work during the entire period of the contract that is, for the original period of the contract as well as the extended period. The accounts indicated that the total overhead charges incurred during the entire length of the contract was ₹17,07,14,045/- [Rs.42,58,589/- (2001-2002), ₹2,48,18,855/- (2002-2003), ₹6,72,49,737/- (2003-2004) & ₹7,43,86,864/- (2004-2005)]. On the aforesaid basis, Patel had contended that an amount of ₹19,71,74,721/- was incurred as overhead expenses after accounting for head office overheads as 10% of the site expenses. Patel also pointed out that as per the MOST Standard Data Book, 8% of the contract value was considered as reasonable in respect of contracts, which are above ₹50 crores and, thus, a sum of ₹13,07,96,280/- was expected to be incurred as overhead expenses. Reducing the same from the sum of ₹19,71,74,721/-, Patel contended that the sum of ₹6,63,78,441/- was reasonable but had restricted its claim to ₹4,12,00,000/-. The Arbitral Tribunal did not accept the aforesaid

quantification and restricted the amount to only 5% of the balance works executed during the extended period (31,51,85,994 x 0.05 = ₹1,57,59,300/-).

45. This is not a case where Patel had not provided the necessary data for substantiating its claim; however, the Arbitral Tribunal had restricted the same only to 5% of the balance works executed. Thus, NHAI's contention that Patel had not provided data for substantiating its claim is erroneous and, thus, this Court finds it difficult to accept that any interference with the impugned award is warranted.

Re: Claim No. 12

46. The Arbitral Tribunal has awarded a sum of ₹92,25,364/- on account of payment in escalation of Mild Steel. Patel had claimed the aforesaid amount in terms of Clause 70.5(ii)(b) of COPA, which expressly provided that the contract price would be subject to account of variation in cost of cement and steel based on the formula specified therein. The formula was based on index price of iron and steel, as shown in the index principles of whole sale prices in India released by the Office of Economic Advisory, Ministry of Industry.

47. Sub-clause 70.5 of COPA specifically provided that variation in price of specified materials would be payable as per the formulae specified. The opening words of sub-clause 70.5 of COPA are set out below:

> "Sub-Clause 70.5: Increase or Decrease of Price of Specified Materials

> i) Increase or decrease of price of specified materials will be adjusted by either an addition to or a deduction from the Contract Prices. For the purpose of this
>
> Sub-Clause:
>
> "Specified materials" means the materials stated in Schedule 2 of Section VII of the Bidding Documents and required on the site for the execution and completion of the Permanent Works.
>
> "Basic Price" means the price for "Specified materials" indicated in Schedule 2 of Section VII of the Bidding Documents."

48. There is no dispute that Mild Steel was a specified item in Schedule 2 of Section VII and, thus, in terms of Clause 70.5(ii)(b) – which provides for the formula for variation in price of steel – was payable.

49. It is also relevant to note that NHAI had paid the escalation in price of Mild Steel upto the 34^{th} Interim Payment Certificate (IPC). This amount aggregated to ₹17,04,061/-. Patel had claimed a further amount of ₹75,21,303/-. There was no dispute as to the computation of the escalation payable; however, instead of payment of the said amount, NHAI had also recovered the escalation paid earlier.

50. NHAI had resisted this claim on the ground that escalation formula could not be applied to items made of mild steel. The said contention was rejected, as the Arbitral Tribunal found that mild steel was brought at site and incorporated in the permanent works.

51. This Court finds no infirmity with the aforesaid view.

Re: Interest

52. The Arbitral Tribunal has awarded pre award interest at the rate of 12% per annum. Ms Anand, learned ASG has contended that the levy of such interest was unreasonable given the extraordinary pre award period. This contention is bereft of any merit and the pre award interest cannot be interfered with.

53. In view of the above, the petition is unmerited and is, accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

MAY 14, 2018
RK/pkv