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

Reserved on : 20th February, 2019

Date of decision : 2nd July, 2019

+ **O.M.P. 265/2009**

GAMMON INDIA LIMITED

.....Plaintiff

Through: Mr. J. P. Cama, Senior Advocate with
Mr. Sumit Goel, Ms. Tanya
Chaudhary, Ms. Malvika Bhanot and
Mr. Ishan Nagar, Advocates
(M:9654436678)

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIADefendants

Through: Ms. Kritika Shukla and Ms. Neetika
Sharma, Advocates (M:9654156410)

+ **O.M.P. 319/2009 & I.A. 7751/2009**

NATIONAL HIGHWAYS AUTHORITY OF INDIADefendants

Through: Ms. Kritika Shukla and Ms. Neetika
Sharma, Advocates (M:9654156410)

versus

GAMMON INDIA LIMITED

.....Plaintiff

Through: Mr. J.P. Cama, Senior Advocate with
Mr. Sumit Goel, Ms. Tanya
Chaudhary, Ms. Malvika Bhanot and
Mr. Ishan Nagar, Advocates
(M:9654436678)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

I.A. 7751/2009 in OMP 319/2009

1. The present application has been filed by the Petitioner – National Highways Authority of India, for condonation of delay of 68 days in re-

filing the present petition. For reasons stated in the application, the same is condoned. I.A. is disposed of.

O.M.P. 265/2009

O.M.P. 319/2009

2. The above two OMPs arise out of a contract for '*Widening to 4/6 Lanes and Strengthening of Existing 2 Lane Carriageway (Bridges, Flyovers & ROB) of NH-5 in the State of Orissa from Km. 61.000 to Km. 199.141 (Chandikhole-Baleshwar) Contract Package No. OR-V (Agreement No. 005/NH-5/GQ/GM(E-III)2001)*' (hereinafter, '*project*'). The said stretch of road was part of the Golden Quadrilateral. A tender was called for by National Highways Authority of India (hereinafter, '*NHAI*'), pursuant to which M/s Gammon India Ltd. (hereinafter, '*Contractor*') submitted its bid on 11th January, 2001. The letter of acceptance was issued on 6th July, 2001. The total value of the contract was Rs.144,56,88,536/-. After issuance of the letter of acceptance, the contract agreement dated 20th August, 2001 was executed between NHAI and the Contractor. The Contractor also furnished the performance security as per the contract. The project was to be completed within 33 calendar months.

3. The Contractor submitted its running bills (hereinafter, '*RA Bills*') from time to time – substantial parts of which were approved by the Engineer-in-Charge and payments were released to the Contractor. However, some of the claims made by the Contractor were rejected by the Engineer-in-Charge. The issues were then referred to the Dispute Resolution Board, under Clause 67.1 of the Conditions of Particular Application (hereinafter, '*COPA*') which gave its report on 16th January, 2005. However, since the grievances between the parties persisted, a three-member

Arbitral Tribunal was constituted to adjudicate the disputes between the parties.

4. The Ld. Arbitral Tribunal passed the impugned award dated 31st October, 2008. There were a total of six claims urged before the Arbitral Tribunal, out of which four were decided in favour of the Contractor and two claims in favour of NHAI. Two petitions have been filed under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act'). OMP 265/2009 has been filed by the Contractor, raising a challenge in respect of the two claims awarded in favour of NHAI i.e., Claim No.2 and Claim No.3. OMP 319/2009 has been filed by NHAI challenging the award in respect of the four claims decided in favour of the Contractor i.e., Claims No.1, 4, 5 and 6.

OMP 265/2009

5. The present OMP relates to Claim No.2 and Claim No.3.

A. Claim No.2 –Payment of Reinforcement in Piles.

6. The project involved construction of piles as part of the construction of bridges, flyovers and Rail-over-Bridge (*hereinafter*, 'ROB'). The Encyclopaedia Britannica explains 'Piles'¹ as under:

“Pile, in building construction, a postlike foundation member used from prehistoric times. In modern civil engineering, piles of timber, steel, or concrete are driven into the ground to support a structure; bridge piers may be supported on groups of large-diameter piles. On unstable soils, piles are indispensable building supports and may also be used on stable ground when exceptionally large structural loads are involved. Piles are driven into the ground by pile drivers, machines consisting usually of a high

¹ “Pile Construction”, Encyclopaedia Britannica, available at <https://www.britannica.com/technology/pile-construction>

frame with appliances for raising and dropping a pile hammer or for supporting and guiding a stream or air hammer.”

7. The question here is as to whether in the construction of Piles, the Contractor is entitled to separate payment for the reinforcement or whether the cost of reinforcement is included in the amount payable towards construction of piles. There were several items which were specified in the Bill of Quantities (*hereinafter, 'BOQ'*), under which the Contractor was entitled to claim payment. The present claim is concerned with Item No.3.14 of the BOQ. The said item reads as under:

“Bored/Cast in situ RCC vertical *piles including reinforcement complete as per drawing and technical Specification Sections 1100, 1600 and 1700.*

- a) 750mm dia, Piles-M-35
- b) 1000mm dia. Piles-M-35”

8. As part of the bid documents, the BOQ was furnished to the bidders and the bidders were to fill in the quoted rates against each of the items. The completed BOQ item 3.14 reads as under:

Item No.	Description	Unit	Estimated Quantity	In figures	In words	Amount (Rupee)
3.14	Bored/ Cast in situ RCC <u>vertical piles including reinforcement complete as per drawing and technical Specification. Sections 1100, 1600 and 1700.</u>				(Three	

	a) 750mm dia, Piles-M-35	Lm	1480.00	3,000/-	thousand only)	44,40,000
	b) 1000mm dia. Piles-M-35	Lm	2100.00	5,000/-	(Five thousand only)	1,05,00,000

9. The case of the Contractor is that though item no.3.14 of the BOQ states that the rates for piles includes reinforcement, however, since the same was to be as per the drawings and the Technical Specifications Sections 1100, 1600 and 1700, the rates for reinforcement were not included and were to be treated as extra items. The Contractor had, accordingly, raised a claim for separate payment for the reinforcement, under item 3.18 of the BOQ. Item 3.18, as per the BOQ, which was duly filled in by the Contractor at the time of submission of bid, reads as under:

Item No.	Description	Unit	Estimated Quantity	In figures	In words	Amount (Rupee)
3.18	<u>Providing and laying High Strength deformed (HYSD) reinforcement with anti-corrosive treatment complete as per drawing and Technical Specifications Section 1600.</u>					
	a) In Open foundation	tonne	991.00	28,000/-	(Twenty eight thousand only)	2,77,48,000

b) In Well Curb	tonne	277.00	28,000/-	(Twenty eight thousand only)	77.56.000
c) In Well Steining	tonne	605.00	28,000/-	(Twenty eight thousand only)	169,40,000
d) In Well Cap	tonne	764.00	28,000/-	(Twenty eight thousand only)	213,92,000
e) In Pile Cap	tonne	75.00	28,000/-	(Twenty eight thousand only)	21,00,000
f) Substructure	tonne	1930.00	28,000/-	(Twenty eight thousand only)	5,40,40,000
g) Superstructure	tonne	6511.00	28,000/-	(Twenty eight thousand only)	18,23,08,000

10. As part of the 2nd RA bill, the Contractor raised a claim for construction of 'Piling' as part of Item 3.18 of BOQ as under:

3.18	Providing and laying High Strength deformed (HYSD) reinforcement with anti corrosive treatment complete as per drawing and Technical Specifications Section 1600.									
a)	In Open Foundations	Tonne	991	28000	30.54		30.54	855120		855120.00
b)	In Well Curb	Tonne	277	28000	107.84	1.73	109.57	3019520	48440.00	3067960.00
c)	In Well Steining	Tonne	605	28000	43	16.881	59.88	1204000	472668.00	1676668.00
d)	In Well Cap	Tonne	764	28000						
e)	In Pile Cap	Tonne	75	28000						
f)	Sub-Structure	Tonne	1930	28000		3.753	3.75		105084.00	105084.00
g)	Superstructure	Tonne	6511	28000						
h)	Piling (Extra Item)	Tonne		28000		42.615	42.62		1193220.00	1193220.00

Not in
the
priced
BOQ

The above claim of the Contractor was part of the 2nd RA bill and related to the work completed till 28th February, 2002. The bill was submitted for payment on 6th March, 2002.

11. Insofar as the works carried out under item 3.14 are concerned, the Contractor raised the following claim:

Item No.	Description	Unit	BOQ Qty	Rate (IR)	Quantity			Amount (In Rs.)			Measurement Sheet No.
					Previous	This Period	Total To Date	Previous	This Period	Total To Date	
3.14	Bored/Cast in situ RCC vertical piles complete as per drawing and Technical Specifications Sections 1100, 1600 & 1700.										
a)	750 mm dia Piles, M-35	Lm	1480	3000	617.55	68.4	685.95	1852650	205200.00	2057850.00	
b)	1000 mm dia Piles, M-35	Lm	2100	5000	169.2	126.9	296.10	846000	634500.00	1480500.00	

Words –
“including
reinforcement”
as per BOQ
item 3.14 are
missing

Actual language of item 3.14 of the BOQ, as per the bid documents, is as under:

“Bored/Cast in situ RCC vertical **piles including reinforcement complete** as per drawing and technical Specification Sections 1100, 1600 and 1700.

a) 750mm dia, Piles-M-35

b) 1000mm dia. Piles-M-35”

12. What the Contractor did while raising these two claims was that the reinforcement was billed separately under Item 3.18, and Item 3.14 only related to the in-situ RCC vertical piles. While describing Item 3.14 in the bill, the Contractor deleted the words “including reinforcement”, as appearing in the original priced BOQ, as it believed that reinforcement was billable and payable under Item 3.18. Thus the Contractor billed separately for the Piles (under Item 3.14) and for the reinforcement (under Item 3.18). The Engineer-in-Charge rejected this claim of the Contractor. The

justification of the Contractor before the Tribunal in support of this claim was based on a reading of Technical Specification 1600 which, according to the Contractor, provided that payment for reinforcement has to be separately made. The Contractor also relied on sub-clause 5.2.2 of the COPA, as also Sections 1118 and 1119 of the Technical Specifications, in support of its claims.

13. On the other hand, NHAI argued that the BOQ is clear and the rates quoted for Piles included the reinforcement. The same are not separately billable, chargeable or payable. NHAI's submission was based on the fact that the Contractor was fully aware as to what the construction of the piles entailed. The Contractor was also aware that reinforcement is to be done. The drawings which were provided to the Contractor clearly show the diameter and capacity of the piles. The Contractor had to visualise the site and only then quote the rates. Any Contractor would have been aware that piles required reinforcement, and hence the rate for piles included the cost of reinforcement and the same was not an extra item.

14. The Ld. Tribunal, by a 2:1 majority, under this claim, held as under:

“2.3 Discussions and Findings of the Arbitral Tribunal

2.3.0 The Tribunal could not come to a consensus, The majority award by S/Shri O. P. Goel and D. N. Handa is given below The minority Award given by Shri Inder Mohan Singh is attached.

2.3.1 After considering all facts, based on the material placed before us, our observations and decisions on the dispute are as under:

2.3.2 The BOQ item No. 3.14 stipulates:

"Bored/cast in situ RCC vertical piles including reinforcement complete as per drawing and technical specifications 1100, 1600 and 1700".

As per description or nomenclature of the item, it is clear that the rate as per above item is inclusive of reinforcement. The Contractor was knowing well that the piles would have reinforcement and the BOQ item rates included the reinforcement at the time of quoting this rate. The contract drawings, however, did not show the reinforcement but indicated the diameter and capacity of piles. In this regard, MOST specifications clause 107.1 "Contract Drawing" being quite clear and relevant is reproduced:

"The Contract Drawings provided for tendering purposes shall be as contained in the tender documents and shall be, used as a reference only. The Contractor should visualize the nature and type of work contemplated and ensure that the rates and prices quoted by him in the bill of quantities have due consideration of qualitative and quantitative variation as may be found at site and complexities of work involved during actual execution / construction".

The Contract Drawings with bid documents clearly indicated as "General Arrangement Drawings" and thus were for reference purpose only and can not be taken as working drawings. Bored/cast in situ RCC vertical piles as the name implies are always with reinforcement. A general arrangement drawing does not generally show the details of reinforcement which is always shown in the working or "good for construction" drawings issued subsequently. The Contractor's plea that the working drawings issued after commencement of work differed with tender drawings therefore, is not tenable.

2.3.3 Clause 1.1.4 of preamble to technical specifications is abundantly clear which under the head "Measurement and Payment" clearly specifies that:

"The methods of measurement and payment shall be as described under various items and in the Bill of

Quantities shall be deemed to be included in the rates and prices entered by the Contractor in the BOQ".

This clearly means that the cost of reinforcement is included in the quoted rates of BOQ item 3.14. The bidders were required to quote the rates of piles including reinforcement for which no separate provision existed. This is corroborated by the fact that the contractor has been subsequently billing this reinforcement as "Extra items" under BOQ item 3.18 relating to reinforcement. In absence of any provision, the Employer wanted rate of this item as inclusive of reinforcement which the Contractor quoted in clear terms.

2.3.4 As regards priority of documents under clause 5.2.2 of COPA, no doubt the technical specifications carry priority over drawing and drawing prevails over BOQ, it may be pointed out that since the Contract has been evaluated on the basis of BOQ item, stipulating clearly "including reinforcement", the technical specifications, being of general nature and drawings being preliminary / general arrangement drawings only, can not get priority. In this case, the priority is that of BOQ provisions as also clearly established under clause 1.1.4 "preamble to Tech. Specifications". However, no clarification on this point was ever sought during the pre-bid meeting. The Contractor's subsequent contention that the rate quoted for BOQ item 3.14 does not include the cost of reinforcement simply because BOQ is of low priority under clause 5.2.2 of COPA thus does not hold good due to the fact that the reinforcement has specifically been included in the said BOQ item. When the BOQ item clearly indicates "including reinforcement", the priority has to be that of BOQ. Further the clause for priority of document will come into play only when there is any ambiguity or contradiction between different documents. The BOQ item being very clear and

complete without any ambiguity reference to priority of document is uncalled for. The specific requirement of quoting the rates including reinforcement renders the applicability of the priority of document meaningless. Reference to precedence of specification over BOQ thus does not mean that the reinforcement is to be measured separately. It is well known that bored piles have to be built with reinforcement. Apart from codal requirement of providing some minimum reinforcing steel, the bidders were required to include the total cost of reinforcing steel in their quoted rates. It is perhaps on this account that the Employer did not feel any necessity of furnishing details and joint verification of reinforcement.

2.3.5 It may be significant to add that it is not always necessary for the client/owner to base the description or nomenclature of an item on specifications which is of general nature. To cite an example, for the item of earthwork in excavation, a composite rate for all types of soils may be arrived at and specified and with all leads and lifts etc. for disposal in the tender documents. An RCC item can be specified "including reinforcement" or as "reinforcement to be paid separately". Similarly RCC items can be including centering and shuttering or to be paid separately etc. The Employer wanted the rates of bored / cast in situ RCC vertical piles including reinforcement. The contention of the Contractor that reinforcement is to be measured and paid separately as per section 1600 of MOST specifications, therefore, does not carry any weight. Moreover, the "Preamble to Technical Specifications" carrying highest priority, is crystal clear, and thus the case of the Contractor fails under "Priority of document".

2.3.6 Issues

The issue before the Arbitrators is:

Whether the rate quoted for BOQ item No. 3.14 for bored / cast in situ piles is excluding the cost of reinforcement as prayed by the Contractor.

2.3.7 We examined the above issue as per relevant contract provisions and above discussions based on submissions made by both the parties and now therefore, make the following award.

The rate of BOQ item 3.14 is clearly inclusive of reinforcement and hence reinforcement is not separately payable in view of detailed reasons discussed above. The claim of the Contractor is found to be inadmissible.”

15. The above findings of the tribunal are impugned by the Contractor. Mr. Cama, Ld. Senior Counsel, submits that the Arbitral Tribunal failed to consider the crucial clauses of the bid documents. Enormous reliance is placed on Sections 1118 and 1119 of the Technical Specification to argue that reinforcement was to be paid for separately as per Section 1600. Ld. Senior Counsel relied on Section 1608 to argue that the measurement of the pile was to be done after it was completed and the weight of reinforcement was to be deduced in tonnage after completion. Thus, according to him, no rate could have been quoted by the bidder at the time of submission of the bid by the Contractor.

16. It is his further submission that the priced BOQ appears below the Technical Specifications in the order of priority of documents, and hence the technical specifications would prevail over the priced BOQ. Thus, according to Ld. Senior Counsel, the cost of reinforcement is separately chargeable and payable. He submits that there are 3 categories of items in this contract:

- i. Listed items
- ii. Listed items, to be paid in actuals.
- iii. Extra items.

17. Though reinforcement is a listed item, it had to be paid in actuals after completion of the work. Mr. Cama, submits that the award gives priority to the priced BOQ, whereas in fact the priced BOQ and Section 1608 have to be read together. He submits that though, generally, reinforcement is part of the contracted items, in respect of piles, separate measurement is needed, and hence the payment has to be made separately.

18. On behalf of NHAI, Ms. Jain, Id. Counsel, who was initially appearing for NHAI, submits that the BOQ mentions the unit, the estimated quantity to be executed, plus the rate of the item. In the case of piles, since the same is a cylindrical unit, it is measured in linear metres, or even in cubic metres. Item 3.14 of the BOQ is very clear in its wording and includes reinforcement. Thus, the rates for reinforcement are included in Item 3.14 and this was well within the knowledge of the Contractor. She contrasts items 3.14 and 3.16 to argue that in the case of item 3.16, the item is excluding reinforcement, whereas in the case of item 3.14, it is inclusive of reinforcement. The award, according to Id. counsel, is thus, as per the terms of the contract and does not deserve to be interfered with.

19. Ms. Jain further submits that the Tribunal has noted the fact that the understanding of the Contractor, in the technical bid itself, was that the construction of piles would include the reinforcement. She relies on paragraph 2.2.3 of the award, which reads as under:

“2.2.3 In the technical bid furnished by the bidder at page 483 by giving out the proposed

construction methodology for pile foundation as under, the contractor has illustrated, how the job could be executed with reinforcement.

“These piles will be executed as land based piles after construction of bund/cofferdam at the location wherever necessary. After completion of the boring, the foundation level of the pile shall be decided in consultation with Engineer-in-Charge taking into consideration the soil condition etc. After reaching the foundation level, the bore shall be thoroughly flushed with fresh bentonite solution. Reinforcement cages will be prefabricated in suitable length of about 10m. These will be lap welded at site and lowered in to the bore with the help of mobile crane/winch. On placing the reinf Cage tremmie pipe elements shall be assembled and lowered inside the cage. The bore is then concreted by under water concreting method with a minimum slump of 150 mm using tremmie pipe in such a way that the water inside the bore will be displaced by concrete. The tremmie segments will be progressively withdrawn during the process of concreting.”

20. Since the drawings which were provided to the bidders included diameter and capacity of piles, the Contractor was well-aware of the cost of the reinforcement as well. According to her, reinforcement is not an extra item. Specific reliance is placed by Id. counsel on the preamble of the BOQ. She also submitted that if the Contractor had any doubt in respect of the inclusive rate for the reinforcement under item 3.14 of the BOQ, a clarification could have been sought in the pre-bid meetings, which was also not sought. Since the BOQ itself is clear, there is no need to apply the test as to which document would have priority over the other. She further submits that certain works are inbuilt depending upon the nature of the item being

executed. When the bid document is clear, that the rates were inclusive of reinforcement, separate payment cannot be made for the reinforcement. She further submitted that at the time when the present contract was awarded, five other contracts were also executed. However, in none of those, such a claim has been raised.

21. Mr. Cama, Id. Senior Counsel for the Contractor submitted in rejoinder that the simple question is whether item 3.14 of the BOQ includes cost of reinforcement. A pile is the outside structure, whereas the reinforcement is inside the pile. In the BOQ the quantities are provisional for reinforcement. The Technical Specification is different and method of calculation of the amounts due for reinforcement is different. While for piles the measurement is by linear metres or cubic meters, for reinforcement the measurement is in tonnes. The quantity of the material used for reinforcement cannot be known until the entire work is executed. The Id. Arbitral Tribunal has noted that the vertical reinforcement could range from 0.44 % in flyovers to 1.99 % in bridges. Thus, until actual reinforcement was executed, it was impossible to predict as how to how much it would cost. The pricing, thus, given against item 3.14 of the BOQ is only for the piles.

22. He submits that clause 1.1.4 of the preamble to the Technical Specifications, which is a deeming provision, applies only when there is no reference in the Technical Specification. If there is a reference to the Technical Specifications, the payment has to be made as per the same. If item 3.14 of the BOQ is deemed to include the reinforcement cost, then the same would be in conflict with the Technical Specification.

Conclusions on claim 2

23. The Court has considered the submissions of the parties, as also the various clauses of the contract, Technical Specification, COPA, BOQ items, etc. It is a settled principle of law that the Arbitral Tribunal has to proceed as per the terms of the contract. In the present case, the original bid documents, which were furnished to the bidders, enumerated all the items, their units and the estimated quantity to be executed during the work. The bidders had to fill the unit rate in figures and in words, as also the total amounts. The filling up of the BOQ had to be done, on the basis of the Technical Specification provided by NHAI. After going through the Technical Specification, the bidder had to arrive at the rates at which it would be willing to execute the works. The bidder, obviously, has to have an understanding of the various items and their descriptions. Along with the bid documents, various schedules of the basic data of the bid were also annexed. The detailed specifications of the works were handed to the bidders. The conditions of contract were also appended to the bid documents.

24. A perusal of the Technical Specification shows that the same are detailed in nature. Insofar as the bored/cast in-situ RCC vertical piles are concerned, section 115.2 provides the details of the same. The piles had to be constructed with reinforcement as mentioned in the Technical Specifications. Though the actual payment for the reinforcement was to be made after measurements, Sections 1118 and 1119 of the Technical Specifications, clearly bring out the difference of the manner in which the piles and piles caps are to be treated. For the sake of reference, Sections 1118 and 1119 of the Technical Specifications are quoted hereinbelow:

“1118 MEASUREMENTS FOR PAYMENT

For supply of precast concrete, timber or steel piles of specified cross-section, the measurement shall be in metres of the length of piles ordered in writing by the Engineer measured from the head to the butt of the shoe or the tapered point. Reinforcement in precast concrete piles shall not be measured for payment.

For cast in-situ driven and bored concrete piles of specified cross-section, the measurement shall be the length in metres of the accepted pile that remains in the finished structure complete in place. Reinforcement in cast in-situ driven and bored concrete piles shall be measured for payment as per Section 1600 of these Specifications.

Routine and Initial Pile Load Tests shall not be measured for payment.

For installation of the pile, i.e. by drilling in the case of precast concrete, timber, steel and cast in-situ driven piles, and by boring in the case of cast in-situ bored pile the measurement shall be the length in metres that remains in the finished structure complete in place, limited to that shown on drawings or ordered by the Engineer. No distinction shall be made for penetration through hard strata or rock and socketing into rock.

For steel liners/casing shown on the drawings to be permanently left in place, the measurement shall be by weight in tonnes that remains in the finished structure complete in place, limited to that shown on drawings or ordered by the Engineer.

For the pile cap, the quantity of concrete shall be measured in cubic metres as per Section 1700 of these Specifications and reinforcement in pile cap shall be measured in tonnes as per Section 1600 of these Specifications.

1119 RATE

The contract unit rate for supplying precast concrete, timber or steel piles shall include cost of all labour, materials, tools and equipment, and other work

involved in making or fabricating the pile complete as shown on the drawing, and where required its loading, transport, delivery to site, unloading and stacking at the place indicated by the Engineer. The cost of reinforcement including treatment as per Section 1600 of these Specifications in precast concrete shall be deemed to be included in the quoted rate for supply of piles. The contract unit rate shall also include costs of all labour, materials, equipments and all other incidentals involved in conducting routine and initial pile load tests, including installation of piles for initial load tests.

The contract unit rate for cast in-situ driven and bored piles shall include the cost of concrete and all other items as per Section 1700 of these Specifications. The contract unit rate shall also include costs of all labour, materials, equipments and all other incidentals involved in conducting routine and initial pile load tests, including installation of piles for initial load tests.

The contract unit rate for reinforcement in cast in-situ driven and bored piles shall be as per Section 1600 of these Specifications.

The contract unit rate for installation of piles shall include full compensation for furnishing all labour, materials, tools and equipment, and incidentals for doing all the works involved in driving timber, precast concrete and steel piles, driving or making bores for cast in-situ driven and bored concrete piles, cutting off pile heads, all complete in place to the specified penetration of piles. Providing temporary liner/casing and its withdrawal and placing reinforcement in position shall also be deemed to be included in the rate for installation of piles and no additional payment shall be made for the same.

The contract unit rate for permanent steel liners shall include cost of all labour, fabrication, treatment to the liner and placing the steel liner to the required depth

as shown on the drawings and as ordered by the Engineer.

The contract unit rate for concrete in pile cap shall cover all costs of labour, materials, tools, plant and equipment, formwork and staging including placing in position, sampling and testing and all as per Section 1700 of these Specifications. Unit rate quoted shall also include the treatment to be given to the surfaces of the pile cap. Reinforcement in the pile cap shall be paid for separately as per Section 1600 of these Specifications.”

25. In respect of measurement for payment of steel reinforcements, Section 1608 of the Technical Specification reads as under:

“1608 MEASUREMENT FOR PAYMENT

Reinforcement shall be measured in length including hooks, if any, separately for different diameters as actually used in work, excluding overlaps. From the length so measured, the weight of reinforcement shall be calculated in tonnes on the basis of IS: 1732. Wastage, overlaps, couplings, welded joints, spacer bars, chairs, stays, hangers and annealed steel wire or other methods for binding and placing shall not be measured and cost of these items shall be deemed to be included in the rates for reinforcement.”

26. Thus, the difference between items 3.14, 3.16 and 3.18 of the BOQ items was clear to the Contractor at the time when the bid itself was submitted. Item 3.14 of the BOQ included reinforcements wherein item 3.16 was exclusive of reinforcement. Where the item was exclusive of reinforcement, separate rate for the reinforcement was to be quoted in item 3.18 of the BOQ. Thus, item 3.18 provides for piles caps covered in item 3.16 of the BOQ, but not for bored/cast in-situ RCC vertical piles. There is no ambiguity in the reading of the two items i.e. Items 3.14 & 3.18. For the sake of ready reference, the relevant language of the said two items is set out hereinbelow:

<i>Item No.</i>	<i>Description</i>
3.14	<i>Bored/Cast in situ RCC vertical piles <u>including reinforcement</u> complete as per drawing and Technical Specification Sections 1100, 1600 & 1700. a) 750 mm dia. Piles- M-35 b) 1000 mm dia. Piles – M-35</i>
3.16	<i>Cement concrete for reinforced concrete in pile caps <u>excluding reinforcement</u> complete as per drawing and Technical Specification Sections 1100, 1500 1600 & 1700. M-35 grade</i>
3.18	<i><u>Providing and laying High Strength deformed (HYSD) reinforcement</u> with anti-corrosive treatment complete as per drawing and Technical Specifications Section 1600. a) In Open foundation b) In Well Curb c) In Well Steining d) In Well Cap e) In Pile Cap f) Substructure g) Superstructure</i>

From the above, it is clear that Item 3.14 is all inclusive, but items 3.16 and 3.18 are to be read together as Item 3.16 is ‘*excluding reinforcement*’. The Contractor however, while billing, adds an additional sub-item (h) in Item 3.18 of the BOQ, which is impermissible.

27. At the time when the bid was submitted, the Preamble of the Bill of Quantities itself was very clear. The relevant clauses of the preamble are extracted below:

“SECTION VII
BILL OF QUANTITIES
A. PREAMBLE

1. *The Bill of Quantities shall be read in conjunction with the Instructions to Bidders, General Conditions of Contract, Conditions of Particular Application, Technical Specifications, Drawings, Schedules, Annexures.*
2. *The quantities given in the Bill of Quantities are estimated and provisional and are given to provide a common basis for bidding. The basis of payment will be the actual quantities of work ordered and carried out, as measured by the actual quantities of work ordered and carried out, as measured by the Contractor and verified by the Engineer and valued at the rates and prices tendered in then priced Bill of Quantities, where applicable, and otherwise at such rates and prices as the Engineer may fix within the terms of the Contract.*
6. *The whole cost of complying with the provisions of the Contract shall be included in the items provided in the priced Bill of Quantities, and where no items are provided, the cost shall be deemed to be distributed among the rates and prices entered for the related items of work.*
7. *General directions and descriptions of work and materials are not necessarily repeated or summarised in the Bill of Quantities. Reference to the relevant sections of the contract documentation shall be made before entering rates or prices against each item in the Bill of Quantities.*
8. *Provisional Items included and so designated in the Bill of Quantities shall be expended in whole or in part at the direction and discretion of the Engineer. In case of deletion or reduction of the any of the provisional Items listed in the BOQ, it shall be treated as provisional sum as regards the operation of Sub-clause 52.3 and the Contractor shall not be entitled to claim any extra payment or varied rate*

under Sub-clause 52.2 as per Clause 58 of Part I of the Conditions of Contract. Section III.

9. The method of measurement of completed work for payment shall be in accordance with the requirements as stated in the individual sections of the Technical Specifications.”

28. A perusal of the above clauses shows that in respect of all items to be executed, the quantities are estimates and provisional in nature. The payments were to be made on the basis of actual quantity of work executed. The same was to be measured by the Contractor and verified by the Engineer-in-Charge. The payment was to be made on the basis of the rate and price tendered in the priced BOQ. Clauses 3 and 6 of the Preamble of the BOQ, are very categorical that the whole cost is included in the priced BOQ. If a particular item is not provided, then the cost shall be deemed to be “distributed” amongst the rates entered in respect of “related items of work”.

29. The contractor seeks to take support of the language of Item 3.14 which refers to the drawings and technical specification in support of its claim. However, the submission, that in item 3.14 of the BOQ, the expression “complete as per drawing and technical specification, Sections 1100, 1600 and 1700” means that the payment had to be made as per Section 1600, would not be correct. The expression, “complete as per drawing and technical specification” is used in respect of almost every item of work in the BOQ. Since the details in respect of what each item of work entailed, how it was to be carried out, measured and verified, is laid down in the technical specification, this expression is used in each and every item to mean ‘completion as per drawings and technical specifications’ and NOT

'payment as per drawings and technical specifications'. The language does not mean that the payment for reinforcement is to be made separately as per Section 1600 of the Technical Specification. It merely means that quality of the work would be gauged as per Section 1600 of the Technical Specification, the quantity would be measured as per the Technical Specification, and the payment would be made on the basis of the rates mentioned in the priced BOQ. Any other interpretation would make the priced BOQ extremely uncertain, fluid and tenuous, which is not the purpose of such bids and, in fact, defeats the very purpose of quoting rates. The purpose of providing the Technical Specification to a Contractor is to ensure that the Contractor is well-versed with the complete scope of work and thus, is able to quote the rates for the complete works and cannot make any claims beyond what it has bid for.

30. Clause 6 of the preamble of the BOQ, while using the expression *"whole cost of complying with the provisions of the Contract shall be included in the items provided in the priced Bill of Quantities"*, itself means that nothing beyond the priced BOQ is even payable. The manner, in which the bill has been drafted by the Contractor, itself shows that it was conscious of the language of item 3.14 of the BOQ. In the bill raised by the Contractor, under item 3.14, the words *"including reinforcement"*, have been consciously and deliberately deleted. Further, even in item 3.18 of the BOQ, despite there being no provision for the same, the Contractor added point (h), claiming for extra works executed for piles. The same can be evidenced as under:

	<i>Language as per the priced BOQ (in the Bid documents)</i>	<i>Language as per second RA bill submitted on 6th March, 2002</i>
<i>Item 3.14</i>	<i>Bored/Cast in situ RCC vertical piles including reinforcement complete as per drawing and Technical Specification Sections 1100, 1600 & 1700.</i> a) 750 mm dia. Piles- M-35 b) 1000 mm dia. Piles – M-35	<i>Bored/Cast in situ RCC vertical piles complete as per drawing and Technical Specification Sections 1100, 1600 & 1700</i> c) 750 mm dia. Piles- M-35 d) 1000 mm dia. Piles – M-35
<i>3.18</i>	<i>Providing and laying High Strength deformed (HYSD) reinforcement with anti-corrosive treatment complete as per drawing and Technical Specifications Section 1600.</i> a) In Open foundation b) In Well Curb c) In Well Steining d) In Well Cap e) In Pile Cap f) Substructure g) Superstructure	<i>Providing and laying High Strength deformed (HYSD) reinforcement with anti-corrosive treatment complete as per drawing and Technical Specifications Section 1600.</i> a) In Open foundation b) In Well Curb c) In Well Steining d) In Well Cap e) In Pile Cap f) Substructure g) Superstructure h) Piles (Extra Item)

31. The above comparison clearly shows that the bill submitted by the Contractor was not as per the BOQ/contract. The priced BOQ is an integral part of the contract on the basis of which the payment is to be made. The question of priority of documents arises only when there is an ambiguity, vagueness or discrepancy in the item number, which has been described. The contract, bid documents, Technical Specifications and finally the priced

BOQ have all to be read as a whole. The purpose and intent of the priced BOQ is to ensure that nothing beyond what is permissible is claimed.

32. Clause 9 of the Preamble to the BOQ also makes it clear that the measurements would be governed by the Technical Specification and not the payments. The measurements, once taken as per the Technical Specification, shall be paid as per the priced BOQ in terms of clause 3 of the Preamble. The submission that the Technical Specification would, in effect, result in separate payment for the reinforcement under item 3.18, is liable to be rejected, inasmuch as, wherever separate amounts qua reinforcement was to be paid, the same has been specifically mentioned in item 3.18. The Bored/cast-in situ RCC vertical piles is not a separate head under item 3.18. The claim of the Contractor under item 3.18(h), which was itself non-existent in the priced BOQ is, therefore, contrary to the contract, the BOQ and the Technical Specifications. The Ld. Arbitral Tribunal has, therefore, rightly held that the Contractor had to visualise the complete work, which was contemplated as per clause 115.1. The Ld. Arbitral Tribunal, which consisted of expert members, had given a categorical finding as under:

“2.3.2.....Bored/cast in situ RCC vertical piles as the name implies are always with reinforcement. A general arrangement drawing does not generally show the details of reinforcement which is always shown in the working or “good for construction” drawings issued subsequently. The Contractor’s plea that the working drawings issued after commencement of work differed with tender drawings therefore, is not tenable.

2.3.3 Clause 1.1.4 of preamble to technical specifications is abundantly clear under which head “Measurement and Payment” clearly specifies that: “The methods of measurement and payment shall be as described under various items and in the Bill of

Quantities shall be deemed to be included in the rates and prices entered by the Contractor in the BOQ”

This clearly means that the cost of reinforcement is included in the quoted rates of BOQ item 3.14. The bidders were required to quote the rates of piles including reinforcement for which no separate provision existed. This is corroborated by the fact that the contractor has been subsequently billing this reinforcement as “Extra items” under BOQ items 3.18 relating to reinforcement. In absence of any provision, the Employer wanted rate of this item as inclusive of reinforcement which the Contractor quoted in clear terms.

2.3.4 As regards priority of documents under clause 5.2.2 of COPA, no doubt the technical specifications carry priority over drawing prevails over BOQ, it may be pointed out that since the Contract has been evaluated on the basis of BOQ items, stipulating clearly “including reinforcement”, the technical specifications, being of general nature and drawings being preliminary/ general arrangement drawings only, can not get priority. In this case, the priority is that of BOQ provisions as also clearly established under clause 1.1.4 “preamble to Tech. Specifications”. However, no clarification on this point was ever sought during the pre-bid meeting. The Contractor’s subsequent contention that the rate quoted for BOQ item 3.14 does not include the cost of reinforcement simply because BOQ is of low priority under clause 5.2.2 of COPA thus does not hold good due to the fact that the reinforcement has specifically been included in the said BOQ item. When the BOQ item clearly indicates “including reinforcement”, the priority has to be that of BOQ. Further the clause for priority of document will come into play only when there is any ambiguity or contradiction between different documents. The BOQ item being very clear and complete without any ambiguity reference to priority of

document is uncalled for. The specific requirement of quoting the rates including reinforcement renders the applicability of the priority of document meaningless. Reference to precedence of specification over BOQ thus does not mean that the reinforcement is to be measured separately. It is well known that bored piles have to be built with reinforcement. Apart from codal requirement of providing some minimum reinforcing steel, the bidders were required to include the total cost of reinforcing steel in their quoted rates. It is perhaps on this account that the Employer did not feel any necessity of furnishing details and joint verification of reinforcement.

2.3.5 It may be significant to add that it is not always necessary for the client/owner to base the description or nomenclature of an item on specifications which is of general nature. To cite an example, for the item of earthwork in excavation, a composite rate for all types of soils may be arrived at and specified and with all leads and lifts etc. for disposal in the tender documents. An RCC item can be specified “including reinforcement” or as “reinforcement to be paid separately”. Similarly RCC items can be including centering and shuttering or to be paid separately etc. The Employer wanted the rates of bored/ cast in situ RCC vertical piles including reinforcement. The contention of the Contractor that reinforcement is to be measured and paid separately as per section 1600 of MOST specifications, therefore, does not carry any weight. Moreover, the “Preamble to Technical Specifications” carrying highest priority, is crystal clear, and thus the case of the Contractor fails under “Priority of document.”

2.3.6 Issues

The issue before the Arbitrators is:

Whether the rate quoted for BOQ item No. 3.14 for bored/cast in situ piles is excluding the cost of reinforcement as prayed by the Contractor.

2.3.7 We examined the above issue as per relevant contract provisions and above discussions based on submissions made by both the parties and now therefore, make the following award.

The rate of BOQ item 3.14 is clearly inclusive of reinforcement and hence reinforcement is not separately payable in view of detailed reasons discussed above. The claim of the Contractor is found to be inadmissible.”

This finding cannot be held to perverse or contrary to terms of the contract or violative of public policy. Thus, the claim of the Contractor, under this head, was rightly rejected by the Id. Arbitral Tribunal.

B. Claim No.3 – Issue of Take Over Certificate.

33. The dispute under this claim relates to the non-handing over of Taking-Over Certificate (*hereinafter*, ‘TOC’) to the Contractor by the NHAI, who claimed that certain portions of the bridge were in-fact handed over to the NHAI and that once the handing over has taken place, the cost of maintenance, overheads, etc, are the liability of NHAI and the Contractor is entitled to compensation in respect thereof.

34. The Contractor claimed that bridge nos.102/1, 102/2, 105/1, 105/2 & 105/3 were completed substantially by it. They were thrown open to traffic and, therefore, as per the terms of the contract, the TOC ought to have been issued. The said request was made vide letters dated 20th December, 2003 and 29th February, 2004. The resident engineer replied to the same on 5th April, 2004 and informed the Contractor that the TOCs could not be issued as some works were still incomplete in respect of all these bridges. The Contractor again requested for a TOC vide letter dated 7th May, 2004, which was replied to by the Engineer on 20th May, 2004, stating that the TOC

would be issued only after “*the whole of the works was completed*”. Again on 22nd July, 2004, the Engineer rejected the request for issuance of the TOC. The stand of the Engineer was that the TOC would not be issued due to the following reasons:-

- *Bridge wise/ Structure wise TOCs are not stipulated in contract.*
- *There are still BOQ items to be executed in the above mentioned bridges.*
- *Even the Repair, Rehabilitation and widening works are not taken up in above mentioned bridges.*
- *Traffic diversion has been done to facilitate Repair and Rehabilitation Work.*
- *Contract does not specifically stipulate that traffic flow on New carriageway is the criteria for issuing TOC,*
- *It is noticed that in the similar adjacent packages, Kilometer-wise/ Bridge-wise/ structure-wise TOC's are not issued.*
- *Sections for sectional/milestone TOCs are not stipulated in contract.*
- *Neither the Client nor the Engineer has intimated that any substantial part of above mentioned bridges will be occupied or used for their purpose.”*

35. In view of the non-issuance of the TOC, the Contractor claimed that the expenses of watch and ward, maintenance etc., were liable to be reimbursed by NHAI. The matter was referred to DRB, which held that there was no justifiable reason to deny the TOC. The recommendations of the DRB were as under:

“In view of the above, we recommend that “Taking Over Certificates” for bridges on the new carriageway numbered as 102/1, 102/2, 105/1, 105/2 & 105/3 be

issued with effect from the date of this recommendation.”

The NHAI did not accept the recommendations of the DRB and hence the matter was adjudicated by the Arbitral Tribunal.

36. The stand of the Contractor was that under clauses 48.1, 48.2 and 48.3 of the COPA, TOCs could be issued even prior to the completion of the whole work. The purpose of these bridges was to connect the same to the National Highway and throw open the same to the traffic, and hence the date when the bridges were thrown open to the traffic, ought to be taken as the date when the bridges are substantially completed. Thus, according to the Contractor, the TOCs were wrongly withheld.

37. The stand of NHAI was that the TOC could be issued only after completion of the whole work and not bridge-wise completion. Since the contract provided for extension of time and imposition of liquidated damages on the whole of the work, the TOCs could not be granted on parts of the work. In any event, NHAI claimed that there were several outstanding works to be carried out on each of those bridges. The main stand of NHAI was that the bridges were opened to traffic by the Contractor, only so that it could complete the project, which included strengthening of exits in the existing two-lane carriageways. In order to do this, the new carriageways, which were not fully completed, were to be utilised and were thrown open to traffic. This would, however, not mean that the work of such bridges had, in fact, been fully completed.

38. The Id. Arbitral Tribunal partially accepted the stand of the Contractor and partially the stand of NHAI. The operative portion of the award reads as under:

“3.3.10 The Arbitral Tribunal examined above issues as per relevant Contract provisions and above discussions based on submissions made by both the parties and now therefore makes the following Award.

- a) That for reasons stated above, the Employer can not be asked to take over five partially completed bridges, opened to traffic to facilitate the work of repair and rehabilitation including widening of existing bridges on the existing carriageway. There is only one bridge with same number both on existing and the new carriageway and the Contractor thus did not complete the work substantially. The Contractor’s request for issue of TOC for 5 bridges partly completed can not be accepted.*
- b) Accordingly, cost of maintenance, overheads, refund of proportionate retention money and interest etc. as prayed by the Contractor are not admissible for these 5 bridges.*
- c) The Contractors’ has also prayed for a declaratory award for the balance bridges. The Contractor shall be entitled to hand over and the Employer shall take over the bridges for issue of TOC on substantial completion of corresponding bridges on both carriageways in continuous reaches in four Groups as per the Construction Methodology provided in the Contract Agreement.”*

39. The submission of Mr. Cama, Ld. Senior Counsel is that clause 48.3 of COPA contemplates issuance of the TOCs for part of the works as well, prior to completion of the whole work. The decision to throw the bridges open was that of the NHAI and hence, it should be made to compensate the Contractor for the same.

40. The stand of NHAI was the same as that before the Ld. Arbitral Tribunal. It argued that under clause 48.2 of the COPA, TOCs can be issued only if a substantial part of the work has been completed to the satisfaction of the Engineer-in-Charge.

Conclusions on Claim 3

41. Clauses 48.1, 48.2 and 48.3 of the COPA are set out hereinbelow:

“Clause 48.1: Taking over Certificate:

When the whole of the Works have been substantially completed and have satisfactorily passed any Tests and Completion prescribed by the Contract, the Contractor may give a notice to that effect to the Engineer, with a copy to the Employer, accompanied by a written undertaking to finish with due expedition any outstanding work during the Defects Liability Period. Such notice and undertaking shall be deemed to be a request by the Contractor for the Engineer to issue a Taking-Over Certificate in respect of the Works. The Engineer shall within 21 days of the date of delivery of such notice, either issue to the Contractor, with a copy to the Employer, a Taking-Over Certificate, stating the date on which, in his opinion, the Works were substantially completed in accordance with the Contract, or give instructions in writing to the Contractor specifying all the work which, in the Engineer’s opinion, is required to be done by the Contractor before the issue of such Certificate. The Engineer shall also notify the Contractor of any defects in the Works affecting substantial completion that may appear after instructions and before completion of the Works specified therein. The Contractor shall be entitled to receive such Taking-Over Certificate within 21 days of completion, to the satisfaction of the Engineer, of the Works so specified and remedying any defects so notified.

Clause 48.2: Taking Over of Sections or Part

Similarly, in accordance with the procedure set out in Sub-Clause 48.1, the Contractor may request and the Engineer shall issue a Taking-Over Certificate in respect of:

- (a) any Section in respect of which a separate Time for Completion is provided in the Appendix to Tender.*
- (b) any substantial part of the Permanent Works which has been both completed to the satisfaction of the Engineer and, otherwise than as provided for in the Contract, occupied or used by the Employer, or*
- (c) any part of the Permanent Works which the Employer has elected to occupy or use prior to completion (where such prior occupation or use is not provided for in the Contract or has not been agreed by the Contractor as a temporary measure.)*

Clause 48.3: Substantial completion of Parts

If any part of the Permanent Works has been substantially completed and has satisfactorily passed any Tests and Completion prescribed by the Contract, the Engineer may issue a Taking-Over Certificate in respect of that part of the Permanent Works before completion of the whole of the Works and upon the issue of such Certificate, the Contractor shall be deemed to have undertaken to complete with due expedition any outstanding work in that part of the Permanent Works during the Defects Liability Period.”

42. In order to decide whether the Contractor was entitled to TOCs, one has to see the scope of work contemplated under the contract. The contract was for a value of approximately Rs.145 crores and was issued on 20th August, 2001. The request for issuance of the TOC was firstly made on 20th December, 2003. The total number of bridges, that were to be constructed,

were 47 in number and apart from the said construction, the existing carriageways were also to be strengthened. The Contractor claimed, after constructing five of the bridges, that the said bridges had been handed over and hence it was entitled to TOC. The clauses above are clear to the effect that the TOC can be issued when the “*whole of works have been substantially completed*”, or any “*substantial part of the permanent works has been both completed to the satisfaction of the engineer or used by NHAI*”. TOC can also be issued if “*any part of the permanent work*” was occupied by the NHAI at its own election or used prior to the completion - but not merely as a temporary measure.

43. In a contract involving construction of such a large number of bridges and strengthening of existing carriageways, the construction/completion of five bridges cannot be, by itself, termed as substantial. There is no doubt that under clause 48.3 of the COPA, TOC can be issued even prior to the completion of work, however, TOC can only be issued when there is “*substantial completion*”. The Id. Arbitral Tribunal has come to the conclusion that out of 40 bridges, 6 fly-overs and one ROB, only five bridges were completed and even in respect of said 5 bridges, there were various pending works as contained in the letter dated 22nd July, 2004 written by the Engineer-in-Charge. Moreover, the said five bridges cannot be taken to be substantially complete as the existing carriageways connecting the said bridges were still incomplete. The Id. Arbitral Tribunal’s finding, that the traffic diversion of the five bridges was done by the Contractor “*for his own convenience*”, is a factual finding, which is beyond the scope of interference in a petition under Section 34. Though, there is no doubt that the traffic diversion to the bridges took place “*under the nose of*

NHAI”, the same cannot constitute a waiver of requirements under clauses 48.1, 48.2 and 48.3 of COPA. Clause 48.3 cannot be read in isolation. If there are pending works in respect of a particular bridge, the same cannot be deemed to be completed. The nature of the works, which were pending in respect of the bridges, does not indicate that they are the only works to be carried out during the Defect Liability Period. The Guide to the use of FIDIC – Conditions of Contract for Works of Civil Engineering Construction, relied upon by the Contractor, does not take its case forward, inasmuch as, while TOCs can be issued for substantial completion, what is substantial completion varies from case to case and requires application of FIDIC conditions to the facts and circumstances of each case.

44. Thus, TOCs for 5 bridges cannot be issued separately as requested by the Contractor, and the same was rightly refused by the Engineer as also the Id. Arbitral Tribunal. No interference is called for.

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45. In this petition, NHAI challenges the impugned award in respect of claim nos. 1, 4, 5 and 6 in favour of the Contractor. The objections in respect of each of the claims are dealt with below.

C. Claim No.1- Reimbursement of Excise Duty

46. It is the admitted position that the issue of reimbursement of excise duty is covered by the judgment of the Supreme Court in *NHAI v. ITD Cementation (2015) 14 SCC 21* (hereinafter, ‘*ITD Cementation*’) and two Division Bench judgments of this Court in *NHAI v. Afcons Infrastructure Ltd. [FAO(OS) 120/2012 decision dated 2nd July, 2012]* (hereinafter, ‘*Afcons Infrastructure*’), *NHAI v. Hindustan Construction Company Ltd.*

[FAO(OS) 617/2012 decision dated 21st December, 2012] and *NHAI v. Gammon Atlanta (JV) [FAO(OS) 7/2017 decided on 18th January, 2017]* (hereinafter, 'Gammon Atlanta') . The Id. Arbitral Tribunal has awarded reimbursement of excise duty after giving price adjustments under Clause 70.3 of the COPA, in respect of cement, reinforced steel, and various other construction materials etc. The Tribunal has rejected the claim for increased excise duty demanded by the Contractor. The operative portion of the award reads as under:

“1.3.8.2 As stated earlier, the increase in excise duty during the progress of the work is reflected in the input to WPI indices for price adjustment under clause 70.3. Therefore increase in excise duty during the progress of the work is not reimbursable to the Contractor under clause 70.8. The Contractor is only entitled to the excise duty originally payable at the rates prevailing at the time of bid.

The rates of excise duty on cement, reinforcement steel and other materials at the time of the bid are not available. Therefore, the excise duty actually paid on cement, reinforcement steel and other materials in the initial invoices of Annexure CA-1 has been adopted to work out the amount admissible to the Contractor, considering that the Contractor is entitled to receive the excise duty at the time of bid only and if there is any increase subsequently that is not payable.

The entitlement of the Contractor under this Claim works out to be Rs.4,82,65,367/- up to 31.03.2005 as shown in Annexure I. Accordingly, we award an amount of Rs.4,82,65,367/- only to the Contractor against his claim of Rs.5,60,20,558/-.

1.3.8.3 Similarly, excise duty on the construction materials consumed after 31.03.2005 upto completion of the work, if any, shall also be reimbursable to the

Contractor at the basic excise duty rates as in Annexure II.

1.3.8.4 Interest @10% per annum compounded monthly is awarded on the above amounts as per Sub-clause 60.8 of COPA from the respective due dates till the date of Award.

1.3.8.5 Future interest @ 10% per annum simple interest is awarded from the date of Award till actual payment/ realization.”

47. The Division Bench of this Court in ***Afcons Infrastructure (supra)***, while dealing with applicability of the same EXIM Policy held as under:

“10. In view of the above, this Court is satisfied that the interpretation placed on the terms of contract, as far as liability for payment of excise duty, on account of withdrawal of the “deemed export” facility in relation to the duty drawback scheme, did result in a new tax liability, which had to be borne by the appellant. The findings of the single judge cannot be faulted. So far as the question of liability is concerned, the findings in that regard are concurrent and therefore do not call for interference.”

48. Further, in ***Gammon Atlanta (JV) (supra)*** the Division Bench held as under:

“10. Upon a plain reading of clause 70.8 of COPA it is evident that it comprises of two parts. The first part enables a contractor or an employer as the case may be to get the benefit of an increase or reduction in the cost (as the case may be) consequent upon subsequent changes in legislation. The second part which is a non-obstante provision is essentially to ensure that neither the employer nor the contractor gets a double benefit. In other words if by subsequent legislation a benefit accrues to the contractor under the first part he would not be entitled to that benefit if the same is already

factored in the price adjustment formulae which are given in sub-clauses 70.1 to 70.7 of COPA.

11. There is no doubt that there has been a change in the Exim policy which has been construed as a change in legislation. There is also no doubt that because of the change when, earlier, the respondent was not liable to pay excise duty, after the amendment it would be exigible to excise duty. The arguments that this benefit is not available to the respondent as it is not the manufacturer would not hold any water because excise duty is an indirect tax and although it is levied on the manufacturer of goods and collected from the manufacturer, the same is passed on to the consumer. Therefore, if there has been any additional burden of payment of excise duty cast upon the respondent by virtue of the change in the Exim Policy it would certainly be covered under the first part of sub-clause 70.8 of COPA.

15. The price adjustment formula given in sub-clause 70.3 of COPA is based on the indices of three cost elements or inputs- (i) labour costs; (ii) wholesale prices; and (iii) diesel fuel costs as applicable at Bhubaneswar. We are not concerned with labour costs or diesel fuel costs. Insofar as the wholesale prices are concerned, we find that the price adjustment formula takes into account the change in the wholesale price index (all commodities) as published by the Reserve Bank of India for the current period as against the base period. Now, the question that arises is whether the excise duty component is a part of the wholesale price. The answer is clearly – yes, it is. Therefore, an argument could be raised that the changes in excise duty would in any event be covered by the changes in the wholesale price index and therefore the benefit could not be given under the first part of sub-clause 70.8 of COPA as then it would amount to a double benefit. But, in the present case the change is not in the

excise duty but in the exim policy and this change would not be reflected in the wholesale price index.”

In view of the settled legal position, the award of the sums in respect of this claim is not liable to be interfered with.

D. Claim No.4 – Excavation of Open Foundations/Protection of Existing Embankment

49. Under this claim, the Contractor argued that in order to build the new carriageways, which entailed carrying out of excavation of open foundations, protection had to be given to existing embankments. The Contractor claimed the expenses incurred for protection of existing embankments, as also for pile foundations, with raised pile caps to ensure that the existing roads at some of the bridges were not endangered. The Engineer entered into correspondence with the Contractor and some of the work was approved by the Engineer. However, NHAI headquarters took a decision to the contrary and did not approve the said expenditure.

50. The DRB held that the Contractor is entitled to be compensated for all works of permanent nature, which were left at the site, which were executed for the purpose of giving protection to the existing embankments during excavation and for construction of the piles, etc. The Ld. Arbitral Tribunal, after considering the scope of work involved in excavation under Section 304 of Technical Specification, came to the conclusion that the protection works, which were executed by the Contractor at bridge sites 87/1, 96/1 and 125/2 were not covered within the scope of BOQ items. Thus, separate payment is liable to be made. In respect of bridge numbers 114/1 and 199/1, since the works were of temporary nature, separate payment was not awarded to the Contractor, as against the total claim of

Rs.38,95,197/- for protection works and Rs.55,24,523/- for the RCC piling work for protection of the open embankments. The Tribunal awarded a sum of Rs.27,41,837/- for the former and Rs.32,80,586/- in respect of the latter. Thus, the total award by the Tribunal was Rs.60,22,423/-, along with interest @ 10% compounded monthly as per clause 60.8 in the following manner:

“4.3.16 The Contractor has claimed the following amounts:

i) Rs.38,95,197/- for protection work.

No comments have been offered by the Employer nor the quantification has been objected to. We have gone through the calculations submitted by the Contractor. Some items claimed have been deleted being non-admissible and a few rates have been revised bases on the purchase vouchers submitted by the Contractor/market feedback and our assessment. We consider an amount of Rs.27,41,837/- only (Details at Annexure-II) for the claim pertaining to bridge Nos. 87/1 and 96/1 and 125/2 as justified.

ii) Rs.55,24,523/- (Annexure CA-10, page 557 of Contractor) has been claimed R.C.C. piling for protection of open embankments. The amount is stated to have been certified by the Engineer and has not been contested by the Employer. However, out of this, an amount of Rs.22,43,937/- for reinforcement in piles has also been claimed under Claim No.2. The same is dealt with in the Award against Claim No.2. Therefore, only Rs.32,80,586/- is found to be admissible.

Therefore, in our view, the Contractor is entitled to an amount of Rs.60,22,423/- (i.e. Rs.27,41,837 + 32,80,586) only against his claim of Rs.94,19,720/-. In addition, the Contractor shall be eligible for price adjustment on the BOQ rates of the concrete

piles/R.C.C. pile caps as per the terms of the Contract.

iii) Further costs to be incurred in protection of existing embankment in respect of other bridges having Open Foundations for Abutment shall also be reimbursable in respect of all such ancillary structures/arrangements which are necessarily left in place/incorporated permanently in the Permanent Works.

iv) Interest at the rate of 10% per annum compounded monthly (as per clause 60.8) is also awarded as follows:

(a) with effect from 16.01.2005 (date of Recommendation of DRB) on the amount awarded in para (i) till the date of Award.

(b) For the amount awarded in para (i) with effect from 15.11.2005 or later dates when the respective payments fell due till the date of Award.

v) Future interest @ 10% per annum simple interest from the date of Award till actual payment/realisation.”

51. Ms. Kritika Shukla, ld. counsel appearing for NHAI submits that Technical Specification 304 dealt with excavation. Ld. Counsel further submitted that the scope of works included the providing of “*suitably designed protective works*”. She relied on the bidding data to argue that the data clearly provided that repair/rehabilitation of existing bridges was covered and hence no separate payment is liable to be made.

52. While there is no doubt that the protection works are separately payable, under clause 20.3, the Contractor is bound to rectify the loss or damage. Unless and until there is a finding that the design provided by

NHAI was faulty, under clause 20.4 the burden cannot be shifted to the NHAI.

53. Mr. Cama, Ld. Senior Counsel, on the other hand, submitted that under clause 304.1, the work that was covered, was temporary in nature and public safety as contemplated in clause 304.3.6 was not raised before the Ld. Arbitral Tribunal. He vehemently urged that the submissions not made before the Tribunal, cannot be raised in the present petition under Section 34. The Ld. Arbitral Tribunal has rightly arrived at a conclusion that only temporary works were covered under these clauses i.e. 304.1 and 304.3.2 and the works, which were of the permanent nature, were separately payable. He specifically relies upon paragraph 4.3.12 of the award to argue that clause 304.3.6 was never pressed into service by the NHAI. According to Mr. Cama, even the bidding data could not be read in a manner so as to include works of permanent nature. The Ld. Arbitral Tribunal has dealt with in detail the correspondence between the Contractor and the Engineer. The various letters exchanged between the parties show that the case of the Contractor has been consistent that item 3.01 in BOQ does not include the works of a permanent nature.

54. Item 3.01 of the BOQ is set out herein below:

3.01	<i>Earthwork in excavation of foundation for structures complete as per drawing and Technical Specifications Clause 304 in</i> <i>a) All types of Soil</i> <i>b) Marshy Soil</i>
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The said item 3.01 refers to Section 304 of the Technical Specification. Clauses 304.1, 304.3.2 and 304.3.6 are set out hereinbelow:

“Clause 304.1 Scope: Excavation for structures shall consist of the removal of material for the construction of foundations for bridges, culverts, retaining walls, headwalls, cutoff walls, pipe culverts and other similar structures, in accordance with the requirements of these Specifications and the lines and dimensions shown on the drawings or as indicated by the Engineer. The work shall include construction of the necessary cofferdams and cribs and their subsequent removal; all necessary sheeting, shoring, bracing, draining and pumping; the removal of all logs, stumps, grubs and other deleterious matter and obstructions, necessary for placing the foundations; trimming bottoms of excavations; backfilling and clearing up the site and the disposal of all surplus material.

Clause 304.3.2 Excavation: Excavation shall be taken to the width of the lowest step of the footing and the sides shall be left plumb where the nature of soil allows it. Where the nature of soil or the depth of the trench and season of the year do not permit vertical sides, the Contractor at his own expenses shall put up necessary shoring, strutting and planking or cut slopes to a safer angle or both with due regard to the safety of personnel and works and to the satisfaction of the Engineer.

The depth to which the excavation is to be carried out shall be as shown on the drawings, unless the type of material encountered is such as to require changes, in which case the depth shall be as ordered by the Engineer. Propping shall be undertaken when any foundation or stressed zone from an adjoining structure is within a line of 1 vertical to 2 horizontal from the bottom of excavation.

Where blasting is to be restored to the same shall be carried out in accordance with Clause 302 and all precautions indicated therein observed. Where blasting is likely to endanger adjoining foundations or other structures, necessary precautions such as controlled

blasting, providing rubber mat cover to prevent flying if debris etc. shall be taken to prevent any damage.

Clause 304.3.6 Public Safety: Near towns, villages and all frequented places, trenches and foundation pits shall be securely fenced, provided with proper caution signs and marked with red lights at night to avoid accidents. The Contractor shall take adequate protective measures to see that the excavation operations do not affect or damage adjoining structures. For safety precautions, guidance may be taken from IS:3764.”

55. A perusal of Section 304.1 of the Technical Specification clearly shows that the work contemplated is of construction of cofferdams and cribs, which are to be removed subsequently and the remaining works were also of temporary nature. The permanent work entailing construction of protection of embankment of existing structure as also of piles and pile caps, which are of a permanent nature, are clearly not covered in either of these clauses. The broad Section 304.3.6, which was not relied upon before the Ld. Arbitral Tribunal, which relates to general obligations to maintain public safety, cannot be relied upon to get additional extra work executed by the Contractor. Thus, the Engineer-in-Charge had rightly recommended the construction of these works, and the NHAI had wrongly rejected the claims of the Contractor. The Tribunal's award does not call for interference on this count.

E. Claim No.5:- Sinking of wells

56. The claim of the Contractor under this head related to extra charges for sinking of wells with a diameter of 6.70 meters for total depth of 11.696 meters. According to the Contractor, the said size of the well was not

prescribed in the contract and was not a standard size as contemplated in the BOQ. The BOQ contemplated various permutations and combinations of wells with varying depth and diameter, but the size of the well which was 6.70 meters was not specified in the BOQ at all.

57. The Contractor asked for fixation of rates of this well by the Engineer-in-Charge. The Contractor claimed that it is entitled to 25% extra payment towards the construction of this well. However, the Engineer applied Clause 52.1 of the General Conditions of Contract prescribed rates for sinking of wells of diameters 9m and 10m beyond 20 depth, arrived at the rate to be paid to the Contractor. For the well of diameter of 6.70m, the rate was derived on the basis of interpolation of rates for wells of 6m diameter and 8m diameter. The Contractor challenged this fixation and the matter was referred to the DRB. The DRB, however, held that the methodology adopted by the Contractor for deriving the rate is not correct. The rates for 6.70 diameter well could not be higher than the rates for wells with 8m diameter and 9m diameter. Accordingly, DRB rejected the Contractor's claim.

58. The Ld. Arbitral Tribunal came to the conclusion that extra amount is payable to the Contractor and the findings of the Tribunal are as under:

“5.3.5 As per the Contract drawings, there were 27 no. wells of 6.0 m and 43 no. wells of 8.0 m dia. The Contractor had quoted his rates keeping in view these numbers. After change of design, there is a solitary well of 6.70 m. The Contractor had to fabricate shuttering exclusively for a single well which was not feasible to be used again. Therefore, we are of the view that the rate of 6.70 Well cannot be determined only by simple interpolation from the BOQ rates of 6.0 m and 8.0 m wells, as these have been rendered inappropriate

due to drastic reduction in numbers and the rate needs to be determined under Clause 52.2.

5.3.6 In our view, reference to MORT&H data Book is not required for deriving the rates of 9.0 m and 10.0 m dia. Wells of depth 20-30 m and 30-40 m as rates of same diameter Wells for depths 10-20 m are available in the BOQ. We are of the opinion that the rates of 9.0 m and 10.0 m dia. Wells for depth beyond 20 m have been correctly derived by the Engineer from similar items available in the Contract in terms of Clause 52.1 of the Contract.

The demand of the Contractor for 25% extra rate for 6 dia. well for extra sinking efforts required due to less steining thickness is not justified because the steining thickness of this well is 700 mm whereas the Contractor has already undertaken to sink 6.00 M dia. well with steining thickness of 600mm with the same rate. The question of any risk factor for a nominal depth of 11.69 M hardly arises when the Contractor's rates exist even up to 20 M depth.

However, we are of the view that the demand of the Contractor for Rs.80,834/- (Annexure B, Page 314) for fabrication of special shuttering for 6.70m dia. single well (C-42) is justified. This is over and above the rate already fixed by the Engineer under Clause 52.1 of G.C.C. This works to an additional rate of 80834/11.69m i.e. Rs.6915/- per RM.

Therefore, we award as follows:

(i) An additional rate of Rs.6915/- per RM for 6.70m dia. well to the Contractor over and above the rate fixed by the Engineer.

(ii) Interest @ 10% per annum compounded monthly from 01.01.2004 till the date of Award.

(iii) Future interest @ 10% per annum simple interest from the date of Award till actual payment/realization."

59. The above conclusion was arrived at by the Tribunal by considering various technical aspects which were required to sink a well of this odd size. The Tribunal held that a simple extrapolation of the BOQ rates for 6m diameter and 8m diameter wells would not be permissible, especially considering that special shuttering was also required to be fabricated for the said purpose. The Tribunal, however, did not award the contractor's claim of 25% extra rate. However, it took into consideration the fabrication costs for special shuttering and awarded an extra rate of Rs.6,915/- per RM(LM) for the 6.70 m diameter.

60. The contention of Ld. Counsel for NHAI is that a well of 6.70m diameter is clearly covered in the BOQ item and nothing extra would be payable. On the other hand, it is the contention of the Contractor that there was only one well which was of an odd size for which shuttering had to be done and hence the view of the Tribunal is not liable to be interfered with.

61. The Court has considered the rival submissions. The Ld. Arbitral Tribunal notes in paragraph 5.3.5 above that as per the contractual drawings, there were 27 wells of 6 meters diameter and 43 wells of 8 meters diameter. The well with 6.70 meters diameter was a single well. Though, NHAI's argument appears appealing at the first blush that the rates should be as per a bigger well of 8 meters diameter or 9 meters diameter, the same is a very simplistic submission. Clearly, from a perusal of the BOQ, such an odd measured well was not in the contemplation of the parties or NHAI at the time of submission of the bid. Due to the condition on the ground, the said well with an unusual measurement was asked to be constructed.

62. The Tribunal has arrived at a factual finding that construction of such a well required fabrication of special shuttering for which the Contractor is

liable to be compensated. A perusal of Clause 52.1 shows that the Engineer has enormous discretion in fixing rates and prices. Wherever the rate can be derived based on the rates fixed in the BOQ, the Engineer would do the same, however, the creation of special shuttering to be used only for one well is completely beyond the contemplation of the parties. Factually, it is not disputed that the special shuttering was in fact created. Under these circumstances, the award of this claim in favour of the Contractor as given by the Arbitral Tribunal is not liable to be interfered with.

F. Claim No.6:- Payment of price adjustment.

63. The only question which was decided under this claim was whether price adjustment was applicable for the entire work including BOQ items and variation items or adjustment was to be given only qua the variation items. The Tribunal after considering the various clauses and recommendations of the DRB, came to the following conclusion:

“6.3.18 After deliberating in detail and considering all the submissions, legal opinions, case laws and other documents filed by the parties, we are of the unanimous view that the Contractor is entitled to price adjustment on all items of work including all BOQ items, variation items and daywork, except those specifically excluded in sub-clause 70.7, due to the rise and fall in the cost indices on the basis of the formula given in sub-clause 70.3. In respect of variation items and daywork, the price adjustment is to be applied only to those items whose rates have been derived from the B.O.Q rates.”

64. In respect of quantification, the Ld. Arbitral Tribunal held as under:

*“6.3.19 Qualification
The Employer had not given any comments in his submissions on the quantification of the claim by the*

Contractor (Annexure CA-7, page 403 of Contractor's reply). Another opportunity was given to the Employer on 11.05.2008 to give his comments. Comments of the Employer were received vide his letter dt.22.05.2008. The amount as per the calculations of the Employer is Rs.8,03,35,519/- (price adjustment plus interest @10% compounded monthly up to 30 June 05) against Rs.8,37,65,344/- claimed by the Contractor (Annexure CA-7). The main reason for difference is that the base labour rate taken by the Contractor in his price adjustment calculations is the minimum wage of unskilled category whereas the Employer has taken the average wage of unskilled, semiskilled, skilled and highly skilled categories. The Employer stated that the average has been adopted as there is a mix of all categories employed on the execution of the Contract. It was also stated that the Contractor had been accepting price escalation based on the average minimum wage of labour on this very contract. The Claimant have not rebutted this point.

6.3.20 We have considered the contentions of both parties. We find the contentions of the Employer to be more reasonable. The Contractor also did not produce any documents in support of their contention. Therefore, we award an amount of Rs.8,03,35,519/- (price adjustment plus interest @ 10% compounded monthly up to 30 June 05) to the Contractor against their claim of Rs.8,37,65,344/-.

6.3.21 Price Adjustment in subsequent IPC's shall also be payable on similar basis.

6.3.22 Interest @ 10% per annum compounded monthly on the amounts of price adjustment is awarded from 30.06.05 till the date of award.

6.3.23 Future interest is awarded @ 10% per annum from the date of award till payment/realization."

65. The award in the present case was rendered on 31st October, 2008. The issue in respect of price adjustment has now been settled by the Division Bench of this Court in *National Highways Authority of India v. BBEL-MIPL (JV) [FAO (OS) 141/2017 decision dated 1st September, 2017]* (hereinafter, '*BBEL-MIPL (JV)*'). The appeal against the said judgment was dismissed by the Supreme Court on 12th March, 2018. Thus, the said judgment has attained finality. After considering all the previous judgments in *NHAI v. M/s Unitech-NCC JV [OMP 362/2008 decided on 8th March, 2010]* and *NHAI v. M/s KMC-RK-SD (JV) [OMP 1043/2013 decision dated 22nd December, 2013]* as also the orders passed by the Division Bench and the Supreme Court in these two cases, the Ld. Division Bench in *BBEL-MIPL (JV)* (*supra*) observed as under:

“11. The judgements in KMC (supra) and Unitech (supra), when read conjunctively, and vis-a-vis the present case, make it apparent that it was the same work which the appellant had, successively, contracted to Unitech, KMC and, later, the present respondent. We may regard this as indisputable, as, on facts at least, the decisions in KMC (supra) and Unitech (supra) have clearly attained finality - irrespective of the import of the “caveat” entered, by the Supreme Court, in its order dated 17th November 2015, regarding the “question of law”, on which Mr Abhijat understandably pegs his case.

12. In view of this factual position, if we were to accept the stand of the appellant, or even accord it serious consideration on merits, we would be going against the grain of the decisions in KMC (supra) and Unitech (supra), which deal with the self-same contract, and the self-same dispute, with which we are concerned, albeit with earlier contractors. Such an approach would render any decision, by us, inconsistent with the

decisions in **KMC (supra)** and **Unitech (supra)**. What Mr Abhijat would have us hold, therefore, would be that, in respect of a single contract, successively awarded to three contractors, we should hold the third contractor to be entitled to price adjustment, or escalation, only on items not mentioned in the BOQ, i.e., on variations, even when it has been held, by co-equal benches, that the two earlier contractors were entitled to price adjustment on all works, including BOQ items, and not merely on variations. We are, therefore, being exhorted to adopt a view clearly inconsistent with the views taken by earlier Division Benches, of this Court, in **KMC (supra)** and **Unitech (supra)**.

13. Is this advisable?

...

17. We, too, have, with us, the advantage of recent pronouncements, of this Court, on identical disputes, regarding the very contract with which we are concerned, albeit vis-a-vis predecessor-contractors-in-interest. The said decisions are recent in point of time. They, therefore, constitute “very valuable precedent”, and we are unable to glean any “extraordinary or special reasons” which should persuade us to depart therefrom.

18. Any such departure, moreover, would also result in the citizen contractor becoming totally unsure of the legal position. It would result in the litigant harbouring the perfectly legitimate apprehension that, were he to approach this Court with a similar dispute, the outcome would be totally unpredictable. This is destructive of the very fabric of law, and has to be avoided at all costs.

19. Not much, in our view, deserves to be made of the reliance, of Mr Abhijat, on the caveat, in the order dated 17th November 2015, of the Supreme Court, in the SLPs emanating from **KMC (supra)** and **Unitech (supra)**. The Supreme Court, in unambiguous terms,

not only dismissed all the SLPs before it; it also directed payment, to the contractors, of the amounts deposited by the appellant in court. Clearly, therefore, in the facts obtaining before it - which, as repeatedly emphasised hereinbefore, were identical to the facts obtaining in the present case - the Supreme Court felt the decision of this Court to be unexceptionable. We are in the realm of similar facts, and, therefore, have to adhere to the same view.”

66. As per the above judgments of the Division Bench in view of the fact that the judgments of the earlier Division Bench in **NHAI v. M/s Unitech-NCC JV [FAO(OS) 338/2010 decided on 30th August, 2010]** (hereinafter, ‘Unitech-NCC’) and **NHAI v. M/s KMC-RK-SD (JV) [FAO(OS) 134/2014 decided on 1st April, 2014]** (hereinafter, ‘KMC-RK-SD’) having not been interfered with by the Supreme Court, even though the question of law was left open, price adjustment was not to be restricted only to the variation items.

67. Recently, in **National Highway Authority of India v. Progressive-MVR (JV) (2018) 14 SCC 688**, the Supreme Court, while dealing with a similar NHAI contract and clauses went into the purpose of price adjustment clauses and laid down in detail in the manner in which the price adjustment formula is to be interpreted.

68. The various Division Benches in **BBEL-MIPL (JV) (supra)**, **Unitech-NCC (supra)** and **KMR-RK-SD (supra)** have primarily upheld the views taken by the Arbitral Tribunal that the price adjustment would not apply only qua the variation items. The said view having been taken by three separate Division Benches of this Court, to maintain consistency, this Court does not interfere with the view of the Ld. Arbitral Tribunal. The Arbitral

Tribunal has no doubt considered the ambiguity in the clauses themselves and by applying the principle of *contra-proferentem* ruled in favour of the Contractor. The legal position currently being governed by the judgments in ***BBEL-MIPL (JV) (supra)***, ***Unitech-NCC (supra)*** and ***KMR-RK-SD (supra)***, the objections of NHA I qua this claim are rejected.

69. **Post script:** In NHA I contracts, the interest clause reads as under:

“Sub-Clause 60.8 Time of Payment and Interest

The amount due to the Contractor under any Interim Payment Certificate issued by the Engineer pursuant to this Clause, or to any other term of the Contract, shall, subject to Clause 47, be paid by the Employer to the Contractor upto fifty percent (50%) of eligible payment within 7 (seven) days of receipt of acceptable Monthly Statement from the Contractor. The balance eligible payment shall be released within 42 days after the Contractor’s monthly statement has been submitted to the Engineer for certification or, in the case of Final Certificate pursuant to Sub-Clause 60.13, within 84 days after the agreed Final Statement and written discharge have been submitted to the Engineer for certification. In the event of the failure of the Employer to make payment within the times state, the Employer shall pay to the Contractor interest compounded monthly at the rate stated in the Appendix to Bid upon all sums unpaid from the date upon which the same should have been paid, in the currencies in which the payments are due.

However, for calculation of interest, the specified time limit of 42 (Forty two) days will be applicable.”

70. The above clause shows that if any claims of the contractor are not acceded to by NHAI and payments are made later after being awarded by either the DRB or even the Tribunal, the amounts so awarded would have to be paid by NHAI with interest compounded monthly at the rates specified in the Appendix to Bid. This would be applicable upon all sums which are unpaid from the date upon which the same should have been paid. Thus, the Arbitral Tribunal awarded the following rates of interest on the awarded sum:

“ ...
(ii) Interest @ 10% per annum **compounded monthly** from 01.01.2004 till the date of Award.
(iii) Future interest @ 10% per annum simple interest from the date of Award till actual payment/realization.”

71. In the present two petitions, neither parties addressed any submissions on the payment of interest. Disputes arose between the parties during the execution of the works and the award is of 31st October, 2008. Sums which are not paid or awarded would attract interest compounded monthly. The Tribunal has awarded monthly interest compounded from 1st January, 2004 which is when the arbitral proceedings commenced. On the sum awarded with interest, which is compounded monthly, the liability of NHAI which is a public sector undertaking is enhanced by crores of rupees. Added to this, the fact that NHAI has filed a challenge to the award which has been rejected without depositing or paying the sums to the Contractor at the time when the award was rendered, would increase the liability of NHAI and cost dearly to the public exchequer.

72. Thus, there is a need for NHAI to not mechanically and casually challenge arbitral awards, especially where objections to the award are not strong or substantial. The challenge being raised to awards in this manner also results in derailment of infrastructural projects. On the one hand NHAI deprived the Contractor of timely payments and added to that additional amounts are payable on account of interest, that too compounded monthly.

73. This Court has upheld the payment of interest compounded monthly under clause 60.8 of the COPA in various decisions including:

- ***NHAI v. M/s HCC Ltd. (2014) 211 DLT 656;***
- ***NHAI v. Som Datt Builders-Noc-Nec(JV) 2014 iv AD (Delhi) 632;***
- ***NHAI v. DIC-NCC (JV) [OMP (COMM) 416/2017 decided on 12th October, 2018]***

Recently, a Division Bench of this Court, has in ***NHAI v. DIC-NCC(JV) [FAO(OS) (COMM) 20/2019 decided on 14th March, 2019]*** has reaffirmed the said position.

74. There is an urgent need for the NHAI to take a policy decision on the manner in which disputes with contractors need to be resolved. The entire mechanism of DRB and Arbitral Tribunal would be set at naught if every recommendation of the DRB and every award of the Tribunal is challenged. The large number of NHAI disputes pending before the Court are evidence of the fact that most awards are challenged.

75. A policy level decision deserves to be taken at the highest quarters in the NHAI to ensure that:

- a) recommendations of the Dispute Resolution Board are evaluated before matters proceed to arbitration;
- b) that in cases where the recommendations are not accepted and the

matter goes to arbitration, the arbitrations are pursued with right earnest and no undue delays and adjournments are caused;

c) upon the Tribunal rendering the award, challenges to award are made only in respect of those claims where NHAI believes that they have more than a reasonable chance of success;

d) even when challenges are made to awards, some mechanism ought to be adopted to ensure that interest stops running and more liability is not incurred by NHAI/the public exchequer, in case the objections are rejected.

76. The Registry is directed to communicate this order to the Chairman, NHAI.

77. Both the OMPs are, accordingly, dismissed. All pending applications also stand disposed of.

**PRATHIBA M. SINGH, J.
JUDGE**

JUNE 2, 2019/Rahul