

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

+ **O.M.P. (COMM) 416/2017 & I.A. No. 13742/2017(Stay)**

Reserved on: 03.07.2018
Date of decision : 12.10.2018

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Petitioner

Through: Ms. Kritika Shukla, Advs.

versus

DIC - NCC (JV)

..... Respondent

**Through: Dr. Amit George, Mr. K.
Dhananjaya Naidu, Mr. Swaroop
George and Mr. Rishabh Dheer,
Advs.**

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The petitioner by way of this present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), challenges the Arbitral Award dated 18.07.2017 passed by the Arbitral Tribunal (hereinafter referred to as 'Impugned Award'), partially awarding certain claims in favour of the respondent, while rejecting the counter-claims raised by the petitioner. The Impugned Award allowed an amount of Rs. 66,00,02,997/- inclusive of pre-award interest and alongwith post award interest in favour of the respondent, while also directing the petitioner to release the Bank Guarantee of Rs. 3,93,77,776/- furnished by the respondent in respect of labour cess, to the respondent.

2. The challenge in the petition is made against the claims of the respondent allowed by the Arbitral Tribunal, that is, Claim Nos. 1, 2, 3(a) and (c), 4, 6 and 7, as also to the rejection of the Counter Claims and grant of interest.

3. Before dealing with the objections against each of the claims, the following basic facts regarding the dispute may be noted.

4. Pursuant to the submission of its bid for the work of construction and completion of East-West Corridor Project Package III: Rehabilitation and Upgrading of Bamanbore – Garamore Road Section of NH-8A from Km. 182.60 to Km.254.00 in the State of Gujarat (hereinafter referred to as “Project work”) vide letter dated 10.12.2003, the respondent was awarded the Project work by the petitioner vide the Letter of Acceptance dated 22.11.2004 at the Contract Price of Rs. 289,92,46,020/-. In terms of the Acceptance Letter, the respondent furnished two Performance Bank Guarantees dated 06.12.2004 for Rs.14,49,62,310/- (Rupees Fourteen Crores Forty Nine Lakhs Sixty Two Thousand Three Hundred and Ten) each. The scope of work encompassed rehabilitation of existing 2 lanes, construction of additional 2 lanes with the provision of Service Roads, Underpasses, At-Grade Intersections, Grade Separators, Drainage and Protective Works, safety works and maintenance works.

5. The parties thereafter entered into an Agreement dated 23.12.2004, incorporating terms contained in inter alia the ‘Conditions of Particular Application’ (hereinafter referred to as ‘COPA’) and the ‘General Conditions of Contract’ (hereinafter referred to as ‘GCC’). The stipulated time for completion of the work was thirty-three months. The notice for

commencement of the work was dated 11.02.2005 and accordingly, the Scheduled Date of Completion was 11.11.2007. The project however, was actually completed on 16.08.2009, with the value of the executed work being Rs.278,14,89,533/-.

6. For the delayed completion, extensions of time were sought for on various grounds not attributable to the respondent inter alia adverse climatic conditions, strikes and granted to the respondent on recommendation of the Engineer appointed by the petitioner, M/s Stanley – CES (JV). The final extension was granted by the petitioner vide letter dated 22.12.2009 upto the actual date of completion, that is, 16.08.2009. Admittedly, the respondent submitted three undertakings dated 14.07.2008, 20.12.2008 and 21.09.2009 to the petitioner in the course of applying for the extensions of time and prior to being allowed the extensions, not to claim additional costs for the extended period. The final extension was subsequently granted with price escalation and without any levy of liquidated damages, under Clause 44 of the GCC.

7. Upon completion of the work, the respondent was issued a 'Taking Over Certificate' dated 12.09.2009 and thereafter, a 'Defects Liability Certificate' dated 25.03.2011 with effect from 07.01.2011.

8. As per sub-clause 60.11 of the COPA, the respondent submitted a 'Draft Final Statement' dated 26.03.2011 describing the value of work done as well as the amounts due as payable by the petitioner to the respondent, including prolongation costs incurred due to alleged delays caused by the petitioner in completion of the project. While the amount claimed in Part (A) of the Draft Statement, being the final bill, was duly

certified by the Engineer, Part (B) of the Draft Statement containing all amounts due remained uncertified, certain amounts contained therein being disputed and subject to decision of the redressal authority, as per the Engineer's letter dated 20.05.2011.

9. Respondent sought to refer the disputes in relation to unpaid claims and non-certification thereof to the Disputes Adjudication Board (hereinafter referred to as the 'DAB') as per sub-clause 67.1 of the COPA on 18.01.2013, however, was informed by the petitioner that the DAB was not in existence subsequent to issuance of the Defects Liability Certificate. The respondent accordingly referred the disputes to arbitration vide letter dated 22.04.2013, leading to the Impugned Award under challenge.

10. The Arbitral Tribunal in its Impugned Award has awarded the following claims in favour of the respondent and against the petitioner:-

- “(i) Claim no. 1: Extra cost due to difference in escalation indices considered weekly & monthly: Rs. 85,54,979/-*
- (ii) Claim no. 2: Extra cost of staging at Grade Separator: Rs. 5,93,276/-*
- (iii) Claim No.3(a): Additional expenses on deployment of machinery, plant & equipment: Rs. 26,49,31,980/-*
- (iv) Claim No.3(c): Additional expenses on overheads and establishment: Rs. 11,29,75,844/-*
- (v) Claim no.4.1: Reimbursement of Additional Expenses incurred due to introduction of Value Added Tax (VAT): Rs. 4,32,08,227/-*
- (vi) Claim no.4.2: Reimbursement of Additional Expenses due to Change in Service Tax: Rs. 5,27,035/-.*
- (vii) Claim no. 4.3: Reimbursement of Additional Expenses due to increase in Royalty charges: Rs. 12,31,799/-*

(viii) Claim no. 4.4: Non-Deposition of Labour Cess: BG for amount Rs. 3,93,77,776/- held by the Respondent to be released to the Claimant

(ix) Claim no. 6: Loss of interest due to delayed IPC payments: Rs. 6,91,145/-

(x) Claim no. 7: Interest @ 10% compounded monthly on principal amount as per Clause 60.8 from date of cause of action up to the date of Award: Interest @ 10% compounded monthly is awarded on principal amount as per Clause 60.8 from 22.04.2013 up to the date of the Award

And

(xi) Claim no. 7: Future Interest @ 18% compounded monthly on awarded amount from the date of award up to actual date of payment: Future Interest @ 10% simple awarded on the awarded amount from the date of award up to actual date of payment.”

11. Additionally, following counter-claims of the petitioner have been dismissed by the Arbitral Tribunal:

(i) Counter-claim no. 1: Recovery of Rs.46,19,051/- paid in excess against Price Adjustment : Nil

(ii) Counter-claim no. 2: Recovery of Rs.5,67,00,000/- on account of hire charges of Staging and Return of Staging referred by the Contractor in its Claim No. 2 in good condition : Nil

(iii) Counter-claim no. 3: Recovery of Rs.12,28,92,957/- in the matter of WCT/VAT : Nil

(iv) Counter-claim no. 4: Interest @ 18% pa : Nil

12. On the merits of the Award, the petitioner has challenged the claims as under:

Claim No. 1

13. Claim No. 1 relates to the respondent's claim for payment due on account of difference in price adjustment on alleged wrongful

consideration of price indices. The Tribunal has concomitantly dealt with and rejected the Counter-Claim No. 1 of the petitioner herein towards alleged excess payment made by the petitioner to the respondent on the basis of weekly price indices.

14. The learned counsel for the petitioner refers to sub-clause 70.5 of the COPA, which specifies the current indices/prices to be those prevailing on the day 28 days prior to the last day of the period to which the Interim Payment Certificate (hereinafter referred to as 'IPC') is related and contends that since the contract stipulates that if the IPC is of the last day of the month, the current indices shall be of the 2nd / 3rd of the month and therefore, weekly indices nearer to the 2nd / 3rd of the month would be adopted. She submits that as opposed to this, the monthly indices are the average of the month being wholly irrelevant for the 2nd/3rd of the month. She further submits that the Arbitral Tribunal has simply reproduced the said clause and has come to an erroneous conclusion by not interpreting it.

15. It is further submitted by the counsel that even upon the shift by the petitioner in payment of price adjustment on the basis of weekly indices from 24.06.2008, the respondent duly accepted the payments and did not raise any issue thereon, including before the DAB. The claim raised before the Arbitral Tribunal suffered from a delay of 56 months and is barred in law.

16. Learned counsel for the respondent, on the other hand, contends that the relevant clause herein, that is sub-clause 70.5 of the COPA, while providing for indices, does not expressly specify use of weekly indices as

current indices and that monthly indices were more appropriate for calculation of price adjustment. He further submits that the parties themselves understood that indices to be used were monthly indices inasmuch as the petitioner itself, until the 36th IPC had been making payment as per the monthly indices and had only later unilaterally and abruptly decided to use weekly indices as current indices to calculate price adjustment. The learned counsel points to the plausible interpretation to the Agreement provided by the Arbitral Tribunal meriting no interference. He submits that as the indices have to apply to the value of work which is executed all days/weeks of the entire month and not in any specific week of the month, the monthly indices are most appropriate to be applied.

17. On the petitioner's objection to respondent's belated raising of dispute with respect to change in methodology of use of price indices in the Draft Final Statement, the learned counsel for respondent states that firstly, petitioner has itself failed to point out any bar of limitation; secondly, the respondent did in fact raise the aforesaid issue to the DAB; and thirdly, in any case, the Agreement in sub-clause 60.11(b) of the COPA contemplates raising of all claims payable at the time of completion of work in the Draft Final Statement, which is essentially in the nature of a final bill.

18. On the said claim, the Arbitral Tribunal has reached the following conclusions:

“9. The WPI is applied to the value of work which is executed during the previous one month. The work is

executed spread over all days/weeks of the entire month and not in any specific week of the month. Taking into view this aspect, to arrive at the realistic amount of escalation, it is only appropriate to apply the monthly wholesale price Index and not the weekly WPI.

AWARD CLAIM NO.1:

10. In view of the above discussion, the Arbitral Tribunal is of the view that as per contract and trade practice only monthly indices are appropriate to work out the amount of Price Adjustment. The claim of the Claimant for payment of price adjustment based on monthly indices is justified.

11. The Claimant has submitted his claim for Rs. 82,62,342 in the SOC Pg. 195 to Pg. 243 which was subsequently updated to Rs. 85,54,979 Exhibit C-132;

Accordingly, the Arbitral Tribunal awards Rs. 85,54,979/- to the Claimant for Claim No. 1.

AWARD COUNTER CLAIM NO.1:

12. It has been held under Claim No.1 that as per contract and trade practice only monthly indices are to be used to work out the amount of Price Adjustment. The claim of the Claimant for payment of price adjustment based on monthly indices has been upheld.

Therefore, the counter-claim of the Respondent derived from payment of price adjustment on the basis of weekly price indices is not justified. Accordingly, Nil Award."

19. I have considered the submissions made by the learned counsel for the petitioner, however find no merit in the same. Sub-clause 70.5 of COPA is reproduced hereinunder:-

“Base, Current and Provisional Indices

The base cost indices or prices shall be those prevailing on the day 28 days prior to the closing date for the submission of bids. Current indices or prices shall be those prevailing on the days 28 days prior to the last day of the period to which a particular Interim Payment Certificate is related. If, at any time the current indices are not available, provisional indices as determined by the Engineer will be used, subject to subsequent correction of the amounts paid to the Contractor when the current indices become available”.

20. The said sub-clause does not indicate as to whether the weekly or the monthly indices are to be used. It is not in dispute that till the 36th IPC, the petitioner applied the monthly indices for arriving at the price adjustment on various components. It was only on 24.06.2008 that the petitioner conveyed to the Engineer that the indices to be considered in the price adjustment formula should be weekly indices as on the week ending preceding the 28th day prior to the last day of the month for which the particular IPC was related. Consequently, the Engineer revised the mechanism of calculation of price adjustment and considered weekly indices in place of monthly indices. The Arbitral Tribunal found that the change in the decision of the petitioner was based on the observation made by the internal auditor, which is an extra-contractual entity and therefore, its decision was not binding. The Arbitral Tribunal further relied upon various news articles/reports which indicated that the use of monthly indices was a widely followed international practice and even the Government of India had decided to discontinue releasing weekly indices because of the variation in the same. The Arbitral Tribunal further found that as the indices are applied to the value of the work which is

executed during the previous one month, to arrive at the realistic amount of escalation, it is only appropriate to apply the monthly indices and not the weekly indices. This being a matter of interpretation of the Agreement, which is also supported by the conduct of the petitioner itself upto the 36th IPC, cannot be faulted, leave alone said to be perverse or unreasonable.

21. In *Associate Builders v. DDA*, (2015) 3 SCC 49, the Supreme Court has held as under:-

“42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

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42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

“28. Rules applicable to substance of dispute. (1)-(2)

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)

*“112. It is trite that the terms of the contract can be expressed 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 and Natural Gas Commission*, (2003) 8 SCC 593; 2003 Supp (4) SCR 561 and *D.D.Sharma v. Union of India*.] (2004) 5 SCC 325.*

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 fact of the award.”

22. As far as the delay in raising of the dispute by the respondent is concerned, sub-clause 60.11(b) of COPA provides for raising of a final statement of claim by the contractor within 56 days after the issue of the Defects Liability Certificate. The same is reproduced hereinbelow:

“Sub-Clause 60.11: Final Statement

Not later than 56 days after the issue of the Defects Liability Certificate pursuant to Sub-Clause 62.1, the Contractor shall submit to the Engineer six (6) copies of a draft final statement for consideration with supporting documents showing in detail, in the form approved by the Engineer

(a) the value of all work done in accordance with the Contract; and

(b) any further sums which the Contractor considers to be due to him under the Contract.

If the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed (for the purposes of these Conditions referred to as the “Final Statement”)

If, following discussions between the Engineer and the Contractor and any changes to the draft final statement which may be agreed between them, it becomes evident that a dispute exists, the Engineer shall issue to the Employer an Interim Payment Certificate for those parts of the draft final statement which are not in dispute. The dispute shall then be settled in accordance with Clause 67. The Final Statement shall be agreed upon settlement of the dispute.”

23. This Court in ***National Highways Authority of India v. Progressive Constructions Ltd***, 2014 (2) Arb. LR 504 (Delhi), held as under:

“21.....Clause 57.1 provides that the intention behind the final bill is to avoid a situation where for each minor dispute

*or difference which may arise at different stages of the contract, the parties are forced to immediately invoke arbitration with the result that by the time the work is completed multiple arbitrations would already be ongoing between the parties. In a similar vein, a learned Single Judge of this Court in the case of **Naraindas R. Israni v. Union of India**, AIR 1993 Delhi 78=1993 (1) Arb. LR 233(Del.) has also taken the view that the right to recover the claims survives till the stage of the final bill, and has held in this regard as under (at page 238 of Arb. LR):*

“16. ...I am supported in my above view by the observations of P.C. Mallick, J. as made in AIR 1963 Calcutta 277- M.L. Dalmiya and Co. v. Union of India..... If any payment is made on a running bill, such sum will be deducted from the final bill as being an advance payment on account of the final bill. If one or more of the running bills submitted by the contractor has or have not been paid and the cause of action for the realization of the same has become time barred due to the passage of time, nevertheless, the contractor will be entitled to recover the same as a part of the final bill. Failure to pay the final bill constitutes a new cause of action and the starting point of limitation for payment will arise from the date of default in the payment of the final bill.”

24. The Defects Liability Certificate was issued on 25.03.2011 and on 26.03.2011 the respondent submitted its final statement of claim. Therefore, it was permissible for the respondent to have waited for the completion of the work and raise the claim alongwith the final statement of claim rather than escalating it during the currency of the work. In any case, once on the interpretation of the contract it is found that the claim of the respondent was justified, it cannot be rejected only on the ground of delay in raising the same. It would have been a different thing if this

claim was found to be barred by law of limitation, however, the Arbitral Tribunal after having dealt with said submissions of delay, held the claims to be not barred by limitation, the limitation having started from date of final statement, that is, 26.03.2011.

25. I therefore, find no merit in the objection raised by the petitioner against the grant of Claim No.1 in favour of the respondent and rejection of Counter Claim No. 1 of the petitioner.

Claim No. 2

26. Insofar as Claim No. 2 is concerned, the same relates to payment of extra cost of staging involved in construction of Grade Separator due to use of new material by the respondent. While granting the claim of the respondent, the Arbitral Tribunal has rejected the Counter-Claim No. 2 of the petitioner for Rs. 5,67,00,000/- on account of hire charges of staging, and return of staging in good condition.

27. Learned counsel for the petitioner objects to the grant of the claim stating that the Priced Bill of Quantities at Item 6.13, referring to the item of work in question, includes within its scope the cost of 'Form Work' to be provided, which 'Form Work' was the responsibility of the respondent and thus no amount on account of staging is payable. The counsel draws my attention to the Item 6.13 and wording therein to the effect "... or as directed by Engineer" in support thereof and submits that the drawing of staging approved by the Engineer is the drawing in fact submitted by the respondent itself and, therefore, the claim of respondent was not tenable.

28. The counsel further submits that even as per clause 52.1 of the contract providing for valuation of 'variations', the Arbitral Tribunal has itself not come to a finding of the use of new material by the respondent amounting to a variation to the original terms of the contract.

29. The learned counsel submits that upon collapse of the staging on 15.05.2007 after an earthquake on 13.05.2007, an Expert report submitted by IIT Bombay concluded that the collapse was caused due to the failure of the staging and use of old, used supporting structural elements by the respondent and hence, the collapse is completely attributable to the respondent and the respondent could not have benefited of its own wrong.

30. On the other hand, the learned counsel for the respondent submits that the expenditure incurred by the respondent was rightly awarded by the Arbitral Tribunal as the contract does not provide for use of new material for staging work and that the same was done at the instruction of the Engineer. He contends that in the contract, Technical Specification clause 1509 provides for re-use of Form Work for upto twenty times by the contractor and accordingly, the respondent took the Engineer's approval for re-using old material. However, at the stage of concreting after completion of staging, an earthquake on 13.05.2007 caused the collapse of staging arrangement on 15.05.2007, whereafter the Engineer on 19.09.2007 called upon the respondent to utilize only new materials for staging, in contradiction to the contractual stipulations for use of old material. Learned counsel for respondent submits that the Arbitral Tribunal rightly interpreted the contract to conclude that any extra

expenditure incurred due to variation at the Engineer's behest was to be compensated to the respondent and this finding deserves no interference. The claim granted by the Arbitral Tribunal being quantified by the Tribunal on the basis of costs of materials provided by the petitioner and thereafter also, as only 10% of cost arrived at has been awarded, the same cannot be interfered with.

31. The findings of the Arbitral Tribunal on the aforesaid claim are reproduced as under:

"3. As per record, after approval and completion of staging work by the Claimant for the ROB, concreting was done in three stages viz., i) Soffit slab casting completed on 07.03.2007, ii) Casting in both webs completed on 28.03.2007, iii) Deck slab concreting commenced on 14.05.2007 at 11:00 PM. On 15.05.2007 around 5:30AM, when most of the concreting on deck slab had been placed, the Staging collapsed. The Engineer's Representative was present at the site at the time of collapse.

The Claimant, on the same day, by the letter dated 15.05.2007 (C-155, Pg.3047), submitted initial report on the mishap enclosing the sequence of events thereto. The Claimant in the said letter also mentioned that, an earthquake occurred on the night of the 13th May, 2007 which has caused some distress/displacement in the staging arrangement.

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5. The Engineer by letter dated 19.09.2007 (C-155, Pg.3090) instructed the Claimant to use new staging material for work at Grade Separator and stated that no old materials for staging works are allowed.

The Engineer vide letter dated 19 September 2007 wrote to the Claimant:

“We are informing you to use new staging material for work at all the Major Bridges, ROB and Grade Separator. No old materials for staging works are allowed at the said structure.”

Accordingly, the Claimant vide letter dated 25.09.2007 (C-155, Pg.3091) resubmitted the design and drawings to the Engineer after correcting the same. The Engineer gave his approval vide letter 27.09.2007 (C-155, Pg.3110); wherein, the Engineer specifically marked on the drawing in red ink that, “All materials should be new”. Copy of the letters dated 19.09.2007 and 27.09.2007 are filed as Annexure-6 (Colly) at Pg.3508.

6. *Such use of new material is not provided anywhere in the Contract. Also, the staging of the Grade Separator at the first instance which was approved, was not with the use new materials but in the second instance, the Engineer insisted the Claimant to use new materials.*

7. *Clause 51.1 of the Contract (Pg.160 of Vol.C-I) provides that the Engineer shall make any variation of form, quality or quantity of the works or any part thereof, which in his opinion be appropriate, and instruct the Contractor to do and the Contractor shall do the same. The said clause also provides that, the effect, if any, of all such variations shall be valued in accordance with Clause 52 i.e. Variations.*

8. *In the present case, due to the specific instructions of the Engineer by letter dated 19.09.2007 as well as in the approved drawing dated 27.09.2007 to use new material for staging, the Claimant had to go for the staging by using new material and incurred additional expenses.*

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AWARD CLAIM NO.2

13. *The Claimant has given details of Rs.2,09,10,866/- for this item and the Respondent in R-35 and R-48 worked out the cost of the same as Rs.59,32,763/-.*

14. *The method of calculations for working out this claim by the Claimant is indirect.*

15. *The Arbitral Tribunal is of the opinion that the additional cost caused to the Claimant by the Respondent for purchase of new materials was unwarranted. The quantity and the cost of material worked out by the Respondent in R-35 and R-48 is found to be reasonable and acceptable to the Arbitral Tribunal. However, the staging material is in the possession of the Claimant and has been used only once on this work. It is still good for use on other similar works by the Claimant. The Arbitral Tribunal considers only 10% of Rs.59,32,763/- i.e. Rs.5,93,276/- for use of new materials for staging of the ROB to be justified. Accordingly, an amount of Rs.5,93,276/- is awarded to the Claimant for this claim.*

AWARD COUNTER-CLAIM NO.2

16.

The Arbitral Tribunal has awarded only an amount 10% of Rs.59,32,763/- of the cost of new materials i.e. an amount of Rs.5,93,276/- to cover the cost of single usage of staging with new materials to the Claimant for this claim.

As cost of staging and interest thereon has not been awarded to the Claimant, the question of payment of any hire charges and returning the materials to the Respondent does not arise.”

32. The Arbitral Tribunal has therefore given cogent reasons for allowing the claim of the respondent and rejecting the counter claim raised by the petitioner. It may be true that the staging had collapsed due to reasons attributable to the respondent, at the same time, the claim awarded to the respondent is for the use of the new staging material as insisted upon by the Engineer instead of and in place of the old staging material that could be used in terms of the contract. The Arbitral Tribunal

has also balanced the equities by awarding only 10% of the cost of such material in favour of the respondent. The award on Claim No. 2, therefore, cannot be said to be unreasonable or perverse so as to warrant any interference of this Court in exercise of its powers under Section 34 of the Act.

Claim No. 3

33. The petitioner challenges the award of amounts as additional expenses/costs incurred or losses suffered due to prolongation of contract from 12.11.2007 to 16.08.2009 under Claims 3(a) and (c). It is the submission of the learned counsel for the petitioner that the Arbitral Tribunal has taken into consideration delays even beyond the control of the petitioner. She submits that delay caused due to adverse climatic conditions, being delay due to force majeure, cannot be covered under sub-clause 20.4 of the COPA, providing for the 'Employer's risk'. She further adds that as per clause 20.3 read with sub-clause 20.4 of the COPA, to bring a cause within the definition of Employer's Risk and thereafter claim increase in the contract price, loss or damage to the work/physical property had to be demonstrated and the Arbitral Tribunal has failed to assess such loss or damage due to the risk. She submits that the extension of the contract does not itself entitle the respondent to additional costs.

34. The counsel for the petitioner also challenges the quantification of the claim by the Arbitral Tribunal stating the same to be without consideration of the petitioner's submissions therein. She further challenges the amount awarded in Claim No. 3(a) claiming that the

values of the usage rates for Plant and Machinery considered by the Tribunal relying on the Data Book of the Ministry of Road Transport and Highway (MoRTH) pertain to the working hours of the machinery while the working hours can only be ascertained from the Log Books of the machinery, which have not been produced by the respondent. She submits that even as per the MoRTH circular dated 28.10.1993, the working hours of the machinery deployed cannot be more than 900 hours in a year, whereas the Arbitral Tribunal has erroneously considered 2400 hours per year. She further adds that the usage charges given in the Standard Data Book relate to the year 2001-2002 at which time the plant and machinery was more costly. She states that even the usage charges adopted by the Arbitral Tribunal are not as per those provided in the MoRTH data book, such as the usage charges of Tractor Dozer which are considered by the Tribunal to be Rs. 1912/- per hour as against the rate of Rs. 234/- per hour in the Standard Data Book, which includes the fuel charges as well.

35. On the other hand, the learned counsel for the respondent submits that the finding returned by the Arbitral Tribunal holding the petitioner responsible for the delay being one of fact, cannot be disturbed. He places reliance on the Judgment of the Supreme Court in ***K.V. Mohammed Zakir v. Regional Sports Centre*** (2009) 9 SCC 357, to buttress his contention. He submits that clauses similar to those involved herein have been interpreted by this Court only to uphold the award of additional costs in similar factual situations. He further relies upon the Judgment of the Division Bench of this Court dated 17.05.2017 in

National Highways Authority of India v. BEL-TBL (JV) (FAO(OS) 254/2016).

36. He submits that as the execution of the works was delayed due to reasons not attributable to the respondent, it was rightly held entitled to receive compensation from the petitioner for the prolonged period. In support of the same, the learned counsel, relying upon *inter alia* clauses 6.4, 12.2, 20.4 and 42.2 of the GCC (as modified by COPA), submits that the respondent is entitled to extension of time for completion of the work in case of delays beyond its control as also to costs for delayed period of work, including for instances risk whereof had been shouldered by the petitioner as per the contract. He further submits that the petitioner having itself granted the extension of time to the respondent without imposition of liquidated damages, the same amounted to the petitioner's acceptance of lack of fault on the respondent's part for delay caused. He brings to my notice letter dated 20.02.2009 from the Project Director of the petitioner, wherein extension of time was recommended upto 07.03.2009 on various grounds, ultimately narrowing the causes of delay to three major events, that is, additional quantities of works, removal of encumbrances and public agitation at Morbi/Halvad junction. The contents of the letter as are relevant for the present claim are reproduced as under:

“DIC-NCC (JV)/EWCP/PKG-III/40.02/08-2678 Dated 04/06/2008 and DIC-NCC (JV)/EWCP/PKG-III/40.02/08-2967 Dated 20.12.2008 has submitted request for Extension of Time for completion under clause 44 of General Condition of Contract [copy enclosed at (E-1), (E-6), & (E-10)]. The contractor has requested for an Extension of Time for 18 (Eighteen) months

beyond schedule completion date i.e. up to 10/05/2009 mainly based on the following events.

<i>Exceptionally adverse climatic conditions-</i>	<i>98 Days</i>
<i>Shifting of existing Level Crossing by Railways-</i>	<i>186 Days</i>
<i>Additional Quantities of Earth Work -</i>	<i>304 Days</i>
<i>Removal of Encumbrances @ Km 207+544 NH-8A-</i>	<i>413 Days</i>
<i>Due to change in Toll Plaza Location -</i>	<i>69 Days</i>
<i>Public agitation at Morbi/Halvad Junction –</i>	<i>483 Days</i>
<i>for Demand of Over Bridge</i>	

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PIU/Engineer's Recommendation is as under:

<i>Sr. No.</i>	<i>Event/Hindrances</i>	<i>Contractor's request for extension beyond completion date</i>	<i>Engineer's recommendation</i>	<i>PIU's Recommendation</i>
<i>1.</i>	<i>Exceptionally adverse climatic condition during monsoon season of 2005, 2006, 2007 & 2008.</i>	<i>234 Days</i>	<i>143 Days</i>	<i>143 Days</i>
<i>2.</i>	<i>Shifting of existing Level Crossing by railways</i>	<i>6.10 Months</i>	<i>186 Days</i>	<i>186 Days</i>
<i>3.</i>	<i>Additional Quantities of works</i>	<i>308 Days</i>	<i>304 Days</i>	<i>304 Days</i>
<i>4.</i>	<i>Removal of Encumbrances @ Km 207+544 of NH-8A</i>	<i>547 Days</i>	<i>413 Days</i>	<i>413 Days</i>

5.	<i>Due to Change in Toll Plaza Location</i>	<i>542 Days</i>	<i>69 Days</i>	<i>69 Days</i>
6.	<i>Public agitation at Morbi/Halvad Junction</i>	<i>492 Days</i>	<i>483 Days</i>	<i>483 Days</i>
7.	<i>Handing Over of Site</i>	<i>4.10 Months</i>	<i>NIL</i>	<i>NIL</i>
8.	<i>Suspension of Work</i>			
	<i>i) Major Bridge-3 Nos.</i>	<i>1.80 Months</i>	<i>NIL</i>	<i>NIL</i>
	<i>ii) Design & Approval of RE wall</i>	<i>3.20 Months</i>	<i>NIL</i>	<i>NIL</i>

As per above detailed evaluation, it is established that there are three major events/activities, which contributed to alleged delay in completion of project.

A. Additional Quantities of Works – 304 Days

B. Removal of Encumbrance @ Km 207+544 – 413 Days

C. Due to Public Agitation at Morbi/Halvad Junction – 483 Days

Therefore, overall delay of 483 days beyond schedule completion date as per contract.

The detailed recommendation of Project Manager of Supervision Consultant for each event is enclosed herewith for your reference.

*In Light of above, it is recommended to grant EOT to M/s. DIC-NCC (JV) for 483 days beyond schedule completion **Date i.e. 10th Nov. 2007** and extended completion date be considered as **07th March, 2009.***

37. He further submits that adding all of delays recommended in the above letter, the resultant delay would be of 1598 days, however, the

respondent was ultimately held entitled only to 645 days' delay upon considering the concurrent delays for the same period. He opposes the petitioner's challenge to Arbitral Tribunal's findings on specific grounds *inter alia* of adverse climatic conditions on the premise that not only does the same refute the Project Director's own determination as reproduced above, but in any case, said challenge does not affect the conclusion in respect of total delay, as the remaining causes of delay, that is, on account of removal of encumbrances and others, themselves exceed 645 days of delay allowed by the Arbitral Tribunal.

38. On the issue of quantification of the claims granted under Claim No. 3, that is, Claim 3(a) relating to deployment of machinery, plant and equipment and the petitioner's challenge to the same, learned counsel for the respondent submits that the Arbitral Tribunal duly based its quantification on the Monthly Progress Reports produced by the petitioner and further applied the Data Book of the MoRTH on the deployment to arrive at a figure, from which the Tribunal has further deducted components of fuel and mitigation. Arguing that it is not the contention of the petitioner that this method is illegal, he submits that anyhow, the Data Book being a standardized benchmark to base compensation costs for prolongation period, the same cannot be assailed. The counsel places reliance on the Judgment of the Division Bench of this Court dated 11.04.2018 in *National Highways Authority of India v. M/s. Prakash Atlanta (JV)* (FAO(OS)(COMM) 1/2017).

39. The Arbitral Tribunal on the above claim has held as under:

“7. The Claimant submitted that the main reasons of delay of the project as below.

- i. Delay in removal of Encumbrances/Hindrances;*
- ii. Delay in decisions/approvals by the Engineer;*
- iii. Exceptionally adverse climatic conditions;*
- iv. Transporters strike and Oil Companies’ Employees Strike;*
- v. Non-supply of Crumb Rubber Modified Bitumen (“ CRMB”) from Indian Oil Corporation Limited (“ IOCL”)during the period of contract;*
- vi. Delay in inspection of ROB work by Railway Authorities;*
- vii. Major alterations in the scope of work;*
- viii. Local problems; and*
- ix. Unforeseen cash flow constraints due to subsequent legislation.*

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12. The Project Director of the Respondent vide letter dated 20.02.2009 (pg.497, C-X) recommended extension of time on the basis of the consolidated list of various delay events on the following grounds (Pg.508).

<i>S. No.</i>	<i>Event/Hindrances</i>	<i>Contractor’s request for extension beyond completion date (EOT 1,2,3 & 4)</i>	<i>Engineer’s Recommendation by Letter dt 01.08.2008 (Pg-467 Vol. C-X) & dt. 24.12.2008 Pg-487 Vol. C-X)</i>	<i>PIU’s Recommendation by Letter dt.20.02.2009 (Pg-497 Vol.C-X)</i>
<i>1</i>	<i>Exceptionally adverse climate condition during monsoon season of</i>	<i>234 Days</i>	<i>143 Days</i>	<i>143 Days</i>

	2005, 2006, 2007 & 2008			
2	Shifting of existing Level Crossing by railways	6.10 Months	186 Days	186 Days
3	Additional Quantities of works	308 Days	304 Days	304 Days
4	Removal of Encumbrances @ Km 207+544 of NH8A	547 Days	413 Days	413 Days
5	Due to Change in Toll Plaza Location	542 Days	69 Days	69 Days
6	Public agitation at Morbi/Halvad Junction	492 Days	483 Days	483 Days
7	Handing over of Site	4.10 Months	NIL	NIL
8	Suspension of Work (i) Major Bride-3 Nos. (ii) Design & Approval of RE wall	1.80 Months 3.20 Months	NIL NIL	NIL NIL

13. The Project Director concluded that there were three major delays events viz., additional quantities of works (Cl.44), removal of encumbrances @ Km. 207+544 (Cl.42.2) and public agitation at Morbi/Halvad junction (Cl.12.2/Cl.42.2) and accordingly recommended extension of time up to 07.03.2009.

14. The Respondent vide R-34 at Pg. 16 stated that the extension has been recommended on the basis of the same reasons. Copy of the recommendation is enclosed at Annexure 9 at Pg.3523.

The PD recommended to NHAHQ grant of EOT for 645 days i.e. up to 07.03.2009 for reasons stated in letter dated 13.10.2009.

15. Eventually, the Respondent by its letter dated 22.12.2009 (Pg. 542, Vol. C-X) granted final extension of time (EOT) up to 16.08.2009.

The Letter is reproduced below.

“This is to inform you that the variation committee after due deliberation approved the Final Extension of Time of the subject matter for 162 days beyond already granted interim EOT (07.03.2009) up to 16.08.2009 with the following provisions:

(a) Escalation shall be payable beyond 07.03.2009 to 16.08.2009 for the work items related to ROB and approaches only.

(b) For remaining work items, if any, balance as on 07.03.2009, no escalation shall be payable beyond 07.03.2009.”

16. Project Director by letter dated 13.10.2009 (Pg.526 Vol, C-X) recommended EOT up to 16.08.2009. Final Extension of Time has been granted by the Respondent up to 16.08.2009 with price escalation and without any levy of liquated damages.

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19. The Arbitral Tribunal has observed that:

(a) Extension of 143 days has been recommended by the project director to the Head Quarters vide his letter dated 20.02.2009 page 497 Vol, C-X-for exceptionally adverse climate condition

during monsoon season of 2005, 2006, 2007 & 2008. EOT was granted up to 07.03.2009 by the Employer vide letter dated 24.04.2009 (Pg. 514, Vol. C-X)

(b) Extension of 304 days has been recommended by the Project Director vide his letter dated 20.02.2009 (Page 497 Vol. C-X). It is observed that the Contract Price was Rs.289,92,46,020/- and the actual completed cost of work was Rs.278,14,89,533/- (p 38 of SOC). Therefore, there was no increase in the quantity of work executed under the contract.

Further, the delay of 304 days due to additional Quantities of works has been considered as concurrent delay with the delay due to other reasons such as shifting of existing level Crossing by railways, Removal of Encumbrances, and Public agitation at Morbi/Halvad Junction. Therefore, this factor does not have any effect on the period of extension granted by the Engineer/Employer.

(c) Sub-Clause 20.4 – Employer’s Risks of COPA, Sub-Clause (a) (v) provides that

“(a) in so far as they directly affect the execution of the Works in the country where the Permanent Works are to be executed,

(v) riot, commotion or disorder Risk unless it is solely restricted to the employees of the Contractor or of his Sub contractors and arising from the conduct of the Works.

Further, Sub- Clause 20.4 (d) Employer’s Risks provides:

“ any operation of the forces of nature (insofar as it occurs on the site) which an experienced contractor:

- (i) could not have reasonably foreseen, or
- (ii) could reasonably have foreseen but against which he could not reasonably have taken

appropriate measures to prevent loss or damage to physical property occurring”.

The exceptional adverse climatic conditions/rains and floods cannot be foreseen by an experienced contractor nor the strikes and bandhs. According to Clause 20.4 of COPA, these are the Employer’s Risks and he is liable for delays resulting from adverse climatic conditions and strikes etc.

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22. The next question is who is responsible for delay which had necessitated extension of time? The contract provides guidance to the same. As per clause 44.1 GCC, the contractor is not entitled to extension of time if delays are attributable to the contractor. Therefore, the factum of the contractual period having been extended by the Employer a number of times shows that the Contractor/Claimant was not liable for delayed completion of contract.

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24. In view of Clause 44.1 of GCC of the Contract Agreement, the Respondent, having granted time extension under Clause 44.1, is now estopped in law to allege defaults/breaches on the part of the Claimant in respect of the period of time for which the Employer has already granted time extension.

25. It is observed from the letters of grant of EOT that none of the reasons on the basis of which the Extension has been recommended by the Engineer and granted by the Employer pertains to the Claimant.

26. It is also observed that any delays due to reasons of Force Majeure or such causes for which neither party is responsible, are all concurrent and have not contributed to the delay. All the

reasons of delays are such for which the Respondent is responsible or liable being Employer's Risks.

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35. In light of the above discussion and the Court Judgments, Arbitral Tribunal is of the view that financial duress was caused to the Claimant. As such, the Undertakings given by the Claimant are invalid.

36. The Arbitral Tribunal is of view that the claims of the Claimant for additional cost are admissible under Clause Cl.12.2, Cl.20.3, Cl.20.4 and Cl. 42.2 of the Contract.

Further, Clause 5.1 (b) of COPA of the Contract provides that "This Contract shall be governed and construed in accordance with the laws in force in India." Accordingly, Sections 55 and 73 of the Indian Contract Act, 1872, also get attracted and the Respondent is liable to compensate the Claimant for losses occasioned to the Contractor.

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Claim 3(a)- Additional expenses on deployment of machinery, plant and equipment- Rs. 39,53,37,443/-

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66. A.T has adopted the list and quantum of machinery as submitted by the Respondent in Exhibit R-42. AT has worked out the cost on account of overstay of 21 .5 months by adopting the usage rates for Plant & Machinery on the basis of the rates given in the MORT&H data book. The working hours per day have been taken as 8 and number of working days in a month have been taken as 25 as per the industry practice.

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AWARD:

68. On the basis of the above discussion, the AT has worked out the cost/damages for Plant and Machinery for the extended construction period of 21.5 months as Rs.26,49,31,980/-. Accordingly, A.T awards Rs.26,49,31,980/- to the Claimant towards this Claim.

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Claim 3 (c)- Additional expenses on Overheads & Establishment-Rs. 13,29,09,271

xxxx

104. In case the contractor suffers delay and incurs cost on account of defaults of the Employer, Clauses 6.4,12.2, and 42.2 of the Contract provide for determination by the Engineers of time extension under Clause 44 and additional costs. Clauses 20.3 and 20.4 provides for payment of loss or damages due to Employer's Risks. Amount of Overheads claimed by the Claimant as per SOC Pg 265 of Vol-II of SOC is Rs.13,29,09,271. The Amount certified by the Chartered Accountant as per C.A. Certificate dated 05.08.2016 (Ex.C-170 at Pg 3365) is Rs.11,95,39,946/-.

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AWARD:

106. AT is of the view that the amount of Rs. 11,95,39,946, which is the lowest by the three methods, is reasonable. Against this, the Claimant in his Written Synopsis has claimed an amount of Rs.11,29,75,844/- only. Therefore, AT awards Rs. 11,29,75,844/- to the Claimant for Loss of Overheads on account of overstay of 21.5 months."

40. Reading of the above findings of the Arbitral Tribunal would clearly show that the Arbitral Tribunal has not only considered the various terms of the contract in arriving at its conclusion but also the report of the Project Director with respect to reasons for the delay in completion of the work. The Arbitral Tribunal has also taken note of the fact that the petitioner granted various extensions to the respondent and while granting extension of time, did not impose any liquidated damages on the respondent, clearly admitting that the delay was not caused for reasons attributable to the respondent. The petitioner has submitted that one or other reason could also not be attributed to be a fault of the petitioner. While that may be correct, as submitted by the counsel for the respondent, the total delay, works out to 1598 days and as against this, the claim of the respondent has been restricted by the Arbitral Tribunal to only 645 days. Therefore, even assuming that certain portion of the delay is not attributable to the petitioner, it would have no effect on the final outcome of the Award. The causes of delay being a matter of appreciation of evidence led by the parties before the Arbitral Tribunal, cannot be interfered with by this Court as if sitting as the Court of appeal. The parties having chosen the alternate forum of arbitration for resolution of the disputes, the decision of the Arbitral Tribunal, unless found to be totally perverse or unreasonable in nature or having been passed in total ignorance of the evidence led by the parties before it, cannot be interfered with.

41. As far as the quantification of the claim is concerned, the Arbitral Tribunal has relied upon the list of machinery submitted by the petitioner

before the Arbitral Tribunal. The Arbitral Tribunal has thereafter worked out the cost on account of overstay of 21.5 months by adopting the usage rates for Plant and Machinery on the basis of the rates given in the MoRTH data book and as per the industry practice. The petitioner has made certain grievances on the figures taken by the Arbitral Tribunal in arriving at the final award of quantification. However, I find that the same are based on presumptions. Once the Arbitral Tribunal has adopted a formula for arriving at the prolongation costs and such formula cannot be said to be perverse, the same cannot be faulted. The Arbitral Tribunal has undertaken a very detailed analysis of not only the facts on record but also the governing clauses. There is, therefore no scope for interference with the above determination by the Arbitral Tribunal.

Claim No. 4.3

42. On Claim No. 4.3 relating to reimbursement of additional expenses due to increase in royalty, the counsel for the petitioner submits that while it is not disputed that the royalty charges are payable, the only challenge made is to the lack of proof in support of the claim. She submits that the respondent has failed to produce proof to corroborate its claim for reimbursement and hence, the Award on such claim deserves to be set aside.

43. I have considered the submission made by the counsel for the petitioner. While it is true that the respondent had based its claim on a theoretical basis as has also been taken note of by the Arbitral Tribunal, the Arbitral Tribunal further takes note of the submission of the petitioner that the claim of the respondent has to be reduced by 50% of the amount

so claimed by it. Based on the same, the Arbitral Tribunal has awarded a sum of Rs. 12, 31,799/- in favour of the respondent. Once the liability to pay is admitted, the amount awarded by the Arbitral Tribunal cannot be said to be fanciful or unreasonable. I therefore, do not find any reason to interfere with the said finding of the Arbitral Tribunal.

Claim No. 4.4

44. Claim No. 4.4 relates to grant of reimbursement of additional cost incurred towards Building and other Construction Workers' Welfare Cess under Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 ('BOCW Act'), the Building and Other Construction Workers' Welfare Cess Act, 1996 ('Cess Act') and the Building and other Construction Workers' Welfare Cess Rules, 1998 ('BOCW Cess Rules'). While allowing the aforesaid claim of the respondent, the Arbitral Tribunal directed the release of the Bank Guarantee for Rs. 3,93,77,776/- furnished by the respondent towards labour cess, held by the petitioner.

45. Challenging the above, the counsel for the petitioner submits that the BOCW Act became operational on 01.03.1996 and the Cess Act, 1996 was in force since 03.11.1995. It is further submitted by the learned counsel for the petitioner that the Gujarat Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2003 had been published by the State Government vide notification dated 18.08.2003, which was prior to the Base Date. She submits that liability to pay Cess would arise from the date of enactment of the Central Act and that the same being prior to the Base Date, the

respondent ought to have considered the Cess liability while submitting its bid price. She submits that the date of constitution of the State Welfare Board will not be an impediment to the State's responsibility to collect the labour cess and in support thereof, relies on the Judgment of the Supreme Court in *A. Prabhakara Reddy & Co. v. State of Madhya Pradesh & Ors.* (2016) 1 SCC 600 and of this Court in *Bbel-Mipl Joint Venture v. National Highway Authority of India*, 2015 SCC OnLine Del 10222.

46. Learned counsel for the respondent, on the other hand relies upon sub-clause 70.7 of the COPA and submits that the date for submission of bids for the work being 10.12.2003, the relevant Base Date 28 days prior thereto was 12.11.2003. He submits that the BOCW Welfare Board having been constituted on 18.12.2004, the Board passed a resolution for imposition and collection of Cess only on 30.01.2006, authorizing Cess collectors to collect the Cess from 18.12.2004, and thus, the Building and Other Construction Workers Welfare Cess Act, 1996 was to be implemented only from 18.12.2004. He further submits that the date of implementation of the Building and Other Construction Workers Welfare Cess Act, 1996 being unknown to the bidders at time of submission of the bids, respondent could not have assessed the amount of Cess to account for while submitting its bid. Pointing to the conduct of the petitioner in not deducting any amounts for Cess from the first IPC in December 2004 itself, the counsel submits that in fact, the demand for Cess was made by the petitioner only after implementation of the Cess Act on 30.01.2006 and that, in any event, there was no demand by the

Labour Department, State of Gujarat from the petitioner for deposit of Cess prior to 30.01.2006. The promulgation of BOCW Rules in Gujarat on 18.08.2003 would not then affect the BOCW Act and Cess Act being subsequent legislation in terms of the contract, its true date of implementation being 18.12.2004.

47. The Arbitral Tribunal has dealt with the contentions of the parties and observed:

“Claim No. 4.4 Reimbursement/Refund of additional cost incurred towards Building and other Construction Workers Welfare Cess under Sub-Clause 70.7 of COPA – Rs. 3,93,77,776/- (Release of Bank Guarantee) p 3467

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36. In view of above provisions, it is clear that the “BOCW Act, 1996” requires framing of Rules by State Government for carrying out various functions of this Act. In the absence of such Rules, the “BOCW Act, 1996” can not be operative by itself.

37. Accordingly, in exercise of the powers conferred under section 40 and section 62 of “BOCW Act, 1996”, the State Government of Gujarat enacted and notified “Gujarat Building and Other Construction Workers’ (Regulation of Employment and Conditions of Service) Rules, 2003”, on 18.08.2003.

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40. The Building and Other Construction Workers Welfare Board vide Resolution dated 30.01.2006 passed the necessary Resolution and accordingly the Cess Collectors were directed to pay to the Board, the cess retrospectively with effect from 18.12.2004, the date of constitution of the Welfare Board. As per above Resolution,

the Cess Act was to be implemented in the State of Gujarat from 18.12.2004.

41. Thus the “BOCW Act, 1996” and the “Cess Act, 1996” became operative in the State of Gujarat only upon issue of the Instructions for the Implementation by the Govt. of Gujarat dated 30.01.2006 although the Central Government enacted these Acts in the year 1996. When viewed in terms of the provisions of the contract, it is clear that additional cost on account of the ‘Cess Act, 1996’ has been caused to the Contract only after the Resolution of the Government of Gujarat dated 30.01.2006....

The additional cost due to the Cess having been caused consequent to the Gujarat Govt. Resolution dated 30.01.2006, much after the base date of 12.11.2003 of the Contract, the provisions of ‘Subsequent Legislation’ Clause 70.7 are attracted. Therefore, in accordance with Clause 70.7 of the Contract Agreement, the additional cost caused is required to be added to the Contract Price and borne by the Employer (Respondent). No cess is payable by the Contractor (Claimant) as per terms of the Contract.

42.....The Claimant stated that upon insistence by the Respondent, the Claimant by letter dated 07.02.2013 furnished a Bank Guarantee no. 0195613IFG000025 amounting to Rs. 3,93,77,776 in respect of labour cess. the Claimant has been extending the said bank guarantee from time to time upon instructions of the Respondent. As on date, the BG was extended up to 31.03.2017. Copy of the extended bank guarantee is filed as Annexure-26, Pg. 3592.

43.....The conduct of the Respondent shows that it was never in his contemplation that the cess was leviable under the “Cess Act, 1996” from the commencement of work. There is no demand from the Labour Deptt. of Govt. of Gujarat also, for deposit of cess for any period prior to 30.01.2006.

44. *The date of implementation of the Cess Act by the Gujarat Government was not known to the Bidders at the time when the bids for this contract were submitted by them. The Claimant was in position to know when the notification of the State Government would be issued and therefore to assess as to what amount of cess was to be taken into account while bidding.*

AWARD: CLAIM NO.4.4:

45. *From the above Findings, it is our considered view that as per the terms of the Contract Agreement, cess is not payable by the Claimant. The Claimant stated that upon insistence by the Respondent, the Claimant by letter dated 07.02.2013 furnished a Bank Guarantee no. 0195613IFG000025 amounting to Rs. 3,93,77,776 in respect of labour cess. The Claimant has been extending the said bank guarantee from time to time upon instructions of the Respondent. The Bank Guarantee is being held by the Respondent on the ground that the cess is payable by the Claimant. As the cess is not payable by the Claimant according to our Findings, the Respondent is directed to release the Bank Guarantee to the Claimant forthwith.*”

48. The Arbitral Tribunal has thus interpreted the terms of the Agreement. The view expressed by the Arbitral Tribunal on this issue cannot be said to be perverse or unreasonable. In this regard, I may note that this Court in ***National Highways Authority of India v. Gammon – Atlanta (JV)***, 2013(4) Arb.LR 61 (Delhi) (DB), relying upon the Judgment of the Supreme Court in ***Dewan Chand Builders & Contractors v. Union of India and others***, (2012) 1 SCC 101, has held that where the bids were made in 2000 and the Notification in question was issued in 2008, the burden of Cess could not be passed on the contractor. In the present case, though the State Government of Gujarat

had notified the rules in August 2003, it was only in January 2006 that the BOCW Welfare Board passed a resolution for charging the Cess with effect from 18.12.2004. Relying on the same, the Arbitrator has held that the legislation therefore, was to be implemented from December 2004, that is after the Base Date. The same being a subsequent legislation, therefore, fell within the ambit of sub-clause 70.7 of the COPA and the burden thereof could not have been passed on to the respondent. In fact, the petitioner also did not deduct the Cess at the relevant time.

49. Reliance of the learned counsel for the petitioner on the Judgment of the Supreme Court in *A. Prabhakara Reddy* (Supra) cannot also be accepted as the Supreme Court only held that the BOCW Act and Cess Act shall also be applicable to construction activity which may have commenced before coming into force of the said Acts. The Supreme Court was not considering the effect of the coming into force of the said Acts in relation to the contractual obligations of the parties *inter se* each other. I therefore, find no infirmity in the Arbitral Award on this account.

Claim No. 6

50. The next challenge of the petitioner is to Claim No. 6, which is for interest due to delayed IPC payments. The learned counsel for the petitioner submits that the Arbitral Tribunal has erred in granting of such interest. I am unable to agree with the said submission of the learned counsel for the petitioner. The Arbitral Tribunal has granted this interest relying upon sub-clause 60.8 of COPA. The delay in payments being a matter of fact, cannot be interfered with in exercise of powers under Section 34 of the Act.

Claim No. 7

51. The next challenge of the petitioner is to the grant of interest at the rate of 10% compounded monthly awarded in favour of the respondent in Claim No.7. This again being based on sub-clause 60.8 of COPA cannot be faulted. This Court in *National Highways Authority of India v. ITD Cementation India Limited* 197 (2013) DLT 650 and *National Highways Authority of India v. Som Datt Builders-NCC-NEC (JV)* 2014 IV AD (Delhi) 632 has already allowed interest to be charged on the basis of sub-clause 60.8 in similar agreements.

52. In view of the above I find no merit in the present petition. The same is dismissed with costs quantified at ₹ 25,000. I.A. No. 13742/2017 also stands disposed of.

NAVIN CHAWLA, J

OCTOBER 12, 2018/vp

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