

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

*Reserved on: 7<sup>th</sup> November, 2017,  
Date of decision: 8<sup>th</sup> January, 2018*

+ **OMP 391/2015**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Ms. Gunjan S. Jain, Advocate

versus

MAPEX INFRASTRUCTURE PVT. LTD.

..... Respondent

Through: Mr. Arun K. Varma, Sr. Advocate

with Mr. S.K. Chandwani, Mr. Ashish Joshi and

Mr. Sameer Chandwani, Advocates

**CORAM:**

**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**NAVIN CHAWLA, J.**

For detailed order, kindly refer to the judgment delivered today in  
OMP No. 384/2015 titled *Mapex Infrastructure Pvt. Ltd. vs. National  
Highways Authority of India.*

**NAVIN CHAWLA, J**

**JANUARY 8, 2018**

**RN/rv**

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**CORAM:**  
**HON'BLE MR. JUSTICE NAVIN CHAWLA**

1. The above petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) challenging the award dated 17<sup>th</sup> March, 2015 passed by the Arbitral Tribunal consisting of three Arbitrators.
2. MAPEX Infrastructure Pvt. Ltd. will be referred to as 'MAPEX' while National Highways Authority of India will be referred to as 'NHAI' in the present judgment.
3. The disputes between the parties are in relation to the contract for Four Laning including Strengthening of Existing Two Lane Pavement of National Highway No.2 from Panagarh (Km 517) to Palsit (Km 581.457) Section in the State of West Bengal which was awarded by the NHAI vide Letter of Acceptance No. NHAI/12018/3/2000/GM(E-III) Tech dated 26 September 2001 issued to the Consortium of M/s Gamuda-WCT Joint Venture.
4. MAPEX was incorporated as a Special Purpose Vehicle to implement the project and accordingly, a Concession Agreement was entered into between NHAI and MAPEX on 21<sup>st</sup> November, 2001.
5. The project was awarded on Build, Operate and Transfer (BOT) basis on annuity approach and the concession was granted for a period of 17 years and 6 months commencing from Commencement Date specified as 21<sup>st</sup> June, 2002 and ending on 20<sup>th</sup> December, 2019 (The Concession Period).
6. The Concessionaire was required to commence the construction works on or after the Commencement Date i.e. 21<sup>st</sup> June, 2002 and achieve the Commercial Operation Date (COD) on or before the Scheduled Project Completion Date (SPCD) specified as 20<sup>th</sup> December,

2004. The project was completed, as certified by the Independent Engineer (hereinafter referred as 'IE') appointed by NHAI in accordance with Article 4 of the agreement, achieving COD on 9<sup>th</sup> June, 2005, 171 days after the SPCD.

7. MAPEX, alleging various defaults on part of NHAI, raised claims on NHAI vide its letter dated 28<sup>th</sup> December, 2006. The Project Director of NHAI by a letter dated 3<sup>rd</sup> January, 2007 requested the IE to submit his detailed observations on the said claims, which were duly submitted by the IE vide its letter dated 8<sup>th</sup> June, 2007.

8. As no action was taken by NHAI on the said recommendations, the Arbitral Tribunal was constituted to adjudicate the claims of MAPEX, which resulted in the impugned award dated 17<sup>th</sup> March, 2015.

9. A bird's eye view of the award and the challenge thereto can be gathered from the table given below:-

| Cl. No . | Particulars: <b>Claims of the concessionaire/MAPEX Infrastructure Pvt Ltd</b> | Amounts Awarded by majority Arbitrators | Amounts Awarded by the minority Arbitrator | Objections to the Award filed by NHAI ( OMP No. 391 of 2015) | Objections to the Award filed by Concessionaire/ (OMP No. 391 of 2015) |
|----------|-------------------------------------------------------------------------------|-----------------------------------------|--------------------------------------------|--------------------------------------------------------------|------------------------------------------------------------------------|
| 1.       | Bonus for Early Completion:<br>Rs. 403,916,667/-                              | Nil                                     | Nil                                        | Not challenged                                               | Not challenged                                                         |
| 2.       | EPC Contractor's Time-related (Prolongation) Cost:<br>Rs. 379,281,932/-       | Nil                                     | Rs. 19,52,35,431/-                         | Not challenged                                               | Challenged                                                             |

|    |                                                                                                            |                                                                                                     |                                                                                                                        |                                                          |                                                                                                                                                       |
|----|------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|
| 3. | Concessionaire's Time- related (Prolongation) Costs:<br>Rs. 84,698,894/-                                   | Rs. 4,79,54,645/-                                                                                   | Unanimous Award                                                                                                        | Challenged                                               | Not challenged                                                                                                                                        |
| 4. | Delay & Disruption Costs:<br>Rs. 214,542,785/-                                                             | Nil                                                                                                 | Nil                                                                                                                    | Not challenged                                           | Not challenged                                                                                                                                        |
| 5. | Mitigation Costs for Late Delivery of Shaktigarh Bypass:<br>Rs. 122,634,977/-                              | Nil                                                                                                 | Nil                                                                                                                    | Not challenged                                           | Not challenged                                                                                                                                        |
| 6. | Additional Cost arising from Change in Law:<br>Rs. 211,378,926/-, revised calculation<br>Rs. 215,326,348/- | Rs. 4,81,06,147/-                                                                                   | Rs. 21,13,78,926/-                                                                                                     | Challenged to the amount awarded by majority Arbitrators | Partly challenged to the amount not considered by majority Arbitrators for its EPC Contractor viz-a-viz to amount awarded by the minority Arbitrator. |
| 7. | Financing Cost:<br>Rs. 305,954,444/- revised calculation<br>Rs. 722,371,218/- as updated to 9.11.2008      | Interest @ 12% per annum on the amounts awarded under Claims No. 3 & 6 from 10.6.2005 till payment. | Interest @ 12% per annum including on the further amounts awarded under Claims No. 2 & 6 from 10.06.2005 till payment. | Challenged the interest awarded by majority Arbitrators  | Partly challenged the interest on Claim No. 2 on the amounts not considered by majority Arbitrators and partly on Claim No. 6.                        |

|     |                                                                                                                                                                                                                     |                                                                                               |                 |                |                 |
|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|-----------------|----------------|-----------------|
| 8.  | Underpayment for Changes of Scope and Additional Works:<br><br>Rs. 36,963,258/-, amended claim for revised amount of Rs. 18,838,148/-                                                                               | Rs. 17,26,991/-                                                                               | Unanimous Award | Challenged     | Not challenged  |
| 9.  | Interest on Deferred Payment for Changes of Scope and Additional Works:<br><br>Rs. 28,073,044/- revised calculation Rs. 31,151,661/- as amended Claim No. 8 and updated to 9.11.2008                                | Interest @ 12% per annum on the amounts awarded under Claim No. 8 from 9.07.2008 till payment | Unanimous Award | Challenged     | Not challenged  |
| 10. | Interest on the amounts of aforesaid Claims No.1 to 9 at the rate of 13.5% per annum from the period between the respective dates on which the cause of action for each of the claims arose to the date of payment. | Claim is in duplication of Claim No. 7                                                        | Unanimous Award | Not challenged | Not challenged. |

10. I shall first deal with the challenge raised by MAPEX to the impugned award.

11. The challenge of MAPEX is primarily to the denial of its claim under the majority award for claim no.2 and claim no.6.

12. Claim no.2 was with respect to the EPC Contractor's time-related (Prolongation) Costs from 11<sup>th</sup> August, 2004 to 9<sup>th</sup> June, 2005 amounting to Rs.37,92,81,932/-. Relying upon Article 1 (Definitions and Interpretation) and Article 5.4 (a) (iv), it was stated that the Concession Agreement envisaged and authorized MAPEX to undertake construction work by itself or through an EPC Contractor. As the project was not completed in time due to defaults of NHAI, MAPEX was entitled to claim prolongation cost incurred by such EPC contractor. The same had also been verified by the IE. It was further submitted that these claims were payable even under section 73 of the Contract Act.

13. NHAI, on the other hand, had denied such claim by submitting that the EPC Contractor is not a party to the Arbitration Agreement and, therefore, its claims cannot be adjudicated by the Arbitral Tribunal. It was further submitted that there was no document showing any claim being raised by the said EPC Contractor against MAPEX and, therefore, the same are not payable under Section 73 of the Contract Act.

14. The majority award rejected the claim of MAPEX holding as under:-

*"88. It is a provision of the concessionaire's agreement that the Claimant has to complete the project as per scope of the project under the agreement . It is further a provision under the agreement article 5.4 (iv) that the concessionaire may undertake construction works by itself or through a contractor possessing requisite technical , financial and managerial expertise /capability, but in either case the concessionaire shall remain solely responsible to*

*meet the construction requirements. EPC contract has been defined under article 1.1 of the agreement.*

*Thus there is no bar on the part of the concessionaire to get the work done on his behalf. Now the next question is that, can it be paid to the EPC contractor through the concessionaire?*

*89. According to the claimant the EPC contractor has suffered a loss of Rs.37,92,81,932 as contained in appendix F1, F2 and F3 and it has to be paid to him through the concessionaire whereas the plea of the respondent is that EPC is neither a party to the agreement nor a party to arbitration clause under section 7 of the arbitration and conciliation act 1996. Therefore it cannot be paid. AT agrees with the respondent on this issue.*

*90. Further there is nothing on record to show that EPC has incurred this loss and he has been indemnified by the concessionaire to that extent. Moreover even no agreement has been placed on record which entitles EPC contractor to claim damages from the concessionaire. Thus he is not liable to be paid under section 73 of the Contract Act.*

*91. In view of the foregoing reasons this claim cannot be paid to the EPC contractor through the concessionaire and Award Rs nil."*

15. Learned senior counsel for MAPEX has submitted that the Arbitral Tribunal has committed an error in rejecting the above claim on the ground that the EPC Contractor was not a party to the arbitration agreement. It is submitted that once it is accepted that MAPEX could appoint an EPC Contractor for undertaking the works under the agreement, all claims of such EPC Contractor could be claimed through MAPEX, who is a party to the agreement. He further relies upon the judgment dated 17<sup>th</sup> April, 2017 passed by the Single Judge of this Court in OMP (Comm.) No.176/2016 wherein this Court had rejected a

challenge to an award where similar claims of EPC Contractor had been granted by the Arbitral Tribunal. He further submits that the Division Bench of this Court vide its order dated 8<sup>th</sup> November, 2017 passed in FAO(OS) (Comm.) No.157/2017 has upheld the judgment of the Single Judge. Learned senior counsel for MAPEX has further relied upon the judgment of House of Lords in *Linden Gardens Trust Ltd. vs. Lenesta Sludge Disposals Ltd. & Ors.* (1993) 3 WLR 408 to contend that NHAI being held to be in breach of agreement in form of the delay being attributed to it, the loss suffered due to such breach has to be paid by NHAI irrespective of whether the same in turn is paid by MAPEX to the EPC Contractor or not.

16. In my view, the Arbitrators have accepted that MAPEX could have appointed an EPC Contractor on a back to back basis in accordance with the Concession Agreement. The Arbitral Tribunal, however, has rejected the claim of MAPEX on the following three grounds:-

- (a) EPC Contractor, not being a party to the contract, cannot sustain its claim before the Arbitral Tribunal.
- (b) There is nothing on record to show that the EPC has incurred any loss and has been indemnified by MAPEX to that extent.
- (c) Even no agreement entitling EPC Contractor to claim damages from MAPEX has been placed on record.

17. As far as the first reason for rejection of the claim by the Arbitral Tribunal is concerned, learned senior counsel for MAPEX rightly contends that the EPC being a back to back agreement duly recognized under the Concession Agreement, any claim of the EPC would, in fact, be a claim of the Concessionaire itself, thereby making it subject of being adjudicated in arbitration proceedings. It would be a case where the Concessionaire will agitate the claim of sub-contractor/EPC as being its own claim. In case titled **Larsen & Toubro Ltd. vs. Mohanlal Harbans Lal Bhayana** (2015) 2 SCC 461, the Supreme Court, while dealing with a similar situation of claim being raised by a sub-contractor, held as under:-

*“19. Accordingly, while allowing this appeal and setting aside the order of the High Court, we would like to give the following directions, in order to balance the equities:*

*19.1. It shall be ensured by the appellant that final bill is settled by SCOPE within two months from the date of receiving the copy of this order. For this purpose, this order shall be brought to the notice of SCOPE as well so that SCOPE acts swiftly for settling the bill.*

*19.2. In case there are certain claims of the respondent which are not agreed to while passing the final bill and disputes remain, those will be taken up by the appellant with SCOPE immediately thereafter by invoking arbitration between the appellant and SCOPE as per the arbitration agreement between the appellant and SCOPE. In raising such disputes the appellant and the respondent shall act in unison as per the understanding arrived at between them vide supplementary agreements. In that event, the Arbitral Tribunal shall be constituted within 2 months thereof.*

*19.3. In case the appellant is satisfied with the final bill and chooses not to raise the claims with SCOPE but the respondent feels*

*that their claims are legitimate then it would be treated as dispute between the appellant and the respondent. In that event, the Arbitral Tribunal shall be constituted as per Clause 25 of the agreement dated 3-3-1998 between the parties within a period of two months of that event.*

**19.4.** *In either of the aforesaid arbitrations, the Arbitral Tribunal shall endeavour to render its award within six months from the date of the constitution of the Arbitral Tribunal.”*

18. Therefore, the claim of the EPC Contractor could have been agitated through MAPEX in the arbitration proceedings.

19. However, for succeeding in the arbitration, it was for MAPEX to show whether under the terms of the sub-contract/EPC contract, the EPC Contractor was entitled to raise a claim of prolongation cost and if at all any such claim had been paid by MAPEX to such EPC Contractor. The claim of prolongation cost was in the nature of claim of damages for breach of contract under Section 73 of the Contract Act, therefore, the quantum of loss had to be proved by MAPEX, being the claimant. Principle of mitigation of loss would also apply to such situation.

20. As noted by the Arbitral Tribunal, the contract between MAPEX and EPC Contractor was not placed before the Arbitral Tribunal. Therefore, it could not be shown on record whether or not under that contract the EPC Contractor is at all entitled to claim any prolongation cost from MAPEX and if so, to what extent. It may be true that the IE, on scrutiny of the records produced by MAPEX, had recommended the claim to an extent of Rs.37,92,81,932/- as prolongation cost of EPC Contractor, but whether the same was at all payable by MAPEX to the

EPC Contractor could have been adjudicated only after perusing the agreement between MAPEX and the EPC Contractor. Recently in case of *Sharma and Associates Contractors Pvt. Ltd. vs. Progressive Constructions Ltd. (2017) 5 SCC 743*, Supreme Court upheld the setting aside of an Arbitral Award which had granted a claim of revised rates in favour of a sub-contractor relying upon a clause in the Principal Contract, when the sub-contract did not have such a clause. It was held that though the sub-contract was a back-to-back Agreement, as it did not have a similar term as in the Principal Contract, such a claim could not have been allowed by the Arbitral Tribunal. In the present case, therefore, in absence of EPC contract being on record, claim of MAPEX, in form of damages or indemnity, could not have been allowed by the Arbitral Tribunal.

21. In the case of *Linden Gardens Trust Co. (supra)*, the House of Lords dealt with the situation where there was evidence before it of loss having been suffered by the third party, however, the said party could not have recovered the same from the party in breach of the agreement. It was in that circumstance that the House of Lords held that a party to the contract could enforce such a claim on behalf of the party suffering loss and against the party in breach of the contract. The House of Lords held as under:-

***“(6) What is the measure of damages in the claim by Corporation?”***

*McAlpine accept that, since the attempted assignment by Corporation of its rights under the contract to Investments*

*was ineffective, corporation has retained those rights and is entitled to judgment against McAlpine for any breach of contract. But, McAlpine submits, Corporation is only entitled to nominal damages. Corporation has suffered no loss: it had parted with its interest in the property (and therefore with the works when completed) before any breach of the building contract: moreover Corporation received full value for that interest on its disposal to Investments. Therefore, it is said, neither of the plaintiffs has any right to substantial damages: Investments has incurred damage (being the cost of rectifying the faulty work) but has no cause of action; Corporation has a cause of action but has suffered no loss. If this is right, in the words of my noble and learned friend, Lord Keith of Kinkel in G. U. S. Property Management Ltd. v. Littlewoods Mail Order Stores Ltd., 1982 S. L. T. 533, 538, " the claim to damages would disappear...into some legal black hole, so that the wrongdoer escaped scot-free."*

XXXXX

*In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both Corporation and McAlpine, was going to be occupied, and possibly purchased, by third parties and not by Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the*

*loss of any right of suit against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract could not without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case in which the rule provides "a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it."*

22. Therefore, in the case before the House of Lords, the damage suffered by the party had been duly proved. In the present case, however, in absence of the agreement between MAPEX and the EPC Contractor, it could not have been said whether EPC Contractor at all is entitled to claim the prolongation cost from MAPEX.

23. Learned senior counsel for MAPEX also relied upon the general indemnity clause as contained in Article 19.3 of the Concession Agreement, the relevant portion of which is reproduced herein below:-

*“19.3 Liability and Indemnity*

*(a) General Indemnity*

*(i) The Concessionaire shall indemnify, defend and hold NHAI harmless against any and all proceedings, actions and third party claims arising out of a breach by Concessionaire of any of its obligations under this Agreement except to the extent that any such*

*claim has arisen due to breach by NHAI of any of its obligations under this Agreement or a Force Majeure Event which is a Political Event.*

*(ii) NHAI will, indemnify, defend and hold harmless the Concessionaire against any and all proceedings, actions, third party claims for loss, damage and expense of whatever kind and nature arising out of breach by NHAI, its officers, servants and agents of any obligations of NHAI under this Agreement except to the extent that any such claim has arisen due to breach by the Concessionaire of any of its obligations under this Agreement.*

*(b) xxxxxx*

*(c) xxxxxx*

*(d) In the event that either Party receives a claim from a third party in respect of which it is entitled to the benefit of an indemnity under this Article 19.3(the 'Indemnified Party') it shall notify the other Party ("Indemnifying Party") within 14 (fourteen) days of receipt of the claim and shall not settle or pay the claim without the prior approval of the Indemnifying Party. Provided that, such approval not to be unreasonably withheld or delayed. In the event that the Indemnifying Party wishes to contest or dispute the claim it may conduct the proceedings in the name of the Indemnified Party subject to the Indemnified Party being secured against any costs involved to its reasonable satisfaction."*

24. For attracting the above clause, MAPEX should at least have shown to the Arbitral Tribunal that there was a claim made by EPC Contractor against it towards the prolongation cost. In absence of such claim being shown to the Arbitral Tribunal, no fault can be found in the Arbitral Tribunal denying such a claim.

25. As far as the partial denial of claim no.6 is concerned, the same proceeds on similar basis inasmuch as the claim of additional cost arising from change of law, so far as it relates to MAPEX is concerned, was allowed whereas one claimed against EPC Contractor was disallowed.

26. Here again, in absence of the agreement between the EPC Contractor and MAPEX being filed on record, it could not be proved by MAPEX that it was liable to pay to the EPC Contractor for such additional cost.

27. The challenge to claim no.7 is confined to the aspect that if the claim under claim Nos. 2 and 6 are awarded to EPC Contractor, MAPEX would also be entitled to interest over the amount so awarded. As I find no reason to interfere with the majority award passed by the Arbitral Tribunal rejecting the claim of MAPEX towards EPC Contractor, the objection as far as claim no.7, is also liable to be rejected.

28. This now brings me to the objections filed by NHAI against the impugned award in OMP No.391/2015.

29. The first challenge of NHAI is to the grant of claim no.3 in favour of MAPEX i.e. Concessionaire's time related prolongation cost. It is submitted by the learned counsel for NHAI that the Arbitral Tribunal, for the purposes of having arrived at the claim of bonus/penalty under the Concession Agreement had determined 'X' under Article 8.3 as 171 days relying upon the recommendations of the IE as contained in the letter dated 29<sup>th</sup> June, 2005. It is submitted that mere calculations of 'X' for purposes of bonus and reduction of annuity is distinct from holding that

NHAI is responsible for the delay and thereby making it liable to compensate the Concessionaire under Section 73 of the Contract Act. It is further submitted that the effect of delay is only in the form of bonus or reduction of annuity and not in form of damages.

30. It is additionally submitted that MAPEX has already been compensated for change of scope of work, for which an additional cost of Rs.1,98,93,210.26 had been paid to MAPEX and there was no evidence on record in support of the claim of further damages. It is submitted that the Arbitral Tribunal, in fact, took a contradictory stand in first rejecting to rely upon the letter dated 8<sup>th</sup> June, 2007 of IE, while at the same time granting the claim of MAPEX on the basis of the said letter itself.

31. I have considered the submission made by the learned counsel for NHAI. I am unable to agree with the same. Article 8.3 of the Concession Agreement is reproduced herein below:-

**"8.3 Bonus/Reduction in Annuity**

*(a) The Concessionaire shall either receive bonus for early completion of the Project (the Bonus) or incur reduction in the Annuity for delayed completion of the Project (the Reduction) as the case may be.*

*(b) For the purpose of this Article 8.3, each Annuity Payment Period shall be deemed to be a period of 180 calendar days.*

*(c) The Bonus or Reduction as the case may be shall be computed as under:*

*(i) If COD is achieved prior to first Annuity Payment Date:*

$$B \text{ or } R = [ (SPCD-COD) + X ] * A / 180$$

*(ii) If COD is achieved between two Annuity Payment Dates:*

$$B \text{ or } R = [(PAPD - COD) + X] * A / 180$$

*Where,*

*A = Annuity,*

*B = Bonus,*

*PAPD = Previous Annuity Payment Date.*

*R = Reduction*

*SPCD = Scheduled Project Completion Date,*

*X = As determined by the Independent Engineer, the aggregate number of days of delay caused by;*

- (i) delay in delivery of the Project Site or any part thereof by NHAI,*
- (ii) suspension of Construction Works or part thereof by NHAI or the Independent Engineer, for reasons not attributable to the Concessionaire,*
- (iii) Change of Scope Order pursuant to Article 7,*
- (iv) stoppage of the Construction Works or part thereof on account of the Concessionaire allowing access and use of Project Site for public purposes pursuant to Article 3.2(d),*
- (v) Force Majeure Event which is a Political Event or Other Event,*
- (vi) NHAI Event of Default.*

(d) If the resultant figure arrived at pursuant to computation made in accordance with the preceding sub-article is positive, the same shall be the amount of Bonus payable to the Concessionaire and if negative, the same shall be the amount of Reduction.

(e) The Bonus shall be paid or Reduction shall be effected on the first Annuity Payment Date occurring after COD.

(f) Notwithstanding anything Inconsistent contained anywhere in this Agreement, NHAI's obligation to pay Annuity shall arise subject to and only upon occurrence of COD."

32. The Arbitral Tribunal has calculated delay as 171 days on the basis of the letter dated 29<sup>th</sup> June, 2005 of the IE. Majority of this delay is on account of delay in handing over of the land and delay due to change of scope of work. The Arbitral Tribunal has further held that this delay was attributable to NHAI. A chart showing the calculation of number of days delay is reproduced hereinunder:-

Panagarh – Palsit Project  
DELAY IN PROJECT WORK (X) AS ASSESSED BY  
INDEPENDENT ENGINEER ON 28<sup>TH</sup> JUNE 2005  
Ref: Article No. 8.3 of Concession Agreement

| Sl. No. | Description                                             | Period    |           | Time in days | Proportionate Time Impact on the Whole Project in Days | Remarks                   |
|---------|---------------------------------------------------------|-----------|-----------|--------------|--------------------------------------------------------|---------------------------|
|         |                                                         | From      | To        |              |                                                        |                           |
| 1.      | Delay in handing over of land for Shaktigarh Bypass Km. | 20-May-02 | 01-Oct-03 | 499          | 45.83                                                  | $(5.92/64.457)*499=45.83$ |

|    |                                                                   |                            |           |      |               |                                                     |
|----|-------------------------------------------------------------------|----------------------------|-----------|------|---------------|-----------------------------------------------------|
|    | 573 + 226 to Km. 579 + 146                                        |                            |           |      |               |                                                     |
| 2. | Delay in handing over of land from Km. 542 + 000 to Km. 557 + 000 | 05-Dec-01                  | 03-Jan-02 | 29   | 6.75          | $(15/64.457)*29=6.75$                               |
| 3. | Delay in handing over of land from Km. 539 + 000 to Km. 542 + 000 | 20-Mar-02                  | 18-Jul-02 | 129  | 5.59          | $(3/64.457)*120=5.59$                               |
| 4. | Delay in handing over of land from Km. 522 + 349 to Km. 526 + 700 | 20-Mar-02                  | 23-Jul-03 | 490  | 33.07         | $(4.35/64.457)*490=33.07$                           |
| 5. | Delay due to Change of Scope                                      |                            |           | 70   | 70            |                                                     |
| 6. | Delay due to strikes/bandh                                        |                            |           | 9    | 9             | Refer to enclosures in letters of 14 & 16 June 2005 |
| 7. | Delay due to forceful stoppages                                   |                            |           | 69.5 | 1             | Refer to enclosures in letters of 14 & 16 June 2005 |
|    |                                                                   | <b>Total Delay in Days</b> |           |      | <b>171.24</b> |                                                     |

33. The above is a finding of fact. This Court, in exercise of its powers under Section 34 of the Act, cannot convert itself into a Court of appeal and start re-appreciating the evidence to find out if a different

conclusion can be arrived at from the evidence led on record. This is not the scope of challenge to an Award under Section 34 of the Act. In fact, a reading of paragraph 14.6 of the Objection Petition, being OMP no.391/2015, filed by NHAI would show that there was no challenge to delay of 171 days being attributable to NHAI.

34. As far as the second contention of the NHAI is concerned, i.e. that the agreement having provided for the effect of delay in form of bonus or reduction of annuity, claim of damages under section 73 of the Contract Act would not be maintainable, is also not acceptable. The claim of bonus is merely an incentive to the Concessionaire/ Contractor to achieve the Schedule Date of Completion of the project and similarly the reduction of annuity is a disincentive to the Concessionaire for having failed to commission the project in a timely manner. The same, however, cannot allow a party in breach of agreement to escape the consequence of such breach. The claim of prolongation cost is in form of claim of compensation under section 73 of the Contract Act. It is an independent claim based on the breach of agreement by NHAI. Once, it is held that NHAI was in breach of contract in form of having caused delay, NHAI could not be permitted to take shelter behind clause 8.3 of the Concession Agreement to deny the legitimate claim of the Concessionaire/MAPEX arising out of such breach.

35. In *Assam State Electricity Board And Ors. vs. Buildworth Pvt. Ltd.* (2017) 8 SCC 146, Supreme Court while dealing with the claim of escalation and idling charges, held that once there was a delay in execution of the contract due to employer, the employer was liable for the

consequences of the delay, namely, an increase in price and the other party would be entitled to a claim for damages.

36. In the present case, once the delay has been found attributable to NHAI, claim of MAPEX towards prolongation cost has been rightly granted by the Arbitral Tribunal.

37. It is further submitted by learned counsel for the NHAI that MAPEX had not filed any document on record in support of the quantification of its claim and in view on the same, MAPEX, even if it is assumed had suffered loss, could not have been granted the amount as directed by the Arbitral Tribunal. This submission of the learned counsel for the NHAI is again without any merit.

38. It may be correct that MAPEX did not file on record any supporting documents for its claim or a certificate of a Chartered Accountant and neither produced any Chartered Accountant in support of its quantification of the claim, however, at the same time, it cannot be lost sight of that the IE had quantified the damages suffered by MAPEX after randomly scrutinizing its books of accounts. The Arbitral Tribunal, as far as the quantification is concerned holds as under:-

*"163. AT has held that delay in the completion of the project from 21st December 2004 to 9th June 2005 is attributable to the employer .AT has further held that the concessionaire is entitled for damages arising out of this delay under section 73 of the Contract Act 1872. Thus Actual loss incurred by the claimant is reimbursable to him from December 2004 to June 2005. No supporting documents have been placed before the AT for losses incurred by the*

*claimant during this period except the recommendations of the IE which have been contested by the respondent on the ground that IE has failed to discharge his functions as contained in para 2.2 of Schedule L of the agreement. Now the question arises, is AT bound by the recommendations of the IE or work out some other reasonable methodology within the four corners of the agreement.*

*164. At has applied his mind on this issue and have come to a conclusion that AT should give weightage to the recommendations of the IE where AT feels that due to inadequate data it is not possible to arrive at proper quantification and IE being present at site throughout the period of construction. IE's recommendations are for the period from 11<sup>th</sup> August 2004 to 9th June 2005 (302 days). Where as AT has held the employer attributable for delay from 21st December 2004 to 9th June 2005 (171 days). Keeping this factor in mind IE's recommendations have been modified. In claims 2,3,4, and 5 wherever the quantification is in respect of EPC has been disallowed on account of reasons recorded under claim no.2. Concessionaire's claim recommended by the IE has been modified to  $171/302=0.566$ . Quantification in case claim 6 pertaining to the concessionaire has been allowed as per page 328 of SOC.*

39. The Arbitral Tribunal is not bound by the law of evidence. It has weighted the recommendation of the IE and found the same worthy of reliance for the purpose of quantification. It is not for this Court to arrive at a different finding in this regard.

40. Article 1 defines the term Independent Engineer as under:-

*“Independent Engineer” means a reputed Person being a firm, company or a body corporate appointed in accordance with Article 4 for supervision and monitoring of compliance by the Concessionaire with the Project Requirements, more particularly to undertake, perform, carry out the duties, responsibilities, services and activities set forth in Schedule “L”.*”

41. Clause 2.2(a)(viii) of Schedule – L further provides as under:-

*“SCHEDULE – L  
INDEPENDENT ENGINEER – SCOPE OF WORK*

*2.2 Implementation Period – Construction*

*a. The Independent Engineer would monitor, in accordance with Good Industry Practice, the progress in implementation and ensure compliance with the Construction Requirements. For this purpose the Independent Engineer shall undertake, inter alia, the following activities and where appropriate make suitable suggestions.*

*xxxxxx*

*(viii) review and ascertain the cost variation arising as a result of Change in Law and/or Change in Scope and determine the Additional Cost;”*

42. Therefore, ascertaining cost variation arising as a result of change in law and / or change in scope and determination of the additional cost was the work assigned to the Independent Engineer. The IE, gave a detailed report under cover of its letter dated 08.06.2007 after examining the books of accounts of MAPEX, though in random. On such random checks of the original documents and accounts, the IE had certified the claims on basis of which the Arbitral Tribunal has awarded claim No. 3

in favour of MAPEX. Mr. Philip E.Konen, team leader of IE was examined as a witness by MAPEX. In his cross-examination the following questions were put to him, though in relation to the EPC Contractor's prolongation cost claims, and the same would show that the certification of the claim was on the basis of a checking of the accounts produced by MAPEX:-

*"Q40. Do I take it that you did not have any evidence or documents on records to compute the prolongation cost of EPC contractor?"*

*Ans. I disagree. I inspected the records pertaining to these items at the Concessionaire's offices.*

*Q41. Have you kept any copy of the documents submitted by the EPC contractor on record?"*

*Ans. I do not recall, keepings copies of these documents. Our office documents were handed over to NHAI when the office was closed.*

xxxxx

*Q43. Can you please give the description of the books of Accounts, documents and other evidence which you perused in support of the EPC contractor's claim.*

*Ans. I looked at the yearly amounts and then at the monthly amounts. I then picked two or three months per year and verified the amounts for that month and if they agreed or not with the monthly summery data.*

*Q44. What did you pick up for two or three months as stated in your previous answer.*

*Ans. I looked at all the items which built up to the costs for that month. I worked backward from the total for a month I was inspecting and would check all of the items contributing to it including but not limited to salaries, expenses, supplies and so on. I do not recall in detail after 3 years.*

*Q45. Can you give me a description of specific document which you examined in support of EPC contractor's claim.*

*Ans. The books of accounts, bills and invoices.*

*Q46. Which particular book of accounts did you examine?*

*Ans. Those of EPC contractor's document available at the Concessionaire's office showing the expenses included in the claim.*

*Q47. Which particular book out of contractor's document was available in the Concessionaire's office?*

*Ans. All of the books and records which I requested were immediately made available to me, I do not remember the title of the specific book.*

*Q48. According to you, you tried to verify the summary data for a particular month.*

*Ans. That is incorrect. After I had a monthly summarise for the year I picked months at random and verified all the costs from the bills, invoices and so forth for that specific month. I then checked whether all of the individual costs added up to the monthly total. When I had looked at the yearly amount and the monthly summary I told the Concessionaire to bring me all the data for a specific month which they were not informed of in advance. That data, produced on the spot is what I used to verify the amounts.*

*Q49. So, you undertook sample checking only.*

*Ans. Yes.*

xxxxxx

*Q56. Please tell me how you have reached the figure of Rs. 84,698,894/- in recommending the claim of prolongation cost of Concessionaire in its favour.*

*Ans. By following the same procedure detailed above to verify the EPC contractor's costs for prolongation.*

*Q57. Did you have any material on your record in recommending the above mentioned claim referred in Q56?*

*Ans. I do not recall keeping separate records in my files.*

*Q58. I put it to you that your recommendations are baseless and without any support of documents.*

*Ans. I disagree entirely. I was asked for comments and recommendations and not to supply documents about the claim submitted."*

43. In view of the above, in my opinion, the Arbitral Tribunal wrongly rejected to rely upon the report of the IE as contained in its letter dated 08.06.2007 for the purpose of ascertaining the damages / prolongation cost suffered by MAPEX as observed by it in paragraphs 102 and 103 of the award. However, it later rightly applied the said report, while determining the quantum of damages / prolongation cost in paragraphs 163 and 164 of the impugned award.

44. Similarly, challenge to grant of claim No.6 on account of change of law being granted by the Arbitral Tribunal without any proof of the same being placed on record is without merit.

45. Though submissions were made with respect to grant of claim no.8 in favour of MAPEX by the Arbitral Tribunal, the same were asking this Court to re-appreciate the evidence led before the Arbitral Tribunal, which in my opinion is not permissible for this Court. The same is accordingly, rejected.

46. NHAI has further challenged the award of interest in claim Nos. 7 and 9, however, I find that the said objection is premised more on the basis that there was no evidence on record for allowing such a claim. It was further contended that in any case, interest at the rate of 12% p.a. could not have been granted. The Arbitral Tribunal has allowed claim No.7 holding as under:-

*“171. This claim is in respect of financing charges incurred by the claimant on claim amounts of claims from no.1 to 6 due to delays on the part of the respondent. AT has already held under claim no. 1 that the project has been delayed by the respondent by 171 days.*

*All claims arising out of this delay will be payable to the claimant if tenable. Further this is BOT project and finances have to be arranged by the concessionaire from banks at interest. Thus all amounts due to the claimant under claims 1 to 6 will carry interest. 172. Whereas the respondent has contended that nothing is payable under article 5 and 9 of the agreement. AT has gone through these provisions and observe that the contention of the respondent in the instant case is not correct. The claimant has argued that additional resources were arranged through banks at interest. Thus AT holds that financing charges will be payable on the amounts of claims which AT finds due to the claimant from 10-06-2005 till it is paid by the Respondent@ 12% simple interest per annum.”*

47. The Arbitral Tribunal, therefore, has given cogent reasons for allowing the said claim. As far as the rate of interest is concerned, I do not find anything unreasonable in the same so as to warrant interference in exercise of jurisdiction under Section 34 of the Act. Interest as granted under the claim no. 9 was on the amount awarded under claim no.8, objection against which I have already rejected herein above.

48. In view of the above, I find no merit in the above petitions, the same are accordingly dismissed, with no order as to costs.

**NAVIN CHAWLA, J**

**JANUARY 8, 2018**  
**RN/rv**