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

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Date of Judgment: 14th March, 2019

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FAO(OS) (COMM) 20/2019

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Appellant

Through Mr. Narinder Hooda, Senior Advocate
with Ms. Padma Priya, Advocate.

versus

M/S DIC NCC (JV)

..... Respondent

Through Dr. Amit George, Mr. Rishabh Dheer
and Mr. Amol Acharya, Advocates.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. This is an appeal under Section 37 (1) (b) of the Arbitration and Conciliation Act, 1996 read with Section 13 of the Commercial Courts Act, 2015 for setting aside order dated 12.10.2018 passed by a learned Single Judge of this Court, by which the objections to the award dated 18.07.2017 stand dismissed.
2. Some necessary facts required to be noticed for disposal of this appeal are:
3. The appellant is a statutory body designed to maintain and manage the national highways or stretch vested with the Central Govt. The appellant has entered into contracts with civil works contractor for the purpose of development, maintenance and management of national highways. The Govt. of India has assigned the appellant authority to work on a project of rehabilitation and upgrading of Bamanbore-

Garamore Section of NH-8A from 182.60 KM to 254 KM in the State of Gujarat following under the East-West Corridor Project Package-III (hereinafter referred to as the 'Project').

4. The respondent was awarded the project work vide the letter of acceptance dated 22.11.2004. In terms of such acceptance, the respondent furnished two Performance Bank Guarantees (PBG) dated 06.12.2004 each for Rs. 14,49,62,310/- (Rupees Fourteen Crores Forty-Nine Lakhs Sixty-Two Thousand Three Hundred and Ten). The parties entered into the contract agreement dated 23.12.2004 for a consideration of Rs.289,92,46,020/- (Rupees Two Eighty-Nine Crores Ninety-Two Lacs Forty-Six Thousand and Twenty). The scope of work included construction of roads and bridges inclusive of culverts, minor bridges, under passes, grade separators etc.
5. The stipulated date of completion of the work was 11.11.2007. However, the work was actually completed on 16.08.2009 (final extension of time), with the value of the executed work being Rs.278,14,89,533/- (Rupees Two Hundred Seventy Eight Crores Fourteen Lakhs Eighty Nine Thousand Five Hundred and Thirty Three).The final extension was granted by the appellant vide letter dated 22.12.2009.The said extensions were granted on the specific undertakings dated 14.07.2008, 20.12.2008 and 21.09.2009 of the contractor that he would not claim any damages for such extensions. However, the final extension was granted with price escalation excluding liquidated damages under Clause 44 of the GCC.
6. On completion of the work, the appellant issued a 'Taking Over Certificate' dated 12.09.2009 followed by a 'Defects Liability

Certificate' dated 25.03.11 w.e.f. f 07.01.2011. On 26.03.2011 the respondent submitted its final Statement as per sub-clause 60.11 of the Conditions of Particular Application (COPA) explaining the value of work and the amount payable inclusive of the costs incurred owing to the delays caused by the appellant in completion of the work.

7. During the currency of the agreement, certain disputes in relation to the unpaid claims arose between the parties, which were duly referred to the arbitration. The learned Arbitral Tribunal published the impugned award allowing an amount of Rs.66,00,02,997/- towards the claims of the respondent and also directed the appellant to release the bank guarantee of Rs.3,93,77,776/- furnished by the respondent in respect of labour cess and summarily rejected the counter claims of the appellant accordingly. The appellant aggrieved by the said award filed a petition under Section 34 of the Act along with an application for stay before the learned Single Judge of this Court for setting aside the arbitral award along with the future interest. The learned Single Judge dismissed the said application in addition to the cost of Rs.25,000/- and the stay application was accordingly disposed of. Hence, the present appeal.
8. We have heard detailed arguments advanced by learned Senior Counsel, appearing for the appellant, and learned counsel for the respondent and we are disposing of this appeal at the admission stage itself.
9. The learned Single Judge has noted in para 2 of the order that claims no.1, 2, 3(a) & (c), 4, 6 & 7 stand rejected by the Arbitral Tribunal. The Tribunal has also rejected counter claim and grant of interest. A summary of the impugned award has been extracted by the learned

Single Judge. For the sake of convenience and for appreciating the arguments of learned counsel for the appellant, we deem it appropriate to reproduce the same:

“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.””

10. For the purpose of appreciating the arguments of learned Senior Counsel with respect to claim no.1, the relevant provision being subject clause 70.5 of COPA is being reproduced below :

“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.”

11. By way of claim no.1, the respondent claimed payment due on account of difference in price adjustment on alleged wrongful consideration of price in the indices. Learned Senior Counsel submits that the impugned order is ex facie bad in law and contrary to the provisions of Arbitration and Conciliation Act, 1996 and is thus liable to be set aside. It has been strenuously urged before us by Mr. Hooda that the learned Single Judge has failed to appreciate that the Arbitrator has failed to interpret sub-clause 70.5 in its right perspective. According to him, the only interpretation of this clause could have been what is being sought to be urged before us and thus, even while deciding this issue under Section 37, the scope of interference although narrow would allow this Court to reject this claim of the claimant. Elaborating his arguments further, it is contended that the impugned award as also the order of the learned Single Judge is clearly passed against the terms of the contract (sub-

clause 70.5) in relation to claim no.1 and public policy of Govt. of India. A request for adoption of indices of the previous month was urged before the Arbitrator by the claimant, which has been accepted without any discussion by the Tribunal on clause 70.5 and thus, a serious prejudice has been caused to the rights of the appellant and accordingly, making the impugned award and the order of the learned Single Judge perverse on the face of it. It is contended that the Arbitral Tribunal instead of acting as per the explicit terms of the contract has adopted an unrealistic approach, which has resulted in changing the terms of the contract agreed between the parties at the relevant time. It is submitted that the Tribunal would be bound by the express terms of the contract and cannot be permitted to change or modify the terms so agreed by the parties or to create a new contract which the parties did not create for themselves. The learned Senior Counsel submits that the Arbitrator as also the learned Single Judge has interpreted sub-clause 70.5 incorrectly and have applied the monthly indices to settle claim no.1 of the respondent whereas the weekly indices as per clause 70.5 were to be applied. It is submitted that an objection was raised by the internal auditor and it is only at that stage that the appellant realised that clause 70.5 was being wrongly interpreted by the parties. The stand of the respondent has been noted by learned Single Judge, which has also been raised before us today. It is submitted that sub clause 70.5 of COPA while providing for indices does not expressly specify use of weekly indices and since the work was carried throughout the month indices would naturally apply for the month.

12. While there is no quarrel with the proposition which is sought to be urged by the learned Senior Counsel with regard to scope of interference and the power of this Court to take a view different to that of the Arbitrator. However, what is required to be considered is whether the interpretation of the Arbitrator as also the decision rendered by the Arbitrator is in accordance with the terms of the contract or is it a decision that no fair minded or reasonable person could arrive at or that is it so perverse or it shocks the conscience of the Court. The Supreme Court has repeatedly held that interpretation of a contract is a matter for the Arbitrator to determine it in this backdrop that we have considered the submission of learned Senior Counsel. A look at sub-clause 17.5 of COPA, which we have reproduced in para 5 foregoing would firstly show that there is neither any reference of the word 'weekly' or 'monthly'. According to sub-clause 70.5, the base cost indices or prices shall be those prevailing on 'the day 28 days prior to the closing date for submission of bids'. While learned Senior Counsel for the appellant has strongly urged before us that reading of this clause would imply that it is the weekly wholesale price indices, which is to be considered and the obvious answer would be the weekly price indices for the last week of the month which would apply whereas the stand of the respondent is that the word 'weekly' is being included and re-written in the contract when it does not exist.
13. Dr. George, counsel for the respondent has submitted before us that the word used 'on the day 28 days prior' indicates that it is for the full month and even otherwise, as we have noticed that this was the interpretation given by both the parties and stands reflected by the fact

that till the 36th IPC even the appellant applied the monthly indices for arriving at a price adjustment on various components having been noticed thus can it be said that the interpretation of the Arbitrator with respect to sub-clause 70.5 is perverse or an interpretation which no ordinarily reasonable person would take that this was the interpretation of the appellant as well.

14. Having said so and having regard to the consistent view of the Apex Court that interpretation of the contract lies in the domain of the Arbitrator. The Apex Court in *McDermott International vs. Burn Standard Co.* reported at (2006) 11 SCC 181, categorically held that the construction and interpretation of a contract is matter for the arbitrator to determine, even if it gives rise to question of law. Moreover, in *MSK Projects vs. State of Rajasthan* reported at (2011) 10 SCC 573, the Supreme Court in paragraph 17 has further observed that even when the arbitrator commits an error in the construction of the contract, that error is also within his jurisdiction.
15. Accordingly, we are unable to accept the submission of learned Senior Counsel for the appellant, we do not find any patent illegality in the interpretation of the Arbitrator.
16. Second claim which has been raised and rejected by the Arbitrator and the learned Single Judge pertains to the extra cost of staging at grade separator in the tune of Rs.59,32,763/-. Mr. Hooda has drawn attention of the Court to the expert report submitted by IIT Bombay in support of his contention that the appellant cannot be called upon to pay the aforesaid sum when the staging has collapsed as the same was old and this would be completely attributable to the respondent. As far as this

claim is concerned, the respondent has relied upon the terms of the contract, more particularly, technical specification clause 11509, which provides for reuse of Form Work for upto 20 times by the contractor. It is the case of the respondent that based on the technical specification, the respondent took the engineer's approval for reusing the old material. Concreting was carried out on 13.05.2007, however, according to the respondent, the same collapsed on 15.05.2007, due to an earthquake but according to report, the same collapsed on account of use of old supporting structure, but what is relevant is that the Engineer on 19.09.2007 called upon the respondent to use only new materials for staging. The Arbitrator has returned a finding that since the new material was used at the instruction of the engineer, the appellant was liable to pay for the same. The view of the Arbitrator cannot be said to be perverse. We may note that the Arbitrator only awarded 10% of the claim made by the respondent by awarding Rs.59,32,763/- since this finding cannot be said to be perverse or completely unreasonable, the same cannot be interfered by us.

17. Mr. Hooda, learned Senior Counsel, has also challenged the order pertaining to claim no.3(a) to 3(c). Learned Senior Counsel submits that the award rendered while allowing claim no.3(a) to 3(c) is completely perverse and unreasonable for the reason that three extensions were granted based on an undertaking given by the respondent that no claim will be raised for extra work in relation to the period where extension of time was granted nor any request for additional payment would be made. The undertaking dated 14.07.2008 given by the respondent is reproduced below:

“(A Joint Venture of M/s. Daelim Industrial Co. Ltd., & Nagarjuna Construction Co. Ltd.)

14th July 2008

Team Leader,
Stanley Consultants Inc-CES (JV),
9th-10th Floor, Aalap-A,
Limda Chowk, Shastri Matdan,
RAJKOT-360001.

Dear Sir,

Sub: Rehabilitation and Upgrading of Bamanbore –
Garamore Road Section of NH-8A from Km
182+600 to Km 254+000, Package-UI.

I, A K H S Rama Raju, the authorized representative of M/s. DIC-NCG (JV), Contractor of East-West Corridor Project, Package-III Rehabilitation & Upgrading of Bamanbore – Garamore Road Section of NH-8A from Km 182.600 to Km 254 in the State of Gujarat, agree that I will not submit any claim for extra cost in relation to the granted EOT, if Employer grant EOT, I will not use EOT as a reason for Employees default and will not request for additional payment in this regard.

Thanking you and assuring you of our best services at all times.

Yours faithfully,

For DIC-NCC (JV)
AKH S Rama Raju
Authorised Signatory
CC: Project Director, PIU, NHAI, Rajkot”

18. It has strongly been urged before us that once the undertaking had been given, no claim could have been raised and in the absence of any evidence to show that the undertaking was given under any duress,

coercion or pressure. The claims were liable to be rejected. Counsel for the respondent submits that what has prevailed upon the Arbitrator and the learned Single Judge is the fact that in case delay was attributable to the respondent, extension of time would not have been granted without burdening the respondent with penalty as provided in the contract. It was taken as a tacit admission that delay was either not attributable to the respondent wholly or attributable to the appellant. In fact, the Arbitrator has returned a finding holding the appellant herein responsible for the delay. This claim has been dealt with by the Arbitrator as detailed below:

“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 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>

4	Removal of	547 Days	413 Days	413 Days
5	Encumbrances @	542 Days	69 Days	69 Days
6	Km 207+544 of	492 Days	483 Days	483 Days
7	NH8A	4.10 Months	NIL	NIL
8	Due to Change in	1.80 Months 3.20 Months	NIL NIL	NIL NIL
	Toll Plaza Location			
	Public agitation at Morbi/Halvad Junction			
	Handing over of Site			
	Suspension of Work			
	(i) Major Bride-3 Nos.			
	(ii) Design Approval of RE wall			

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 NHAI HQ 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

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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."

19. The finding of the Arbitrator has been analysed by the learned Single Judge in the following paragraph:

"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.”

20. A specific finding has been returned by the Arbitrator, as we have noticed in para 10 foregoing, that the delay was attributable to the appellant but we may also note that out of delay of 1598 days, the claim of the respondent has only been restricted by the Tribunal to 645 days. The question which is sought to be raised before us in our view cannot be considered in proceeding arising out of Section 37 of the Arbitration and Conciliation Act. The question of evidence cannot be considered in these proceedings and thus, this claim has also been rightly rejected. In the case of *MTNL Vs. Fujitsu India Private Limited*, reported at 2015(2) *ARBLR332(Delhi)*, the division bench held as under:

"The law is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34

of the said Act does not sit as a court of appeal and is not expected to re- appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible ***Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited***: MANU/DE/1282/2013: 202(2013) DLT 218

The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under section 34.”

21. Another submission which has been made pertains to claim no.4.1 and it is submitted that although this claim was raised and is reflected at

page 736 of the paper book but the learned Single Judge has omitted to decide the same. Learned counsel for the respondent submits at the bar that this claim was not pressed and it is for this reason, the same does not find mention in the order. Without entering into this controversy, we can say that in case, the same was not reflected or decided, it would have been open for the respondent to seek review of the order which has not been done and thus, in our view, in case, it was not raised before the learned Single Judge, it cannot be raised before us as well.

22. The only other claim seriously pressed before us is claim no.4.3, which pertains to additional expenses due to increase in royalty. Mr. Hooda submits that in the absence of any proof, this claim could not have been decided in favour of the respondent and the award deserves to be set aside. The Tribunal has taken note of the rival submission and reduced the claim of the respondent to 50% of the amount so claimed and awarded Rs.12,31,799/-. The Court cannot lose track of the fact that the expenses due to increase in royalty charges which are payable but the basis on which the claim has been raised, has been challenged before us. The manner in which the claim has been decided by the Arbitrator cannot be termed as unreasonable or perverse. As far as claim no.4.4 is concerned, this claim has been decided against them [see *National Highways Authority of India Vs. Gammon – Atlanta (JV)*, reported in 2013 (4) Arb. LR 61 (Delhi) (DB)]. In claim no.6, interest has been awarded relating to sub-clause 60.8 of COPA and claim no.7 pertains to grant of interest @ 10% compounded monthly in favour of the respondent. This question already stands decided in *National Highways Authority of India Vs. ITD Cementation India Limited* reported in 197

(2013) DLT 650 and *National Highways Authority of India Vs. Som Datt Builders-NCC-NEC (JV)* reported in 2014 IV AD (Delhi) 632 and this cannot be faulted.

23. Resultantly, we find no merit in the appeal, the same is dismissed.

CM.APPL 3955/2019(stay)

24. The application stands disposed of in view of the order passed in the appeal.

G.S. SISTANI, J.

JYOTI SINGH, J.

MARCH 14, 2019

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