

* IN THE HIGH COURT OF DELHI AT NEW DELHI

*Reserved on: 29.10.2018
Date of decision : 10.04.2019*

+ **O.M.P. (COMM) 66/2017**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Petitioner

Through: Ms.Tanu Priya Gupta, Adv.

versus

PROGRESSIVE CONSTRUCTIONS LTD. Respondent

Through: Dr.Amit George, Mr.Rishabh
Dheer, Mr.Swaroop George,
Ms.Rajsree Ajay, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The petitioner by way of this present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenges the Arbitral Award dated 27.04.2016 (hereinafter referred to as the 'Impugned Award') passed by the Arbitral Tribunal in favour of the respondent.
2. The Impugned Award allows an amount of Rs. 74,25,61,312/- inclusive of pre-award interest and alongwith post award interest in case of failure of payment, in favour of the respondent, while also directing the petitioner to release the Bank Guarantees for Rs. 35,71,45,914/- as also Rs. 17,85,72,957/-furnished by the respondent as Performance Bank Guarantee and Machinery Advance respectively, to the respondent, if not

already released by the petitioner in furtherance of the Tribunal's interim Award dated 16.01.2016.

3. The challenge in the petition is made to the claims of the respondent allowed by the Arbitral Tribunal, that is, Claim Nos. 1(i) to (v), 2, 3, 4, 6 and 7, as also to the rejection of the counter claims. However, during the course of arguments, the counsel for the petitioner has made no submissions assailing the rejection of counter claims. Accordingly, I shall be only dealing with the claims of the respondent allowed by the Tribunal and challenged by the petitioner.

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

5. In response to the petitioner's notice inviting bids for the work relating to four laning from km.360.915 to km.402.00 of Gorakhpur-Gopalganj section of NH-28 in Bihar – Contract Package No. LMNHP-EW-II-(WB)-9 (hereinafter referred to as "Project Work"), the respondent's tender dated 25.07.2005 was accepted by the petitioner vide Letter of Acceptance dated 09.09.2005 at the contract price of Rs. 357,14,59,136/-.

6. In terms of the Acceptance Letter, the respondent furnished the Performance Bank Guarantee dated 05.10.2005 for Rs.35,71,45,914/- (Rupees Thirty Five Crores Seventy One Lakhs Forty Five Thousand Nine Hundred Fourteen) to the petitioner.

7. The parties thereafter entered into an Agreement dated 20.10.2005 for execution of the aforesaid Project work. The stipulated time for completion of the work was thirty-six months. The notice for commencement of the work was dated 28.10.2005 and accordingly, the

Scheduled Date of Completion was 27.10.2008. The Project however, was not completed by the aforesaid date.

8. The parties, therefore, entered into a Supplementary Agreement dated 27.11.2008 providing for minimum monthly progress of the Project work. The petitioner also granted extension of time to the respondent revising the completion schedule. The Supplementary Agreement records an acknowledgement of the respondent that the rate of progress of work had remained too slow despite it receiving notices from the Engineer.

9. Shortly thereafter, citing reasons of non achievement of the minimum monthly progress as mandated in the aforesaid Supplementary Agreement, the petitioner served upon the respondent notice dated 07.02.2009 under Clause 63.1 of the Contract, stating that a case for termination of the Contract has been made out and directed the respondent to handover the work site.

10. In response, the respondent sought reinstatement of the Contract upon revocation of the termination/expulsion notice, assuring timely completion of the Project work and accordingly, based on such representation, the petitioner vide letter dated 27.08.2010 revoked its termination notice. The said letter dated 27.08.2010 further envisaged the completion of the project by 30.06.2012, alongwith a fresh Agreement to be entered into by the parties for the altered target date.

11. A Supplementary Agreement dated 19.11.2010 was thereafter executed by the parties, modifying the terms of the original Contract dated 20.10.2005 to a limited extent of extending the target date till 30.06.2012, that is, by twenty two months of construction period from

01.09.2010. In Clause 3 and 4 of the Supplementary Agreement it was provided that the respondent will no longer be entitled to any of the facilities available under the World Bank contract nor to escalation for the period from 07.02.2009 to 31.08.2010.

12. Owing to the pendency of work even on the extended date, the respondent, vide its letter dated 13.06.2012, sought a further extension of time till 31.12.2013 and reiterated its request through letters even thereafter. The petitioner instead issued a Show Cause Notice dated 26.09.2012 to the respondent, whereafter it ultimately terminated the Contract dated 20.10.2005 and the Supplementary Agreements dated 27.11.2008 and 19.11.2010, vide its notice dated 11.11.2013.

13. In the meanwhile, the respondent had furnished additional Bank Guarantees, *inter alia* Bank Guarantee dated 16.01.2009 for Rs.17,85,72,957/- towards mobilisation advance; Bank Guarantee dated 06.09.2010 for Rs.17,85,72,957/- towards machinery advance; Bank Guarantee dated 14.02.2011 for Rs.2,00,00,000/- towards Retention Money; and Bank Guarantee dated 14.02.2011 for Rs.3,66,94,206/- towards Retention Money.

14. Disputes having arisen between the parties due to the termination of the Contract, the respondent submitted its claims to the petitioner to be settled/adjudicated as per sub clause 67 of the Conditions of Particular Application. As no resolution was achieved, the respondent invoked arbitration vide its notice dated 03.03.2014.

15. The respondent also filed a petition under Section 9 of the Act being O.P. 2415 of 2013, in the City Civil Court, Hyderabad, seeking to restrain the petitioner from invoking the Bank Guarantees upon

termination of the Contract and Supplementary Agreements. The Court on 14.11.2013 passed an *ex-parte* order of injunction against the petitioner restraining it from invoking the Bank Guarantees stated therein till 28.11.2013.

16. The City Civil Court on 01.05.2014 dismissed the petition filed by the respondent accepting petitioner's plea of lack of jurisdiction.

17. In an appeal filed against this order, the High Court of Andhra Pradesh in CMA 520 of 2014, vide order dated 08.05.2014, directed the petitioner not to invoke the Bank Guarantees till 16.06.2014, subject to the respondent extending their validity.

18. The said appeal was however, later dismissed on 10.09.2014 in view of the constitution of the Arbitral Tribunal and interim order passed by the Tribunal on 25.08.2014.

19. Even before the Arbitral Tribunal, the respondent filed an application for stay on the encashment of the Bank Guarantees, whereupon the Arbitral Tribunal granted an *ex parte* order of stay on 25.08.2014.

20. The Arbitral Tribunal passed orders extending the stay on invocation of the Bank Guarantees and subsequently, on 16.09.2015, the Arbitral Tribunal modified its earlier orders and allowed invocation of the Bank Guarantee dated 16.01.2009 towards mobilisation advance, which was then duly encashed by the petitioner.

21. Eventually, the Tribunal passed an Interim Award dated 16.01.2016 directing the petitioner to release two Bank Guarantees, that is, Bank Guarantee dated 05.10.2005 towards Performance Guarantee and Bank Guarantee dated 06.09.2010 towards machinery advance.

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

- (i) Claim no. 1(i): Payment towards work done against IPC 30 and IPA 31: Rs.1,28,97,988/-*
- (ii) Claim No. 1 (ii): Payment towards refund of Building Worker's Welfare Cess deducted from the IPCs : Rs. 1,21,40,107/-*
- (iii) Claim No. 1(iii): Payment towards cost of left over materials lying at the site; Rs. 1,73,53,624/-*
- (iv) Claim No. 1(iv): Payment towards refund of retention money: Rs. 8,43,82,382/-*
- (v) Claim No. 1(v): Payment towards refund of royalty on earth: Rs. 21,80,143/-*
- (vi) Claim No. 2: Loss of profit on balance work : Rs. 24.90 crores*
- (vii) Claim No. 3: Loss due to idle hire charges of machinery and equipment: Rs. 25,75,95,264/-*
- (viii) Claim No. 4: Loss due to encashment of Bank Guarantees: Rs. 1,35,10,120/- ; Respondent to release two BG's, one issued by the Union Bank of India for Rs.35,71,45,914/- and second issued by Bank of India for Rs.17,85,72,957/-, if the same have not been released in compliance of interim award passed by the Arbitral Tribunal dated 16.01.2016*
- (ix) Claim No. 6: Cost of temporary assets taken over: Rs. 3,96,57,600/-*
- (x) Claim no 7: Interest on Claim Nos. 1-6: Rs. 24,32,74,960/-*
Total: 93,19,92,198/-

23. Additionally, following Award has been passed on the counter-claims of the petitioner:

- (i) Counter-claim (a): Rs. 210,75,85,461/- to execute the Balance Work of the Project which is awarded to M/s Punj Lloyd: : Nil*

(ii) Counter-claim (b), (c), (d) towards maintenance of road: Nil
(iii) Counter-claim (e) for recovery of mobilization and machinery advance: Rs. 11,54,84,240/-
(iv) Counter-claim (f) for interest on early release of retention money: Nil
(v) Counter-claim (g) for recovery of outstanding material advance : Rs. 2,56,26,674/-
(vi) Counter-claim (h) for recovery against final bill IPC-31: Nil
(vii) Counter-claim (i) for recovery of DRB retainership : Rs. 1,50,000/-
(viii) Counter-claim (j) & (k) for recovery of taxes against notice issued by deputy commissioner commercial taxes: Nil
(ix) Counter-claim (l), (m), (n), (o), (p), (q) and (r) for the claims raised by various vendors: Nil
(x) Counter-claim for interest on awarded amount: Interest against counter claim for the period 11.11.2013 to 27.04.2016 @ 12% p.a. compounded monthly as provided in the contract. The interest amount comes to Rs. 4,81,69,972/-.
Total : Rs. 18,94,30,9886/-

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

Claim No.1(i) : Towards the Work Done : Rs. 1,28,97,998/- (Rs.64,32,682/- against IPC-30 and Rs.64,65,316/- against IPA-31)

25. The finding of the Arbitral Tribunal on this sub-claim is reproduced hereinunder:

“6.02 The record shows that the Contractor submitted IPA-30 on 07.05.2012 for the work done in respect of the period 01.04.2012 to 30.04.2012. The Engineer issued IPC-30 on 11.06.2012 for payment of Rs.64,32,682/- to the

Claimant. However the Employer did not release the payment against this IPC on the ground that the Contractor had been paid excess amount in respect of price escalation which needed to be recovered and took further plea that even the High Court had passed orders that the Contractor should give Bank Guarantee of equivalent amount.

- 6.03 *We observe that the payments against price escalation have been made to the Contractor against IPCs up to IPC-29 in view of some mutual understanding of the parties regarding interpretation of price escalation clause in the Contract. Thereafter if the Employer feels that the Contractor has been paid excessively in the previous 29 IPCs, then it is a dispute which needs to be got resolved through the mechanism provided in the Contract. Employer cannot be judge of his own cause. Moreover on going through the relevant High Court orders as referred by the Respondent, AT found that there were no such orders of Hon'ble High Court for giving Bank Guarantee of equivalent amount. Thus there was no justification for denying the payment to the Contractor against IPC-30 to which he was entitled under the Contract.*
- 6.04 *Record further shows that on 30.06.2012, the Claimant submitted Interim Payment Application (IPA-31) for Rs.64,65,316/- (Exhibit 'C-26' at Page 153 of CD-2 Vol.-1) for the work done in respect of the period from 01.05.2012 to 31.05.2012. However, neither the Engineer certified the said IPA within the stipulated period of 42-days nor the Respondent released the amount in respect of this IPA-31.*
- 6.05 *The Respondent did not deny or dispute the correctness of the amounts claimed of Rs.1,28,97,998/- i.e. Rs.64,32,682/- (+) Rs.64,65,316/- towards IPC-30 & IPA-31.*
- 6.06 *.....Thus the Contractor is entitled to payment of Rs.64,32,682/-(against IPC-30) and Rs.64,65,316/-*

(against IPA-31), under terms of the Contract, against the claim.

26. The learned counsel for the petitioner submits that the payments under IPC-30 and IPA-31 had been rightly withheld by the petitioner for recovery of the escalation amount overpaid by it till IPC-29 to the respondent.

27. It is, however, not denied that claim of such alleged over-paid amount was not a subject matter of the arbitration proceedings in question, but is a subject matter of another arbitration proceeding. Therefore, the finding of the Arbitral Tribunal in regard to this claim cannot be faulted.

28. The petitioner further challenges the Award on ***Claim No.1(ii) towards Refund of Building Worker's Welfare Cess Deducted from the IPCs: Rs. 1,21,40,107/-.***

29. The findings of the Arbitral Tribunal on this sub-claim are reproduced hereinbelow:

“6.10 In the present case before us, it is evident that the Cess Act becomes operative only from the notification of publishing of “The Bihar Building and other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2005” which were published on 03.09.2005

6.11 The last date of submission of bids in this case was 25.07.2005 and so the cut off date i.e. 28 days prior to last date of submission was 26.06.2005 whereas The Bihar Building and other Construction Workers (Regulation of Employment and Conditions of Service)

Rules, 2005” were published on 03.09.2005. So the cess deducted from various IPCs becomes reimbursable under Clause 70.8 of the Contract. The Respondent has not disputed the amount of deductions of cess. Thus the Claimant is entitled to a payment of Rs.1,21,40,107/- against this claim.”

30. In view of the judgment of the Division Bench of this Court in ***National Highways of India v. Gammon-Atlanta (JV)***, 2013 (4) Arb. L.R. 61 (Delhi) (DB), there is no serious challenge to the above finding and the same is accordingly rejected.

31. Though the petitioner also challenges the grant of ***Claim no.1(v) towards refund of Royalty on Earth of Rs.21,80,143/-***, in view of the judgment of Supreme Court in ***National Highways Authority of India v. ITD Cementation India Ltd.***, (2015) 14 SCC 21, the learned counsel for the petitioner does not press such challenge.

32. The primary challenge of the petitioner is to the Award of ***Claim no.2 towards loss of profit of Rs.24.9 crores on balance work***. Connected with this is the challenge to ***Claim No.1 (iii) towards the cost of left over materials lying at site of Rs.1,73,53,624/-*** and ***Claim No.1(iv) towards refund of retention money of Rs.8,43,82,382/-***.

33. The learned counsel for the petitioner submits that the Arbitral Tribunal has erred in passing the above Award in favour of the respondent. She submits that from the reading of the Supplementary Agreements dated 27.11.2008 and 19.11.2010, it is evident that it was the respondent who was in default in carrying out its obligations under the Contract. In fact, these Supplementary Agreement(s) contain the admission of the respondent to this effect. It is further asserted that the

petitioner in its Show Cause Notice dated 26.09.2012 had referred to various letters written by the petitioner to the respondent pointing out to the delay in execution of the work. The petitioner thereafter, considered the reply dated 10.10.2012 submitted by the respondent and found the justification for delay given therein to be untenable and, therefore, terminated the Agreement vide its notice dated 11.11.2013. The Arbitral Tribunal has, however, without appreciating the reasons for termination of the Contract, held the same to be illegal and granted the above claims of the respondent. She submits that the real reason for the delay in the execution of the work was the financial constraint faced by the respondent and not the reasons attributed to the petitioner. She submits that it was the responsibility of the respondent to remove the utilities and therefore, having itself failed to perform the Contract, the respondent was not entitled to the above claim.

34. On the other hand, the learned counsel for the respondent, while reminding this Court of limitation on its powers to re-appreciate the evidence or interfere with the interpretation of the Contract by the Arbitrator, submits that the Arbitral Tribunal has rightly held that the petitioner had failed to discharge its obligations under the Contract.

35. Relying upon the judgment of the Supreme Court in *M/s Hind Construction Contractors vs. State of Maharashtra*, AIR 1979 SC 720, he submits that time was not of essence to the Contract. The petitioner, on the one hand did not consider the repeated applications of the respondent seeking extension of time, on the other hand abruptly terminated the Contract without making time the essence of contract or fixing a reasonable period of time for completion of the work by the

respondent. He also places reliance on the judgment of this Court in ***National Buildings Construction Corporation Ltd. vs. Indian Railways Construction Co. Ltd.***, MANU/DE/2728/2015.

36. The learned counsel for the respondent further submits that the Arbitral Tribunal has considered the effect of sub-Clause 110.1 of the Technical Specifications and has rightly concluded that the said Clause does not make it the responsibility of the Contractor to make the site hindrance free. He relies upon judgment of this Court in ***National Highways Authority of India vs. Hindustan Construction Co. Ltd.***, 2017 (5) Arb. L.R. 258 (Delhi).

37. The learned counsel for the respondent further submits that the Arbitral Tribunal has considered all submissions made by the parties before it and it is not essential for the Arbitral Tribunal to refer to every single submission of the aggrieved party or to each and every correspondence relied upon by the aggrieved party. He places reliance on the judgments of this Court in ***CMDR S.P.Puri vs. Alankit Assignments Ltd.***, 2008 (3) Arb. L.R. 465 (Delhi), and ***National Highways Authority of India vs. Som Dutt Builders-NCC(JV)***, MANU/DE/3053/2018, in this regard.

38. The learned counsel for the respondent further submits that the reliance of the petitioner on the termination letter dated 11.11.2013 is ill-founded as the petitioner had made no effort to even aver, let alone establish the self-serving contents of its termination letter. He submits that having not done so, the petitioner cannot be allowed to challenge the Award on this issue. He relies upon judgment of this Court in ***KEI Industries Ltd. vs. DVB & Ors.***, MANU/DE/0852/2012.

39. The learned counsel for the respondent further relies on the judgment of the Supreme Court in *Dwaraka Das vs. State of M.P. & Anr.* (1999) 3 SCC 500, to submit that in case of construction contracts, when the contractor is deprived of profit on account of illegal termination of contract, the contractor is to be compensated for the same. He further relies on the judgment of this Court in *NHAI vs. BEL-ACC (JV)* MANU/DE/5111/ 2012, to contend that in case of illegal termination of contract, the Court has upheld grant of loss of profit at the rate of 10% of the left over work.

40. I have considered the submissions made by the counsels for the parties. It would be useful to first quote the relevant findings of the Arbitral Tribunal on this issue:

6.27 *In the Contract in question, Clause 44.1 provides that the Contractor is entitled for extension of time for completion of work in certain eventualities. The scheduled date of completion as stipulated in the Contract is 27.10.2008. This date of completion was firstly extended up to 01.11.2009 which was further extended up to 11.12.2009. This was still further extended up to 30.06.2012.*

6.28 *Thus, in view of provision in the Contract for time extension and such time extensions actually having been granted, time is not the essence of the Contract in this case in view of the law laid down by the Supreme Court as above.*

6.29 *The Respondent, without making time as the essence of the Contract, terminated the Contract vide its letter dated 11.11.2013 under Clause 63.1 of the Contract on account of slow progress of the work. Evidently, such termination of Contract is wrongful and illegal in terms of the law*

laid down by the Supreme Court as above, being violative of second para of Section 55 of the Indian Contract Act 1872.

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- 6.33 *The record shows that the Respondent has not been responsive to all these letters of the Contractor for the removal of hindrances probably because it is his contention, as stated in the SOD that it is the Contractor who has to remove the hindrances as stipulated in sub Clause 110.1 of the technical specifications of the Contract.*
- 6.34 *AT has gone through the relevant Sub-clause 110.1 and finds that cutting of trees, shifting of utilities and removal of encroachments etc. is to be done by authorities concerned like forest department or state electricity board etc. and payment for such activities has to be made by the Respondent as required by the concerned department. The Contractor is only to work as coordinator between the concerned department and the Respondent. Thus the basic obligation for removal of hindrances lies with the Employer only and not with the Contractor.*
- 6.35 *In this Sub-clause 110.1, it is very clearly provided that in the first priority stretch of about 10 km, tree cutting will be done by the Contractor against BOQ item provided in the Contract and the balance reach free from encumbrances shall be subsequently provided to the Contractor so except for tree cutting of the priority stretch, the obligation for removal of all other hindrances lies with the Employer.*
- 6.36 *AT finds that approval for shifting of electric cables/ poles was given to the Contractor as late as on 19.04.2011, after about 6 years of awarding the work, when the*

concerned department refused to carry out the job. Thereafter, the Engineer took about 10-months in finalizing the location of utility ducts and overhead wire raising as conveyed by his letter dated 23.02.2012. Similarly the permission of cutting of additional trees was given on a very belated stage i.e., on 15.11.2011. The Contractor was asked to carry out these works of removal of hindrances whereas as per Contract, it was the Employer who was to handover encumbrance free site to the Contractor as provided in sub-Clause 110.1 of the technical specifications.

6.37 Record shows that in addition to the trees, HT/LT cables and cultural properties, there were other hindrances which were causing delay but these had not been contemplated at the time of entering into the Contract. If we extend the intent of the Contract regarding unforeseen hindrances as dealt by Clause 12.2 of the Contract, all such hindrances, which were beyond the control of the Contractor and which could not be contemplated at the time of formation of the Contract, are required to be got removed by the Respondent for putting the Contractor in the same position, viz-a-viz, the availability of encumbrance-free site as was contemplated at time of formation of Contract. Also as provided under Clause 12.2, the Contractor is even entitled to time extension and additional cost on account of non-removal of such hindrances.

6.38 This is a Contract with reciprocal promises wherein the hindrances are required to be first got removed by the Employer and thereafter only the Contractor can execute the work. So in view of the provision in Section 54 of the Indian Contract 1872, the Respondent cannot claim the performance of the Contractor till it performs its obligation of removing the hindrances and the Respondent has to rather make compensation to the

Contractor for any loss which the Contractor may sustain on account of non-removal of these hindrances.

- 6.39 *This is a Contract based of FIDIC conditions wherein the Contractor is not considered a financier of the project and the Respondent has to ensure the cash flow for the Contractor. That is why the Contractor is given interest free mobilisation advance as well as machinery advance to the extent of 20% of the Contract price. Further if the payment has not been made within 42 days of the date of submission of bill, the Contractor gets the interest for such delayed payment.*
- 6.40 *Further if any IPC has not been paid by the Employer within the stipulated time, the Contractor is even entitled to suspend the work under Clause 69.4 of the Contract or even terminate the Contract under Clause 69.3 of the Contract.*
- 6.41 *The record shows that the Contractor submitted IPA-30 on 07.05.2012 for the work done in respect of the period 01.04.2012 to 30.04.2012. The Engineer issued IPC-30 on 11.06.2012 for payment of Rs.64,32,682/- to the Claimant. However the Employer did not release the payment against this IPC.
This issue has been examined by AT under Claim No. 1 (i) in the previous paras and it has been found that there was no justification for the Respondent to deny the payment of IPC-30 to the Contractor.*
- 6.42 *Since the Respondent did not make payment against IPC-30, the Contractor issued notice to the Engineer under Clause 69.4 of the Contract on 23.07.2012 for suspending the work. When it was brought to his knowledge that such notice is to be addressed to the Employer only, the Contractor issued notice to the Employer vide his letter no. PCL/ND/WB-9/2012/8586 dated 24.07.2012 for suspension of work. Record shows that these notices have been duly received by Engineer and Employer but the payment against IPC-30 was not made. Clause 69.5 of the Contract stipulates that it is only after payment by the Respondent that the notice of*

suspension shall lapse. Thus the work remained suspended because of non-payment of IPC-30 by the Employer.

6.43 The Claimant vide its letter NO.PCL/ND/WB-9/2012/8520 dated 13.06.2012 (Page 430 of CD-2) applied to the Engineer for extension of time up to 31.12.2013 under Clause 42.2(a) and (b) of GCC on account of existence of hindrances in the ROW, like tree cutting, shifting of electric poles, raising of height of HT/LT cables, delay in finalization of land for relocation of cultural properties, etc. It was brought out that against the completion period of 36 months for the whole work as provided in the Contract for 42.085 km of road, a length of 20.62 km (two lane) is yet to be handed over encumbrance-free, though a period of 6 years and 6 months has lapsed. This was followed by reminders vide letters dated 15.10.2012 and 24.03.2013 wherein the Contractor had even submitted the work programmes for the completion of the work within the extended time applied for. But the Employer/ Engineer neither rejected the application for time extension nor granted the time extension beyond 30.06.2012.

6.44 From the record it is clear that non-removal of hindrances attributable to the Employer is the main cause of delay and slow progress of work. Still the Employer served a show-cause notice dated 26.09.2012 for termination of the Contract. It was replied by the Contractor vide his letter dated 10.10.2012 wherein it was brought out that the various reasons for slow progress were delay in tree cuttings, delay in raising of height of HT/LT lines, delay in shifting of properties etc. as attributable to the Employer. The Contractor also stated in this reply letter that they had got surplus plant and machinery from works at WB-10 and WB-12 packages which could be well utilized for WB-9 for early completion of work. The Contractor requested for

granting EOT and submitted the work program for completion of work but there was no response from the Employer.

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6.46 *In view of above facts of the case, AT finds that the Claimant was entitled to EOT under Clause 42.2 (a) and (b) of GCC but the EOT was not granted by the Employer. After sitting over the matter for more than a year, the Employer terminated the Contract on 11.11.2013 on account of slow progress which, in the opinion of AT, is unjust and unfair Thus on facts of the case also the termination of the Contract the Employer vide its letter dated 11.11.2013 is wrongful and illegal being violative contractual provisions.*

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6.49 *The Claimant has stated that against a Contract value of Rs.367.14 Crores, the work done up to IPA-31 was of Rs.108.1 Crores and he has been prevented in completing the balance work of Rs.249.04 Crores. He has claimed loss of profit of Rs.24.9 Crores which is @10% of the left over work. He has referred to the Data Book of Ministry of Road Transport & Highways which provides for 10% Contractors profit in road projects.....*

6.50 *The Respondent has not denied the basis of claim not countered the principles laid down in the judgment on the basis of which loss of profit has been claimed.*

6.51 *The facts of the case reveal that the Contractor has been prevented by the Respondent from completing the work when he issued wrongful and illegal termination orders of the Contract. Thus, in view the facts of the case and the law of the land governing the loss of profit in such*

cases, AT finds that the Contractor is entitled to a claim of Rs. 24.90 Crores on account of loss of profit.

41. A reading of the above findings of the Arbitral Tribunal would show that the Tribunal has held that in presence of the provision for grant of Extension of Time and such Extension of Time having been granted on earlier occasion by the petitioner, time cannot be considered to be the essence of the Contract. No fault can be found to such finding.

42. In *M/s Hind Construction Contractors* (supra), the Supreme Court has held as under :

“8. It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract.....

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10.In our view, the question would not be whether the rescission of the contract was unreasonable and, therefore, unjustified but whether the rescission of the contract in the circumstances of the case was wrongful and illegal. If time was not of the essence of the contract or if the stipulation as to the time fixed for completion had, by reason of waiver, ceased to be applicable then the only course open to the respondent-defendant was to fix some time making it

the essence and if within the time so fixed the appellant-plaintiff had failed to complete the work the respondent-defendant could have rescinded the contract. The High Court has taken the view that the contract was rightly rescinded by the respondent-defendant because by about July 21, 1956 (vide letter Ex. 74) the appellant-plaintiff had done work of the value of Rs 35,000 as against the tender value of Rs 1,07,000, that is to say, only one-third of the total work had been completed and, therefore, even though time was not of the essence of the contract, the appellant-plaintiff, in the circumstances, could not have completed the work even within the next three months. In our view, this approach adopted by the respondent-defendant and upheld by the High Court is not correct. Long before the expiry of the period of 12 months the appellant-plaintiff had by his letter dated June 6, 1956 (Ex. 68) requested for extension of period of completion up to the end of December, 1956; this request was repeated by another letter dated June 23, 1956 (Ex. 69). Maybe the reasons or grounds on which the request was made may not have appealed to the Superintending Engineer but some reasonable time making it the essence sought to have been granted..... It will thus appear clear that though time was not of the essence of the contract, the respondent-defendant did not fix any further period making time the essence directing the appellant-plaintiff to complete the work within such period instead it rescinded the contract straightaway by letter dated August 27, 1956. Such rescission on the part of the respondent-defendant was clearly illegal and wrongful and thereby the respondent-defendant committed a breach of contract, with the result that there could be no forfeiture of the security deposit.”

43. However, in the facts of the present case, this finding could not have been sufficient to award the claims of the respondent. It is relevant to take note that the time for completion of work had been extended by

the petitioner vide the Supplementary Agreement dated 27.11.2008. The said Agreement *inter alia* recorded as under:

“AND WHEREAS the Contractor having accepted that the rate of progress of works remained too slow despite its receiving notices pursuant to sub-clause 46.1 of the Contract from the Engineer has now represented to the Employer that it would expedite the progress of works here onwards

AND WHEREAS the Employer based on the representation/request of the Contractor and in the interest of the Project has agreed to allow the Contractor a last opportunity to demonstrate its earnestness and capability by expediting the works and meeting the minimum monthly progress set below to complete the works without waiving any of the rights and interests of the Employer under the Contract

NOW THEREFORE, IT IS HEREBY AGREED BETWEEN THE PARTIES AS UNDER:

The Contractor hereby undertakes that it shall expedite the progress of works and shall achieve the minimum monthly progress of works as stated below:

- | | | | |
|----|--------------|---|------|
| a) | December, 08 | - | 2% |
| b) | January, 09 | - | 3% |
| c) | February, 09 | - | 3% |
| d) | March, 09 | - | 3.5% |
| e) | April, 09 | - | 3.5% |
| f) | May, 09 | - | 4% |

xxxxx

3. *In case the Contractor fails to achieve the required minimum progress in any one of the calendar months stipulated in para 1 above the Employer shall have the absolute right, without being required to give any kind of notice whatsoever (Save and except force majeure conditions) to the Contractor notwithstanding any related specific requirements in the Contract to terminate the Contract forthwith and enter upon the site. The Contractor shall not be entitled to adjust any shortfall in the*

stipulated minimum progress of works in a particular month as provided in para 1 above to the subsequent months) or any other month.

4. This Agreement is without prejudice to the right of the Employer to levy Liquidated Damages in accordance with the terms of the Contract.

5. The Contractor hereby undertakes that it shall maintain sufficient staff labour and equipment for effective progress of works. The Contractor further undertakes that it shall have available at site the aggregate and other construction materials sufficient for next 10 days of work required for achieving the above minimum progress of works.”

44. The petitioner, thereafter, sought to terminate the Contract vide its notice dated 07.02.2009 for failure of the respondent to meet the monthly progress as stipulated in the Supplementary Agreement dated 27.11.2008.

45. The parties thereafter entered into the second Supplementary Agreement dated 19.11.2010 extending the time of completion of work till 30.06.2012. The Supplementary Agreement records *inter alia* as under:

“2. The final revised target date for completion of project shall be 30.06.12 by the Contractor i.e. 22 months of construction period reckoned from 01.09.2010. The Quarterly Miles-Stones scheduled to be achieved by the Contractor as under mutually finalized.

<i>Sl. No.</i>	<i>Year</i>	<i>Quarter</i>	<i>Target (%)</i>
<i>1.</i>	<i>2010-11</i>	<i>Till September 2010</i>	<i>19%</i>
		<i>October-December</i>	<i>5%</i>
<i>2.</i>		<i>January-March</i>	<i>9%</i>
<i>3.</i>	<i>2011-12</i>	<i>April-June</i>	<i>10%</i>

4.		<i>July-September</i>	<i>7%</i>
5.		<i>October-December</i>	<i>12%</i>
6.		<i>January-March</i>	<i>18%</i>
7.	<i>2012-13</i>	<i>April-June</i>	<i>20%</i>

3. *The Contractor will not be entitled to any of the facilities available under World Bank contract in future. However for the facilities which have already been availed by the Contractor under certain terms and conditions has to be necessarily maintained and conditions obligation incorporated therein in the respective approvals have to be fulfilled by the Contractor in future also.*

4. *The contractor shall not be entitled for the escalation for the period from 07.02.2009 to 31.08.2010 (the sine-die period) i.e. from termination of the Contract to the date on which the termination of the Contract was revoked.”*

46. Before the expiry of this extended period, the respondent vide its letter dated 13.06.2012 and subsequent reminder letters dated 15.10.2012, 13.03.2013 and 27.06.2013 sought further extension of time.

47. The petitioner, however, issued Show Cause Notice dated 26.09.2012, *inter alia* asserting as under:

“AND WHEREAS in view of the grossly inadequate execution of the Project reflecting an extremely slow rate of progress of work, the Engineer to the Project has issued Notices under Clause 46.1 of the Contract Agreement which obliges you to take such steps so as to expedite progress to comply with the time for completion which is 30.06.2012.

AND WHEREAS the Regional Officer (RO) vide its letter no. NHAI/RO/PAT/PIU-MUZ/WB-09/2011/538(i) dated 21.04.2011 to the Project Manager of PCL, pointed that after site visit with PD, Muzaffarpur, RE of the Supervision Consultant and your Representative it was noted that the

progress of the works is slow and dissatisfactory and due attention on the observations made thereunder is required, since, they are extremely vital for progress of work within the scheduled time frame of the Contract.

AND WHEREAS the Manager (Tech.) of NHAI, PIU, Muzaffarpur vide its letter No.33018/01/2006/PD/PIU-MUZ/489 dated 25.04.2011 had requested the Project Manager of PCL to submit the catch up programme to achieve the progress as per the Supplementary Agreement.

AND WHEREAS the Team Leader (TL) issued a Notice under Clause 46.1 of GCC to PCL vide its letter No. TL-PCL/LMNHP-9/WB-9/217/11 dated 29.04.2011 and specifically pointed out that progress of works in Gopalganj Section from Km.381.500 to Km. 389.000, Rail Over Bridge at Km.368.898 and in underpass at Sasamusa and Koini are extremely slow and necessary action for expediting progress shall be taken by PCL to comply with the time for completion as per the Supplementary Agreement.

AND WHEREAS the PCL vide its letter NO. PCL/LMNHP /pkg-09/11/178 dated 18.05.2011, submitted its response in reference to above letter of TL dated 29.04.11.

AND WHEREAS the TL vide its letter No. TL-PCL/LMNHP-9/WB-9/218/11 dated 21.05.2011 in response to PCL letter dated 18.05.11, asked PCL to submit overall work programme for completion of contract within the time schedule agreed, substantiated with resources plan within week time for review and refuted all claims for slow progress raised by PCL.

AND WHEREAS the TL vide its letter no. TL-PO-/LMNHP /TL/277/11 dated 06.06.2011 to the Project Director, PIU, Muzaffarpur mentioned that since PCL has already been issued notice for slow progress of works no

steps necessary for expediting progress to comply with the time frame under the Supplementary Agreement have been taken. The TL also stated that PCL does not have adequate resources to complete the works in agreed time schedule and further mentioned that as per their evaluation PCL may take atleast 36 months to complete the works. It was also mentioned that the amount of works done by PCL are not confirming to the required specifications and standards under the Contract and pointed out that PCL is not taking any remedial measures in this context. The TL further stated that PCL has employed a sub-contractor for execution of earthworks without the prior consent of NHAI. Therefore, since it was observed by the TL that the works under the Contract would not be completed either under the time schedule or executed as per the specifications of the Contract, he recommended NHAI to take action against PCL under Clause 63.1 of GCC.

AND WHEREAS the Deputy General Manager (T)/PD of NHAI vide its letter No. 33018/01/2006/PD/PIU-MUZ/696 dated 07.06.2011 to the Project Manager of PCL forwarded the letter of the TL dated 06.06.2011 and required the Project Manager to submit parawise compliance to the said letter failing which action would be against PCL as per the Contract.

AND WHEREAS the PD, PIU, Muzaffarpur vide its letter No. 33018/01/2006/PD/PIU/MUZ/1222 dated 21.09.2011 informed you that the works as on date have come to a stands still even after your repeated assurances that the works shall be completed by June, 2012 and whereas the actual progress achieved till the date of the letter was only 35%. The status of progress of work was categorically stated in this letter and it was pointed out that from September, 2010 to March, 2011 the progress of work was only 12% against the target of 18% and further stated during the previous 3 months the percentage of works done by PCL was 0.6%, 0.3% and 0.2% in July, August and September, respectively. The PD, in the said letter also

reminded you that as per your discussion held with the PD in the Month of August you had given fund crises as the reason for such delays and stated that the situation would improve by September end. In spite of your assurances to the PD the work done at the site was almost nil. Therefore, the PD asked you to show cause as to why termination process shall not be initiated against you.

AND WHEREAS PCL vide its letter No. PCL/ND/WB-09/2011/8196 dated 03.10.2011 submitted its reply to above show cause letter issued by PD, PIU, Muzaffarpur.

AND WHEREAS the PD, PIU, Muzaffarpur vide its letter No. 33018/01/2006/PD/PIU/MUZ/1469A dated 21.10.2011 while replying to your above mentioned letter stated that the reasons cited by you are completely frivolous as no progress has been achieved in the past three months. It was further stated that as per the meeting of your Project Manager with the District Magistrate, Gopalganj on 10.10.2011 you had promised to complete the maintenance within 10 days but the fact remains that nothing in this matter has been done. Moreover, during the last 3-days nil works have been carried out due to non-payment of labour and staff and non-availability of diesel at the site. It was also pointed out that in the ongoing month works amounting to only Rs. 50 lacs have been carried out. It was categorically stated that as the site is being monitored by this Office on a daily basis it has been noted that due to non-maintenance of the road regular accidents have been caused for which no remedial measures have been taken by you.

This shows your complete lack of responsibility towards the project and deliberate lack of action which has been severely jeopardizing the safety and life of the users of the road.

AND WHEREAS Engineer vide its letter no. 160/LM/FPI/PVK/2011 dated 10.11.2011 intimated to the Project Director, PIU, Muzaffarpur that the progress of works continue to remain poor, the matter of slow progress has been brought to the notice of the General Manager, NHAI on 21 April, 2011 and recommended action against contractor by NHAI under clause 63.1 of GCC.

AND WHEREAS the Team Leader (TL) of the SC has issued notice to PCL 46.1 of GCC vide his letter TL-PCL/LMNHP/WB-9/228/11 of 29.08.2011.

AND WHEREAS you have consistently failed to achieve the milestones ever since and the actual achieved percentage is as under:

<i>Year</i>	<i>Quarter</i>	<i>Achieved (%)</i>
<i>2010-11</i>	<i>Till September 2010</i>	<i>19%</i>
	<i>October-December</i>	<i>4.2%</i>
	<i>January-March</i>	<i>4.8%</i>
<i>2011-12</i>	<i>April-June</i>	<i>4.3%</i>
	<i>July-September</i>	<i>1.06%</i>
	<i>October-December</i>	<i>0.49%</i>
	<i>January-March</i>	<i>1.05%</i>

AND WHEREAS as per the terms of the Supplementary Agreement, you failed to achieve the required minimum progress in any of the quarter of year 2010-11, 2011-12 and 2012-13, NHAI has the absolute right, without being required any kind of the notice whatsoever to you, to terminate the Contract forthwith and enter upon the site."

48. The respondent submitted its reply to the Show Cause Notice vide its letter dated 10.10.2012.

49. The petitioner considered the above reply and terminated the Contract vide its letter dated 11.11.2013 *inter alia* observing as under:

“AND WHEREAS the Contractor submitted a reply vide letter no. PCL/ND/WB-9/2012/8665 dated 10.10.2012 to the NHAI. The same was examined and the various reasons for delay mentioned by Contractor like non-handling over of encumbrance free site, delay in tree cutting, raising of height of HT/LT lines, shifting of properties, shortage of aggregates, delay in payment of IPC 30 are found to be not correct representation of the fact. Due to poor progress, the Employer terminated the contract in Feb 2009 when the progress was only 18% after lapse of 3.25 years. After revocation of termination in Nov 2010, the progress till date is only 35%. The properties relocation and cutting of trees is to be carried out by Contractor under BOQ item no. 1.08 & 1.02 receptively. Also separate sanction was made for utility shifting items to be carried out by Contractor as non-BOQ items. However, due to failure of Contractor these could not be carried out. Hence, Contractor himself is responsible for not making the site encumbrance free. The procurement of aggregate is also responsibility of Contractor and that has not affected the progress of this project because Contractor himself has stated to be in possession of quarry licence. The fact remains that the Contractor is always suffering from shortage of funds and this has affected the project. The proposal for grant of Extension of Time till June 2014 with full escalation and without penalty cannot be agreed as per contract agreement and supplementary agreement.

AND WHEREAS, PD NHAI, PIU Muzaffarpur vide its letter no. 33018/01/2006/PD/PIU/MUZ/272 dated 21.02.2013, stated that the issue of non-payment of IPC-30 has already been intimated vide this office no. 33018/01/2006/PD/PIU/MUZ/1335 dated 03.08.2012 and 33018/01/2006/PD/PIU//MUZ/1573 dated 11.09.2012 and other issues raised by you has already been furnished by

Resident Engineer vide his letter no. FB/NH-28/RE-9/PCL/A/365/13 dated 06.02.2013.

AND WHEREAS the Contractor vide letter no. PCL/HYD/BD/NHAI/WB-9/2013/116 dated 25.02.2013 while replying to the letter of PD NHAI, PIU Muzaffarpur, stated that it is due to financial problems that it was unable to maintain the Project Highway and has opted for Corporate Debt Restructuring (CDR) of 100 crores as working capital. The Contractor requested the NHAI to release the payment of IPC 30 and IPC 31 and further requested NHAI to instruct the concerned authorities to grant extension of time applied by the Contractor vide its letter no. PCL/ND/WB9/2012/8520 dated 13.06.2012. The Contractor further requested NHAI to clear arbitration awards amounting to Rs. 92 crores. Further, the Contractor vide his letter no. PCL/ND/WB-09/2013/8841 dated 13.03.2013 to the Chairman of NHAI stated that its financial constraints would be overcome in view of the CDR and also requested the NHAI to grant EOT and sign a new supplementary agreement incorporating the EOT. It was also stated by the Contractor that a time period of approx two months would be required to procure working capital assistance from the Bank so as to proceed further with the Project.

AND WHEREAS the Contractor vide his letter no. PCL/ND/WB-09/2013/8885 dated 22.04.2013 to NHAI submitted a revised construction programme and cash flow statement. The letter also stated that deficit in cash flow would be covered by taking loans from banks and that the Contractor would complete the work within the time schedule mentioned in the revised construction programme.

AND WHEREAS vide his letter dated 04.05.2013, the Contractor requested NHAI to sign another supplementary agreement granting EOT for completing the balance work with full extension of time without any penalty and also with the provision of full escalation even for the period of suspension (07.02.2009 till 30.09.2010). It is pertinent to

mention that this escalation during suspended period was agreed to be frozen as per the Supplementary Agreement dated 19.11.2010 at the time of consideration of revocation of the termination. Therefore, the Contractor's request for grant of full escalation was not in accordance with the supplementary agreement and hence it was not agreed to.

AND WHEREAS vide his letter no. PCL/HYD/Operations/NHAI/WB-09/2013-14/077 dated 27.06.2013, the Contractor stated that to facilitate the working capital for WB-9 and WB-10, the Bankers had insisted for EOT and therefore requested NHAI to issue EOT which would allow the Contractor to complete the Project.

From the above paras, it is apparent that at first the Contractor tried to convince NHAI that it has procured working capital to start construction and maintenance of the Project Highway and upon anticipating that the Authority may accede to the request of the Contractor tried to trick the Authority to believe that the Contractor is serious in implementing the Project, however, the ill motive of the Contractor is apparent from the fact that once the Authority seemed agreeing to continue with the Project, the Contractor has tried to trick the Authority to procure full escalation even for the period of suspension.

AND WHEREAS the Contractor vide his letter no. PCL/HYD/Operations/EW-II(WB-09)/2013-14/063 dated 17.06.2013 informed NHAI about the details of his Quarry Agreements and Crusher Licences as required by NHAI during the meeting dated 14.06.2013. The status of six aggregate quarry with the Contractor as informed vide letter dated 17.06.2013 is as follow:

S.N	Mauze	Plot No.	Area	Period	Status
1.	Jamuara	366 (P)	1.00 acre	7.12.07 to 06.12.12	

2.	Jamuara	366 (P)	1.90 acre	7.12.07 to 06.12.12	Applied for renewal
3.	Jamuara	366 (P)	1.00 acre	31.03.08 to 30.03.13	Applied for renewal (Quarry no. 17)
4.	Neerpur	01 (P)	1.00 acre	19.12.08 to 18.12.13	(Quarry no. 18)
5.	Neerpur	01 (P)	1.20 acre	23.01.09 to 22.01.14	(Quarry no. 19)
6.	Jamuara	366 (P)	1.25 acre	17.03.20 13 to 29.01.20 14	New Quarry has taken on Lease.

Even though as per the Conditions of the Contract, the arrangement of approved quality of raw materials for the Project execution including aggregates is responsibility of the Contractor your submission regarding quarry availability with you to support your ability for the execution of the Project xxxx mentioned that in view of the notification dated 04.02.2010 of xxxxx non-renewal of lease for quarry, your submission that renewal is xxxxx for

three quarries of Jamuara, can be treated as optimistic view. As per the present position you are having only three quarries at Neerpur and Jamuara with lease expiring on Dec 2013 & Jan 2014. So far you have not submitted any other documentary evidence to Authority in support of any renewal of above lease.

AND WHEREAS The work programme cash flow statements and machinery deployment submitted vide your letter dated 22.4.2013 was also examined. The updated work programme and cash flow submitted by the Contractor for completing the work in Oct, 2014 are not workable it assumes 3.7% per month average progress. The balance work is estimated to be about Rs. 474 Crore at present prices. This implies average per month progress of about Rs. 17.54 Crores. Considering the past performance of the Contractor your ability to achieve this target is highly doubtful.

AND WHEREAS one of the prime reasons for non-performance of the Contractor was its financial crisis which was also admitted by the Contractor in its various correspondence and meetings with the Authority. Even though as per the conditions of the Contract, the arrangement of necessary funds for the execution of the Project including aggregates is responsible of the Contractor, your submission vide letter dated 27.06.2013 regarding sanction of working capital fund of Rs. 68.92 crore was also examined. In this context, it is mentioned that the working capital loan sanctioned by Bank is as per the settlement between the Contractor and Bank wherein the Authority is not a party. Therefore, the Bank is in no way accountable to the Authority for continuing to extend the working capital loan facility till the completion of the Project or increase the loan amount as per the requirement of the Project.

AND WHEREAS it is further important to note that the commercial tax department of Bihar has issued directions against you due to outstanding dues Rs. 21.86 Cr on your part. Further, there is also a case (No.OA 3285 of 2012

and CS 392 of 2012) In Hon'ble High Court Kolkata wherein Hon'ble Court inquired if there are any outstanding payment due to M/S PCL. However, you have not submitted your response to the Authority on these issues till date.

AND WHEREAS it is vital to mention that the Authority has been deprived of the toll revenue from the Project due to continuous delay in completing the Project and more so due to stoppage of work since May 2012. The expected toll revenue from the Project is about Rs.14.5 Cr. per annum implying Rs.1.1 Cr. per month.

AND WHEREAS due to the non-maintenance of the road in traffic worthy condition the Authority has been subjected to continued public criticism and complaints. The State Government is also pressing hard for maintaining the road as it is important link with UP along east-west corridor. Since the Project is not completed and road is to be maintained in traffic worthy condition, the Authority has incurred costs from its end solely due to your failure to comply with the terms and conditions of the Contract and the revised time schedules.

AND WHEREAS, considering the poor condition of existing highway & your attitude for not maintaining the highway, NHAI appointed a maintenance contractor at a cost of about Rs.4.26 Cr for carrying out the maintenance for keeping road in safe and traffic worthy condition prior to monsoon under clause 39.2. However, your continuous denial to maintain the road even after the cyclone attack in Aug 2013 and heavy rain have made the condition of project highway exceptionally bad and unsafe. Considering the inconvenience caused to the Road users and safety aspect, the state government vide letter dated 25.09.2013 has submitted an estimate amounting to rs.37.76 crores for maintenance of the project section and adjacent reach. The same is under examination for sanction in Authority.

AND WHEREAS as per the terms of the Supplementary Agreement dated 19.11.2010, you have failed to comply with your unambiguous and unequivocal obligation of achieving the minimum required progress in the specified period. The records clearly reflect that the failure on your part is solely attributable to you besides reflecting your total disregard to the mandatory provisions of the Contract dated 20.10.2005, Supplementary Agreement dated 27.11.2008 & 19.11.2010. Your failure has resulted in not only monetary loss to the NHAI but has also caused immense hardship to the general public who have been denied the benefit of a highway.”

50. The above letters have been quoted in detail as their reading would show that the Team Leader and the Project Director were repeatedly pointing out the slow progress of the work to the respondent and calling upon it to expedite the work. Further, the progress of work was nowhere near the percentage as stipulated in the second Supplementary Agreement.

51. The Arbitral Tribunal, relying upon Clause 110.1 of the Technical Specifications of the Contract, has held that the cutting of trees, Shifting of utilities and removal of encroachments etc., was to be done by the Authorities concerned like Forest Department or State Electricity Board etc., and the respondent was only to work as a coordinator between the concerned department and the petitioner herein. Clause 110.1 of the Technical Conditions of Contract is reproduced hereinunder:-

“Clause 110.1

The contractor shall be responsible to coordinate with service provider/concerned authorities for cutting of trees, shifting of utilities and removal of encroachments, etc. and making the

site unencumbered from the project construction area required for completion of work. This will include initial and frequent follow-up meetings/actions/discussions, with each involved service provider/concerned authorities. The contractor will not be entitled for any additional compensation for delay in cutting of trees, shifting of utilities and removal of encroachments by the service provider/concerned authorities. The Employer shall make payment for cutting of trees and shifting of utilities as required by the concerned department.

However, for the first priority stretch as mentioned in BOQ, the tree cutting provided in BOQ will be done by the contractor and the balance reach free from encumbrance shall be subsequently provided to the contractor.”

(Emphasis supplied)

52. A reading of the above Clause shows that even if the interpretation of the Arbitral Tribunal cannot be faulted, however, at the same time, the Clause further provides that the Contractor will not be entitled for any additional compensation for delay in cutting of trees, shifting of utilities and removal of encroachments by the service provider / concerned authorities.

53. It is also a matter of record that the approval for shifting of electric cables/poles was given to the Contractor on 19.04.2011 and the Engineer finalized the location of utility ducts and overhead wire raising by his letter dated 23.02.2012. Similarly, the permission of cutting of additional trees was given on 15.11.2011. Though it cannot be denied that grant of such late permission would have affected the performance of the work by the respondent, however, it was for the Arbitral Tribunal to have further considered whether the slow performance of the work as mentioned in the Show Cause

Notice as also in the termination notice issued by the petitioner was justified on part of the respondent due to such delays and if so, to what extent. Certainly, the entire delay in the execution of the Contract could not have been justified merely for the above reasons. This becomes more profound in light of the two Supplementary Agreement (s) executed between the parties wherein the respondent had admitted to the slow progress of work by it. In view of the above, the reliance of counsel for the respondent on judgment of *Hindustan Construction Co. Ltd.* (supra) does not suffice.

54. The Arbitral Tribunal has further placed reliance on the non-payment of IPC-30/IPA-31 by the petitioner to the respondent. It is noted that IPC-30 was submitted only on 07.05.2012 and therefore, could not have been a cause for delay prior to the date of submission.

55. Equally, the Arbitral Tribunal places reliance on non-payment of IPA-31 as also on the fact that the respondent vide its letter dated 13.03.2013 had informed the petitioner of approval of CDR and further vide letter dated 27.06.2013 had submitted that the banks were insisting on grant of extension of time before releasing the working capital.

56. I note that while IPA 31 was submitted by the respondent only on 30.06.2012, letters regarding CDR are dated 13.03.2013 and 27.06.2013, that is much beyond the extended period of the Contract. These letters, instead of helping the respondent, infact suggest merit in the case of the petitioner that the work was being

delayed due to financial crunch faced by the respondent during the execution of the work.

57. It is true that in exercise of powers under Section 34 of the Act, this Court cannot act as a Court of appeal and re-appreciate the evidence led before the Arbitral Tribunal, however, at the same time, if the Arbitral Tribunal has drawn inference from the documents that are totally unreasonable and has not even considered the vital evidence led by the parties before the Arbitral Tribunal, this Court, certainly, cannot act as a mute spectator and uphold such Award. In the present case, I find that the Arbitral Tribunal has not only drawn incorrect inference from the documents referred by it in the Award, it has also not considered other vital and relevant documents in reaching its conclusion. Therefore, the Award on claim no. 2 cannot be sustained.

58. As noted earlier, the learned counsel for the respondent has relied upon the judgments of this Court in **CMDR S.P.Puri** (supra) and **Som Dutt Builders-NCC (JV)** (supra) to contend that the Arbitral Tribunal cannot be said to have violated the law merely because it has not referred to every single contention of the parties nor can it be said that the Award is liable to be set aside merely because each and every correspondence referred by the parties has not been elaborately discussed by the Arbitral Tribunal.

59. Though there can be no quarrel with the said legal proposition, the same cannot come to the aid of the respondent in the present case. It is not as if the Arbitral Tribunal has failed to consider only one or two correspondences that are relevant to be

considered nor can it be inferred from reading of the Award through any specific reference in the Award that such correspondences were appreciated and considered by the Arbitral Tribunal in passing of the Award. As noted above, the Arbitrator has not considered various complaints made by the Team Leader and the Project Director to the respondent regarding slow progress of the work. It has also not considered the percentage of work done by the respondent within the extended period of Contract. It has also not considered what portion of delay can be attributed solely to the petitioner for the reasons given by the respondent as a justification for such delay in the progress of the work. This would certainly have had an effect on the claim for loss of profit even if the termination of contract is held to be premature or illegal. The Award, therefore, infact can qualify as a non-speaking Award.

60. As far as the judgment of *Dwaraka Das* (supra) and *M/s BEL-ACC(JV)* (supra) relied on by counsel for the respondent, it is significant to note that grant of loss of profit was upheld in these judgments on the ground of termination of contract being illegal or amounting to a breach of contract. In the instant case, the finding of delay being attributable solely to the petitioner and termination of contract being illegal is being set aside due to non-consideration and improper consideration of evidence by the Arbitral Tribunal and hence, question of allowing loss of profit on ground of alleged wrongful termination does not arise. In any case, whether in the facts of the present case, the respondent was entitled to claim loss of profit at the rate of 10% of the balance work, required consideration

of the Arbitral Tribunal. It cannot be that in each case the contractor must be held entitled to claim loss of profit at the rate 10% on the termination being found illegal. The fact whether the Contractor also contributed to the delay and was at all in a position to complete the balance work in a reasonable period of time, would be relevant to be taken into consideration while awarding damages / loss of profit.

61. In *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49, the Supreme Court has, while cautioning the Courts exercising power under Section 34 of the Act, held as under:

“29. It is clear that the juristic principle of a “judicial approach” demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

xxx

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or*
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.”*

62. The present case would fall in the exception to the general rule of non-interference as the Arbitral Tribunal has ignored vital evidence in arriving at its decision.

63. In view of the above, grant of Claim no.2 in favour of the respondent cannot be sustained.

64. As Claim No.1(iii) and 1(iv) were also allowed on basis of the finding that the Contract had been illegally terminated by the petitioner, the Award on these claims is also liable to be set aside.

65. However, as these claims are being set aside for reasons of non-consideration of vital evidence by the Arbitral Tribunal, the respondent would be entitled to re-agitate these claims afresh in accordance with law.

66. As noted above, the Claim no.3 of the respondent is for ***loss of idle hire charges of machinery and equipment confiscated by the Employer for Rs.25,75,95,264/-***.

67. Counsel for the respondent has submitted that the claim for loss of idle charges on machinery and equipment has been rightly granted by the Arbitral Tribunal by computing hire charges on basis of Standard Data Book of Ministry of Road Transport and Highways (MORTH), which is an accepted benchmark in road projects and relies on judgment dated 11.04.2018 of this Court in ***NHAI vs. Prakash Atlanta (JV)*** (FAO(OS) (Comm.) No.1/2017).

68. The said claim is premised on the finding of the Arbitral Tribunal regarding delay in execution of the work being attributable to the petitioner and non-grant of extension of time by the petitioner resulting in idling of the machinery and equipment. Apart from the fact that the finding of the Arbitral Tribunal of delay being attributable solely to the petitioner cannot be accepted, equally, the Arbitral Tribunal having already noted that the respondent had stopped the execution of the work with effect from 01.07.2012, albeit on the ground of non grant of

extension of time, such claim could not have been allowed in full by adopting the MORTH Standard Data Book.

69. As far as the Claim no.4 is concerned, the same was for ***cash loss due to encashment of bank guarantees***. The Arbitral Tribunal, while awarding this claim has noted that the petitioner had claimed Rs.29,40,57,197/- on account of recovery of mobilization and machinery advance from the respondent in its counter claim. An amount of Rs.17,85,72,957/- had been recovered by the petitioner on encashment of a Bank Guarantee, leaving an amount of Rs.11,54,84,240/- further to be recovered, which the Arbitral Tribunal directs to be adjusted against the amount payable by the petitioner to the respondent in terms of the Award. As far as the other two Bank Guarantees are concerned, the same were ordered to be released by way of an Interim Award dated 16.01.2016, which is not in challenge before this Court. Having held so, the Arbitral Tribunal has granted the above claim in favour of the respondent only on the ground that it found the petitioner to be guilty of reasons leading to the prolongation of the Contract.

70. As noted above, this finding of the Arbitral Tribunal cannot be sustained. Even otherwise, I do not find this to be an adequate justification for awarding such claim in the peculiar facts of the present case.

71. The petitioner has further challenged the award of Claim no.6, which is for ***cost of temporary assets taken over for Rs.3,96,57,600/- per month***. As this claim is again based on the finding of the Arbitral Tribunal that the termination of the Contract by the petitioner was illegal,

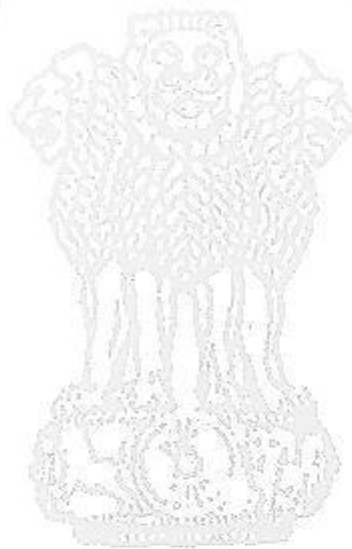
the said award also cannot be sustained. The Award insofar as it allows the same is set aside.

72. The last challenge of the petitioner is to award of interest in favour of the respondent. While awarding such interest, the Arbitral Tribunal has placed reliance on Clause 60.8 of the Contract. Therefore, I do not find any merit in the said challenge.

73. In view of the above, the present petition partially succeeds, leaving the parties to bear their own cost.

NAVIN CHAWLA, J

APRIL 10, 2019/rv/Arya



सत्यमेव जयते