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

***Reserved on: 10.01.2020***

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***Pronounced on: 27.05.2020***

+ OMP (COMM) 101/2016

NATIONAL HIGHWAYS AUTHORITY  
OF INDIA

.....Petitioner

Through: Ms. Saumya Priyadarshinee,  
and Ms. Shreya Sethi,  
Advocates

versus

M/S. HINDUSTAN CONSTRUCTION CO. LTD. ....Respondent

Through: Mr. Dayan Krishnan, Sr.  
Advocate with Mr. Rishi  
Agrawala, Mr. Sukrit Seth,  
Ms. Aakashi Lodha, Mr.  
Ankit Banati and Ms. Shruti  
Arora, Advocates

**CORAM:  
HON'BLE MS. JUSTICE JYOTI SINGH**

**JYOTI SINGH, J.**

1. By way of the present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), Petitioner assails the Arbitral Award dated 30.05.2015 whereby the Arbitral Tribunal has allowed all the Claims of the Respondent herein, being Claim Nos. 1 to 5. Respondent herein was the Claimant before the Tribunal and the Petitioner herein was the Respondent.

2. The facts which need narration to decide the present petition are that the Petitioner is a Statutory body constituted under Section 3 of NHAI Act, 1988 and the functions assigned to the Petitioner under Section 16 of the 1988 Act, amongst others, are to develop, maintain and manage the National Highways entrusted to it by the Central Government. Respondent is a Limited Company.

3. Petitioner and the Respondent entered into a Contract on 21.10.2005 (hereinafter referred to as the 'Contract') for a Contract Price of Rs. 2,55,20,86,851/- for executing the work of "4-laning from km 135.00 to Km 164.00 of Ayodhya to Gorakhpur Section of NH-28 in UP-Contract Pkg. LMNHP EW-ii (WB-4)". The accepted amount of the Bid for the said work in consideration of the execution, completion and maintenance of the works by Contractor/Respondent as prescribed by the Contract and in the conditions of Contract called the Contract Price was Rs. 2,55,20,86,851/-, excluding provisional sum. The duration of the Contract for completion of the work was 36 months from the date of Notice to Proceed.

4. During the currency of the Contract the following disputes arose between the parties:-

*"Claim No.1: Payment for the construction of embankment with fly ash as per additional technical specification Clause A-8 (Item No.2.08 of BOQ).*

*Claim No.2: Approval of the revised rate for the increased quantum of reinforcement complying with Clause 52.2 of conditions of particular applications.*

*Claim No.3: Withholding of part of payment due towards price adjustment on foreign currency portion from interim payment certificate.*

*Claim No.4: Reimbursement of additional cost incurred by the contractor on account of implementation of the provisions of Cess Act by levying cess @ 1% of the project cost in the State of UP w.e.f. 04.02.2009 – Subsequent Legislation.*

*Claim No.5: Reduction in determined Extension of Time for completion of whole of the works in contravention to Clause 44.3 of Conditions of Contract and non admission of the Contractor's entitlement to Bonus for early completion."*

5. In terms of Clause 67 of the Contract, the disputes were referred to the Dispute Review Board (hereinafter referred to as 'DRB') for its recommendation. The DRB gave its recommendations on Dispute Nos.1, 2, 3 & 4, but did not give any recommendation with respect to Dispute No. 5. Respondent being dissatisfied with the decision of the DRB qua dispute Nos. 2 & 3 and the Petitioner being dissatisfied with respect to the decision on Dispute Nos. 1, 2 & 4 notified their intention to commence Arbitration. Finally, the Arbitral Tribunal was constituted and it entered upon reference on 07.01.2013 with respect to all the above mentioned disputes.

6. Respondent filed Statement of Claim raising the following Claims:-

| <i>Dispute No.</i> | <i>Description</i>                                                                                                                        | <i>Amount claimed in SOC</i>                                                               |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| <i>1.</i>          | <i>Payment for the construction of embankment with fly ash as per additional technical specification Clause A-8 (Item No.2.08 of BOQ)</i> | <i>Rs.6,75,47,806/- and Euro 1,39,278/-<br/><br/>Interest @ 12% for local currency and</i> |

|    |                                                                                                                                                                                                                                       |                                                                     |
|----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------|
|    |                                                                                                                                                                                                                                       | <i>LIBOR + 2% for Euro, compounded monthly.</i>                     |
| 2. | <i>Approval of the revised rate for the increased quantum of reinforcement complying with Clause 52.2 of conditions of particular applications.</i>                                                                                   | <i>Rs.12,63,79,011/- and Interest @ 12% compounded monthly.</i>     |
| 3. | <i>Withholding of part of payment due towards price adjustment on foreign currency portion from interim payment certificate.</i>                                                                                                      | <i>Euro 93,686.71 and Interest @ LIBOR + 2% compounded monthly.</i> |
| 4. | <i>Reimbursement of additional cost incurred by the Contractor on account of implementation of the provisions of Cess Act by levying cess @ 1% of the project cost in the State of UP w.e.f. 04.02.2009 – Subsequent Legislation.</i> | <i>Rs.1,98,16,250/- and Interest @ 12% compounded monthly.</i>      |
| 5. | <i>Reduction in determined Extension of Time for completion of whole of the works in contravention to Clause 44.3 of Conditions of Contract and non admission of the Contractor's entitlement to Bonus for early completion.</i>      | <i>Rs.16,48,56,000/- and Interest @ 12% compounded monthly.</i>     |

7. Petitioner filed its Statement of Defence. Both parties led evidence and argued the matter.

8. The Tribunal finally rendered the Impugned Award dated 30.05.2015. Claim Nos. 1 to 5 were allowed but with respect to Claim No. 5, the minority Award was in favour of the Petitioner.

9. Arguing in support of the objections filed against the Award, learned counsel for the Petitioner submits that the impugned Award is against the Public Policy of India and in contravention of the provisions of the Contract governing the parties and is thus liable to be set aside. Reliance is placed on the judgment of the Supreme Court in the case of *Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., (2003) 5 SCC 705*, wherein the Court has held that if the Award is contrary to the substantive provisions of Law or the Act or is against the terms of the Contract, it would be patently illegal and can be interfered with under Section 34 of the Act. Learned counsel has made arguments claim wise which are summarized hereinafter.

**Claim No.1: Payment for Construction of Embankment with Fly Ash as per Additional Technical Specifications Clause A-8 (item number 2.08 of BOQ)**

10. Respondent made a Claim for payment of Rs. 6,75,47,806/- and Euro portion of Euro 1,39,278 towards construction of embankment with fly ash along with a direction to the Petitioner to pay the balance of Rs. 2,17,71,040/- and Euro portion of Euro 45,754/-. The dispute was essentially with regard to interpretation of the Clauses of the Contract, more particularly, Clause A-8 of the Additional Technical Specifications, Clauses 2.02 and 2.08 of BOQ and Clause 6 of the Preamble to BOQ as well as Clause 305.8 of MoRT&H.

11. The case of the Respondent as set out before the Arbitrator was that the Contract provided for two types of embankments construction i.e. Embankment with Soil and Embankment with Fly Ash. Clause A-8 of

Additional Technical Specifications dealt with construction with fly ash whereas Clause 305 of Technical Specifications (MoRT&H) dealt with embankment with soil. In respect of embankment construction, be it with earth under item No. 2.02 or with fly ash under item No. 2.08, the method of measurement was the same and there was no separate method, other than Clause 305.8 of the MoRT&H Technical Specifications. The term separately appearing in Clause 305.8 was to distinguish between earth embankment and the Sub-Grade, where this Sub-Grade construction is separate from embankment. In respect of fly ash embankment, the top '1m' of embankment itself acts as a Sub-Grade and thus the entire embankment has to be measured as a whole. Item No. 2.02 of the BOQ is relevant to Construction of embankment with earth, to be undertaken as per Technical Specification Clause 305, unless otherwise provided in the Contract, while item No. 2.08 is relevant to construction with fly ash, as per Additional Technical Specifications A-8. Respondent submitted that under Clause 57.1 of CoPA, it is the duty of the Engineer to ensure that the measurements are taken/certified in accordance with specifications and drawings for the works and in line with the Contract conditions. Yet the Engineer opted to take separate measurements for the earth cover portion and valued at the rates agreed under item No. 2.02. This action was clearly contrary to the Contract which stipulated for measurement of the entire fly ash embankment section, as one single unit and valued at the rates agreed against BOQ item No. 2.08. Respondent submitted that there was no dispute between the parties on the quantity of work executed and the only dispute was with respect to the valuation of Earth/soil portion/top '1m' under appropriate BOQ item No. 2.08. The Contract

specifies measurement of works of embankment construction with fly ash as a single/composite cross section and does not permit measuring earth and fly ash portions separately. Respondent was thus entitled for payment of the work done with fly ash (inclusive of fly ash core and earth/intermediate layer/topsoil), along with interest, on the amount unduly withheld from various IPCs, at the rate stipulated in the Contract i.e. 12% compounded monthly, from the date of cause of action.

12. Per contra, Petitioner herein had argued that the fly ash embankment is part of the Ayodhya Bypass, which was required to be executed with fly ash and earthen embankment part was required to be executed with earth. The Engineer rightly certified the embankment by separating the earth and fly ash portion under two separate items and valued them at the unit rates quoted under item Nos. 2.02 and 2.08 of BOQ. Construction of embankment with fly ash did not mean that the embankment of the road would be constructed with fly ash only and meant that fly ash had to be surrounded with earthwork embankment from all sides to prevent erosion of fly ash. Para 6 of Preamble to BOQ provided that measurement of completed work for payment shall be in accordance with requirements stated in individual sections of Technical Specifications. Work of fly ash embankment was to be carried out as per Additional Technical Specification A-8 and on soil as per Clauses 300 and 200 of MoRT&H specifications. Clause A-8 is dedicated to work with fly ash only and therefore, when the work is done with fly ash, only then the measurement would be of fly ash.

13. Petitioner further argued that Respondent had wrongly interpreted item Nos. 2.02 and 2.08. Clause 2.02 of BOQ provided “the construction

of Embankment for main road and Ayodhya bypass (earth part) with approved borrow soil with all leads and lifts all complete as per drawings and technical specification i.e. clause 305” while Clause item no.2.08 of BOQ provided “the construction of embankment (fly ash part) for Ayodhya by pass with fly ash obtained from coal or lignite burning thermal power station as work material spread and completed in layers as per drawing and additional technical specification clause A-8”. It was thus clear that no embankment could be constructed only with fly ash. Fly ash is a form of dust and it is not possible to construct the road only with fly ash and the Contractor is required to mix other material to protect the fly ash as well as to give hardness to the construction. This position was also made clear in the Summary of Works itself. Clause 305 is for measurement for payment and is applicable for all embankments, whether earth embankment for main road Ayodhya Bypass or fly ash embankment as part of the Bypass. The Bypass has been constructed with fly ash embankment and earth embankment in unison with each other and payment was to be made as per BOQ item 2.08 and 2.02 respectively. Cross-Section was a term of Engineering Drawing, which meant front view of any object when it was cut from top to bottom in vertical plane. The word ‘cross-section’ here meant only the fly ash embankment part. Rate for item No. 2.08 shall include only fly ash embankment part of Ayodhya Bypass which was to be constructed with fly ash only obtained as work material, spread and compacted in layers, as per drawing. The Engineer had thus properly assessed the value of fly ash used under Item No.2.08 BOQ for the said embankment and paid accordingly.

14. Petitioner had relied upon a judgment of this Court in the case of ***NHAI v. HCC, FAO (OS) No. 48/2012, decided on 08.11.2012***, wherein it was held that, cross sections of fly ash embankment and soil portion have to be measured and paid separately. The properties of fly ash embankment provided in Clause 305.2.2.3 of ABP2 Project, in the said judgment, were similar to the Additional Technical Specification A-8 of the present case.

15. Learned counsels for the parties have reiterated the above arguments before this Court.

16. Counsel for the Petitioner vehemently contended that the present claim of the Respondent is squarely covered by the judgment of this Court in ***NHAI (supra)*** and the Tribunal has erred in rendering a finding that the said judgment is not relevant for Claim No. 1. The Tribunal has wrongly distinguished the judgment on the ground that in the Contract in question in the said judgment, there was only one single BOQ item, for both the embankments, with the same Technical Specification i.e. Clause 305. It is further submitted that, even this issue is no more res integra and had arisen in another case, where the relevant Clauses were identical as in this case and this Court in the said case titled ***NHAI v. Progressive MVR (JV) in OMP NO. 155/2011, decided on 12.04.2013***, decided the issue in favour of the Petitioner herein and while the said judgment is pending adjudication before the Supreme Court, but there is no stay.

17. Learned Senior Counsel for the Respondent argues that the dispute centres around interpretation of Clause A-8 by the Arbitrator, who has given an interpretation, while allowing the Claim in favour of the Respondent. It is not open to this Court to interfere and give a different

interpretation to the Clauses, as the same is beyond the scope of Judicial Review under Section 34 of the Act. In fact, even the DRB accepted the case of the Respondent and in order to comply with the said decision, Petitioner paid a sum of Rs.61,03,31,892/- to the Respondent, but subsequently, it was treated as an advance. Reliance is placed on the judgments in the case of *ONGC vs. Saw Pipes*, (2003) 5 SCC 705, *Associate Builders vs. DDA*, (2015) 3 SCC 49, *Associated Construction v. Pawanhans Helicopter Ltd.*, (2008) 16 SCC 128, *MP Power Generation vs. Ansaldo Energia*, (2018) 16 SCC 661, and *Ssangyong Engineering & Construction Co. Ltd. Vs. NHAI*, 2019 SCC Online SC 677, for the proposition that the scope of interference in an Arbitral Award is limited.

18. Insofar as the judgments in the case of *NHAI vs. HCC- 2012* (supra) and *NHAI vs. Progressive MVR (JV) -2013* (supra) are concerned, learned senior counsel for the Respondent submits that the Tribunal has rightly held that the said judgments are not applicable to the facts of the present case. The latter judgment was passed relying upon the former one. The Clauses which fell for consideration before the Court, in the earlier case were totally different from the Clauses, which have been interpreted by the Tribunal in the present case. In the said case, only one BOQ item was split into two i.e. 2.02, ‘construction of embankment with approved material complete as per Technical Specifications Clause 305 with all leads and lifts (a) with soil (b) with pond ash’. However, in the present case, there are two different Clauses 2.02 and 2.08 which had to be interpreted by the Tribunal. Supreme Court in the case of *State of Orissa vs. Mohd. Illiyas*, (2006) 1 SCC 275, has held that Courts should

not place reliance on decisions, without discussing how the factual situation differs in each case. Observations of Courts are not to be read as Euclid's Theorem or Statutes and taken out of context.

**Claim No. 2: Approval of Revised Rate for Increased Quantum of Reinforcement Complying with Clause 52.2 of Conditions of Particular Application.**

19. Petitioner has challenged the following findings of the Arbitral Tribunal with respect to Claim No. 2:

*“12.3.1 - This dispute has arisen on account of differing view of the Claimant and the Respondent on the issue whether the Claimant is entitled to new rate for the variation in the work of steel reinforcement and what would be the quantum of varied work on which the new rate (if entitled to) shall be applicable. Both the parties have submitted their contentions / submissions during the hearings and refused each others arguments. The respective arguments have been condensed in paras 8.1 and 8.2 above.*

XXX XXX XXX XXX

*12.3.13 – From the perusal of the aforesaid provisions of contract and case law, Arbitral Tribunal finds the following :*

*(1). Varied work is defined under Clause 51, which clearly states that any increase or decrease of any work stipulated in the contract is a variation.*

*(2). The Clause 52.2 deals with two situations viz (a) when the rates included in the contract would subject to rate revision? And (b) On what quantum the revised rate would apply? In the*

*instant contract the criteria set out in the proviso clause of 52.2 of CoPA i.e. quantity of the varied work exceeds by more than 25% of BOQ quantity and the value of the item accounts for more than 2% of initial Contract price is situation (a). Thus, the criterion specified in proviso clause is nothing but tolerance limits beyond which the rates included in the contract would subject to rate revision. As far as the situation (b) is concerned, it is clear from the wordings of proviso clause “any item, such item”, that it refers to item as a whole i.e., for the entire revised quantity.*

*Provided further that no change in the rate or price for any items contained in the Contract shall be considered unless such item accounts for an amount more than 2 percent of the Contract price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of quantity by more than 25 percent.*

*(3). In this regard, Arbitral Tribunal also notes the High Court Judgment submitted by the Claimant M/s. JSC Centrodorstroy vs. NHAI wherein the Hon’ble Court on a case having similar factual matrix and similar classes on variation held the following :*

*“The rate / price-so-agreed / determined would have to substitute the existing rate / price as provided under the contract (in the case the BOQ) as the same have been rendered inappropriate or inapplicable”*

*(4). Arbitral Tribunal also notes the contract clauses of other contract i.e. CBP2 contract, wherein it is specifically stipulated that the*

*revised would be applicable only for the quantity in excess of 125% of provision in BOQ. Such a provision is noticeably absent in the instant contract, which leaves the scope to apply such revised rate to the entire revised quantum of work i.e. item in BOQ.*

*(5). Arbitral Tribunal further notes the pleading of the Claimant on the application of contra-proferentum rule in case of ambiguity in the provisions of contract. Arbitral Tribunal is of the view that the provisions of contract are unambiguous and there is no necessity to apply rule of contra-proferentum in the instant case.*

*(6). Therefore, considering the above analysis, Arbitral Tribunal is of the firm view that the revised rate would substitute the existing rate in BOQ and would apply to the revised quantum of the work included in the contract i.e. BOQ item as whole.*

*(7). However, the Arbitral Tribunal notes that the Claimant has claimed only the quantity in excess of 100% for the application of revised rate and as such the Arbitral tribunal limits the entitlement of the claimant to their claim.”*

20. During the course of arguments, Respondent had relied upon the judgment of a Division Bench of this Court in **JSC Centrodorstroy vs. NHAI, in FAO (OS) 508/2013**, and a Coordinate Bench of this Court in **NHAI vs. HCC, in OMP (COMM) 73/2016**, to contend that the present Claim was covered by the said judgments. Learned counsel for the Petitioner could not successfully rebut the said contention. Relevant paragraph of the judgment in **JSC (supra)** is as under:

*“31. As discussed earlier, clause 52.2 triggers only when the nature or amount of any varied work is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item of the works is rendered inappropriate or inapplicable on account of the variation. If this condition is satisfied then clause 52.2 provides for fixation/determination of an agreed/appropriate rate/price of the item of work. Even if we assume that the condition for triggering clause 52.2, as stated above, has occurred then it follows that the rate/price for the item of work has to be fixed/determined. If we consider the applicability of clause of 52.2 in respect of work under item 8.02(a), which was not completely omitted but merely reduced in terms of quantities, and assume that all the preconditions for triggering clause 52.2, including the Engineer forming an opinion that the rate/price provided has become inappropriate on account of reduction of the quantity of work, have been met, then an agreed/appropriate rate would have to be fixed for that item of work. The rate/price so agreed/determined would have to substitute the existing rate/price as provided under the contract (in this case the BOQ) as the same have been rendered inappropriate or inapplicable. These new rates/price would obviously apply to the revised quantum of work under item 8.02(a) and not to the quantum of work that is not to be executed and stands removed from the BOQ. However, as indicated above this was not the claim made by the appellant, the appellant did not seek enhancement of the rates for the residuary quantity of work under item 8.02(a) but applied for compensation for loss of contribution (margin) that the appellant would have earned from the work that was reduced from the scope of works. It is in this context that the Arbitral Tribunal found that, “Work included in variation is to be valued in accordance with sub clause 52.2. The impact of variation which deals with exclusion of work from the BOQ, is to be considered under sub clause 52.3.” This finding must be read in conjunction*

*with the observation of the Arbitral tribunal that “The claimant would have been justified in invoking sub clause 52.2 if he had asked the Engineer for review of the accepted rate for item 8.02(a), in the context of payment to him for the ‘varied work’ under the item i.e. the work actually executed under the item.” It would be erroneous to read the arbitral award to mean that in all cases of reduction of work the rates/prices of the residuary work cannot be fixed or determined under clause 52.2 of the GCC.”*

21. Relevant para of the judgment in **NHAI 73/2016 (supra)** is as under:

*“10. In the present case, there is no dispute that the conditions which are required to be met for revision of contractual rates had been met for certain items as indicated above. Thus, undisputedly, Clause 52.2 of GCC was applicable. A plain reading of Clause 52.2 of GCC indicates that where in the opinion of Engineer, the rate or price contained in the agreement for any item or work on account of variation has been rendered inappropriate or inapplicable then a suitable rate or price would be agreed upon between the Engineer and contractor. Plainly, the rate to be agreed would be for the works executed since the rate or price as indicated in the contract has been rendered “inappropriate” or “inapplicable”. The revised rates in such circumstances would be applicable to the entire quantity of works executed. This is also the view expressed by a Division Bench of this Court (of which the undersigned is also a party) in **JSC Centrodorstroy v. National Highways Authority of India: 2014 (1) Arb. LR 148 (Delhi) (DB)**. Ms Sinha, the learned counsel appearing for NHAI contended that the said decision in **JSC Centrodorstroy (supra)** is not applicable as in that case, the observations made by the Court only related to a situation where the*

quantity of work executed was less by 25% of the BOQ quantities. She submitted that where the quantities executed are less than the BOQ quantities, the revised rates may be applied to the quantities of work executed by the contractor but in cases where the quantities have been increased then necessarily the revised rates must be applied only in respect of quantities above 125% of the BOQ quantities. In my view, the aforesaid contention is not sustainable. A plain reading of Clause 52.2 of GCC indicates that where the rates as fixed have been rendered inappropriate or inapplicable on account of variation in the works then a suitable rate or price shall be determined by the Engineer. Such suitable price/rate would obviously replace the contractual rates/price. The said interpretation would be equally applicable irrespective of whether the variation in the quantities is on the negative side or on the positive. In JSC Centrodorstroy (supra), the Court had further clarified that clause 51.2 of GCC does not restrict determination of appropriate rates only to variations as a result of increase or decrease in the quantities of BOQ items but would also include situations resulting from other variations. This is plainly clear from the following passage from the said decision:-

“Clause 51.2 of the GCC is not restricted only to variations as a result of increase or decrease in the quantities of work but also encompasses situations resulting from other variations, as are indicated in Clause 51.1 of GCC, which may be required to be carried out in execution of the works. In all such cases, clause 51.2 would be applicable provided that variation of work has rendered the rates/prices as indicated in the contract as inappropriate or inapplicable and the volume of the variation is more than the threshold specified, in this regard, under COPA.”

*11. It is also well settled that a decision as to the interpretation of a contract is clearly within the jurisdiction of an arbitral tribunal and even if the interpretation is erroneous, the same would not be amenable to judicial review under Section 34 of the Act.*

*12. In the present case, the Arbitral Tribunal has interpreted the relevant clauses of GCC and COPA and concluded that if the necessary conditions are met and revised rates are to be applied, the same shall apply to the entire quantities of work executed. The relevant extract from the impugned award is reproduced below:*

*"8.30 Issue No: 2 What would be the quantum of varied work for which the new rates shall be applicable?"*

*8.30.1 The Tribunal observes that as per clause 51 and 52 of G.C.C. The rate or price to be agreed is for the item of work and such rate fixed/determined shall be applicable for that particular item of work. As per Clause 52.1 any increase in B.O.Q. quantity would amount to varied work. It could also be interpreted that such changed rate shall be applicable for the item (BOQ) as a whole in view of such BOQ item rate becoming inappropriate or inapplicable. It is also to be noted that new appropriate unit rate has to be determined and agreed between the parties for execution of these varied items of work based on the rates prevailing for the said item of works at the time when the variation took place.*

*In addition to aforesaid clauses, the Arbitral Tribunal also perused the Clause 52.2 of CoPA & case laws submitted by the Claimant. From the*

*perusal of the aforesaid provisions of contract and case laws, Arbitral Tribunal finds the following:*

*(1) Varied work is defined under Clause 51, which clearly states that any increase or decrease of any work stipulated in the contract is a variation.*

*(2) The Clause 52.2 deals with two situations viz, (a) when the rates included in the contract would subject to rate revision? and (b) On what quantum the revised rate would apply? In the instant contract, the criteria set out in the proviso clause of 52.2 of CoPA ie., quantity of the varied work exceeds by more than 25% of BOQ quantity and the value of the item accounts for more than 2% of initial Contract price is situation (a). Thus, the criterion specified in proviso clause is nothing but tolerance limits beyond which the rates included in the contract would subject to rate revision. As far as the situation (b) is concerned, it is clear from the workings of proviso clause "any item, such item", that it refers to item as a whole ie., for the entire revised quantity.*

*Provided further that no change in the rate or price for any items contained in the Contract shall be considered unless such item accounts for an amount more than 2 percent of the Contract price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill Quantity by more than 25 percent.*

*(3) In this regard, Arbitral Tribunal notes the High Court Judgment submitted by the Claimant M/s JSC Centrodorstroy Vs NHAI, wherein the Hon'ble Court on a case having similar factual matrix and similar clauses on variations, held the following:*

*“The rates / price so agreed/determined would have to substitute the existing rate/price as provided under the contract (in this case the BOQ) as the same have been rendered inappropriate or inapplicable.”*

*(4) Arbitral Tribunal notes the High Court Judgment submitted by the Claimant between National Highways Authority of India vs M/s Progressive Construction Ltd dated 19th May 2014, wherein, it was held as follows:*

*The Arbitral Tribunal has discussed Clause 38 and has rightly held that for a change in the rate of the item as a whole and only for the varied work and noted the conduct of the petitioner and the Engineer at the relevant time, which would show the intention of the petitioner and the Engineer.”*

*Thus, the revised rate, so determined by the Engineer would have to substitute the BOQ rate and therefore, the revised rate would apply to the entire revised quantum of works.*

(5) *Arbitral Tribunal also notes the contract clauses of other contracts between the same parties, wherein it is specifically stipulated that the revised rate would be applicable only for the quantity in excess of 125% of provision in BOQ. Such a provision is noticeably absent in the instant contract, which leaves the scope to apply such revised rate to the entire revised quantum of work ie, item in BOQ.*

(6) *Arbitral Tribunal further notes the pleading of the Claimant on the applicable of contra-proferentum rule in case of ambiguity in the provisions of contract. Arbitral Tribunal is of the view that the provisions of contract are unambiguous and there is no necessity to apply rule of contra-proferentum in the instant case.*

(7) *Therefore, considering the above analysis, Arbitral Tribunal is of the firm view that the revised rate would substitute the existing rate in BOQ and would apply to the revised quantum of the work included in the contract ie., BOQ item as whole.*

(8) *However, the Arbitral Tribunal notes that the Claimant has claimed only the quantity in excess of 100% for the application of revised rate and as such the Arbitral Tribunal limits the entitlement of the Claimant to their claim.*

8.30.2 Therefore the Tribunal is of the firm view that new/revised rates would be applicable for the quantum of work executed in excess of 100% off B.O.Q. quantity and hence decides accordingly.

8.30.3 The contention/argument of the Engineer/Respondent that the new rates would be applicable only for the quantity exceeding 125% of B.O.Q. item is not based on any such specific terms of contract. In this contract there is no such specific provision. Hence the Tribunal rejects the contention of the Engineer/Respondent in this regard.”

13. This Court finds no infirmity with the aforesaid view. However, even if it is accepted - although this Court does not and there is no reason to do so - that the Arbitral Tribunal had erred in interpreting the relevant clauses of GCC and/or COPA, the said error is within the jurisdiction of the Arbitral Tribunal and the same cannot be corrected in proceedings under Section 34 of the Act. (see: *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India*: (2010) 11 SCC 296 and *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.*: (2009) 10 SCC 63).”

**Claim no. 3: Withholding of Part Payment Due Towards Price Adjustment on Foreign Currency Portion from Interim Payment Certificate.**

22. Petitioner has challenged the Arbitral Award with respect to this claim and relevant portion of the finding by the Arbitral Tribunal is as under :

“12.4.4 – After careful perusal of the above provisions of contract, Arbitral Tribunal finds the following :

(i). Contract provides for payment under two currencies i.e. Indian Rupee (Rs.) – 90% and Euro (€) – 10%.

(ii). Contract also provides for Price adjustment for both the currencies in accordance with the formulae stated in Clause 70.3 of CoPA.

(iii). Contract provides for price adjustment for total value of work done  
i.e. R, which is further divided into two as per the currencies i.e.

$$R = R_i + R_f$$

R = Total value of work done during the month

R<sub>i</sub> = Portion of R as payable in Indian Rupees

R<sub>f</sub> = Portion of R as payable in foreign currency.

Arbitral Tribunal notes the word “payable” R<sub>f</sub> and not the “adjustable” R<sub>f</sub>.

(iv). The R<sub>f</sub> used in the formula is the portion of R payable in foreign currency and not the adjustable one. Hence, it cannot be 0.85 R<sub>f</sub>. The Contract nowhere stipulates that R<sub>f</sub> is to be 0.85R<sub>f</sub>.

(v). Contract also requires the bidders to provide break up of foreign currency component. Here, the contract specifically indicates 15% as non-adjustable, which, in other words, 85% is adjustable, which is nothing but the factor 0.85 in the formulae. This view is further supported by the note, which is provided under the format,

(Refer to para (viii) of Adjustment to foreign currency of COPA 70.3. The Non-adjustable part is 15%).

The para (viii) of Clause 70.3 of CoPA provides formula which is reproduced below :

$$VF_c = 0.85 \times R_f \times (F_{ei} - F_{eo}) / F_{eo}$$

*Thus, when the note (15% non-adjustable) read with the formula under clause 70.3 viii of CoPA, it is clear that 85% of Euro component is adjustable. There cannot be further 85% adjustment and such adjustment would result in 72.2% ( $0.85 \times 0.85$ ) adjustment which is unfounded in contract.*

*The Claimant has given break down of the 85% adjustable portion of Euro into Expatriate staff @ 30% and plant and machinery @ 55% respectively, which is agreed to by the Respondent.*

*Therefore, Arbitral Tribunal is of the view that payments for the price adjustment are to be made to Claimant duly considering the above components in such a manner that 85% of the foreign currency component is only adjusted and not 72% ( $0.85 \times 0.85$ ). Arbitral Tribunal is of the firm view that only 85% Euro component is adjustable and any modifications / interpretation to the formula which leads to 72% adjustment is incorrect and not in accordance with the terms of contract.*

*(vi) Arbitral Tribunal also notes the Summary of payment currencies of the Bid @ page 21 of contract, wherein the total foreign currency requirement of the Claimant (10% of the original bid price) was EURO 5,709,434 and at the currency rate of 52.87 / Euro, works out to Rs.301,857,788/-.*

*At page 28 of the Contract, wherein the Claimant has given break up of foreign currency component, Arbitral Tribunal notes that the total of foreign currency components (expatriate staff and labour @ 30% and plant, machinery and spares @ 55%) is EURO 4,853,019 and at the currency exchanges rate of 52.87/Euro, works out to Rs.256,579,119/-. This is exactly 85% of total foreign currency requirement at page 21 of contract i.e. 85% of Rs.301,857,788/-. Therefore, there is no*

*justification in applying 0.85% again for price adjustment, which goes contrary to contract provision that 85% of Euro portion is adjustable.”*

23. Learned senior counsel for the Respondent argued that the said Claim is covered by a judgment of the Division Bench in ***NHAI vs. HCC in FAO (OS) 192/17 and FAO (OS) 196/17 and FAO (OS) (COMM) 154/17***. Learned counsel for the Petitioner conceded that this part of the Award is covered by the aforesaid judgments and hence no arguments were made with respect to Claim No. 3.

**Claim No. 4: Reimbursement of additional costs incurred by the Contractor on account of implementation of the provisions of Cess Act.**

24. Learned senior counsel for the Respondent submitted that even this part of the Award is covered in favour of the Respondent by the aforementioned three judgments. Relevant part of the Award, which is under challenge by the Petitioner is as under:

*“After careful perusal of the above clause, Arbitral Tribunal finds the following:*

*(11) The Pre-amble of Cess Act (Act No. 28) refers to constitution of welfare Boards for levy and collection of cess. Hence, the prerequisite for levy and collection of cess is constitution of Board by State Government.*

*(ii) The set-up for implementation of the said Acts ie.. Act No.27 and Act No.28 of 1996 like - cess collection, appellate authority, shall be appointed by the State Government and in the absence of such appointment, the said Acts remain inoperative for all practical purposes.*

(iii) *The Claimant is required to - consider. All duties, taxes and other levies payable as on 28 days prior to last date of submission of bids. It is nobody's case that the cess was levied in the State of UP at the time of submission of bid. Even, for that matter, there was no board or setup for levy and collection of cess. This is further supported by findings of Hon'ble Supreme Court judgement in the case National Campaign committee, C.L. labour, Petitioner Vs Union of India and Others.*

(iv) *The constitution of Board by state government is by way of gazette notification. Arbitral Tribunal notes such action by State Government was accomplished on 20.11.2009 by way of a notification appointing — an Administrator, much after the base date of the instant project. Therefore, this notification, when- read with Clause 34.2 of Co PA and Clause 70.8 of CoPA refers to future notification or in other-words, subsequent legislation by state.*

(v) *In the event of Cess recovered by PSU from the bills of Claimant at — notified- rates, the same should be deposited- by a crossed demand draft in favour of the Board and payable at the station at which the Board is located. As already noted, the "Administrator"/ "Board" was appointed by the State Government on 20.11.2009 ie., much after the base date 17.06.2005. In the absence of Board, the entire process of levy and collection of cess would become inoperative.*

(vi) *Therefore, Arbitral Tribunal holds that the implementation of Act No.27 and 28 requires action of State Government and without such action, the Acts remains inoperative. The constitution of Board is the pre-requisite for levy and collection of cess and such constitution is by way of gazette notification, which is a state legislation. Since such notification was issued*

*subsequent to the base date, the levy and collection of cess clearly falls under the pale of subsequent legislation under Clause 70.8 of CoPA.”*

25. Learned Senior Counsel pointed out the following paragraphs of the judgment in *NHAI vs. HCC in FAO(OS) 192/2017 (supra)* which directly cover the aforesaid claim:

**“11. Re. Claim No.3 - Reimbursement of additional cost incurred by the Contractor on account of implementation of the provisions of Cess Act by levying cess (a), 1% of the project cost in the state of Uttar Pradesh with effect from 04.02.200 — Subsequent Legislation**

*11.1 Clause 70.8 of the COPA stipulated that if, after the expiry of 28 days prior to the last date for submission of tenders, there occurred any changes to any national or State statute, or other law, which resulted in additional or reduced cost to the contractor in the execution of the contract, such additional or reduced cost would be added to, or deducted from, the contract price, and the Engineer would notify the contractor accordingly. It is not necessary for us to delve deep into this claim or the specifics thereof as the issue was elementary. The two statutes levying cess i.e. the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 and the Cess Act, 1996, provided for payment of cess by all establishments who carried on building and other construction work, or employed ten or more than workers. Cess was payable at a rate not exceeding 2% of the cost on construction, to be notified by the Government. These Acts, had, therefore, been enacted prior to the 28- day period stipulated in Clause 70.8 of the COP A (supra).*

11.2 The Cess Act required levy and collection of cess by a Welfare Board. The notification constituting the said Board, was issued only on dated 20th November 2009. In the absence of the Welfare Board, collection of cess, under either of the aforementioned two Acts, was impossible. It was also a conceded factual position that, at the time of submission of bid, no cess was levied in the State of UP, and that the applications received in response to the notice inviting bids were required to consider only duties, taxes and other levies payable 28 days prior to the last date of submission of bids. In view of these facts, the Arbitral Tribunal held that the Cess Act and the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, having become operative, qua payment of cess thereunder, only after the cut off date, i.e 17th June 2005, the levy of cess was eligible to be treated as "subsequent legislation" and consequently, that the recovery of cess by the appellant from the respondent's bills was contrary to the terms of the contract.

11.3 The learned Single Judge found that this aspect of the matter stood covered by the judgment of the Supreme Court in *NHAI vs. ITD Cementation India Limited* (supra). It is also noted, in para 16 of the impugned judgment, that this part of the impugned award was "very fairly" not pressed by the learned senior counsel appearing for the appellant, Mr. Adarsh B. Dial.

11.4 Ms. Gunjan Sinha Jain, appearing for the appellant, has no quarrel, with the finding of the learned Single Judge that the merits of her client's case, qua this claim, are covered against it; she, however, takes exception to the observation, in the impugned judgement, that the decision which covers her client is *NHAI Vs. ITD Cementation India Limited Ltd* (supra). She submits that, in fact, the judgement which covers her client, as regards this claim, is not *NHAI Vs. ITD Cementation India*

*Limited (supra) but the judgment of a predecessor Division Bench of this Court in NHAI v. Gammon-Atlanta, 2013 (4) Arb LR 61 (Del). Apparently, the reason for Ms. Jain wanting this aspect clarified by us is that the decision in NHAI V. Gammon Atlanta (supra) is presently under challenge before the Supreme Court, whereas NHAI v. ITD Cementation India Limited (supra) is a judgement of the Supreme Court itself.*

**11.5 Having examined the decisions of NHAI v. ITD Cementation India Limited (supra) and NHAI v. Gammon-Atlanta (supra), we find substance in the submission of Ms. Gunjan Sinha Jain, to the extent that, on facts, the dispute indeed appears to be covered against her client, on merits, by the Division Bench judgement of this Court in NHAI V. Gammon-Atlanta (supra).** A reading of NHAI V. ITD Cementation India Limited (supra) reveals that the controversy before the Supreme Court therein did not deal with an issue where the statute had been enacted prior to the cut off date, and became capable of implementation and enforcement thereafter. The Supreme Court, in that case, was concerned with the question of whether additional cost, owing to change of seigniorage fee had, or had not, been taken into account in the indexing of inputs while providing for price adjustments in the contract. The contention of NHAI, in that case, was that the said levy having already been factored into the indexing price formula, no further payment to the contractor was justified. As against this, we find that the decision of this Court in NHAI v. Gammon-Atlanta (supra) directly dealt with a controversy parallelizing that involved in the present case.

**11.6** As regards the specific grievance urged by Ms. Jain at the Bar, we note that the learned Single Judge has not specifically stated that, on facts, the present claim is covered by the decision in NHAI v. ITD Cementation

*India Limited (supra). It appears that the impugned judgement has upheld the award of the Arbitral Tribunal on merits, and the reference, to NHAI v. ITD Cementation India Limited (supra) was probably intended to underscore the position that no case for interference existed, given the limited playing field that Section 34 of the 1996 Act provides, with which proposition there can possibly be no cavil.*

*11.7 Be that as it may, we agree with Ms. Gunjan Sinha Jain, learned counsel for the appellant that, on facts as well as in law, the issue in controversy in Claim No. 3 stands covered by the judgement of the Division Bench of this Court in NHAI v. Gammon-Atlanta (supra). At the same time, we hasten to add that even de hors the said judgment, applying the principles regarding the scope of interference, by this Court with arbitral awards, under Sections 34 and 37 of the 1996 Act, as laid down in inter alia. NHAI v. ITD Cementation India Limited (supra), we find no reason to differ with the findings of the Arbitral Tribunal, regarding this claim of the respondent.*

26. Faced with this, learned Counsel for the Petitioner fairly submitted that she would not press the objection with respect to Claim No. 4 as the judgment squarely covers the issue in favour of the Respondent.

**Claim No. 5: Reduction in the Determined Extension of Time for Completion of Whole of the Work in Contravention to Clause 44.3 of the Conditions of Contract and Non-Admission of the Contractor's entitlement to Bonus for Early Completion.**

27. Before the Arbitral Tribunal, Respondent had argued that the date of commencement of the work was 29.11.2005 and accordingly, the date of completion of the entire work was to expire on 28.11.2008, which

included EOT granted by the Engineer under Clause 44 of GCC. Engineer could grant EOT only for the delays other than those attributable to the Contractor and could not decrease any interim extension already determined by him, during the Final Review. The prerequisite for entitlement to Bonus was that the Contractor should achieve completion, prior to the time stipulated in Clause 43 and for calculation of Bonus, extension of time for completion, was to be considered with regard to the delay not attributable to the Contractor. Respondent submitted that they had structured the Price Bid based on the above express stipulations in the Contract.

28. Respondent argued that in compliance with the requirement of Clause 14.1 of Conditions of Contract, it had prepared a detailed program which was submitted to the Engineer for approval and it had mobilized the required manpower and equipment as per the said program. Petitioner, however, did not fulfill its reciprocal obligations and the execution of the work was hampered due to various delay events, which were brought out at length before the Tribunal. On account of this, the Respondent had submitted seven applications for Interim Extension of Time to the Engineer, duly covering the impact of delays up to March 2011. Engineer had made his assessment and notified the parties accordingly. The Engineer vide letter dated 04.03.2011 had intimated that in view of the continuance of delay events, Respondent was entitled to further extension of time and hence determined the entitlement of EOT upto 11.03.2012. Respondent completed the work ahead of the extended time and work was taken over by the Engineer on 31.03.2011 and even Taking Over Certificate was issued on 01.04.2011. The Engineer, while assessing

the final determination on entitlement to EOT, contrary to the interim determinations and provisions of Clause 44.3, decreased Respondent's entitlement to the overall extension, up to 31.03.2011. As per Clause 44.3, the Engineer, at the time of Final Review was not entitled to decrease the interim time for completion, already determined up to 11.03.2012.

29. Respondent argued that the Contract expressly provided for Bonus under Clause 47.3 of CoPA read with 'Appendix' to the Bid. As the Respondent had completed the work ahead of completion time prescribed in Clause 43 of GCC, he was entitled to Bonus. The said provision reads as under :-

*"Clause 43.1- Time for Completion:*

*The whole of the Works and if applicable, any Section required to be completed within a particular time as stated in the Appendix to Tender, shall be completed, in accordance with the provisions of Clause 48, within the time stated in the Appendix to Tender for the whole of the Works or the Section (as the case maybe), calculated from the Commencement Date or such extended time as may be allowed under Clause 44. "*

30. Per contra, Petitioner has defended its action by arguing that as per Clause 110.1, responsibility to complete the work was of the Respondent, yet the extension of time was approved by the Petitioner, without imposition of Liquidated Damages, as well as, without any prolongation cost and additional payment (except Escalation). Delay was mainly due to insufficient manpower and equipment brought by the Respondent. The cases of *Sarayu Bridge* and *Tehri Nala* are few such examples where

Respondent should have completed the work within the priority stretch. However, even after granting EOT, as requested by the Respondent, it could not finish the work in the stipulated time. Various letters filed with the Statement of Defence would indicate that it was the Respondent who was responsible for delay in completion of the work. The Engineer frequently corresponded with the Respondent to expedite the progress, which was slow due to lack of labour, project management and resource shortage, etc. As per the Bid Conditions, Respondent was to submit work program within 20 days, after issue of LOA, for consent of the Engineer, which was not submitted till 09.03.2006 i.e. for five months. The deployment plan, as per Clause 14.1 for Plant and Equipment was never adhered to, the Crusher Layout Plan was not finalized until 07.06.2006 and similarly Hot Mix Plant Erection was not started till May 2006, due to which road maintenance including Renewal Coat, with SDBC over the existing road, was delayed for about a year, while it was the first job required at the site.

31. Petitioner argued that as per CoPA Clause 47.3, Respondent was entitled to Bonus only if it achieved completion of work prior to the time completion prescribed by Clause 43. For calculating Bonus payments, time for completion of the work was fixed in the Agreement and extension of time, for any reason attributable to the Contractor, would disentitle him for the payment. Respondent could not organize and mobilize its resources to complete the work before the Scheduled Completion Date. Project was substantially completed in more than 63 months, as against 36 months, given in the Contract and thus no Bonus could be paid.

32. In rejoinder, Respondent argued that EOT was determined by the Engineer upto 11.03.2012, which was subsequently limited/reduced till the actual completion of work, due to malafide intent, only when the Engineer realized that the Respondent would be able to complete the work ahead of schedule. It was reiterated that in terms of the Contract, it was the Engineer who had to determine the EOT and once the same was determined, based on seventh EOT in terms of Clause 44.3, it could not be subsequently reviewed. Respondent had completed the work on 31.03.2011, even though it was entitled to EOT upto 11.03.2012. The allegations of the Petitioner with regard to the Respondent not having achieved the targets and slow progress of work were denied. In fact, Respondent, to the contrary had achieved completion of work 11 months ahead of the Schedule for Completion and thus allegations of slow progress of work or late deployment of machinery, lost relevance.

33. Respondent further argued that under Clause 47.3 of CoPA, on completion of the work, prior to stipulated time, Contractor was entitled to Bonus for every completed month. Clause 48.1 provided that when the whole of the work was substantially completed, the Engineer would issue Taking Over Certificate, which would confirm that the work was complete.

34. Learned Counsel for the Petitioner and learned Senior Counsel for the Respondent have reiterated the said arguments before this Court. In addition, learned Senior Counsel for the Respondent argued that findings of the Tribunal are based on record and contractual provisions and it is beyond the scope of Judicial Review of this Court to interfere in findings of fact.

35. Arguing on the issue of interest granted by the Tribunal, learned senior counsel submits that the amount awarded by the Tribunal towards payment of Bonus is Rs.16.48/- Crores, on which interest @ 12%, compounded monthly, from the date of cause of action till the date of payment, has been correctly awarded. This part of the Award is sought to be challenged by the Petitioner on the ground of non-appreciation of facts by the Tribunal i.e. reduction of Extension of Time. It is contended that reduction in Extension of Time was contrary to Clause 44.3. In any case, the reduction was made by the Petitioner on 19.04.2011 i.e. after the Respondent had completed the work on 31.03.2011. The interpretation of the Tribunal cannot be interfered with in a situation where terms of the Contract prohibited the Petitioner to revise the Extension of Time once granted. Respondent argues that the Petitioner is liable to pay the aforesaid amount and this issue has been upheld in another case decided by a Division Bench of this Court in ***Union of India v. N N Buildcon Pvt. Ltd in FAO (OS) 438/2015***, which has been followed in ***Union of India v. Rama Construction Company in OMP 175/2015***. Relevant paras of the judgment in ***Union of India v. N N Buildcon Pvt. Ltd (supra)*** read as under:

*“7. We are of the view that the Arbitral Tribunal has correctly interpreted the bonus provision and applied the principles of calculation of the bonus. If the stipulated period awarded to the contractor for completion of the work, as in the present case, was 14 months then the contractor was entitled to complete 14 months for completion of the work. If the commencement of the work is delayed or there are hindrances in the completion of the work, which lead to a delay of a particular period, then the period by which the commencement is delayed*

and/or the period during which the hindrances occurred have to be excluded from the period stipulated for completion of the work. **The total period available to the contractor to complete the work would be the stipulated period of completion plus the additional period during which the hindrances occurred. If after exclusion of the delay period so computed the work is completed by the contractor in a period lesser than the stipulated period for completion, the contractor would be entitled to Bonus.**

8. In the present case, the period of completion available to the contractor was 14 months. Because of additional work awarded to the contractor, the contractor would be entitled to additional time of four months i.e. the total time available to the contractor to complete the originally stipulated work and the additional work was 18 months. In addition, the contractor would be entitled to the benefit of the time during which delay occurred on account hindrances caused by the employer. In the present case, the delay in completion of the work as held by the Arbitrator is 5.3 months only. While computing the period taken by the Arbitrator to complete the work, the period of hindrances and delay have to be excluded from the time taken by the contractor. The Arbitrator has accordingly worked out the period of delay comprising of hindrances as 9.7 months from which 5.3 months have been excluded and the balance left was 4.4 months. This period of 4.4 months will enure to the credit of the contractor and clearly, the contractor has completed the work in a period less than the period available to the contractor. The originally stipulated period available to the contractor was 14 months and the period of hindrances (including time for extra work) as worked out was 9.7 months thereby totaling to 23.7 months. The work has been completed with a delay of 5.3 months. This added to the stipulated period of 14 months would make it 19.3 months. If this is excluded from the total period as

*available to the contractor (i.e. 23.7 month), the balance left is 4.4 months."* (emphasis supplied)

36. I have heard learned Counsel for Petitioner and learned Senior Counsel for the Respondent and examined their rival contentions.

37. Learned Senior Counsel for Respondent, in my view, has rightly argued that the scope of interference in an Arbitral Award by this Court under Section 34 of the Act is extremely narrow. Interpretation of the Clauses of a Contract between the parties is in the domain of the Arbitral Tribunal. Learned Senior Counsel has rightly relied on the judgments on the scope of judicial review, as above. In the case of **MP Power Generation v. ANSALDO Energia Spa, (2018) 16 SCC 661**, Court held as under:-

*"25. The limit of exercise of power by courts under Section 34 of the Act has been comprehensively dealt with by R.F. Nariman, J. in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204]. Lack of judicial approach, violation of principles of natural justice, perversity and patent illegality have been identified as grounds for interference with an award of the arbitrator. The restrictions placed on the exercise of power of a court under Section 34 of the Act have been analysed and enumerated in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] which are as follows:*

*(a) The court under Section 34(2) of the Act, does not act as a court of appeal while applying the ground of "public policy" to an arbitral award and consequently errors of fact cannot be corrected.*

*(b) A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the sole judge of the quantity and quality of the evidence.*

*(c) Insufficiency of evidence cannot be a ground for interference by the court. Re-examination of the facts to find out whether a different decision can be arrived at is impermissible under Section 34(2) of the Act.*

*(d) An award can be set aside only if it shocks the conscience of the court.*

*(e) Illegality must go to the root of the matter and cannot be of a trivial nature for interference by a court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the court. Error of construction is within the jurisdiction of the arbitrator. Hence, no interference is warranted.*

*(f) If there are two possible interpretations of the terms of the contract, the arbitrator's interpretation has to be accepted and the court under Section 34 cannot substitute its opinion over the arbitrator's view."*

38. In a recent judgment in the case of ***Hindustan Construction Company Ltd. vs. Union of India, 2019 SCC Online SC 1520***, the Supreme Court reiterated the position of law on the scope of judicial review in a petition under Section 34 of the Act and held:-

*"55. Further, this Court has repeatedly held that an application under Section 34 of the Arbitration Act, 1996 is a summary proceeding not in the nature of a regular*

*suit - see Canara Nidhi Ltd. v. M. Shashikala 2019 SCC OnLine SC 1244 at paragraph 20. As a result, a court reviewing an arbitral award under Section 34 does not sit in appeal over the award, and if the view taken by the arbitrator is possible, no interference is called for - see Associated Construction v. Pawanhans Helicopters Ltd. (2008) 16 SCC 128 at paragraph 17.*

*56. Also, as has been held in the recent decision Ssangyong Engineering & Construction Co. Ltd. v. NHAI 2019 SCC OnLine SC 677, after the 2015 Amendment Act, this Court cannot interfere with an arbitral award on merits (see paragraph 28 and 76 therein). The anomaly, therefore, of Order XLI Rule 5 of the CPC applying in the case of full-blown appeals, and not being applicable by reason of Section 36 of the Arbitration Act, 1996 when it comes to review of arbitral awards, (where an appeal is in the nature of a rehearing of the original proceeding, where the chance of succeeding is far greater than in a restricted review of arbitral awards under Section 34), is itself a circumstance which militates against the enactment of Section 87, placing the amendments made in the 2015 Amendment Act, in particular Section 36, on a backburner.”*

39. In the case of ***McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181***, Supreme Court held that interpretation of the Contract and its terms is the domain of the Arbitrator. Relevant portion is as under:-

*“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration*

*agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See Pure Helium India (P) Ltd. v. ONGC [(2003) 8 SCC 593] and D.D. Sharma v. Union of India [(2004) 5 SCC 325] .)*

*113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”*

40. The arguments raised by the Petitioner in the present petition which are now confined only to Claim Nos. 1 & 5 relate to the interpretation of the Clauses in the conditions of the Contract between the parties. The arguments would have to be tested on the anvil of the law on the subject as brought out above.

41. In so far as Claim No. 1 is concerned, relevant Clauses are as follows:-

*“BOQ Item No. 2.02 - Construction of embankment with approved borrow soil with all leads and lifts all complete as per drawings and Technical specifications clause 305.”*

*"BOQ Item No. 2.08 - Construction of embankment with fly ash obtained from coal or lignite burning thermal power station as waste material, spread and compacted in layers as per drawing and additional technical specification Clause A-8.”*

*"Clause 6 of preamble to BOQ - 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."*

***"A-8 CONSTRUCTION OF EMBANKMENT WITH FLY ASH/POND ASH AVAILABLE FROM COAL OR LIGNITE BURNING THERMAL PLANTS AS BASE MATERIAL."***

*"1. General*

*These specifications shall apply to the construction of fly ash embankments. All fly ash embankments shall be constructed with the requirements of these specifications and the earthen sides cover, selected sub-grade construction on top and preparation of ground shall be as per section 300 and 200 of MOR T&H specifications.*

*4. Earth Cover*

*The Fly ash embankments shall be covered on the sides and top by soil to prevent erosion of fly ash. Good earth suitable for embankment construction shall be adopted as cover material for fly ash embankments. The soil used for cover shall have maximum dry density as per MORT&H specifications. Plasticity index of cover soil shall be between 5 to 9 percent. Chemical analysis or determination of deleterious constituents shall be necessary in salt-infested areas or when presence of salts is suspected in the borrow material. Expansive soils shall not be used for construction of cover.*

*5. Embankment Construction*

*5.1 Compacting the ground supporting embankment*

*...*

*5.2 Spreading and compaction*

*The cover soil and flyash shall be laid simultaneously before compaction, to ensure confinement of flyash. Clods in cover soil shall be broken to have a maximum size of 50mm....*

*...*

*10. Measurement for payments: The measurements and payments shall be done as per clause 305 of MORT&H specifications ...”*

***“Clause 305.8***

*Earth embankment/sub grade construction shall be measured separately by taking cross sections at intervals after clearing grubbing, scarifying and compacting the original ground and after its completion and computing the volumes of earth work in cum by the method of average end areas.”*

42. The Arbitral Tribunal gave the following findings with respect to Claim No.1 :-

*"12.2.9 Thus, the Arbitral Tribunal is of the firm view that the BOQ items are to be read and interpreted conjointly with ITB, General conditions of contract/CoPA, Technical specifications and drawings. The description of item of work mentioned in BOQ is not a complete one and it is essential to refer the relevant technical specification mentioned in the item to appreciate the complete nature of work.*

***XXX***

*12.2.13 A perusal of the above BOQ items would make it clear that only a brief description of the works to be executed under each of the item of the work has been mentioned in the said items. However, when it comes to execution of the said item of works, the relevant*

*Technical specifications have to be looked into as to how to execute the works and measure/value the works.*

*12.2.14 The specification applicable-for item No.2.02 is Clause 305 of the Technical specifications, whereas the Specification applicable for the item No.2.08 is Additional specifications A-8.*

*XXX*

*12.2.18 The BOQ items 2.02 and 2.08 are two different, distinct and definite BOQ items of work for construction of embankment. One embankment with soil and the other embankment with fly ash and corresponding cross sections have been given in the Contract.*

*12.2.19 Thus, the Arbitral Tribunal is of the firm view that the provision made in the BOQ items 2.02 and 2.08 for embankment construction is for the construction of the respective embankments as contemplated in the said items in all. respects ie., finished/completed items and not for the supply of materials to be used in. the respective items.*

*XXX*

*12.2.25 Thus, the above Clause mandates that the method of measurement for the embankment constructions with fly ash shall also be done exactly as per the Clause 305.8 of MoRTH specifications. This means that the method adopted for –measuring the-Earth embankment shall be adopted for the measurement of the fly ash embankment without any change. This essentially means that, be it the embankment with soil under item No.2.02 or the embankment with fly ash under item No.2.08, both are to be measured, in the same manner.*

*12.2.26 Arbitral Tribunal further notes the copy of extract from MORTH Specifications for Road and Bridge works-*

*Fifth revision- Clause 305.8 submitted by the Claimant, wherein it is stated that the flyash embankment is required to be measured separately for flyash and earth portion separately. Such a provision is noticeably absent in the Fourth revision (MORTH Specifications for Road and Bridge works — Clause 305.8), which is applicable to the present contract. This conclusively establishes that the fly ash embankment is required to be measured as a one composite section.*

*12.2.27 Accordingly, the Arbitral Tribunal is of the firm view that method contemplated for measurement for payment of the Earth embankment ie.. Item No. 2.02 and the fly ash embankment ie.. Item No. 2.08 in the contract are one and the same, which is by taking composite cross section as a whole of the embankment and determining the volume by average end area method*

*XXX*

*12.2.29 To analyse the above Point, the Tribunal, relies on the analysis /findings of the Points 1, 2 and 3. As analysed herein above, in terms of Clause 305.8, the method of measurement to be adopted for payment of the fly ash embankment is to determine the total cross section area at specified intervals as a whole as one composite section. Then the volume of the embankment is to be determined by multiplying the cross sectional area with length of the interval and determine the volume based on the average end area method.*

*12.2.30 The Arbitral Tribunal also notes the sketch submitted by the Claimant in the Rejoinder at Page 1262, which conclusively establishes that the sections of embankment cannot constitute itself either earth or fly ash embankment. Arbitral Tribunal has analysed in Point No. 2 that the BOQ items are provided solely for*

*construction of embankment and thus the Engineer's/Respondent's interpretation of measuring sections of the fly ash embankment separately under items 2.02 and 2.08 is not in order.*

*12.2.31 The Tribunal is of the considered opinion that, if the intention of the Contract was to measure the volume of the earth and fly ash separately, it was necessary on the part of the Respondent to specifically stipulate the same to the bidders at the time of tender. In this respect the Arbitral Tribunal also notes the qualification in the Clause 114.1, ie "in the absence of any directions to the contrary, the rates are to be considered as the full inclusive rate for the finished works". Therefore, the rate for item 2.08 is for the completed/finished works of fly ash embankment and not for the measurement of the two components separately.*

*XXX*

*12.2.33 ...*

*A close review of the above provisions of A8, it is unambiguous that the stipulation of Clause AS deals with the earth portion of the fly ash embankments also. Therefore, the- Arbitral Tribunal is of the firm view that AS is a complete specification for fly ash embankment in itself and thus the construction of fly ash embankment as a whole has to be necessarily valued under item No. 2.08.*

*12.2.34 Therefore, the methodology followed by the Engineer in measuring and valuing the fly ash embankment is contrary to the provisions relating to the method of measurement stipulated for the pond ash embankment.*

*12.2.35 As regards the top 1 m of the embankment required to be measured separately under sub-grade or*

*not. Arbitral Tribunal perused the Clause A8 of Additional technical specifications,*

*The top 1 m of the embankment shall be constructed using selected earth to form the sub-grade of the road pavement.*

*It is apparent from the above provision that top 1 m of the embankment shall act as sub-grade. If the top 1.0 m of embankment is separated to measure and value as sub-grade, then the embankment cannot be termed as complete as per Clause A-8 of Additional Technical Specification. Even, the top 1 m of the embankment is also a part of embankment like the side cover and intermediate soil layers. There cannot be different method of measurement for top 1 m unlike side soil cover/intermediate soil layers.*

*Unless the Measurement clause clearly and specifically mentions, the soil and fly ash components cannot be measured separately for payment. For that matter, the top 1 m of the embankment cannot be separated and if it is done it would be completely contrary to the specific provisions of Contract. Therefore, Arbitral Tribunal holds that any part of the embankment, side cover, or intermediate soil layer or top 1 m soil/earth, cannot be measured and paid separately and the whole embankment section has to be measured as one and paid under BOQ item 2.08.*

*XXX*

*12.2.36 Point 5: What is the significance of the Delhi High Court Judgment relied on by the Respondent?*

*The Respondent had argued that the Hon'ble High Court of Delhi in its Judgment dated 08.11.2012 has decided that the cross sections of fly ash embankment have to be*

*measured and paid separately for soil and fly ash portions.*

*On this aspect, the Claimant had submitted a statement showing the distinguishing factors between the present case and the case decided by the Hon'ble High Court and argued that the case law is clearly distinguishable from the factual and contractual point of view. The Claimant also drew the attention of Arbitral Tribunal to para 32.*

*In our view, the first fallacy in the majority view of the arbitral tribunal is the manner of extraction of the terms of the contract itself. Para 11. 3. 11 of the Majority award where BoQ item 2.02 (a) and (b) have been extracted "seeks to suggest as if there are two item numbers - one dealing with the construction of soil embankment, while the other dealing with the construction of pond ash embankment. However, the said construction of embankment can take place in two manners. The first is where only soil is used and the other is where soil and pond ash is used. The technical specification clause is the same, i.e. clause 305.*

*After careful review of the Judgment, the Arbitral Tribunal is of the view that the judgment pertains to a contract where there is only one single BOQ item: for both the embankments with same technical specification ie., Clause 305. However, in the instant case, there are two distinct and separate BOQ items exclusively for earth embankment BOQ item 2.02 under clause 305 of TS and for embankment with flyash BOQ item 2.08 under A8 of Additional technical specification. Therefore, Arbitral Tribunal is of the view that the Hon'ble High Court judgment is not applicable for the instant contract in its strict sense.*

*XXX*

*12.2.41 In view of the above analysis, discussions and findings. Arbitral Tribunal finds that the Claimant is entitled to payment of Rs.6,75,47,806 and Euro portion of€ 1,39,278 and accordingly permits and admit the claim of the Claimant for balance amount of Rs. 2,17,71,040 and Euro portion of€ 45,754. The Statement showing the details of quantification of the claim as extracted from C-1/19 is enclosed as Annexure -1.*  
*XXX*

*12.2.47 The Arbitration and Conciliation Act 1996, under which the present proceedings are being conducted also provides that, the Tribunal is empowered to grant interest on any sum found due to be paid to any party. Therefore, there is an agreement between the parties on payment of interest.*

*The Claimant has claimed the interest from the expiry date of 42 days of IPA submission date in terms of clause 60.8 of CoPA. Accordingly the Claimant would be entitled for interest at the rate of 12% compounded monthly from the date of cause of action indicated in Annexure -1 till date of award. "*

43. The Tribunal was of the view that method of measurement for the fly ash embankment was to be as per Clause 305.8 of MoRT&H Specifications which meant that the embankment with soil under Item No. 2.02 and the embankment with fly ash under Item No. 2.08 were to be measured in the same manner. The Tribunal arrived at this conclusion based on the extract from MoRT&H Specifications for Road and Bridge Works-Fifth-Revision Clause 305.8 which stipulated that fly ash embankment was to be measured separately for fly ash and earth portion, while such a provision was noticeably absent in the Fourth-Revision, applicable to the present Contract. This conclusively establishes that the

fly ash embankment was required to be measured as one composite section by taking the cross-section as a whole and determining the volume by Average and Area Method. The Tribunal was of the view that if the intention of the Petitioner was to measure the volume of earth and fly ash separately, then the same would have been stipulated in the Tender. The Tribunal also relied on Clause 114.1, as per which the rates were to be considered as full inclusive rates for finished works, in the absence of any directions to the contrary. Therefore, the rate for Item No. 2.08 was for completed work of fly ash embankment and not to measure the two components separately. Interpreting Clause A-8 of Additional Technical Specifications, Tribunal rendered a finding that the methodology followed by the Engineer to measure the fly ash embankment was contrary to the provisions of the Contract. The Tribunal also concluded that the top '1m' of the embankment was also part of the embankment, like the side cover and intermediate soil layers and could not be measured by a different method.

44. Tribunal has given an interpretation to the various Clauses of the Contract and it is not open to this Court to substitute its interpretation with that of the Tribunal. The view taken is a plausible view. Even otherwise a perusal of the Clauses referred to above by their plain reading supports the interpretation and the findings of the Tribunal.

45. The Tribunal has also dealt with the judgment of this Court in NHAI (supra) dated 08.11.2012, relied upon by the Petitioner to argue that the cross sections of fly ash embankment have to be measured and paid separately for soil and fly ash portions. Relevant portion of the judgment of this Court is as under:-

“32. ...In our view, the first fallacy in the majority view of the Arbitral Tribunal is the manner of extraction of the terms of the contract itself. Para 11.3.11 of the Majority award where BoQ item 2.02 (a) and (b) have been extracted seeks to suggest as if there are two item numbers - one dealing with the construction of soil embankment, while the other dealing with the construction of pondash embankment. The fact is that the original contract provides only for one BoQ Item for construction of embankment. However, the said construction of embankment can take place in two manners. The first is where only soil is used and the other is where soil and pond ash is used. The technical specification clause is the same, i.e, clause 305. ...”

46. Tribunal distinguished the judgment on the ground that the said judgment pertains to a Contract, where there is only one BOQ item, for both the embankments, with the same technical specifications i.e. Clause 305. However, in the present case there are two distinct and separate BOQ items, exclusively for Earth Embankment, being BOQ item 2.02 under Clause 305 of Technical Specifications and for Embankment with Fly Ash, being BOQ item 2.08, under A-8 of Additional Technical Specifications.

47. Learned counsel for the Petitioner has relied on the judgment in the case of *NHAI v. HCC (supra)* as well as the subsequent judgment in *NHAI v. Progressive MVR (JV) (supra)* before this Court.

48. Having gone through the two judgments, in my view, the Tribunal is right in drawing the distinction, that it did. The Clauses in those two cases are different from the ones in the present case. Learned Senior Counsel for the Respondent has rightly relied on the judgment of the Supreme Court in the case of *State of Orissa vs. Mohd. Illiyas, (2006) 1*

**SCC 275**, for the proposition that Courts should not place reliance on decisions without discussing the factual situations in each case. The Tribunal, in my view, has given a reasonable and plausible interpretation to the aforesaid Clauses and the same calls for no interference by this Court.

49. In so far as Claim No. 5 is concerned, learned Senior Counsel for the Respondent has drawn out a table to show the various extensions of time granted by the Engineer In-charge and the same is as follows:-

| <i>Reference letter of Engineer</i> | <i>Date of completion as determined by the Engineer</i> | <i>Remarks</i>                                                                                   |
|-------------------------------------|---------------------------------------------------------|--------------------------------------------------------------------------------------------------|
| <i>12.10.2007</i>                   | <i>08.03.2009</i>                                       | <i>Engineer clearly mentioned that final review would not result in a decrease (44.3 of GCC)</i> |
| <i>01.07.2008</i>                   | <i>22.02.2010</i>                                       |                                                                                                  |
| <i>15.10.2008</i>                   | <i>30.06.2010</i>                                       |                                                                                                  |
| <i>22.07.2009</i>                   | <i>07.02.2011</i>                                       |                                                                                                  |
| <i>01.07.2010</i>                   | <i>09.11.2011</i>                                       |                                                                                                  |
| <i>16.12.2010</i>                   | <i>26.11.2011</i>                                       | <i>09.11.2011+17days</i>                                                                         |
| <i>04.02.2011</i>                   | <i>08.01.2012</i>                                       | <i>26.11.2011 + 43 days</i>                                                                      |
| <i>04.03.2011</i>                   | <i>11.03.2012</i>                                       | <i>08.01.2012 + 63 days</i>                                                                      |

50. Submission of the Respondent is that the Engineer had granted EOT till 11.03.2012 while the Respondent had completed the work on

31.03.2011 and this is an undisputed position. However, as an afterthought, the Engineer, on the direction of the Petitioner, revised the Extension of Time by a letter dated 19.04.2011, to coincide with the date by which the Respondent had actually completed the work. This according to the learned Senior Counsel for the Respondent was a strategy employed by the Petitioner only to deny the Respondent, its right to claim Bonus under Clause 47.3 of CoPA. The said Clause reads as under:-

*“47.3 Bonus for Early Completion*

*If the Contractor achieves completion of the whole of the work prior to the time prescribed by clause 43, the Employer shall pay to the Contractor a sum stated in Appendix to Bid as Bonus for every completed month which shall elapse between the date stated in taking over certificate of whole of the work including variations ordered by the Engineer and the relevant time prescribed in clause 43.*

*For the purpose of calculating the bonus payments, the time given in the Bid for completion of the whole of the works is fixed and extension of time for any reason attributable to the delay on the part of the Contractor will not be allowed. Any period falling short of a complete month shall be ignored for the purpose of computing the period relevant for the payment of bonus.”*

51. It is argued by the Respondent that the action of the Petitioner cannot be sustained in view of the clear provisions of Clause 44.3 of CoPA, which is as follows:-

*"44.3 Interim Determination of Extension:*

*Provided also that where an event has a continuing effect such that it is not practicable for the Contractor to submit*

*detailed particulars within the period of 28 days referred to in sub clause 44.2 (b), he shall nevertheless be entitled to an extension of time provided that he has submitted to the Engineer interim particulars at intervals of not more than 28 days and final particulars within 28 days of the end of the effect resulting from the event. On receipt of such interim particulars the Engineer shall without undue delay make and interim determination of extension of time and on receipt of final particulars the Engineer shall review all the circumstances and shall determine and overall extension of time in regard to the event. In both such cases the Engineer shall make his determination after due consultation with the Employer and the Contractor and shall notify the Contractor of the determination with a copy to the Employer. No final review shall result in a decrease of any extension of time already determined by the Engineer. "*

52. Tribunal has given the following findings with respect to this claim:-

***"12.6.11 Point No.3 - What is the final EOT determined by the Engineer? Whether the Engineer is contractually authorized to decrease the determined interim EQT during the final review/determination ?***

*12.6.12 Arbitral Tribunal notes from the Engineer's letter TU5062 dated 19.04.2011 that the final EQT determined by the Engineer is 31.03.2011, which is nothing but the date of issuance of Taking over Certificate for the works. Thus, it is clear from the final determination of the Engineer that the Engineer had decreased the determined interim EQT during the final review/determination.*

xxxx

xxxx

xxxx

*12.6.14 A careful perusal of the above provision, particularly the last two lines (emphasis added) makes it*

clear, without leaving any scope for contrary interpretation, that (during the final review) the Engineer cannot decrease the EQT already determined by him. This provision is kept with a view that once the EQT is determined based on delay events, it can either be same or would increase subsequently consequent to further delay events, if any. It is illogical to decrease the determined EQT unless the Engineer substantiates that there is an error in his earlier determination, which is not the case here. In the instant case, decrease in the earlier determination of EQT was solely due to issuance of Taking over certificate for completion of works. Such reduction/decrease of EQT is impermissible under clause 44.3 of GCC. This is very much significant particularly in view of the bonus clause under Clause 47.3 of GCC/CoPA, which provides for payment of bonus for completion of works earlier than time for completion (which includes EQT).

12.6.15 In view of the unambiguous provision of clause 44.3 of GCC, Arbitral Tribunal is of the firm view that the Engineer is not contractually authorized to decrease the determined interim EOT during the final review/determination. Therefore, the final EOT determination of the Engineer reducing the interim EQT to 31.03.2011 is not in accordance with the terms of contract. Thus, the determination of the EQT upto 11.03.2012 stands and not subject to any decrease.

**12.6.16 Point No.4 - What is the significance of the approval by the Respondent in respect of EOT determinations by the Engineer?**

12.6.17 Arbitral Tribunal finds that the Clause 44.1 to 44.3 of GCC clearly authorizes the Engineer to determine- the EQT on account of certain specified delay events not contributed by the Claimant and there is no scope for the Respondent to contribute in such

*determination of EQT. The approval under Clause 2.1 (b) of CoPA by the Respondent is required before determination of EQT and not after the determination of EQT by the Engineer.*

*12.6.18 In any case, the approval is deemed to be given for any such authority exercised by the Engineer under Clause 2.1 (b) of GCC, which states as follows:*

*"Provided further that any requisite approval shall be deemed to have been given by the Employer for any such authority exercised by the Engineer"*

*12.6.19 Thus, In so far as the Claimant is concerned, the determination of the interim EQT till 11.03.2012 carries approval under Clause 2.1 (b) of GCC. Therefore, Arbitral Tribunal is of the firm view that the approval by the Respondent has no significance in as much as the Engineer exercised such authority and the contract specifically provides that such action carries deemed approval. In any case, Arbitral Tribunal notes that the Respondent has approved the extension of time as determined by the Engineer upto 31.03.2011.*

*xxxx*

*xxxx*

*xxxx*

*12.6.24 Therefore, after considering all the above aspects, the Arbitral Tribunal is of the considered view that, the issue of slow progress of works is not at all relevant to the claim of payment of bonus. Independent of such finding, Arbitral Tribunal is also of the view that the EQT determination was solely for the delays which could not be attributed to the Claimant and thus the Respondent's contention on slow progress of works now before the Arbitral Tribunal is not corroborated by the documents on record.*

***12.6.25 Point No.6 - What is the provision in the contract regarding the payment of bonus? Whether the pre-conditions for payment of bonus have been met with?***

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xxxx

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*12.6.28 Arbitral Tribunal is of the view that the only pre-condition imposed in the Clause 47.3 of CoPA is that the Contractor should achieve completion of the works prior to the time stipulated in Clause 43. From the records placed before the Tribunal, the following aspects are clear beyond any reasonable doubt:*

*(a) Engineer determined EQT is upto 11.03.2012, which is the time for completion under Clause 43.1 of GCC (Page 1192 and 1217 of SOC)*

*(b) Claimant has achieved completion of works and Taking Over Certificate is issued with effect from 31.03.2011 (Page 1193 of SOC) Thus, it is clear from the undisputed records placed before the Tribunal, the Claimant has achieved completion of works prior to Time for completion.*

*12.6.29 In this regard. Arbitral Tribunal notes the Respondent's contention that the Claimant has only achieved substantial completion and not completion of whole of the works as mentioned in Clause 47.3 of CoPA. On this aspect, the Arbitral Tribunal finds the following after careful perusal of provisions of contract viz. Clause 43.1, 48.1 and 47.3 of GCC/CoPA:*

*(a) The Clause 47.3 of COPA stipulates that, if the Contractor achieves completion of the whole of the works prior to the time completion*

*prescribed by Clause 43, then the Employer shall pay to the Contractor bonus.*

*(b) The Clause 43.1 of GCC provides that the whole of the works and if applicable any section required to be completed within a particular time shall be completed in accordance with the provisions of Clause 48. The Clause 48.1 provides that the Engineer to issue the Taking over Certificate when the whole of the works have been substantially completed.*

*(c) The Clause 47.3 of CoPA further states that the period for bonus calculation shall be between the date stated in taking over certificate of whole, of the work including variations ordered by the Engineer and the relevant time prescribed in clause 43.*

*(d) Therefore, Arbitral Tribunal is of the view that, to get entitled for bonus, the date stated in the Taking over certificate should be earlier than the time, for completion (including the EQT determination of the Engineer), which, in the instant case, is fulfilled.*

*12.6.30 Therefore, after considering all the above aspects, the Arbitral Tribunal is of the firm view that, the pre-conditions for payment of bonus have been met with by the Claimant and the Claimant is entitled to payment of bonus under Clause 47.3 of CoPA.*

*xxxx*

*xxxx*

*xxxx*

*12.6.32 Arbitral Tribunal, after taking into consideration of its analysis at Point No.2 to 6 and after careful perusal of Exhibit C- 5/33, finds the following:*

*(1) Claimant considered 11.03.2012 as the time for completion and calculated the no. of months by which the project is completed early as 11 months from the date of Taking over Certificate (31.03.2011)*

*(2) Based on the above. Claimant calculated the entitlement to bonus as Rs.28.05 crores by multiplying with the rate of bonus for every completed month (ie., 1 % of initial contract price Rs.2.55 crores)*

*(3) Claimant also considered the ceiling limit of bonus, which is 6% of final contract price as extracted from Final Statement certified by the Engineer ie., 6% of 274.46 crores = Rs. 16.48 crores*

*(4) Thus, the Claimant worked out the entitlement to the bonus for early completion of work as Rs. 16.48 crores.*

*(5) Arbitral Tribunal finds the above computation is in order and is in accordance with the stipulations under Clause 47.3 of CoPA*

xxxx

xxxx

xxxx

*12.6.36 Therefore, in view of the above analysis, Arbitral Tribunal allows and admits the Claim of the Claimant Rs. 16.48 crores towards payment of bonus. The Statement showing the details of quantifications of the claim as extracted from C-5/33 is enclosed as Annexure -5.*

*12.6.37 In so far as the interest is concerned. Arbitral Tribunal notes the Clause 60.8 of CoPA read with*

*Appendix to bid of contract clearly provides for 12% compounded monthly from the date upon which the payment should have been, paid {date of cause of action}. In terms of Section 31 {7}{a) of Arbitration and Conciliation Act, Arbitral Tribunal is bound by the agreement between the parties for awarding rate of interest from date of cause of action till the date of award."*

53. Tribunal interpreted the unambiguous provision of Clause 44.3 of GCC and held that the Engineer cannot decrease the determined EOT during the Final Review. Tribunal observed that the provision is clear that once the EOT is determined based on delay events, it can either be the same or could increase, consequent to further delays, but cannot decrease, unless there is an error in the earlier determination, which was not the case here. The Tribunal then addressed the question posed to itself, as to the significance of the 'approval' by the Petitioner in respect of EOT determination by the Engineer. Analyzing Clause 2.1 (b) of CoPA the Tribunal concluded that approval by the Petitioner was required before determination of EOT and not after the determination by the Engineer. Tribunal also took note of Clause 2.1 (b) of GCC and concluded that the approval is deemed to be given for any such authority exercised by the Engineer. Clause 2.1 (b) of CoPA and Clause 2.1 (b) of GCC are as follows:-

*"2.1 Engineer's Duties and Authority*

*b) The Engineer may exercise the authority specified in or necessarily to be implied from the Contract, provided, however, that if the Engineer is required, under the terms of his appointment by the Employer, to obtain the specific approval of the Employer before exercising any such*

*authority, particulars of such requirements shall be set out in Part II of these Conditions. Provided further that any requisite approval shall be deemed to have been given by the Employer for any such authority exercised by the Engineer.”*

*“Clause 2.1 (b) of GCC:*

*Provided further that any requisite approval shall be deemed to have been given by the Employer for any such authority exercised by the Engineer”*

54. Tribunal thereafter answered the question posed, by holding that in so far as the Respondent was concerned, the determination of interim EOT till 11.03.2012 carried approval under Clause 2.1 (b) of GCC and also rendered a finding that once EOT had been approved, the issue of slow progress of Respondent was not only irrelevant, but also not corroborated by the documents on record.

55. Having rendered the finding on the Extension of Time, the Tribunal noted the pre-condition of grant of Bonus under Clause 47.3 of CoPA and found that the Respondent had completed the work before the date of final extension of time. Tribunal disagreed with the Petitioner that the Respondent had only achieved substantial completion and balance work remained. Tribunal carefully analysed the provisions of Clauses 43.1, 48.1 and 47.3. Clause 43.1-‘Time for Completion’, has been reproduced in the earlier part of the judgment. Clauses 48.1 and 47.3 are as under:-

*“48.1-Taking-Over Certificate:*

*When the whole of the Works have been substantially completed and have satisfactorily passed any Tests on 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 option, 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 such 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."*

#### *"47.3 – Bonus for Early Completion*

*If the Contractor achieves completion of the whole of the works prior to the time completion prescribed by Clause 43, the Employer shall pay to the contractor a sum, stated in appendix to Bid as bonus for every completed month which shall elapse between the date stated in Taking over Certificate of whole of the works, including variations ordered by the Engineer and the relevant time prescribed in Clause 43.*

*For the purpose of calculating bonus payments, the time given in the Bid for completion of the whole of the works is fixed and extension of time for any reason attributable to the delay on part of the contractor will not be allowed. Any period falling short of a complete month shall be*

*ignored for the purpose of computing the period relevant for the payment of bonus.”*

56. Finally, the Tribunal concluded that the pre-conditions for payment of Bonus were met by the Respondent and allowed the Claim of Rs. 16.48 crores in favour of the Respondent.

57. In my view, the Tribunal has rightly interpreted the various Clauses of the Contract under the present Claim. Clause 44.3 of CoPA can be only read to mean that no final review by the Engineer can result in decrease of any Extension of Time, already granted. Clause 2.1 (b) of the GCC clearly stipulates that once the Engineer exercises its authority to grant Extension of Time, there is a deemed approval. Tribunal has rendered a finding that the extension of time till 31.03.2012 had a deemed approval of the Petitioner and since the Respondent had completed the work by 31.03.2011, it was clearly entitled to the Bonus under Clause 47.3 of CoPA. The interpretation is a plausible interpretation and calls for no interference.

58. The Impugned Award in my view calls for no interference by this Court for the reasons aforementioned.

59. There is no merit in the petition and the same is accordingly dismissed.

**JYOTI SINGH, J**

**MAY 27<sup>th</sup>, 2020**

yo/yg