

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	03.10.2019
Judgment pronounced on	17.10.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.431 of 2010

The Secretary to Government
Government of Tamil Nadu
rep. by the Superintending Engineer(H)
Project II Circle 2977, Elanga Complex,
Neethi Nagar, Court Road
Thanjavur - 613 001.

... Petitioner

VS.

1.SPL Infrastructure Private Limited
(formerly S.P. Lakshmanan),
No.24(Old No.13/3), First Floor,
Crescent Park Street,
T.Nagar, Chennai-600017.

2.M.Rajagopal

3.A.Syed Abuthahir

4.P.Sridharan

... Respondents

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 20.12.2008 passed by the Arbitral Tribunal.

For Petitioner : Mr.Sricharan Rangarajan
Special Government Pleader

For Respondents : Mr.D.Balaraman for R-1

ORDER

The respondent in the Arbitration Proceeding is the Petitioner before this Court. The Petitioner awarded a contract to the first Respondent herein for the design and construction/re-construction of five bridges in the Pudukottai District on turnkey basis under package number X through the Superintending Engineer, TNADP Circle, Trichy, under Letter of Acceptance dated 23.02.1999. Pursuant thereto, an Agreement was executed on 15.03.1999 (the Contract) for a total contract value of Rs.8,18,60,000/-. During the execution of the Contract, certain differences and disputes arose between the Petitioner and the first Respondent herein and the said disputes were referred to arbitration under the arbitration clause in the General Conditions of Contract. The first Respondent herein made claims in respect of each of the bridges. These claims were modified during the course of the Arbitration Proceeding. After modification, the first Respondent herein made aggregate claims of Rs.18,29,437/- in respect of the bridge at km 30/10 of Pudupatti Nedungadi Road (the First Bridge); Rs.28,85,648/- in respect of the bridge at km 135/8 of Perambalur Manamadurai Road (the Second

Bridge); Rs.18,01,595/- in respect of the bridge at km25/8 of Arantangi Kattumavadi Road (the Third Bridge); Rs.68,60,546/- in respect of the bridge at km 112/2 of Peramabalur Manamadurai Road (the Fourth Bridge); and Rs.15,69,024/- in respect of the bridge at km 4/10 of Pudukkottai Embal Road (the Fifth Bridge). These claims were in respect of escalation in cost of materials and labour, overhead charges and loss of profits for all bridges, and in respect of refund of liquidated damages, additional expenses towards preparation of design, earth work and widening of the approach at the curve in some bridges. Upon consideration of the pleadings, documents, oral and written arguments, the Arbitral Tribunal pronounced Arbitral Award dated 20.12.2008(the Award). By the said Award, the Petitioner herein was directed to pay the first Respondent herein an aggregate sum of Rs.84,48,156/- in respect of all five bridges with interest thereon from the date of Award till the date of payment at 12% per annum. The said Award is impugned in this Petition.

2.I heard the learned Special Government Pleader (CS) (the SGP), Mr.Sricharan Rangarajan, on behalf of the Petitioner and the learned counsel for the first Respondent, Mr.D.Balaraman.

3.The learned SGP opened his oral submissions by raising three contentions on the apportionment of delay in respect of the submission of

and approval of designs and drawings by the Arbitral Tribunal. Although these contentions were raised in the overall context of the challenge to the Award, they would be significant in the context of the First and Second Bridges and relevant though not significant in the context of the Third Bridge and not relevant in the factual context of the Fourth and Fifth Bridges, where the claims were not made on the basis of alleged delay in approval of detailed designs and drawings. His first contention, in this regard, was that the Arbitral Tribunal failed to appreciate the fact that the initial delay was admittedly on the part of the first Respondent herein with regard to the submission of designs and drawings. In specific, he submitted that the Contract specified that detailed designs and drawings should be submitted within 60 days whereas the first Respondent admittedly submitted such detailed designs and drawings in respect of the First Bridge on 10.06.1999, instead of 15.05.1999, after a delay of about 25 days. According to the learned SGP, this had a cascading effect on subsequent work. In order to fortify this submission, he relied upon the judgment of the Division Bench of the Hon'ble Delhi High Court in **NTPC Ltd. v. Deconar Services Ltd. 2010 (116) DRJ 648 (DB)** and, in particular, the observations at paragraphs 4 and 21 thereof with regard to cascading, resultant and consequent delays when the initial delay is attributable to one party. Notwithstanding the admitted initial delay by the first Respondent, according to the learned SGP, the Arbitral Tribunal

erroneously attributed subsequent delays to the Petitioner by undertaking apportionment of delay in accordance with the Malmaison approach. In this connection, he referred to the judgment of the England and Wales High Court (Commercial Division) in **Adyard Abu Dhabi v. SD Marine Services [2011] EWHC 848 (Comm)(the Adyard case)** wherein, at paragraphs 276 and 287, the judgments in **Henry Boot Construction (UK) Ltd. v. Malmaison Hotel (Manchester) Ltd. (1999) 70 Con LR 33 (the Malmaison case)** and **City Inn Ltd. v. Shepherd Construction Ltd. [2010] BLR 473 (the City Inn case)** were discussed. He also relied upon an article by Pinsent Masons on "Consequences of Concurrent Delay in Construction Projects" so as to contend that apportionment, in such circumstances, is contrary to settled legal principles and, consequently, concluded his submissions, on this issue, by stating that the said attribution of responsibility for subsequent delay to the Petitioner by undertaking such apportionment is both perverse and unreasonable. सत्यमेव जयते

4.The next contention, in this regard, was that clause 4.35.2 of the Contract stipulates that the Engineer and the Project Management Consultant (the PMC) shall approve the drawings within two months, if found in order, whereas, contrary to such stipulation, the Arbitral Tribunal proceeded on the self-evidently erroneous assumption that the Contract stipulated that the Engineer and PMC shall approve the detailed designs

and drawings within one month in respect of the First Bridge (paragraph 7.5 and 7.7 of the Award). He further submitted that the finding of the Arbitral Tribunal in respect of the First Bridge, at paragraph 7.8 of the Award, to the effect that the Petitioner caused a delay of four months in the approval of drawings is based partly on the above mentioned erroneous assumption that only one month is provided for the approval of drawings in the Contract. The last contention on delay in the submission of and approval of designs and drawings was that the Contract provides for the two-month limit provided the designs and drawings are in order thereby implying that the time limit would run from the date when designs and drawings are submitted in accordance with contractual requirements. In this connection, he also pointed out that the first Respondent admittedly carried out revisions to the designs and drawings on the basis of the comments of the Engineer and PMC and re-submitted the revised designs and drawings on 22.07.1999 in respect of the First Bridge and that such conduct underscored the fact that the designs and drawings, which were originally submitted, were not in order. He further submitted that the rejection of the above contention by the Arbitral Tribunal solely on the ground that the Petitioner had validated the preliminary designs and drawings was patently erroneous inasmuch as the approval contemplated under clause 4.35.2 of the Contract is in respect of detailed designs and drawings and not preliminary designs and drawings.

5.The learned SGP also contended that the attribution of responsibility to the Petitioner for the delay in the commencement of work on account of rains in the monsoon season is perverse because the Contract specifies in Clause 6.3.4 that there would be heavy and concentrated rainfall in the months of September, October and November and that, therefore, such rainfall is foreseeable. Consequently, the first Respondent/contractor is expected to take this into account while agreeing to the completion time line. Hence, the Award, in this respect, is perverse, unreasonable and the result of non-application of mind. This submission would be significant in the context of the First Bridge and relevant in the context of the Third Bridge.

6.The next contention of the learned SGP was that the Arbitral Tribunal disregarded material evidence. In specific, the learned counsel pointed out that it was asserted in the letters granting extension of time that the delay is attributable to the first Respondent and that extension of time is being granted without escalation or extra cost. In this regard, he pointed out that the first Respondent accepted such conditional extension of time without protest and, therefore, cannot approbate and reprobate. In support of the submission, the learned counsel referred to and relied upon the judgment of the Supreme Court in the **General Manager, Northern Railways vs. Sarvesh Chopra (2002) 4 SCC 45** (the

Sarvesh Chopra case) wherein, at paragraph 15, the Hon'ble Supreme Court held that in contracts where time is of the essence, the contractor cannot claim damages, as per Section 55 of the Contract Act, 1872 (the Contract Act), unless the employer was put on notice about such claim at the time of accepting delayed performance by the employer. According to the learned counsel, the above judgment is clearly applicable to this case because "no damages" clauses are found in the Contract in clauses 4.36.1, 4.36.5, 4.56.1, at pages 41, 42 and 56 of the Contract, whereby claims for escalation and price variation are prohibited. He further submitted that the decisions of the Engineer in respect of extension of time and delay damages had become final and binding on account of clause 4.62 at page 64 of the Contract and was not liable to be challenged after the stipulated period of 90 days. He further submitted that the Arbitral Tribunal had ignored relevant clauses, namely, clause 4.23.2, 4.36.1 and 4.36.2 at page 42 which stipulate that no extra payment/PVC/escalation can be granted in the extended period of the Contract. On the above basis, he concluded his submissions on this issue by submitting that the grant of escalation is contrary to the Contract Act and several judgments of the apex court and is, therefore, patently illegal and in violation of public policy.

7.His next contention was that the Award in respect of overheads is in violation of the substantive provisions of Indian law and public policy. In this regard, he pointed out that this claim ought not to have been entertained when the escalation claim was granted. According to the learned SGP, the Award in respect of overheads is, consequently, patently legal and in violation of public policy because the Award directly contradicts the law laid down in **Bharat Coking Coal vs. L.K. Ahuja (2004) 5 SCC 109**(the **Bharat Coking Coal case**), wherein, at paragraph 24, the Hon'ble Supreme Court held that a claim for loss of profits should not granted in the absence of proof that the contractor concerned would have earned that profit on another project during the relevant period. In addition, it was submitted that the award of overhead costs on the basis of Hudson's formula is erroneous. Finally, in this regard, it was submitted that accounts were relied upon as evidence at the final stage of arguments and the Petitioner was not provided an opportunity to examine the same and make submissions thereon.

8.The final submission of the learned SGP was that the first Respondent was fully aware about site conditions and is not entitled, therefore, to make claims for damages with regard to delay on account of land acquisition. It was further submitted that the Contract is on turnkey basis and, consequently, the price is inclusive of all costs, including costs

for additional works. Thus, it was submitted that the Award is perverse and contrary to the terms of the Contract. The award of interest at 12% per annum was also challenged on the basis that it is exorbitant. The learned SGP also circulated written submissions upon conclusion of the hearing.

9. In response and to the contrary, the learned counsel for the first Respondent submitted that the Arbitral Tribunal carefully considered the contractual stipulations and the evidence on record and, therefore, awarded an aggregate sum of about Rs.69 lakhs against the modified aggregate claim of about Rs.1.49 crore. With regard to the delay in respect of designs and drawings, he contended that this was a sequential delay and not concurrent. In particular, the learned counsel pointed out that the first Respondent was required to submit preliminary designs and drawings as a part of the bid documents and that bidding was under a two cover system. Such preliminary designs and drawings were validated and approved by the Petitioner before awarding the contract to the first Respondent. Therefore, he submitted that the scope for requesting modifications to the detailed designs and drawings was limited. Moreover, he submitted that the initial delay on the part of the Petitioner in submitting detailed designs and drawings was taken into consideration by the Arbitral Tribunal and such delay was attributed to the first

Respondent. After attributing such initial delay to the first Respondent, he contended that the Arbitral Tribunal made an assessment of the reasons for subsequent delays in approval of detailed designs and drawings and the impact thereof on the execution of work. With regard to such subsequent delays, he submitted that the Petitioner admittedly delayed the approval of drawings by about three months. As a result of such delay, he submitted that the approved designs and drawings were received by the first Respondent in November, which is in the heart of the monsoon season. In this regard, he pointed out that all five bridges were built across rivers/water bodies and that, therefore, it was not possible to execute foundation work during the monsoon season. In other words, he submitted that but for the three-month delay in approving the designs and drawings, the first Respondent would have completed the foundation work and the substructure work before the onset of monsoon. As regards the attribution of the monsoon related delay to the Petitioner, he submitted that it was not done on the basis that this constituted a force majeure event but on the basis that it is consequential to the delay in approval of drawings by the Petitioner. Moreover, he pointed out that both submission of designs and drawings and the approval thereof are sequential activities on the critical path. Therefore, he submitted that the conclusions of the Arbitral Tribunal, in this regard, were based on a reasonable appraisal of the evidence on record and the apportionment,

which was carried out on the basis of such appraisal, is not liable to be interfered with in a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

10.His next submission was that the first Respondent originally claimed both losses on account of increased overheads and loss of profits during the extended stay period. However, he pointed out that the Arbitral Tribunal rejected the claim for loss of profits. As regards the claim in respect of losses arising out of overheads, in the extended stay period, he pointed out that the first Respondent adduced evidence with regard to the increased overheads during the extended stay period and did not rely only on Hudson's formula. Upon consideration of such evidence, he pointed out that the Arbitral Tribunal awarded damages in this regard. Once again, he pointed out that the award of damages in respect of overheads was based on a reasonable appraisal of the evidence on record and that this is not liable to be interfered with in the absence of any proof that irrelevant evidence was relied upon or that vital evidence was disregarded. In other words, his submission was that such evidence was not liable to be reappraised and that this court ought not to examine the sufficiency of evidence.

11.His final submission was that no arguments were advanced to challenge the Award in respect of the Fourth and Fifth Bridges and, therefore, the Award in respect thereof was, in any event, not liable to be interfered with. Overall, he concluded his arguments by submitting that the Petitioner had not made out a case to set aside the Award because the Award is based on a careful appraisal of evidence and is not contrary to the Contract or to substantive law.

12.The records were examined and the oral and written submissions of the parties were carefully considered. At the outset, it is relevant to begin with the caveat that the documentary evidence, which was adduced before the Arbitral Tribunal, is not on record herein. Consequently, the conclusions, in this order, are based entirely on an examination of the Award, the Contract, the law and the oral and written submissions.

13.The first submission of the learned SGP was that the Award is perverse and unreasonable to the extent that delay was apportioned between the Petitioner and the first Respondent. This contention hinges on establishing that the delay is concurrent and not sequential. When the relevant facts in this regard are considered, it is clear that the Contract envisages that the first Respondent would submit the detailed designs and drawings within two months from the date of commencement of the

Contract. Thereafter, the Engineer and PMC would approve the detailed designs and drawings within two months from the date of submission thereof. The above sequence makes it clear that submission of detailed designs and drawings is the first activity and that the second activity, namely, approval thereof is sequential and contingent on the first activity. Equally, the third activity, namely, the commencement of foundation work is sequential and contingent upon the approval of the detailed designs and drawings. Thus, all the above mentioned three activities are sequential and not concurrent. Moreover, in light of the fact that each of the above three activities are contingent upon and cannot be proceeded with until the preceding activity is completed, it is evident that these activities are on the critical path. With the above factual context in mind, it is necessary to consider the submission of the learned AGP. He submitted that once the initial delay is admittedly attributable to the first Respondent, the subsequent delays ought not to have been attributed to the Petitioner by undertaking apportionment. In this connection, the learned AGP referred to the **Abyard case** and the **Malmaison case**. In those cases, the construction was delayed by more than one event that occurred concurrently. Therefore, the question that arose for consideration was whether both events were attributable to the employer and, if one of the events was attributable to the contractor, is the contractor, nevertheless, entitled to an extension of time. The Malmaison principle is that the

contractor would be entitled to extension of time even if only one of two concurrent events is attributable to the employer. However, in this case, as stated above, the events in question are sequential and not concurrent. Moreover, each of the events is on the critical path. Therefore, the contention of the learned SGP that the Arbitral Tribunal should not have undertaken apportionment is rejected.

14. The second contention of the learned AGP was that the manner of apportionment by the Arbitral Tribunal is contrary to the Contract. In this regard, it was submitted that the Contract provides for a two-month period from the date of receipt of detailed designs and drawings, which are in order, within which the Engineer and PMC should approve the detailed designs and drawings, whereas the Arbitral Tribunal proceeded on the self-evidently erroneous basis that such approval had to be accorded within one month. The relevant clauses of the Contract are, inter alia, as under:

"4.35 Submission and approval of Designs and Drawings

4.35.1 Within 60 days of execution of agreement, the Contractor shall submit detailed designs, drawings for all the components of the bridge in a complete shape for scrutiny and approval....

4.35.2 The Contractor shall submit at least four copies of the complete design calculations and drawings for any bridge unit for approval. The Engineer with the assistance of the Project Management Consultant shall ensure that the approval of the drawings, if found in order, is accorded within two months from the date of receipt of the drawings from the Contractor. Otherwise, he shall apprise the Contractor of his comments on such design calculations and drawings within the above-mentioned period. Where such comments are communicated to the Contractor, the Contractor shall ensure that the designs, modified in view of these comments are submitted to the Engineer within 15 days of receipt of these comments. Similar course of action, as aforesaid shall be taken by the Engineer on the modified designs. The Contractor shall render all assistance to the Engineer and Project Management Consultant in achieving the task.

4.35.3 The Contractor shall be bound to make all such modifications in the set design and drawings as may be indicated by the Employer whose decision in this respect shall be final and binding to comply with the standard codes and specifications mentioned in the contract or, in the absence with principles of

sound engineering practice without extra cost to the Employer."

15. On perusal of the above clause 4.35, it is abundantly clear that a two-month period is stipulated for approval of the detailed designs and drawings by the Engineer and PMC. The contention of the learned counsel for the first Respondent, in this regard, that the Arbitral Tribunal may have apportioned the two month period as between the Engineer and the PMC is untenable because it has neither contractual nor legal basis and there is no such indication in the Award. In light of this clear stipulation, the findings in the Award to the effect that the Petitioner is allowed only one month for the approval of the designs and drawings is in direct contravention of the Contract. This leads to the next question, namely, what is the consequence of the above conclusion? Undoubtedly, in respect of the First Bridge, the finding, at paragraph 7.8 of the Award, that the delay of four months is attributable to the Petitioner would be liable to be revised. It also leads to the next issue, namely, whether the time limit runs from the date of original submission of detailed designs and drawings or the date of submission of the last revision in that regard. The relevant clause of the contract uses the qualifier "if found in order". This indicates that the time limit runs from the date of submission of detailed designs and drawings in accordance with contractual requirements. Moreover, the relevant clause also provides that the Engineer and PMC are entitled to

make comments on the detailed designs and drawings and further envisages the submission of modified or revised detailed designs and drawings by the first Respondent based on such comments. On perusal of the relevant portions of the Award, it is evident that the Arbitral Tribunal did not take this aspect into consideration and instead proceeded on the assumption that only the original date of submission of the detailed designs and drawings by the first Respondent is relevant. If the Arbitral Tribunal had duly considered and interpreted the contractual clauses in a plausible manner, no interference would be warranted. Moreover, the contractual clause with regard to the scope of work at Clause 2.1.2 (d) imposes an obligation on the Contractor to prepare and submit detailed designs and drawings for the approval of the Engineer and PMC, Clause 4.35 confers the right on the Engineer and PMC to comment on the original submission and further imposes an obligation on the first Respondent to revise and resubmit the detailed designs and drawings on the basis of such comments. All these contractual requirements have not been taken into consideration by the Arbitral Tribunal while carrying out apportionment of delay on this account by relying upon the validation of preliminary designs and drawings at the bid stage. Therefore, I am of the view that the apportionment of delay in respect of the submission of and approval of detailed designs and drawings is patently erroneous.

16.The above conclusion would have an impact on the Award in respect of the First Bridge and Second Bridge by adopting and applying the factual findings in the Award. Consequently, as regards the First Bridge, the time limit of two months should be calculated from 23.07.1999, i.e. the date following re-submission by the first Respondent of the detailed designs and drawings. If so re-calculated, the Petitioner should have approved the detailed designs and drawings on or before 22.09.1999, whereas it was approved on 7.11.1999. Thus, the delay of about 46 days is attributable to the Petitioner on this account. As regards the Second Bridge, the original date of submission of detailed designs and drawings was 31.05.1999. Thereafter, upon receipt of comments from the Engineer on 22.06.1999, the first Respondent re-submitted the detailed designs and drawings on 29.06.1999 and approval was granted on or about 07.11.1999. Thus, the time limit for approval should be reckoned from 30.06.1999 and, if so reckoned, the two-month period would end on or about 29.08.1999. Consequently, the period of delay, which would be attributable to the Petitioner, in this regard, would be about 68 days. As regards the Third Bridge, the Arbitral Tribunal concluded, at paragraph 25.7 of the Award, that the delay is not attributable to the Petitioner with regard to approval of detailed designs and drawings. Therefore, the above conclusions do not impact the Award with regard to the Third Bridge. As regards the Fourth and Fifth Bridges, the first Respondent did not make

claims with regard to delay in approval of detailed designs and drawings and, therefore, it is a non-issue as regards the Award in respect of the Fourth and Fifth Bridges.

17.The next ground of challenge is in respect of delay caused by rains in the monsoon period. This is relevant in the context of the Award on the First and Third Bridges. As regards the First Bridge, the Arbitral Tribunal held, in paragraph 7.9 of the Award, that the rainy and flooding season commenced in October 1999 and that, therefore, the first Respondent was prevented from doing any foundation work till January 2000. On that basis, the Arbitral Tribunal attributed a further three months' delay to the Petitioner. As correctly pointed out by the learned counsel for the Petitioner, clause 6.3.4 of the Contract provides that "the average annual rainfall in the area is of the order of 1100 mm and a good portion of which is concentrated in the months of September, October and November." In the above contractual context, the question that arises is whether the Award of the Arbitral Tribunal is liable to be interfered with in this regard. On examining the relevant portions of the Award in respect of the First Bridge, in this regard, I do not find any discussion with regard to the quantum of rainfall in the months of October, November and December of the relevant year or to the evidence adduced by the first Respondent, in this regard, or as to the basis for concluding that raft

foundation work could not be carried out during the above-mentioned three months. The extension of time clause in the Contract contains two relevant sub-clauses, as regards rainfall, namely, abnormally bad weather and force majeure. In light of the above analysis, there is no material to conclude that the rainfall was such as to constitute "abnormally bad weather" as specified in clause 4.36.2 (b). In the absence of any contention or finding that the monsoon season constituted force majeure and in the absence of evidence of "abnormally bad weather", the finding in this regard, on the First Bridge, is liable to be interfered with. When viewed in totality, the Petitioner is liable for only about 46 days of delay as regards the First Bridge and not 7 months as held in the Award.

18.As regards the Third Bridge, the Arbitral Tribunal held, at paragraph 25.16, that the diversion formed by the first Respondent was washed away twice and that this caused a delay of five weeks, which impeded work up to the end of November 1999. Once again, this conclusion is not based on appraisal of evidence with regard to the quantum of rainfall in November 1999. In effect, there does not appear to be any evidence that the quantity of rainfall or the nature thereof in November 1999 constituted "abnormally bad weather" or a force majeure event. Therefore, it does not justify the grant of extension of time or, more importantly, the grant of escalation or damages by way of increased

overheads during such extended period. However, with regard to the Third Bridge, it should be noted that this constituted the reason for extension of the period of delay by only one month and about seven months delay was attributed to the Petitioner on account of the delay in acquiring private land. As regards interference with apportionment of delay, reference may be made to the judgment of the Hon'ble Supreme Court in **ONGC v. Western Geco International Ltd. (2014)9SCC263**, wherein the apportionment of delay was interfered with on examining the relevant evidence. A fortiori, interference is warranted, in this case, because the attribution of responsibility and, consequently, the apportionment of delay is patently contrary to the Contract.

19. The next ground of challenge that should be considered is on the basis of the letters of extension issued by the Petitioner, which are not on record but are referred to generally in the Award while dealing with the pleadings of the Petitioner. This ground of challenge would apply to all the five bridges. According to the learned AGP, each letter of extension specified that extension was being granted although the first Respondent is responsible for delay and that such extension was on condition that no escalation would be paid to the first Respondent. These pleadings of the Petitioner are referred to in paragraphs 4.9(the First Bridge), 15.1(the Second Bridge), 20.6(the Third Bridge), 29.1.4 (the Fourth Bridge) and

39.1.7 (the Fifth Bridge) of the Award but I do not find any discussion or findings, in the Award, on the implications of these letters of extension. In this regard, it is relevant to state that the references to these pleadings do not specify anything other than escalation. In particular, it does not appear that the Petitioner stated in these letters that overheads, loss of profits or other claims should not be made during the extended period. Besides, as discussed earlier, there are factual findings in the Award that the delay is attributable to the Petitioner to the extent specified therein in respect of each of the five bridges. Bearing in mind that such findings are not liable to be interfered with except to the limited extent indicated above and given that these letters are not on record, there is no justifiable basis to interfere with the Award only on the ground that there is no discussion or finding therein with regard to the letters granting conditional extensions of time or the implications thereof.

20.The next ground of challenge that should be examined relates to the alleged contractual prohibition on the grant of escalation, overheads, et cetera. This ground of challenge is relevant as regards the Award on all five bridges. The relevant clauses, in this regard, are set out below:

"4.36.6 For extension of time granted due to default of the Contractor no price escalation shall be paid for such extended period of contract and the

contractor will not also be eligible for any other financial compensation."

"4.56.1 Operative date and operative period

(a) The operative date hereinafter referred to means the last date of submission of bid, if not otherwise mentioned in the contract. The operative period hereafter referred to means the time of completion of the works mentioned in clause 2.2 of the Contract. For the purpose of calculating adjustment in the bid price by way of payments/refunds arising out of variation in the cost of materials and P.O.L and labour wages, the operative period shall end on the last date of the completion period, as per clause 2.2 of the Contract or with the last date of the valid period of time extension granted by the Employer, only to cover the increase in the original scope of the work resulting in an increase in the quantum of work over and above the approved designs as per the terms of the Contract and time extension granted, in case work is suspended by the Employer, under clause 4.60.2 (i). This period of extension shall be considered in continuation of the original operative period as mentioned above. For extension of time granted for any other reason whatsoever, no adjustment in the Contract price shall be made on account of variation in the prices of materials, P.O.L and labour wages.

(b) In case of reduction in the original scope of the work envisaged under the Contract, the operative period shall be proportionately reduced by the Employer.

(c) The payment for variation in prices shall not apply to the work carried out by the Contractor beyond the stipulated time for reasons attributable to the contractor, even if time extension is allowed.

(d) In all cases, the decision of the Employer with regard to the operative period shall be final and binding on the Contractor."

21. Upon reading Clauses 4.36.6 and 4.56.1, it is clear that price variation on account of the increase or decrease in prices of materials and labour during the period of execution of the contract is not prohibited in this Contract. On the contrary, a price variation formula is specified in Clause 4.56.2 to 4.56.4 with regard to materials, petrol, oil and lubricants (P. O. L.) and labour. This price variation formula may be operated either during the original contract period or extended period. However, in order to claim price variation during the extended period of the Contract, it is abundantly clear that the requirements of clause 4.36.6 or 4.56 should be satisfied. As per clause 4.36.6, price escalation or any other financial compensation is not payable if the extension of time is due to default by the Contractor. As a consequence, the first mandatory requirement before claiming price escalation is to establish that the extension of time is not

on account of a default by the Contractor/first Respondent herein. Thus, clause 4.36.6 does not prohibit the grant of price escalation or any other financial compensation if the reason for extension of time is not attributable to the Contractor. This leads to the question as to whether such a prohibition is contained in clause 4.56. As per clause 4.56.1 (a), price variation or price escalation should not be granted unless there is an increase in quantum of work over and above the approved designs as per the terms of the contract or a suspension of work by the Employer as per clause 4.60.2 (i). However, this clause should be read harmoniously both with clause 4.36.6 and 4.56.1 (c). Both these clauses do not prohibit the payment of price variation or price escalation unless the reason for extension of time is attributable to the Contractor/first Respondent herein. Therefore, on a harmonious reading of all the relevant clauses, I am of the view that the Contractor is entitled to claim price variation or escalation if the extension of time is not attributable to a default by the Contractor/first Respondent. With reference to the facts of this case, there are categorical findings in the Award that the extension of time is attributable to the Petitioner and not to the first Respondent and, therefore, it cannot be said that the Award in respect of the grant of escalation is in contravention of the Contract. Moreover, the principle laid down in the **Sarvesh Chopra case** would not apply herein especially when viewed against the fact that the documentary evidence is not on

record in this proceeding so as to ascertain whether the first Respondent reserved its right to claim escalation in its correspondence.

22.The remaining aspect of this ground of challenge is with regard to the grant of damages for increased overheads during the extended stay period. In the previous paragraph, clause 4.36.6 was extracted and discussed and it was concluded that the said provision does not prohibit claims for financial compensation if the reasons for extended stay are not attributable to the Contractor. In this case, the Contractor provided details relating to expenditure incurred on off-site and on-site overheads during the extended period and the Arbitral Tribunal considered the evidence, in this regard, and concluded that the first Respondent is entitled to damages on this account as specified in the Award. These factual findings are not liable to be interfered with. In this regard, the **Bharat Coking Coal case** is distinguishable because, in this case, there is evidence with regard to expenditure during the extended period. Nevertheless, the quantification of damages under this head of claim is contingent on the findings with regard to the extension of time. Consequently, as regards the First, Second and Third Bridges, the award of damages would be required to be revised based on the conclusions in this order with regard to the determination of extension of time by the Arbitral Tribunal. Save and except as set out in this order, the Award in respect of the claim for

overheads is not liable to be set aside under section 34 of the Arbitration Act. The Award in respect of post-Award interest at 12% per annum is reasonable in the context of Section 31(7)(b) of the Arbitration Act, as applicable to this case, and, therefore, does not warrant interference.

23. Thus, in conclusion, the amounts awarded in respect of the First Bridge towards escalation, overheads and interest are not fully sustainable and are liable to be revised on the basis that only about 46 days of delay is attributable to the Petitioner as per the Contract. As a result, the claim for escalation, overheads and interest on escalation would be limited to the period commencing on 15.06.2000 and ending on or about 31.07.2000. Likewise, the amounts awarded in respect of the Second Bridge towards escalation, overheads and interest are not fully sustainable and are liable to be revised on the basis that only about 128 days of delay (68 days on account of delay in approval of detailed designs and drawings and a further two months for reasons not impugned herein) is attributable to the Petitioner. Consequently, the claim for escalation, overheads and interest on escalation would be limited to the period commencing on 15.09.2000 and ending on or about 23.01.2000 and, in the specific context of the escalation claim, would have to be re-worked after taking into account the sum of Rs.18,79,608, which was paid by the Petitioner towards escalation (paragraph 17.5 of the Award). As regards

the Third Bridge, out of the total delay as per the Award, about one month, i.e. the alleged monsoon period of November 1999, is liable to be deducted from the period of delay as determined by the Arbitral Tribunal. However, as regards the Fourth and Fifth Bridges, the Petition to set aside the Award is completely rejected because both the grounds of challenge that are relevant as regards the Fourth and Fifth Bridges are rejected for reasons discussed in preceding paragraphs. In this regard, it may be noted that an arbitral award may be set aside wholly or in part by applying the principle of severance, as held in **R.S.Jiwani v. Ircon International Ltd. 2010(112) Bom LR 491(FB)** and other judgments, and there are compelling reasons to sever the Award, in this case, including in respect of amounts awarded in respect of individual bridges. If severance is not applied, the parties would be back to the starting block after being involved in a protracted dispute resolution process till date.

24. In these proceedings, it is not possible to re-work the amounts due to the first Respondent for several reasons, including the non-availability of the documents that were filed/exhibited in the arbitration proceeding. Nonetheless, as a corollary to the conclusion in the preceding paragraph, the first Respondent is granted leave to re-work the amounts due and payable as per the Award, on the above basis, in respect of the First, Second and Third Bridges and in respect of post-Award interest on

the revised aggregate amount and make an aggregate claim on the Petitioner. In the event of non-payment, the first Respondent is granted leave to initiate execution proceedings or other appropriate proceedings for the limited purpose of crystallising and recovering amounts due and payable, as per the Award read with this order, in respect of the First, Second and Third Bridges or the post-Award interest claim on the aggregate amount.

25. In the result, the Award is partially set aside, in the manner and to the extent indicated above, as regards the First, Second and Third Bridges and, consequently, the aggregate amount awarded is required to be re-worked/revised and interest at the rate of 12% per annum would apply on such revised aggregate amount in the post-Award period but the challenge is completely rejected as regards the Award in respect of the Fourth and Fifth Bridges.

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SENTHILKUMAR RAMAMOORTHY, J.
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